

INTERNATIONAL COURT OF JUSTICE

ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *V.* VENEZUELA)

**THE TRUTH OF THE BOLIVARIAN REPUBLIC OF VENEZUELA
ON THE GUAYANA ESEQUIBA
HISTORIC POSITION**

Counter-Memorial of the Bolivarian Republic of Venezuela



VOLUME I

8 April 2024



Gobierno Bolivariano
de Venezuela

Ministerio del Poder Popular
para Relaciones Exteriores

Misión Permanente de la República
Bolivariana de Venezuela ante
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Courtesy Translation

No. 00395

05 July 2024

**His Excellency
Mr. Philippe Gautier
Registrar
International Court of Justice
Peace Palace
The Hague.-**

Excellency,

On behalf of the Bolivarian Republic of Venezuela, I have the honor to enclose herewith a list of editorial changes corresponding to the document "The Truth of the Bolivarian Republic of Venezuela on the Guayana Esequiba. Historic Position (Counter-Memorial of the Bolivarian Republic of Venezuela)", submitted before the Court by the Bolivarian Republic of Venezuela on 08 April 2024, with reference to the Arbitral Award of 03 October 1899 (Guyana v. Venezuela), without prejudice to the historical position of not recognising or consenting to the jurisdiction of the Court in the territorial dispute over the Guayana Esequiba.

The Bolivarian Republic of Venezuela respectfully requests the Court to include the list in question in the case file.

Please accept, Excellency, the assurances of my highest consideration.



Samuel Reinaldo Mónica Acosta

Ambassador, Permanent Representative of the
Bolivarian Republic of Venezuela to the United Nations
Agent of the Bolivarian Republic of Venezuela to the ICJ



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GUAYANA ESEQUIBA HISTORIC POSITION"**

Counter-Memorial of the Bolivarian Republic of Venezuela

TEXT			
Page	Number	Original	Editorial Changes
22	2.19	Chapter 7	Chapter 6
30	3.1		should be "following Chapters", and not preceding.
32	3.9	controversy	Controversy (iii).
41	Fn. 95		Correspond to "(annex 85)"
103	4.11	(Map 1)	(map 27)
104	4.13	(map no. 2)	(map no. 28)
105	4.13	(Map no. 3)	(map no. 29)
106	4.16	(map no. 3)	(map no. 29)
122	4.54	(map 5)	(map no. 37)
		(maps 6-12)	(maps no. 30-36)
138	4.71	(map 13)	(map no. 19)
152	4.108	(map 16)	(map no. 26)
167	Fn. 370 and 371		Both footnotes refer to fn. 365
189	5.9	Chapter 6	Chapter 4



TEXT			
Page	Number	Original	Editorial Changes
200	5.33	Chapter 7	Chapter 4
206	5.51	1987	1897
223	5.98	Chapter 6	Chapter 4
241	6.1	Chapter 6	Chapter 5
250	Fn. 562	Chapter 7, paras. 64-72.	Chapter 5, paras. 5.68 - 5.76
256	6.47	Chapter 5	Chapter 4
257	6.50	Chapter 7	Chapter 5
258	Fn. 567		Correspond to "(annex 175)"
268	6.80	1914	1814
270	6.86	Chapter 7	Chapter 5
285	6.123	Chapter 7	Chapter 5
286	6.127	Chapter 7	Chapter 5
298	6.155	Chapter 7	Chapter 5
299	6.157	chapter 7	Chapter 5
302	6.167	Chapter 7	Chapter 5
305	Fn. 693	Chapter 7, paras. 119-143.	Chapter 5, paras. 5.111- 5.131
312	7.5	IV, A – IV, B	IV,i – IV,ii
343	Annex 55 (title)	1986	1896

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PRELIMINARY CONSIDERATIONS

1. As the Court has been repeatedly informed, following the fraud committed with the 1899 arbitral award, the Bolivarian Republic of Venezuela has maintained a historic position of not submitting to third-party dispute settlement mechanisms (including the International Court of Justice) matters relating to its vital interests, such as its independence and territorial integrity. This position seeks to protect the most sacred interests of our Nation in all international spaces and mechanisms.

2. For that reason, Venezuela has not made the declaration provided for in article 36(2) of the Statute of the International Court of Justice, which *ipso facto* recognizes the binding jurisdiction of the Court to settle disputes relating to the interpretation of a treaty and any question of international law, among other matters.

3. In other words, although Venezuela is a State party to the Statute of the International Court of Justice, it is one of the 119 States that do not recognize the compulsory jurisdiction of the Court, provided for in Article 36(2) of the Statute, as does the Cooperative Republic of Guyana itself.

4. In fact, in 1945, on the eve of the entry into force of the Statute of the Court, Venezuela submitted a draft article 36, which excluded compulsory jurisdiction in cases of disputes already submitted to other peaceful means of dispute settlement and in cases of disputes resulting from actions which had occurred prior to the signing of the Statute (1945). Both premises excluded the Court's jurisdiction for the boundary case between Venezuela and Guyana.

5. In the same vein, within the United Nations, Venezuela has made twelve specific statements against the compulsory jurisdiction of the Court, demonstrating a consistent position in this regard.

6. In addition, Venezuela has refrained from ratifying treaties at the Inter-American level that *ipso facto* recognises the compulsory jurisdiction of the International Court of

Justice to resolve legal disputes that arise between States in this region, as is the case with the American Treaty on Pacific Settlement or “Pact of Bogotá” of 1948.

7. Venezuela has also made express reservations to international treaties that confer jurisdiction on the International Court of Justice. For example, at the time of ratification of the United Nations Convention against Transnational Organized Crime, it made a reservation to article 35, paragraph 21, in the following terms:

“Pursuant to article 35, paragraph 3, the Bolivarian Republic of Venezuela declares that it enters an express reservation concerning the provisions of paragraph 2 of this article. Consequently, it does not consider itself bound to submit to arbitration as a means of settling disputes, nor does it recognize the compulsory jurisdiction of the International Court of Justice.”¹

8. Also, when it has signed bilateral treaties providing for third-party dispute settlement mechanisms, Venezuela has expressly indicated that such mechanisms are not applicable to issues related to its independence and territory. For example, article II of the Treaty of Non-Aggression, Conciliation, Arbitration and Judicial Settlement between Colombia and Venezuela (Bogotá, 17 December 1939) states the following:

“Article II. The two High Contracting Parties undertake to submit, in accordance with the provisions of this Treaty, to the procedures for peaceful settlement established herein, disputes of any nature or arising for any reason whatsoever between them which have not been possible to settle amicably by ordinary diplomatic means, with the exception only of those which concern the vital interests, independence or territorial integrity of the Contracting States.”²

9. Venezuela’s historical position is expressly contained in the Geneva Agreement of 1966, which does not recognize the jurisdictional *fora* as the friendly way to achieve a practical and satisfactory solution for both parties, as Venezuela ratified to the UN

¹ United Nations, Convention against Transnational Organized Crime, 2000, UNTS, Vol. 2225, p. 209.

² Treaty of Non-Aggression, Conciliation, Arbitration and Judicial Settlement between Colombia and Venezuela, Bogotá, 17 December 1939, UNTS, Vol. 1257.

Secretary-General before his decision to choose the International Court of Justice as a means of settling the dispute.

10. By virtue of the above, since 2018 Venezuela formally opposed the alleged jurisdiction of the Court to hear the unilateral claim filed by Guyana, additionally considering that it has not consented in any way to its jurisdiction for said dispute, under Article 36(1) of the Statute.

11. Indeed, there is no basis on which to establish, even *prima facie*, the jurisdiction of the Court to hear Guyana's unilateral claim. In the absence of recognition of compulsory jurisdiction, the express consent of both parties is indispensable in order to bring the matter before the Court. Venezuela has never given such consent, nor can it be inferred from the content of Article IV of the Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana (Geneva Agreement).³

12. Notwithstanding the above, in its questionable 2020 judgment, the Court claimed jurisdiction to hear Guyana's unilateral claim by interpreting Article IV of the Geneva Agreement in isolation and contrary to the spirit of the Agreement. In doing so, it overlooked the fact that the purpose of the Geneva Agreement, as stated in its preambular part, is to settle the dispute amicably "in a manner acceptable to both parties."

13. This decision seeks to take away from the State an essential element of its existence, such as its sovereignty, artificially constructing a consent to the jurisdiction of the Court that has never been granted. In practice, the jurisdictional immunity of the Venezuelan State has been violated and, therefore, its right not to be subjected to a trial without a legal or legally rational basis.

14. Venezuela's historic position in relation to the jurisdiction of the Court has recently been ratified by the Venezuelan people in the consultative referendum held on 3 December

³ Venezuela and United Kingdom of Great and Northern Ireland, Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana, Geneva, 17 February 1966 (Geneva Agreement) (**Annex 6**).

2023, which voted in favour of not recognizing the jurisdiction of the International Court of Justice to resolve the territorial controversy over Guayana Esequiba.

15. Likewise, in accordance with Article 6 of the Organic Law for the Defence of Guayana Esequiba, published in the Official Gazette of the Bolivarian Republic of Venezuela No. 6.798, dated 3 April 2024:

“Article 6. The Bolivarian Republic of Venezuela shall not submit to third-party dispute resolution mechanisms, including arbitration and the jurisdiction of the International Court of Justice, matters relating to its independence and territorial integrity.

The National Executive shall expressly reserve in any international treaty that provides for mechanisms for the resolution of disputes by third parties, excluding from the application of such mechanisms all matters related to its vital interests, such as its independence and territorial integrity.

The Bolivarian Republic of Venezuela shall use the procedural means available to it to reject the claims of any tribunal or Court, including arbitral tribunals and the International Court of Justice, to grant itself jurisdiction to hear or resolve matters relating to its independence and territorial integrity.

Public officials, authorities and representatives of the public authorities, as well as citizens, shall refrain from enforcing, causing to be enforced or collaborating in the enforcement of awards, judgments, orders or any type of decision, interlocutory or final, issued by any court or tribunal whose jurisdiction is not recognized by the Republic, except that such decisions consist in the rejection of the jurisdiction or the recognition of the lack of jurisdiction of the aforementioned courts or tribunals to hear or resolve matters relating to their independence and territorial integrity.”

16. Notwithstanding all of the above, the Bolivarian Republic of Venezuela, in order not to leave any room for inertia and the vacuum implied by the defence of the historical truth and its legitimate rights through peaceful mechanisms, has decided to present its Counter-Memorial to expose to the world the violation of its

right to due process and the claim of confiscation of the rights that historically correspond to it over the territory of Guayana Esequiba, concocted through the instrumentalization of the International Court of Justice in a fabricated case that clearly violates international law.

17. In view of the foregoing, this document in no way implies recognition of the jurisdiction and competence of the Court over the territorial controversy over Guayana Esequiba, nor of the decision it may adopt on this matter, whatever it may be.

CHAPTER 1: INTRODUCTION

I. THE ORIGIN OF THE CONTROVERSY

1.1. As will be shown in this Counter-Memorial, the territorial controversy between Venezuela and Guyana is the outcome of an outrageous succession of lies, manipulations, forgeries, frauds, abuses, and other wrongdoings, to the systematic detriment of Venezuela.

1.2. The evidence confirms that the territorial controversy between Venezuela and Guyana is thus the outcome of a blatant policy of progressive usurpation of Venezuelan territory, carried out by the British Empire after Venezuela's independence by forging a non-existent territorial controversy, falsifying maps, establishing gold mining camps through furtive incursions, simulating a non-existent territorial occupation and, finally, depriving Venezuela of its territory through the fraudulent Paris Arbitral Award of 1899.

1.3. The United Kingdom burned “thousands of documents detailing some of the most shameful acts and crimes” committed during the era of the British Empire.⁴ Not only did the United Kingdom never recognise the wrongfulness of its past conduct *vis-à-vis* Venezuela, as duly explained in the following Chapters, but it also maintains “classified” archives related to the “Sovereignty dispute over borders between British Guiana and Venezuela”.⁵ Moreover, even if the UK disclosed the current “classified” documents, the most embarrassing ones for it will never come to light because they were submitted to “the purge”. Indeed, before granting independence to its colonies, the UK, fully aware of its systematic wrongdoings, implemented an instruction codenamed “Operation Legacy”,

⁴ “Britain destroyed records of colonial crimes”, *The Guardian*, 18 April 2012 (available at: <https://www.theguardian.com/uk/2012/apr/18/britain-destroyed-records-colonial-crimes>).

⁵ Sovereignty dispute over borders between British Guiana and Venezuela, *The National Archives* (available at: <https://discovery.nationalarchives.gov.uk/details/r/C342332>).

ordering a vast destruction of all colonial archives that “might embarrass Her Majesty’s government”.⁶ This policy was systematically implemented in British Guiana.⁷

1.4. Venezuela is compelled to add that, far from acknowledging its shameful conduct that led to the terrible outrage culminating in the 1899 Arbitral Award, the United Kingdom has continued to interfere in the relation between Venezuela and Guyana, sending its military ships to try to force, by threat, Venezuela to renounce to its historic claim, while further meddling in Venezuela’s internal matters, seeking to attract followers to abandon the legitimate claim of Venezuelans to their territory. through the support political opponents under the condition that they drop Venezuela’s legitimate claim to its territory.⁸

1.5. What motivates UK’s policy, as in colonial times, has nothing to do with international law. During colonial times, its motivation was lust for gold and the domination of the Orinoco to guarantee geo-strategic control of South America.⁹ Today it is its greed for black gold.

II. THE 1966 GENEVA AGREEMENT

1.6. It was precisely in order to set aside this lamentable past that the Geneva Agreement was concluded in 1966, in the context of Guyana’s decolonization process. The Agreement represents the affirmation of the unacceptable nature of the territorial situation resulting from the deplorable British expansionist history just evoked, culminating in the shameful 1899 Arbitral Award, and sought to lay the foundations for an amicable resolution

⁶ UK Government, Cary report on release of the colonial administration files, Independent report, 24 February 2011, p. 1 (available at: <https://assets.publishing.service.gov.uk/media/5a824499e5274a2e87dc2089/cary-report-release-colonial-administration-files.pdf>).

⁷ “Revealed: the bonfire of papers at the end of Empire”, *The Guardian*, 29 November 2013 (available at: <https://www.theguardian.com/uk-news/2013/nov/29/revealed-bonfire-papers-empire>).

⁸ “Revealed: Secretive British unit planning for ‘reconstruction’ of Venezuela”, *Canary*, 13 May 2020 (available at: <https://www.thecanary.co/uk/2020/05/13/revealed-secretive-british-unit-planning-for-reconstruction-of-venezuela/>).

⁹ “UK business mission to Guyana seeks expansive investment opportunities”, *Oil Now*, 27 November 2023 (available at: <https://oilnow.gy/featured/uk-business-mission-to-guyana-seeks-expansive-investment-opportunities/>).

of the territorial controversy in a practicable and equitable manner that is acceptable to both Parties.

1.7. As will be shown below, contrary to what Guyana contends, the Geneva Agreement of 1966 has not been concluded to determining the invalidity of the 1899 Award, an issue that had been frankly overcome. Instead, the Agreement has been concluded to commit the Parties to resolve the controversy in seeking a practicable and equitable solution that is duly acceptable to both. To assist them in this endeavour, the Geneva Agreement establishes a mechanism that requires the Parties' substantial engagement in undoing a grotesque territorial dispossession, in a way that will lead to a balanced and acceptable solutions for both Venezuela and Guyana.

1.8. The Parties' efforts to reach a mutually acceptable solution is reflected, as this Counter-Memorial demonstrates, in the work of the Joint Commission, the Port of Spain Protocol, and the negotiations under the good offices of the Secretary-General of the United Nations. As will be shown below, the Co-operative Republic of Guyana was committed to finding a mutually acceptable solution until 2015, when the "world class oil discovery" was made and its alliance with Exxon Mobil was sealed. Nevertheless, and contrary to what Guyana is claiming today through an unprecedented campaign of misinformation, Guyana was and is legally bound to find a mutually acceptable solution in accordance with the Geneva Agreement, as will be demonstrated below.

III. GUYANA'S BREACH OF THE GENEVA AGREEMENT

1.9. Unfortunately, Guyana did not stick to its own word, and, under the perverse influence of transnational companies, reproduced the outrageous practice of its ancient colonial power. Advised by lawyers paid with funds provided by Exxon Mobil and with the support of the United States State Department machine, Guyana transgressed the 1966 Geneva Agreement and pushed the United Nations Secretary-General, normally bound to act as a neutral third-party, to take sides with its cause, espouse its thesis, and refer a truncated version of the territorial controversy to the Court. Venezuela will never accept such a farce.

1.10. Indeed, it is now known for a fact, as will be fully demonstrated below, that in 2015, while a process of good offices under the auspices of the United Nations Secretary-General was in full swing, Guyana, together with the American firm Exxon Mobil, anxious to secure access to and exploit a “world-class oil discovery” in the maritime area off the coast of Guayana Esequiba,¹⁰ took the *final decision* that the controversy will be adjudicated by the International Court of Justice.¹¹ This decision was then followed by a campaign of pressure on the United Nations, in particular on the United Nations Secretary-General, aiming at influencing him so that he would side with Guyana and endorse this unilateral decision.

1.11. In the meantime, Guyana adopted an aggressive strategy of blocking the process carried out under the Geneva Agreement. And although an extension of the time devoted to searching a solution to the territorial controversy through good offices with mediation “elements” had been decided *and formally agreed by Guyana*, Guyana had no intention at all to act in good faith, as it committed to under the Geneva Agreement. Having already its definitive plan in place since 2015, Guyana sat back and waited for time to pass during meetings with the Good Officer, while, at the same time, “intensif[ying] its bilateral activism with other countries” to pressure the United Nations Secretary-General, as openly admitted in 2017 by the Guyanese Minister of Foreign Affairs, who is now Guyana’s agent before the ICJ.¹²

¹⁰ “ExxonMobil: Well Offshore Guyana Confirms ‘World-Class’ Oil Discovery”, *Hartenergy*, 30 June 2016 (available at: <https://www.hartenergy.com/exclusives/exxonmobil-well-offshore-guyana-confirms-world-class-oil-discovery-28873>). See also “Exxon Mobil announces significant oil discovery offshore Guyana”, *Exxon Mobil’s website*, 20 May 2015, (available at: <https://corporate.exxonmobil.com/locations/guyana/news-releases/exxonmobil-announces-significant-oil-discovery-offshore-guyana>).

¹¹ Raphael G Trotman, *From Destiny to Prosperity*, Mr Trotman was the Guyanese Minister of Governance and of Natural Resources of Guyana, during the period 2015-2020.

¹² “Guyana preparing to litigate 1899 Arbitral Award- Greenidge”, *INews Guyana*, 5 December 2017 (available at: <https://www.inewsguyana.com/guyana-preparing-to-litigate-1899-arbitral-award-greenidge/>).

1.12. Such unacceptable strategy is at odds with the spirit and letter of the Geneva Agreement. Furthermore, and at odds with all basic rules of diplomacy, Guyana lied. It lied to the United Nations. It lied to Venezuela. It lied to everybody.

IV. GUYANA’S LIE

1.13. On 12 November 2015, the Secretary-General of the United Nations proposed to Guyana a course of action – the “Way Forward” – whereby his “[p]ersonal Representative will engage intensively with both parties and offer his or her active assistance in search of a practical solution”. He further requested that “[t]he parties will in good faith provide their full cooperation to the Secretary-General and his Personal Representative” (point 3), further asking the parties to “invite the Secretary-General, acting personally or through his Personal Representative, to make confidential non-binding suggestions on any relevant aspects of their bilateral relationship, including its maritime aspects; environmental aspects; their practical cooperation; and shared principles of good neighbourliness” (point 4), and specifying that “[t]he parties aim to have reached a mutually acceptable agreement by [November 2016]” (point 8).¹³

1.14. Guyana’s response was given weight by the Court at paragraph 58 of the 2020 Judgment:

“In a letter dated 21 December 2016, the President of Guyana, H.E. Mr. David A. Granger, for his part, assured the President of Venezuela of his country’s commitment to fulfilling the highest expectations of the ‘Good Office’ process in the coming twelve-month period in accordance with the decision of the Secretary-General, to conclude a full settlement of the controversy and, should it become necessary, to thereafter resolve it by recourse to the International Court of Justice’.

He reaffirmed this position in a letter to the Secretary-General on 22 December 2016.”

¹³ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Memorial of Guyana on Questions of jurisdiction and/or admissibility, Vol. IV, 19 November 2018, Annex 100.

1.15. This was a pure and simple lie. Guyana had no intention whatsoever to participate in good faith in any good office process. It had decided in 2015 that its claim will be referred to the International Court of Justice,¹⁴ and it lied from this date onward. Guyana even pushed the hypocrisy at its extreme, authorising itself to complain before the United Nations Secretary-General in April 2016 that although “Guyana has expressed its willingness to accept the Way Forward in a spirit of utmost cooperation and compromise”, it was Venezuela which “evidently, is unwilling to accept any effective procedure for settlement of the controversy.”¹⁵

V. GUYANA’S 2015 DECISION AND ITS IMPLEMENTATION

1.16. Guyana’s strategy has been clarified recently in the book entitled “*From Destiny to Prosperity*” published by Mr. Raphael G. Trotman, Minister of Governance and of Natural Resources of Guyana during the period 2015-2020, and as such a direct witness of the facts. Mr. Trotman revealed that Guyana has concluded in 2015 an alliance with the U.S. petroleum company ExxonMobil, then presided by Mr. Rex Tillerson, who was soon to be appointed Secretary of State by President Trump. Mr. Trotman explained the alliance as follows:

“Guyana’s decision to solidify relations with ExxonMobil, Hess and CNOOC, and to press the United Nations to bring this matter of Venezuela’s claim and constant sabre rattling to an end, was a very costly and risky one, but in the end, the right one, and well worth it.”¹⁶

“I was informed that in September 2016, in the margins of the UN General Assembly, the leadership of Guyana met with the leadership

¹⁴ See for instance Guyana’s president answer to a question put in 2015: “Questioned on whether a formal approach has been made to the United Nations Secretary-General to begin a process for a judicial resolution of the issue, Granger said that this has not yet been done but emphasized that an approach would be made.” (available at: <https://en.mercopress.com/2015/06/25/guyana-gives-assurances-to-exxon-to-keep-exploring-for-oil-despite-venezuela-s-threats>).

¹⁵ Memorial of Guyana on jurisdiction and admissibility, Vol. IV, Annex 103.

¹⁶ R. G. Trotman, *From Destiny to Prosperity*, 2023, p. 34.

of ExxonMobil to discuss the discovery and how it could be developed and protected [...]”.¹⁷

“all engagements between Exxon and the Ministry of the Presidency, the Ministry of Foreign Affairs and the Ministry of Natural Resources became inextricably linked. In furtherance of this new thrust, it is no secret that Guyana signed a new agreement with Exxon and received a ‘signature bonus’. The sole objective, and need for this ‘bonus’, was for it to be put towards Guyana’s diplomatic and legal efforts at casting off, from its back, the dark shadow of Venezuela’s continuous and mounting threats. A decision was taken to assemble a world-class legal team that would be supported by the best experts on cartography, maps and treaties and to implore the United Nations Secretary-General, Mr. António Guterres, to use his powers under the Geneva Agreement of 1966, to move beyond the ‘Good Offices’ process and to refer the matter of Venezuela’s unfounded claims to the International Court of Justice for a full and final determination. The terms of the 1966 Geneva Agreement gave the Secretary-General the power and responsibility to choose a means of peaceful settlement from amongst those contemplated in Article 33 of the Charter of the United Nations. After much effort, and what seemed like a long wait, Mr. Guterres took the unprecedented step, on January 30, 2018, of referring the matter to the World Court. By then, and in anticipation of this referral, the legal and expert team was in place and Guyana was ready and in a strong position to present its case.”¹⁸

1.17. To solidify their alliance, in a Petroleum Agreement concluded on 27 June 2016, Tillerson’s Exxon Mobil and Guyana committed as follows:

“Article 31 – Miscellaneous

The Government assures the Contractor that the Contract Area lies entirely within the territorial limits of Guyana and that Guyana has sovereignty over such area. The Government shall continue to assert its right to the entire Contract Area and seek to resolve current or future claims, if any, by other States that impugn any portion of the

¹⁷ *Ibid.*, p. 51.

¹⁸ *Ibid.*, p. 32.

Contract Area. The Government shall also use its best efforts to permit due observance of the terms and conditions of this Agreement by both Parties. Both Parties undertake not to take any action inconsistent with the terms and conditions of the Agreement”.¹⁹

1.18. The “Contract Area” covers the entire maritime area off the coasts of the territory in contention between the Parties, where a “world-class oil discovery” has been located in 2015, as publicly announced by ExxonMobil. To respect this Petroleum contract *vis-à-vis* the oil companies, and in particular to “assure” them that all areas were within its territorial limits, Guyana necessarily breached its commitments *vis-à-vis* Venezuela under the Geneva Agreement. Indeed, abiding by that contract required Guyana to stop all efforts to negotiate a practical solution acceptable to both Parties. In exchange for that commitment, Guyana and Exxon Mobil engaged in a “long-term strategic and economic relationship” aimed at creating and advancing a forged ‘controversy’ over the alleged validity of the 1899 Arbitral Award, in order to direct it before the Court.

1.19. Fraud, especially of this scale, does not come cheap, and Guyana needed money for pursuing it. It would of course have been inappropriate for ExxonMobil to directly hire the lawyers, but ExxonMobil, as part of its deal with Guyana, did provide money, in 2016, in the form of a so-called “bonus” of USD 18 million, with 15 million being earmarked for the lawyers hired to articulate various actions and pressure the Secretary-General to refer Guyana’s claim before the Court. In his book, former Minister Trotman explained that:

“ExxonMobil, after some discussions, agreed to give Guyana some support [...]. Guyana received the sum of \$18 million, which was termed as a signature bonus. But for all intent and purposes, \$15 million of that has always been earmarked as the legal fees to be paid for our legal challenge in court [...].”²⁰

“What was received was money to assist with financing Guyana’s legal challenge at the International Court of Justice (ICJ). It should be noted that at the time the money was received that Guyana had

¹⁹ Petroleum Agreement between Guyana and Exxon, CNOOC, Hess, 7 October 2016.

²⁰ *Ibid.*, pp. 96-97.

not had the controversy referred to the ICJ but had confidence that it would be and needed to start preparations [...].”²¹

1.20. Thus, Guyana adopted a course of conduct between 2015 and January 2018 to drive the United Nations Secretary-General to refer this case to the Court. Former Minister Trotman confirmed:

“After much effort, and what seemed like a long wait, Mr. Guterres took the unprecedented step, on January 30, 2018, of referring the matter to the World Court”.²²

1.21. The truth is that, since 2015, Guyana made nothing resembling such alleged “effort” to participate in good faith in the Geneva Agreement process. It sat back and waited for the passage of time, consistent with its strategy to fabricate a controversy designed to be heard by the Court.

VI. THE BROADER CONTEXT

1.22. The United States decided in 2015, at the very moment of the discovery of huge oil fields off the coast of Guayana Esequiba, that Venezuela was “an unusual and extraordinary threat to the national security and foreign policy of the United States” and declared “a national emergency to deal with that threat”.²³ Rex Tillerson was appointed Secretary of State of the Trump administration two years later, in 2017. Tillerson made clear the United States’ underlying intention in bluntly stating: “President Maduro could choose to just leave [...]. If the kitchen gets a little too hot for him, I’m sure that he’s got some friends over in Cuba that can give him a nice hacienda on the beach, and he can have a nice life over there.”²⁴ The U.S. Congressional Research Service noted more recently that

²¹ *Ibid.*, pp. 53-54.

²² *Ibid.*, p. 33.

²³ U.S. President’s Executive Order 13692, 8 March 2015, (available at: <https://www.federalregister.gov/documents/2015/03/11/2015-05677/blocking-property-and-suspending-entry-of-certain-persons-contributing-to-the-situation-in-venezuela>).

²⁴ K. Atwood, “Tillerson brings up possibility of regime change in Venezuela”, *CBS News*, 2 February 2018 (available at: <https://www.cbsnews.com/news/tillerson-brings-up-possibility-of-regime-change-in-venezuela/>).

“those sanctions and other international pressure failed to dislodge Maduro”,²⁵ confirming the U.S.’s unlawful policy of “regime change.” Of course, this pressure supported Guyana (and Tillerson’s ExxonMobil), which took advantage of these wrongdoings to advance its unilateral actions.

VII. THE PURPOSE OF THE GENEVA AGREEMENT

1.23. The spirit in which the Geneva Agreement was negotiated and signed was not confrontational, since it establishes in black letters that the solution should be mutually satisfactory. The purpose of the Geneva Agreement is conciliatory, its object and purpose being for the Parties to arrive at a mutually acceptable solution. There is no basis in the Geneva Agreement for any decision that would not allow the Parties to reach such a solution.

VIII. THE STRUCTURE AND CONTENT OF THE COUNTER-MEMORIAL

1.24. Venezuela’s Counter-Memorial is structured as follows:

1.25. Chapter 2 determines the true controversy between the Parties, noting that the contours of the controversy submitted by Guyana are totally misleading; that the actual question in this case has been determined by the 1966 Geneva Agreement, and that the court has no role to play for that matter. Chapter 3 delves in the preliminary work of the Agreement, its text and the subsequent practice, aimed to elucidate, not only the subject matter of the territorial dispute, but also the framework of the mutually acceptable and satisfactory settlement enshrined in the Geneva Agreement. Chapter 4 provides evidence of Venezuela historical title to the territory of Guayana Esequiba, which title was baselessly and fraudulently challenged by Great Britain. Chapter 5 reviews the substantial set of exhibits, which prove that the steps leading to the 1899 Arbitral Award was fraudulent, abusive and unfair. Chapter 6 is a conclusion on the manifest, intrinsic nullity of the 1899

²⁵ Congressional Research Service, “Venezuela: Overview of U.S. Sanctions Policy”, 26 January 2024, p. 1 (available at: <https://crsreports.congress.gov/product/pdf/IF/IF10715>).

Award. Chapter 7 shows that Guyana's argument on the allegedly prolonged acceptance of the Arbitral Award by Venezuela lacks merits.

1.26. The Counter-Memorial ends in Venezuela's conclusions and submissions.

CHAPTER 2: THE REAL CONTROVERSY OVER GUAYANA ESEQUIBA

I. INTRODUCTION

2.1. In its memorial on Preliminary Objections, Venezuela stressed that it:

“could not be compelled to prove the validity or invalidity of the award, much less bear the burden of proof of its nullity, simply because it never committed to do so, and much less when it signed the Geneva Agreement in 1966. Venezuela has only undertaken to amicably achieve a settlement acceptable for the Parties.”²⁶

2.2. This chapter elaborates on this point, which is essential for the proper resolution of the territorial controversy. Indeed, as explained in this Chapter, this case has, so far and deplorably, proceeded on the basis of a profound misunderstanding of the Geneva Agreement – a misunderstanding rooted in Guyana’s biased, unfair, and one-sided presentation of the matter at hand.

2.3. The controversy as described by Guyana bears only a superficial resemblance to the true “controversy” that the Geneva Agreement was designed to solve. Indeed, Guyana’s approach to the case all but eradicates the existence of the Geneva Agreement, in an unfounded bid to set the clock back to 1899, as though the decades of good faith engagement between the parties after 1966 could be brushed off for the sake, if Guyana’s machinations were successful, of an asymmetric outcome that gives everything to one party (Guyana), and denies everything to the other (Venezuela).

2.4. After elaborating on the “real issue” in the case (II), namely, the way for the Parties to reach an amicable and satisfactory settlement of their controversy, this Chapter concludes by making it clear that the Court has no role to play in this context other than to respect the validity of the Geneva Agreement which mandates the reaching of a practical, mutually acceptable agreement for both parties (III).

²⁶ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary objections of Venezuela, 7 June 2022, para. 54.

II. THE REAL CONTROVERSY OVER GUAYANA ESEQUIBA DIFFERS SUBSTANTIALLY FROM WHAT GUYANA HAS ASKED THE COURT TO DECIDE

2.5. After establishing that Guyana’s description of the controversy is misleading (A), Venezuela will turn to the “real issue” in the case: a practical and mutually satisfactory resolution of the territorial controversy (B).

A. THE CONTOURS OF THE CONTROVERSY AS INTRODUCED BY GUYANA ARE MISLEADING

2.6. In its Memorial, Guyana concluded by requesting the Court:

“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.”²⁷

2.7. From the outset Venezuela has protested the “unilateral presentation of the mentioned dispute” by Guyana.²⁸ This protest was justified, in particular, by the fact that Guyana’s prayer for relief was exceptionally broad – so broad, in fact, that most of its items have since been dropped. Venezuela was also challenging Guyana’s description of the territorial controversy because it repeated its past unwillingness to give full effect to the Geneva Agreement, what it stands for, and what the Parties have agreed thereunder.

²⁷ GM, p. 287.

²⁸ 2020 Judgment, para. 5. See, in this respect, Memorandum of Venezuela, paras. 104 *et seq.*

2.8. This misunderstanding has deep roots. It is apparent in the failure of the Mixed Commission appointed under the Agreement.²⁹ Yet, Guyana eventually agreed that an amicable settlement was the mandated way forward, as illustrated by its participation in the good offices process over the years, and as will be further shown in Chapter 3. In fact, Guyana changed its attitude and position only in 2015, when it consciously decided to give in and yield to the oil transnationals and to subordinate its relationship with Venezuela to the economic interests of those transnationals, as explained in Chapter 1.

2.9. Since that date, Guyana has falsely represented that the Geneva Agreement was meant to resolve a dispute over the validity or invalidity of the Arbitral Award.³⁰ In reality, the Agreement was entered into in order to leave behind that particular dispute and allow the Parties to find a practical, mutually satisfactory solution to the territorial controversy. This should be particularly clear, for several reasons.

First, the Geneva Agreement does not, at any point, provide that answering the question of the validity of the Award is a pre-condition for the mutually satisfactory solution the Parties are seeking; this is the only way to read the Agreement's multiple references to such a solution.³¹

Second, the Agreement was negotiated and executed after the Parties unsuccessfully conducted a process to review the validity of the 1899 Award.³² It is therefore incredible that Guyana now claims that the Parties signed an agreement to eternally continue in the same process without any concrete advantage.

Third, Guyana did not even exist at the time of the Arbitral Award, and, as the Court decided in 2023, this proceeding does not have the United Kingdom as a Party – which was

²⁹ GM, Annex 47, para. 3: “In effect, the Venezuelan representatives maintained at all times that, in light of the letter and spirit of Article I, their mandate was only and exclusively to ‘seek satisfactory solutions for the practical settlement of the controversy’, while the Guyanese representatives maintained the criterion that the determination of the legality of the Award of 1899 was a prior question that had to be dealt with preferably before examining any practical arrangements.” This was noted by the Court, in the 2020 Judgment, para. 46.

³⁰ Preliminary Objections of Venezuela, paras. 17, 20.

³¹ *Ibid.*, para. 48.

³² 2023 Judgment, para. 37.

the original Party to that fraught arbitration that consecrated its usurpation of Guayana Esequiba. The Agreement was adopted in the full knowledge that Guyana would soon reach independence – and would have to reach its own solution with Venezuela,³³ without relying on an invalid award that it never obtained by itself but, somehow, would inherit from the United Kingdom. In other words, what the Geneva Agreement did was to set the Parties (i.e., Venezuela, and the soon-to-be independent Guyana) on the path of reaching a solution that is mutually beneficial and does not repeat the mistakes (and dead-end) of the situation that had prevailed between Venezuela and the United Kingdom.

2.10. As should now be apparent, the “real issue” differs substantially from Guyana’s monomaniacal focus on the validity of the 1899 Award – a stale issue that was left behind when the Parties concluded the Geneva Agreement.

B. THE REAL CONTROVERSY BETWEEN THE PARTIES

2.11. Now, what does the controversy between the Parties relate to?

2.12. To have a proper view of that issue, it is necessary to make a brief and preliminary review of the historical background to the Geneva Agreement. This section foreshadows several themes that will be amplified below bearing not only on the injustice and invalidity of the 1899 Award, but also on the British criminal schemes that had predated it. But the following sections have a more circumscribed role: highlighting the overarching theme that has informed the Parties’ relationship over the last few decades, which in turn inform the “real issue” existing between them.

a) The territorial question in view of the Spanish discovery and colonisation, and the small "Dutch-British settlements" around the Essequibo region, and the Treaty of Washington of 1897

2.13. As will be detailed in Chapter 4, what was then the territory of Guiana, like many lands in South America, only gradually entered the orbit of the imperial powers – the Spanish colonization being notably predominant. Since their arrival in the 15th century,

³³ Preliminary Objections of Venezuela, para. 40.

and despite the subsequent limited Dutch and British incursions into the territory it is imperative to remember that Spain, as a colonising force, was the first European power to assert territorial sovereignty over the region. While Spanish territorial boundaries have devolved to Venezuela as the successor State upon its independence, the British Empire, in the mid-19th century, when Venezuela had already gained independence from Spain and was a sovereign republic, fabricated what became the territorial controversy, on the basis of illegal incursions into the Essequibo territories, adulterated maps, and a succession of lies.

2.14. This is the background to the Washington Treaty of 1897, which, by all accounts was an unequal treaty deeply disadvantageous to Venezuela. Under that instrument, the British Empire had ultimately agreed to arbitrate this territorial controversy, a path that Venezuela, sure of its rights, had long favoured. The British's change of heart, as explained below was likely prompted by its knowledge that a Commission set up by the United States to investigate this controversy would point to the truth of Venezuela claims.

2.15. Yet, unfortunately, and as recounted in the first section of Chapter 5 in particular, the Washington Treaty was not the right instrument to bring about a fair and just outcome – indeed it had been negotiated behind Venezuela's back with the purpose of committing an injustice, making this early attempt to settle the controversy null and void *ab initio*.

b) The Arbitral Proceedings and the 1899 Award

2.16. As further explained in Chapter 5, whatever the flaws of the Washington Treaty, the arbitral proceedings as they took place only sublimated them in their unfairness towards Venezuela. Whatever trust Venezuela could have had in the justice of these proceedings, or the impartiality of the tribunal, was soon to be betrayed.

2.17. It has been Venezuela's case for decades now that the Award is fraught with both procedural and substantive irregularities that severely impinge upon its legality under international law and would prompt anyone to consider it a nullity. As elaborated in further details below many aspects of the arbitral proceedings evidence this nullity under international law. *Inter alia*: the arbitration panel leaned excessively towards British

interests, with the absence of any Venezuelan nationals among the arbitrators highlighting a glaring procedural anomaly; the lack of any reasoning in the Award was meant to conceal the tribunal's many excesses of powers, such as the tribunal's failure to answer the questions put in the Washington Treaty, and its failure to give a *legal* decision – as was expected of it; and the final demarcation favoured the United Kingdom disproportionately, sanctioning its criminal usurpation of territory. These flaws discredited not only the Award, but also arbitration as a dispute-settlement method under international law, with many participants, on both sides, confessing their disbelief as to what had happened.

2.18. More importantly, for the purpose of this section, is the fact that the Award was bereft of the consensual bedrock that arbitration as a dispute resolution mechanism inherently demands. Both the Washington Treaty and the arbitration were the outcome of manipulations designed to harm Venezuela. Venezuela's hopes that the controversy created from the British motivation could be resolved amicably through a common engagement with international justice, was thus thwarted.

2.19. As such, the 1899 Award, when viewed through the prism of both procedural integrity and substantive justice, cannot be sustained: it was, in essence, an imposition and not an arbitration. As explained in Chapter 7, as soon as the circumstances allowed, Venezuela made its challenge to the Award known to the whole world.³⁴

c) The Geneva Agreement and the Port of Spain Protocol

2.20. The Parties concluded the Geneva Agreement of 1966, with the aim of rectifying the historical injustices. Accordingly, the Geneva Agreement was, first and foremost, a way for the Parties to leave the Arbitral Award behind them and, instead, seek a mutually satisfactory solution to the outstanding territorial controversy between the Parties – as further demonstrated in Chapter 3 of this Counter-Memorial.

2.21. There is ample evidence of this object in the Geneva Agreement:

³⁴ Memorandum of Venezuela, Annex, pp. 3-5.

- a. The goal to amicably resolve the controversy appears from the very title of the Agreement, as well as from its preamble;³⁵
- b. The Commission to be established under Article I of the Agreement was tasked with “seeking **satisfactory** solutions for the **practical** settlement of the controversy between Venezuela and the United Kingdom”. The same terms can be found in the *travaux préparatoires*.³⁶
- c. The nature of the Commission as a diplomatic endeavour, as opposed to a legal one, underlines that the Parties’ purpose was to reach a diplomatic and political solution – and not to review the 1899 Award.
- d. The use of negotiations, mediation, and other dispute-settlement approaches, as provided by Article IV, supports this view since they are ill-fit to the binary (validity/invalidity) question of what should be done with the 1899 Award. As stressed by Venezuela in its past submissions,³⁷ Article IV of the Geneva Agreement embodied the principles of graduality and progressivity: the Parties would, step-by-step, reach a satisfactory outcome.
- e. In particular, and crucially, the United Kingdom (and Guyana) *opposed* to any mention of arbitration or recourse to the Court in the Geneva Agreement.³⁸

2.22. To pretend, as Guyana does, that the final outcome of this controversy should, instead, be an entirely asymmetrical solution where one party (Guyana) gets everything and the other (Venezuela) nothing, is a manifest violation of the Agreement.

2.23. The records from Venezuela’s ratification of the Geneva Agreement³⁹ notably evidenced the intention of this instrument to provide the impetus for a new approach to the

³⁵ 2020 Judgment, para. 73.

³⁶ Letter of 16 December 1965 to the Secretary-General from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland, and Venezuela before the United Nations, 18 December 1965 (**Annex 43**).

³⁷ Memorandum of Venezuela, paras. 51, 106.

³⁸ *Ibid.*, para. 106, and its Annex, p. 31.

³⁹ Cited by the Court itself: see 2020 Judgment, para. 77.

territorial controversy, for the purpose of achieving a mutually satisfactory solution. For instance, Venezuelan President Raúl Leoni described the Geneva Agreement to the Venezuelan Congress as such:

“By signing the Geneva Agreement, the National Government has not only defended the intangibility of our territory **by placing our claim in the same situation as the border dispute was when it was submitted to arbitration in 1897**, but has been consistent with Venezuela’s traditional international position inspired by the principles enshrined in the Preamble of the Constitution, which order cooperation with other nations, in the aims of the international community, on the basis of reciprocal respect for sovereignty, self-determination of peoples and repudiation of war and conquest as instruments of international policy”.⁴⁰

2.24. This is hardly the view of someone that had accepted the “all-or-nothing” reading of Guyana now. Indeed, the entire ratification process supports that the Geneva Agreement leaves aside the question of the Award’s validity. For instance, the then Foreign Minister of Venezuela, Iribarren Borges stated that:

“This admission that there is a “border dispute with British Guiana” is reaffirmed by the admission at the first item of the “need to resolve the dispute.” Moreover, in order to dispel any doubt about the nature of the talks... it was stipulated in the second item of the agenda that it would “seek satisfactory solutions for the practical settlement of the controversy that has arisen as a result of the Venezuelan contention that the Award of 1899 is null and void.” Reinforcing this interpretation, the “determination of deadlines” for the solutions to be reached is contemplated in the fourth item. To no one can escape the fact that the British position at the beginning of this process in 1962 had already changed significantly. What was agreed on the agenda was far from that first offer made by his representative, Mr. Crowe, in the sense that they were only willing to examine the documents relating to the 1899 Award.

[...]

⁴⁰ Memorandum of Venezuela, Annex, p. 25 (emphasis added).

As a result of the diplomatic dialogue, and not of the monologue of the victors, the Geneva Agreement brings to a new situation the extreme positions of those who demand the return of usurped territory by virtue of a null award, and that of those who claimed that having no doubt about their sovereignty over that territory, were not willing to take the case to court.”⁴¹

2.25. These statements are in line with the *travaux préparatoires*. In particular, the Parties’ Joint Statement of 10 December 1965 recorded their intent to find a *practical* settlement of the controversy following the Venezuelan contention over the nullity of the 1899 Award.⁴² The same Statement further recorded that, since the Parties could not accept the conclusions of their respective experts as to the 1899 Award, “the issue will not be considered” in the context of subsequent negotiations, which led to the Geneva Agreement.⁴³ This, again, demonstrates the bad faith that animates Guyana’s efforts to relitigate the validity of the 1899 Award on the basis of the Geneva Agreement.

2.26. Further, and as is well-known, under international law subsequent practice by the parties can be taken into account when interpreting a treaty. This practice includes the Port of Spain Protocol, a moratorium agreed upon in 1970 as yet another attempt for the Parties to reach a settlement of this dispute. In other words, once again, the Parties entered into an international instrument designed to draw a line over the fraught 1899 Award. As such, far from abrogating or altering the Geneva Agreement’s chief purpose, the Protocol confirmed its underlying approach of favouring a satisfactory solution to the controversy, by providing further breathing space for diplomatic negotiations.

2.27. This is readily apparent from the Statement issued by Venezuelan Minister of Foreign Relations, Dr. José Alberto Zambrano Velasco, on 10 April 1981, through which Venezuela declined to prolong the Port of Spain Protocol. In that Statement, Minister Zambrano Velasco opined “that the commitment made by Venezuela, Guyana and United

⁴¹ Memorandum of Venezuela, Annex, pp. 29 and 32.

⁴² Letter of 16 December 1965 to the Secretary-General from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland, and Venezuela before the United Nations, 18 December 1965, p. 2 (**Annex 43**).

⁴³ *Ibid.*, p. 3.

Kingdom in 1966 to find satisfactory solutions for a practical settlement of the dispute should also be respected.”⁴⁴ In a subsequent letter to the Secretary-General, Venezuela demonstrated how Guyana had “consistently refused to negotiate with Venezuela a solution of the type described” in the Geneva Agreement – i.e., and once again, “a satisfactory solution for the practical settlement of the controversy”.

2.28. In this context, it bears recalling that Guyana, not Venezuela, had been in favour of prolongating the Protocol⁴⁵ – thus evidencing that it had thought, at least at that time, that such direct diplomatic endeavours were the only possible approach to the controversy.

d) The UN-mediated Process until Guyana Filed its Unilateral Application with the Court

2.29. In the following years, up to the expiry of the Port of Spain Protocol, the UN Secretary-General appointed a series of Personal Representatives to facilitate dialogue between the Parties. It is notable that two of the three Good Officers were not lawyers, but diplomats or economists – in line with the Geneva Agreement’s goal to reach a “practical” – that is, political and diplomatic – solution to the controversy.⁴⁶

2.30. These negotiations, which are further recounted in Chapter 3, were conducted under the specific understanding – in line with the Geneva Agreement – that diplomatic solutions were the most conducive to resolving this long-standing controversy. Accordingly, the factual record is replete with evidence that the intention of the Parties was to reach an amicable solution acceptable to both sides. For instance:

- a. Documentary evidence from the Good Offices process in 1994, which confirmed the Parties’ commitment “to try to break with traditional schemes and look for novel formulas

⁴⁴ Memorandum of Venezuela, Annex, p. 54. See also: Declaration of the Minister of Foreign Affairs, Mr. José Alberto Zambrano Velasco, 10 April 1981 in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas, 1981, pp. 141-142 (available at Peace Palace Library).

⁴⁵ Memorandum of Venezuela, Annex, pp. 57 *et seq.*

⁴⁶ Both Sir Alister McIntyre and Norman Girvan were economists; only Oliver Jackman was a jurist, although he also qualified as a diplomat.

that would allow a solution to the impasse”,⁴⁷ as well as their “determination to seek a practical settlement of the dispute, in accordance with the provisions of the Geneva Agreement.”⁴⁸ This is on the back of several meetings with the UN-appointed facilitator, that saw substantial developments from both parties.⁴⁹

- b. Guyana’s own Ministry of Foreign Affairs stressing in its 1998 Annual Report “the will of [both] countries to continue the search for a peaceful solution within the framework of the United Nations’ Good Officer process as provided for in the 1966 Geneva Agreement.”⁵⁰
- c. A joint communiqué resulting from a visit of President Chavez to President Jagdeo in Georgetown, on 19-20 February 2004, recounted that “a spirit of cordiality had permeated the approach to the dialogue between the two sides under the auspices of the United Nations Good Offices Process in the search for a peaceful and practical settlement of the controversy in accordance with the Geneva Agreement of 1966”.⁵¹ Similar statements were made in other later high-level visit between the two countries in 2010.⁵²

⁴⁷ Report on the Work of Emilio Figueredo in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983 (**Annex 110**).

⁴⁸ See Memorandum to the Foreign Minister Miguel Angel Burelli Rivas from Ambassador Emilio Figueredo Planchart, 4 July 1994 (**Annex 131**) and Report on the Work of Emilio Figueredo in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983 (**Annex 110**).

⁴⁹ Report on the Work of Emilio Figueredo in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983 (**Annex 110**): see, in particular, p. 6, which records the opinion of the Guyanese facilitator that it was “necessary to break with the traditional approaches and look for a new formula that would allow to exit the impasse.” See also p. 9, where the document recounts that “it is evident that the solution, more than legal, must be political.”

⁵⁰ Ministry of Foreign Affairs, Service within and Beyond our Borders, Annual Report, 1998, pp. 99 *et seq.* (**Annex 50**).

⁵¹ Joint Communiqué issued at the end of the State visit to Guyana of H. E. Hugo Chávez Frías, President of the Bolivarian Republic of Venezuela, 19-20 February 2004, para. 4 (**Annex 51**).

⁵² Joint Statement of Presidents Hugo Chávez Frías and Bharrat Jagdeo on the occasion of the official visit of the President of the Cooperative Republic of Guyana to the Bolivarian Republic of Venezuela, 21 July 2010 (**Annex 52**).

- d. In 2012, a technical workshop took place with Good Officer Girvan, leading to a number of recommendations, such as to “[r]esume inter-institutional meetings to set up expert teams in order to coordinate the actions to be taken with a view to formulating satisfactory solutions for a practical settlement of the territorial controversy and for cooperation in general.”⁵³
- e. During a press briefing in 2013, President Maduro disclosed that both countries were “ready to continue working through the Good Offices of the United Nations organization considering this as the sole and successful mechanism to allow us to channel our differences using international law.”⁵⁴ In the resulting joint communiqué, both countries reconfirmed their commitment to “the search for a peaceful and practical settlement of the controversy”.⁵⁵

2.31. As can be seen from these examples, the spirit of these UN-mediated talks was one of cooperative engagement and bilateralism. This is not the conduct of Parties that disagree over a binary issue, such as the Award’s validity or invalidity, but of neighbours seeking to reach a satisfactory solution and a viable *modus vivendi*. While progress took time in these negotiations, both Parties remained engaged, and Venezuela was confident that it would ultimately result in a mutually acceptable solution.

2.32. Instead, as described in Chapter 1, Guyana suddenly decided to unilaterally bring its unjustified case before the Court, insisting on a single aspiration: that of the fraudulent 1899 Award. What has brought forth such a radical change of tack from Guyana, is the “world-famous discovery” of significant reserves of offshore oil in the maritime areas off the coast.

⁵³ Second Technical Workshop convened by the Good Officer, Norman Girvan, Personal Representative of the Secretary-General of the United Nations Organization, for the Guyana-Venezuela Territorial Controversy, 28 February 2013, p. 5 (**Annex 137**).

⁵⁴ “State visit of Venezuelan President... Maduro, Ramotar recommit to Good Officer process”, *Stabroek News*, 1 September 2013 (available at: <https://www.stabroeknews.com/2013/09/01/news/guyana/state-visit-of-venezuelan-president-maduro-ramotar-recommit-to-good-officer-process/>).

⁵⁵ Joint Declaration issued on the conclusion of the State visit to Guyana by H. E. Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela, 31 August 2013 (**Annex 53**).

2.33. Nevertheless, this departure from a shared commitment to diplomatic resolution cannot allow us to forget that we are dealing with a territorial controversy that is to be resolved through diplomatic mechanisms. Guyana's proposal that the Court should now concentrate on the stale legal issue of the Award's validity would represent an unwarranted break with four decades of negotiations that were much richer, much more conducive to that goal.

III. THE COURT HAS NO ROLE TO PLAY IN THIS CONTEXT

2.34. Having established the subject of the controversy as it arises from the Geneva Agreement, it is evident that the Court has no role to play, without this implying a flagrant violation of the agreement. It is uncontested that the Court's role in any dispute before it is to rule under international law, respecting, in this case the validity of the Geneva Agreement, which mandates a practical and mutually acceptable solution for both parties.

CHAPTER 3: THE MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION OF THE CONTROVERSY UNDER THE GENEVA AGREEMENT

I. INTRODUCTION

3.1. The territorial controversy between Venezuela and Guyana is of a unique nature for two reasons. First, it is governed by a legal instrument, that is, the Geneva Agreement, which is particular in its origins, content, object, and purpose, as demonstrated in the preceding Chapters. Second, this Agreement addresses a controversy resulting from the invalidity of a spurious international Award, that can only be resolved *diplomatically*, and by taking into account numerous other aspects of importance to both parties, that is, through an integral approach.

3.2. In its Application and throughout the course of these proceedings, Guyana has misled the Court by asking it to focus solely on the legal claim of the determination on the validity of the Award as if that was the ultimate goal of the Geneva Agreement.

3.3. As has been seen in Chapter 2, and as will be further explained in the present Chapter, the objective of the Geneva Agreement is to place the parties on a path to find a practical, mutually acceptable and satisfactory solution of the territorial controversy. The subject matter of the Agreement was never related to the validity or invalidity of the Award. As Venezuela has demonstrated in Chapter 2, this would lead to an unwarranted asymmetric approach to the dispute. Rather, the “real issue” in this controversy is to give effect to the Geneva Agreement.

3.4. The present Chapter will show to the Court how far the parties were willing and needed to go to achieve this objective, since anything short of a solution which is acceptable and satisfactory to both parties would not meet the terms of the Geneva Agreement.

3.5. For this purpose, this Chapter will focus on the early discussions and negotiations which eventually materialised into the Geneva Agreement, showing that the parties went to great lengths to conceive and give content to this notion of what a practical, mutually acceptable and satisfactory solution of the controversy was all about (II). It will also recount the subsequent practice of both States, showing that they always recognised that,

to achieve the ultimate objective of the Geneva Agreement, only a solution which comprised numerous aspects was needed, demonstrating how far the parties were willing to compromise for this purpose (III).

II. THE NEGOTIATION OF THE GENEVA AGREEMENT IS EVIDENCE THAT FINDING A PRACTICAL, MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION OF THE CONTROVERSY WAS THE ULTIMATE OBJECTIVE OF THE PARTIES

3.6. The position of Venezuela concerning the settlement of the territorial controversy with Guyana under the Geneva Agreement has been consistent: the only manner to achieve a practicable and long-lasting settlement of the boundary is through a practical arrangement, acceptable and satisfactory to both parties.

3.7. This imperative has been restated throughout the course of these proceedings to the Court,⁵⁶ and constitutes a *bona fides* reading of the Geneva Agreement, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context, and in the light of its object and purpose. It is thus in conformity with the customary international law rules on interpretation of treaties.⁵⁷ This formulation stems from both the preambular section which states that “any outstanding controversy [...] should therefore be amicably resolved in a manner acceptable to both parties”,⁵⁸ and the body of the Geneva Agreement wherein the parties agreed that the objective was to find “satisfactory solutions for the practical settlement of the controversy”.⁵⁹

⁵⁶ See for example, Note Verbale DM No. 000930 of 24 July 2020 from Venezuela’s Minister of Foreign Affairs, Jorge Arreaza, to the then President of the Court, H.E. Abdulqawi Ahmed Yusuf, Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana, 29 March 2018 (**Annex 81**).

⁵⁷ Vienna Convention on the Law of Treaties, Art. 31(1); *Territorial Dispute (Libya Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21-22, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 812, para. 23; *LeGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 501, para. 99.

⁵⁸ Venezuela and United Kingdom of Great and Northern Ireland, Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana, Geneva, 17 February 1966 (Geneva Agreement), preambular paragraph 3 (**Annex 6**).

⁵⁹ *Ibid.*, Article I (**Annex 6**).

3.8. This approach to resolving the controversy regarding Guayana Esequiba has been present since the beginning of the negotiations for the Geneva Agreement and constitutes its ultimate objective. The following subsections address some key aspects concerning the origins and negotiation record of the Geneva Agreement that reveal the initial positions of the parties in this regard, given that, to understand what parameters shall enable the parties to reach a mutually acceptable solution, one needs to review the negotiations and realise that the discussions were always about finding such solutions (III). Meanwhile, the period after the signature of the Geneva Agreement, evidences the extent to which the parties were willing to reach a diplomatic compromise, thus confirming that the only way to resolve the controversy was to find *mutually* acceptable solutions (IV).

III. THE ROAD TOWARDS THE GENEVA AGREEMENT BETWEEN 1962-1966

3.9. Early diplomatic exchanges show Venezuela's willingness to engage with Guyana and find an amicable settlement to the territorial controversy (i). These approaches led to meetings in London in 1965 wherein the parties had the opportunity to discuss, among others, what a satisfactory solution entailed (ii). Said meetings were followed-up in Geneva in 1966 wherein the parties consigned their agreement to find a practical, mutually acceptable and satisfactory solution of the controversy.

(i) VENEZUELA'S EARLY DIPLOMATIC GESTURES SIGNED ITS QUEST FOR A DIPLOMATIC SETTLEMENT WITH GUYANA

3.10. Guyana's recount, in its Memorial on questions of jurisdiction and admissibility,⁶⁰ of some of the events leading up to the Geneva Agreement in 1966 merit comments, not only to highlight Guyana's inaccuracies, but also to evidence the constant position of Venezuela on the territorial controversy.

3.11. First, Venezuela had no qualms with respect to Guyana's independence, which it continuously supported. Rather, it was the United Kingdom who tried to silence Guyana in

⁶⁰ Memorial of Guyana on jurisdiction and admissibility, Ch. II, paras. 2.4-2.14.

its quest to publicise to the world its case for independence. For example, during one debate of the UN General Assembly Fourth Committee on December 18th, 1961, the United Kingdom's representative, Sir Hugh Foot, "expressed his delegation's most formal reservations concerning the hearing of the Premier of British Guiana as a petitioner" claiming that "[s]uch a hearing would have the most serious consequences", and in fact threatened that if allowed to do so the United Kingdom delegation would have to "refrain from taking part in the ensuing discussion".⁶¹

3.12. After a heated debate, the Chairman of the session allowed the Premier of Guyana, Mr. Jagan, to be heard.⁶² It is no wonder that the United Kingdom's representative did not participate in the discussion⁶³ given that Mr. Jagan eloquently recounted Guyana's path to independence, including how, following the suspension of the 1953's constitution after just "four and a half months", and after "the popularly elected Government had been forcibly removed from office, just as the Gallegos Government in Venezuela, the Mossadegh Government in Iran and the Arbenz Government in Guatemala had been in 1948, 1953 and 1954 respectively",⁶⁴ the British Colonial Office had – according to Guyana's Premier own words – "imposed a dictatorial regime in British Guiana, which had amounted to a real reign of terror for the leaders of the national movement."⁶⁵

3.13. By contrast, the records evidence that Venezuela was unequivocal in its support for Guyana's independence process, as shown, for example when Venezuelan President Betancourt stated that "[i]t should be noted that Venezuela's claim over its legitimately owned territory does not hinder the aspirations of the people of British Guiana for independence. The Venezuelan nation sympathises with this cause, as it has a long-standing anti-colonial position dating back to its own struggle for sovereignty and independence."⁶⁶

⁶¹ *Ibid.*, Annex 14, p. 609, para. 2.

⁶² *Ibid.*, p. 611, para. 30.

⁶³ *Ibid.*, p. 611, para. 34.

⁶⁴ *Ibid.*, p. 612, para. 42.

⁶⁵ *Ibid.*, p. 612, para. 43.

⁶⁶ President Don Rómulo Betancourt and the Venezuelan Claim, VI, Presidential Message, 7 March 1964, in *Claim to Guyana Essequibo – Documents 1962-1981*, Caracas 1981, p. 8 (available at Peace Palace Library). In this same regard see Note from the Minister of Foreign Affairs

The Venezuelan Chamber of Deputies, National Congress and legislative assemblies supported this view.⁶⁷

3.14. Likewise, the official records of the UN General Assembly documented that, Venezuela “had always supported the cause for independence in the United Nations and had collaborated actively in the decolonization process”, and even more so “in the present instance, since the country concerned was its immediate neighbour”, proving that Venezuela “hoped that British Guiana would become independent as soon as possible and in the best possible circumstances”.⁶⁸ This was reiterated not only by Venezuela’s executive but also its legislative branch who supported “without reservation the total independence of British Guiana and its immediate inclusion into a democratic system.”⁶⁹ History shows that Venezuela recognized Guyana as sovereign State on the same day of its independence,⁷⁰ while expressly reserving, of course, its territorial sovereignty rights over the entire area on the left bank of the Essequibo River.⁷¹

of Venezuela Mr. Ignacio Iribarren Borges, to the Ambassador of Great Britain, Sir Anthony H. Lincoln, 18 May 1966, available at *Ibidem*, p. 100, and Statement by the Minister of Labour, Mr. Hens Silva Torres, and by Ambassador Francisco Alvarez Chacin, at the International Labour Organization (ILO), June 1966, at *Ibidem*, p. 112-113.

⁶⁷ Agreement of the Chamber of Deputies, 4 April 1962; Agreement of the National Congress, 13 October 1965, and Bolivar Statement of 15 February 1966, in *Claim to Guyana Essequibo – Documents 1962-1981*, Caracas, 1981, pp. 13-15 respectively (available at Peace Palace Library).

⁶⁸ United Nations General Assembly, 16th Session, Agenda Item 25: The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 8 October 1962, p. 130, para. 77 (**Annex 146**). See also Memorial of Guyana on questions of jurisdiction and admissibility, Annex 24, p. 1, and Annex 20; Memorandum of Venezuela, p. 7, and Annex, p. 38.

⁶⁹ *Ibid.*, Annex 20; Memorandum of Venezuela, p. 7.

⁷⁰ Memorandum of Venezuela, Annex, p. 38.

⁷¹ Note of Venezuela’s recognition of the new State of Guyana, with the reservation of Venezuelan rights to the territory of Guyana Essequibo, 26 May 1966, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, pp. 102-103 (available at Peace Palace Library). On Venezuela’s position on the reservation of its rights see also: Declarations by the Venezuelan Minister of Foreign Affairs on the Admission of Guyana into the OAS, published in the press, 6 September 1966 and Statement by Venezuela at the opening meeting of the United Nations General Assembly, 20 September 1966; and, Statement by the Delegate of Venezuela, Mr. Manuel Rafael Rivero, at the first regular working meeting of the second session of the Administrative Council of the United Nations Development Programme (UNDP), June 1966. All documents available at *Ibidem*, pp. 110-111, 114.

3.15. As documented, Venezuela's considerations with respect to the Guyanese independence process were related, rather, to the then perceived possibility that it would prejudice its territorial claim and, as a result, it felt obliged to state its concerns and aspirations, initially in regional forums⁷² and then at the United Nations.⁷³ It is no wonder that, the territorial controversy having not been resolved with the United Kingdom as the colonial power, Venezuela made public its position that it would submit its claims to the independent government of Guyana, having never made its support for the latter's independence contingent upon a solution to the problem.⁷⁴

3.16. The more important point to highlight is the fact that throughout these public interventions, and even long before the Geneva Agreement was foreseen, the initial elements of what Venezuela's constant position has been to this day were laid out, that is, a call for equity and reaching a satisfactory outcome for *both* parties.

3.17. For example, during the meeting of 15 January 1962 between the Minister Counsellor of the Venezuelan Embassy, Mr. Walter Brant, and American officials, the concept of equity was invoked by Venezuela, this time in relation to the 1899 Award which was rightly labelled "inequitable" and "flawed".⁷⁵

3.18. Venezuela of course continued to expand on its position being explicit on the existence of a territorial controversy and detailing the reasons why it could not recognise

⁷² See Declarations of Venezuela made at the Fourth Meeting of Consultation of Foreign Ministers of the American Continent, March 1951, and at the Tenth Inter-American Conference meeting, March 1954, both reproduced at Memorial of Guyana on questions of jurisdiction and admissibility, Annex 19, paras. 51 and 52, p. 11.

⁷³ Memorial of Guyana on questions of jurisdiction and admissibility, Annex 16, p. 1.

⁷⁴ United Nations General Assembly, 16th Session, Agenda Item 25: The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 8 October 1962, p. 130, para. 77 (**Annex 146**). See also Memorandum of Venezuela, Annex, pp. 37-40.

⁷⁵ Memorial of Guyana on questions of jurisdiction and admissibility, Annex 16, p. 2.

the 1899 Award.⁷⁶ In that context, it identified another element to be taken into account for the resolution of the controversy.

3.19. In the letter from the Permanent Representative of Venezuela to the Secretary-General of the UN dated 14 February 1962 and distributed to all Member States of the organization, Mr. Sosa Rodriguez was clear in stating that,

“Venezuela hopes that its long-standing dispute with the United Kingdom regarding the boundaries of British Guiana will be solved by negotiations between the interested parties, in accordance with international law and with the Purposes and Principle of the United Nations Charter, taking into account not only Venezuela’s rights, but also the legitimate interests of the people of British Guiana under the present circumstances”.⁷⁷

3.20. Venezuela restated its position eight days later, on 22 February 1962, when the Venezuelan representative made the following statement at the 1302nd meeting of the 4th Committee of the General Assembly:

“When the question of the independence of British Guiana [...] through peaceful negotiation with the United Kingdom [...] has come before the United Nations, the Government of Venezuela, while warmly supporting the rightful aspirations, must at the same time, in defence of the rights of its people, request that its just claims also be considered and that the injustice committed equitably rectified. [It] hope[d] to accomplish that through friendly negotiations with the parties concerned, who should consider [...] the present circumstances and to the rightful interests of the people of British Guiana”.⁷⁸

⁷⁶ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 466, para. 35; Memorial of Guyana on questions of jurisdiction and admissibility, Annex 17.

⁷⁷ Memorial of Guyana on questions of jurisdiction and admissibility, Annex 17, para. 20, pp. 4-5 (emphasis added).

⁷⁸ Statement made by the Representative of Venezuela at the 1302nd Meeting of the Fourth Committee, 22 February 1962, para. 53 (**Annex 141**).

3.21. Needless to say, Guyana omitted referencing these passages to the Court⁷⁹ even though they are clearly at the root of what eventually became the formula contained in the 1966 Geneva Agreement, which contemplated the parties' search for a practical, mutually acceptable and satisfactory solution of the controversy. These passages highlight Venezuela's position:

- That the controversy is to be resolved by negotiation between the interested parties.
- That such a negotiation should take place in accordance with international law and with the Purpose and Principles of the United Nations Charter – i.e., Articles 1 and 2.
- That *both* States' rights and legitimate interests shall be taken into account.

3.22. Conciliatory conversations subsequently took place, as registered in the records of the United Nations.⁸⁰ This was followed, as explained in Chapter 7, by the tripartite examination of certain documentary evidence related to Venezuela's claims concerning the 1899 Award.

3.23. As already described by Venezuela,⁸¹ talks took place in London on 5 and 7 November 1963, between the Minister of Foreign Affairs of Venezuela, Mr. Marcos Falcón Briceño, the Foreign Secretary of the United Kingdom, Mr. R.A. Butler, with Gov. Sir Ralph Gray standing as the representative of British Guyana. A Joint Communiqué was issued at that point.⁸²

⁷⁹ See omission at para. 2.6 of the Memorial of Guyana on questions of jurisdiction and admissibility.

⁸⁰ Memorial of Guyana on questions of jurisdiction and admissibility, pp. 24-25, paras. 2.9-2.10 and Annexes 24 and 25.

⁸¹ Memorandum of Venezuela, Annex, pp. 8-9.

⁸² Memorial of Guyana on questions of jurisdiction and admissibility, p. 25, para. 2.11; Memorandum of Venezuela, Annex, p. 9. Full text of communiqué in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas, 1981, p. 26 (available at Peace Palace Library).

(ii) THE LONDON MEETINGS OF 1965 GAVE DETAILS OF WHAT A PRACTICAL, MUTUALLY ACCEPTABLE AND SATISFACTORY OF THE CONTROVERSY ENTAILS

3.24. On 9 and 10 December 1965 the interested parties held formal meetings in London. The respective delegations were headed by the Minister of Foreign Affairs of Venezuela, Mr. Ignacio Iribarren, the Secretary of State for Foreign Affairs of the United Kingdom, Mr. Michael Stewart, and the Premier of British Guiana and later Prime Minister, Mr. Forbes Burnham.

3.25. In the final communiqué of this 1965 meeting it was indicated that the agenda had been fixed, according to the joint communiqué of 7 November 1963. However, the said 1963 joint communiqué only indicates, in relevant part, that:

“After the relevant documentation has been examined, the experts will meet to discuss the results of their investigation. The experts will subsequently submit a report to their respective governments. These reports will serve as a basis for further discussions between the Governments.”⁸³

3.26. This is quite different from the agenda of the 1965 meetings, which records:

“(i) Exchange of views on the experts’ report on the examination of the documents and discussion of the consequences therefrom. Necessity of resolving the dispute.

(ii) To seek satisfactory solutions to the practical settlement of the controversy that has arisen as a result of the Venezuelan contention that the 1899 Award is null and void.

(iii) Concrete plans for collaboration in the development of British Guiana.

⁸³ Joint Communiqué on the Ministerial Talks held in London on November 5, 6 and 7, 1963 between the minister for foreign affairs of Venezuela, Mr. Marcos Falcon Briceño, and the Foreign Secretary of the United Kingdom, Hon. R. A. Butler, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, p. 26 (available at Peace Palace Library).

(iv) Determination of time limits for the fulfilment of whatever may be agreed with reference to points 1, 2 and 3 above.

(v) Joint communiqué on the present talks.”⁸⁴

3.27. Clearly, the 1963 Communiqué had contemplated only point (i) of the 1965 meeting, with nothing there relating to points (ii) and (iii). This evidences the new approach then adopted by the United Kingdom, after having understood that it was far safer for it to neutralise the question of the Arbitral Award, as explained in Chapter 7.

3.28. And this is exactly what it did. On the first day of the London meetings, Venezuela, as was probably expected, expressed its complete dissatisfaction of Sir Geoffrey Meade’s frivolous “expert” response to the Venezuelan’s Expert Report based on newly discovered evidence, to a matter that the United Kingdom had itself offered to discuss seriously, on the basis of evidence. Venezuela’s Minister of Foreign affairs noted with some satisfaction the express distance taken by the British Government with Meade’s report, underlying “the expression used by Your Excellency in memorandum AV 1081/75, of August 3, 1965, that the said report ‘does not necessarily represent the considered view of Her Majesty’s Government with regard to any of the points at issue.’” And after forcefully rebutting some of the main substantive deficiencies of the said report, he concluded, that:

“Far from persuading my Government that its claim is without merit, the British expert report has convinced it of the unshakeable strength of its position.”⁸⁵

3.29. While the United Kingdom’s representative formally maintained the position of its country, the representative of British Guiana manifestly understood that the Venezuelan Expert Report was devastating. Because of this, it sought to bypass by all means the

⁸⁴ This agenda is indicated in the Joint Communiqué, 10 December 1965 (**Annex 42**).

⁸⁵ 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, 9 December 1965, p. 1 (**Annex 84**).

obvious fraud behind the 1899 Arbitral Award, by relying on the 1905 demarcation, as if, a proper boundary delimitation⁸⁶ could be independent of the Arbitral Award.

3.30. During the meeting of 10 December 1965, item (i) was considered exhausted by the British representative. Indeed, the British record of discussion indicates that:

“Mr. Stewart recalled that the two sides had been unable to agree on the question of the 1899 Award’s validity. Venezuela had insisted that her position was right, and Her Majesty’s Government had stuck to theirs. He wished to look at more constructive ideas under items 2 and 3 of the Agenda”.⁸⁷

3.31. Thereafter, upon arriving to the discussion of said point (ii) of the agenda, Mr. Stewart and Mr. Burnham both enquired what was meant by the formula “satisfactory solutions”, noting that it had been proposed by Venezuela.⁸⁸ Mr. Iribarren stressed that “the first solution as seen by Venezuela [is] the return of the Territory that by law belongs to it. Now, naturally, we are willing to discuss exhaustively, if its necessary, any other solution that could be proposed to achieve the objective expressed in point 2 of the Agenda.”⁸⁹

3.32. Mr. Stewart and Mr. Burnham rejected this possibility, and further enquired as to what Venezuela meant by “satisfactory solution”,⁹⁰ and having restated its position, Mr. Iribarren enquired what would the United Kingdom and Guyana understand as a “satisfactory solution to the problem”.⁹¹ To this, Mr. Stewart made the proposal that the matter be relayed back to the United Nations or, as a second alternative, that Venezuela “renounced of its claim”, or at least, “withhold it until British Guiana was firmly established as an independent State”.⁹² He further stressed that: “If you were to ask me, what does the British Government feel to be a ‘satisfactory solution’, I would recommend

⁸⁶ *Ibid.*, p. 4 (**Annex 84**).

⁸⁷ *Ibid.*, p. 5 (**Annex 84**).

⁸⁸ Minutes of London Preliminaries to the Geneva Agreement, 9 December 1965, Stewart and Burnham, pp. 14-15, 17 (**Annex 85**).

⁸⁹ *Ibid.*, Iribarren, p. 17 (**Annex 85**).

⁹⁰ *Ibid.*, Stewart and Burnham, pp. 17-19 (**Annex 85**).

⁹¹ *Ibid.*, Iribarren, p. 19 (**Annex 85**).

⁹² *Ibid.*, Stewart, p. 19 (**Annex 85**).

the second alternative. Apart from that, I do not know what we can do, only to go to the United Nations.”⁹³

3.33. For its part, Mr. Iribarren restated that, despite the parties being entrenched in their positions, he was of the view that “there can be satisfactory solutions for both, that encompass a practical arrangement of the problem that none of them can deny exist”, and that such a solution would be one which “contemplates the interests, the problem of both States [...]” – in a context where the settlement of the controversy would result in a triumph for Mr. Burnham – who domestically had to deal with political opposition – as well as benefit Guyana.⁹⁴ In sum, what the Minister of Foreign Affairs of Venezuela was proposing as a “satisfactory solution” was one which was a *win-win* for all involved.

3.34. Upon further enquiry by Mr. Burnham of what was Venezuela’s understanding of what a satisfactory solution would be,⁹⁵ Mr. Iribarren made the following proposal:

“At the invitation of Mr. Burnham, I shall make a second proposal, which would be as follows: that we agree to a joint administration of the disputed territory for a period to be discussed - let us say ten years - with obligations established for both countries, although perhaps in a greater proportion for my country, to provide the necessary means for this joint development, and also, with the agreement of my country, to cooperate in the development of British Guiana itself. Such an agreement, with such details as may be agreed upon after discussion, Venezuela would naturally be willing to enter into, recognizing the sovereignty of my country over the disputed territory”.⁹⁶

3.35. To this proposal Mr. Burnham replied: “The answer is no”.⁹⁷ For its part, Mr. Stewart restated his two propositions, to return the matter to the UN and for Venezuela to renounce to its claim,⁹⁸ both of which, were of course inconceivable for Venezuela. But

⁹³ *Ibid.*, Stewart, p. 19 (**Annex 85**).

⁹⁴ *Ibid.*, Iribarren, p. 20 (**Annex 85**).

⁹⁵ London Minutes, 9 December 1965 (Burnham, pp. 20-21).

⁹⁶ *Ibid.*, Iribarren, p. 21 (**Annex 85**).

⁹⁷ *Ibid.*, Burnham, p. 21 (**Annex 85**).

⁹⁸ *Ibid.*, Stewart, p. 23 (**Annex 85**).

despite the difficulties encountered during the meeting, Mr. Iribarren proceeded to make a third proposal entitled “Creation of a Commission to settle the controversy between Venezuela and the United Kingdom on the territorial question between Venezuela and British Guiana”. This proposition was submitted for consideration of Mr. Stewart, Mr. Burnham, and their delegations for their analysis, and would be discussed on the meeting of the following day.⁹⁹

3.36. The Venezuelan proposition for the creation of a joint commission, attempted to continue with the conversations and the finding of solutions to the controversy. It was structured in such a manner that it envisaged several conciliatory stages, a commission that would continue in this task, with the progressive introduction of mediators to try to conciliate and seek solutions. If no agreement could be found, the matter could be submitted to international arbitration – *not the International Court of Justice*.¹⁰⁰

3.37. As Mr. Iribarren well stressed, “the proposition fully demonstrates the Venezuelan desire to cooperate and collaborate in the development of our neighbour, British Guiana”¹⁰¹ which would allow for the United Kingdom to intervene in all steps as part of the proposed commission, the choice of the mediator or mediators, as well as in the conclusion or discussion, and decision on the bases, conditions, and rules for the envisaged arbitration. It was “a fair proposal”.¹⁰²

3.38. During the meeting other propositions were discussed, including, *inter alia*, an agreement which, similar to the Antarctic Treaty of 1959, would have kept the legal status of the disputed territory *in limbo*,¹⁰³ or a possible joint administration of the said area. While such joint administration was, ultimately, not agreed upon, it is important to note that this was one of the options for a possible mutually satisfactory solution.

⁹⁹ *Ibid.*, Iribarren, pp. 26 and SS; Venezuelan Proposition of 9 December 1965 (**Annex 85**).

¹⁰⁰ *Ibid.*, Venezuelan Proposition of 9 December 1965 (**Annex 85**).

¹⁰¹ *Ibid.*, morning session, Iribarren, pp. 9, 15-16 (**Annex 85**).

¹⁰² *Ibid.*, morning session, Iribarren, p. 9 (**Annex 85**).

¹⁰³ Record of Conversations held at the Foreign Office in London on the Border Dispute between Venezuela and British Guiana, 10 December 1965, p. 3 f. (**Annex 86**).

3.39. The meeting continued and the parties agreed to resume conversations at a later date in February 1966 in Geneva, focusing – at the request of the British representative – only on point (ii) of the agenda,¹⁰⁴ that is, the search for satisfactory solutions for the practical settlement of the controversy.¹⁰⁵ Also, a joint communiqué on the results of the two days of meetings in London was agreed, and which stated that:

“Ideas and propositions for a practical settlement of the dispute were exchanged. It was agreed that some of these should be submitted for further consideration and that the Ministers should continue the present discussions during the week beginning February 13, 1966, in Geneva, in order to consider these propositions, as well as others which might be suggested in accordance with the above Agenda. Since neither party was able to accept the conclusions of the experts appointed by the other party, item one will not be considered. It was further agreed that officials of the governments concerned will shortly begin preparatory talks.”¹⁰⁶

3.40. Various points can be highlighted from the London meetings:

- *First*, an initial approximation to what both parties understood as what a practical settlement of the controversy could be.
- *Second*, Venezuela’s insistence to adopt a win-win approach which would be beneficial to all concerned, even considering the interests of the United Kingdom, at the time a colonial power that reigned over Guyana and its people.
- *Third*, a multi-phased pacific settlement mechanism which would evolve from negotiation through a joint commission, then mediation, and arbitration as a last resort.
- *Lastly*, there was a recognition from the parties of the importance of continuing to seek a practical settlement of the controversy.

¹⁰⁴ Minutes of London Preliminaries to the Geneva Agreement, 10 December 1965, afternoon session, Stewart, p. 1 (**Annex 87**).

¹⁰⁵ *Ibid.*, afternoon session, Iribarren, p. 3 (**Annex 87**).

¹⁰⁶ *Ibid.*, Joint Statement, p. 2 (**Annex 87**).

3.41. Before turning to the discussions in Geneva, it should be highlighted that at no point during the London meetings was there even a remote acknowledgment of the jurisdiction of the International Court of Justice – a historical and *position constante* of Venezuela throughout this controversy.

(iii) THE GENEVA MEETINGS OF 1966 CONCRETISED THE CONSENSUS OF THE PARTIES THAT THE RESOLUTION OF THE CONTROVERSY REQUIRED THEM TO FIND A PRACTICAL, MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION OF THE CONTROVERSY

3.42. Following up on the London meetings, the parties met again in Geneva on 16 and 17 February 1966. Although there was an initial concern from Venezuela that the United Kingdom would not keep its word on the subject of the meetings, this was clarified via diplomatic exchanges between the Parties.¹⁰⁷ The delegations met as agreed and were again represented by the Minister of Foreign Affairs of Venezuela, Mr. Ignacio Iribarren, the Secretary of State for Foreign Affairs of the United Kingdom, Mr. Michael Stewart, and the Premier of British Guyana and later Prime Minister, Mr. Forbes Burnham.¹⁰⁸

3.43. These meetings sought to define the terms of what would be the Geneva Agreement. The meetings advanced upon the preliminary work of the Joint Communiqué of 1963 and of the London Meetings of 1965. The agenda now solely focused on what was then item (ii) of the London Agenda, namely, the search for satisfactory alternatives for the practical settlement of the controversy which had arisen as the result of the Venezuelan well-founded contention that the Arbitral Award of 1899 is null and void.

¹⁰⁷ Aide-Memoire presented by the Venezuelan Foreign Ministry to the British Embassy in Caracas, Regarding Statements Attributed to British Foreign Office Officials, 4 February 1966; Aide-Memoire presented by the British Embassy in Caracas in response to the aide-memoire of the Venezuelan Foreign Ministry of 4 February 1966, 8 February 1966. See also Press Release of the Venezuelan Foreign Ministry in Relation to the visit of Sir Anthony Lincoln, British Ambassador, to the Minister of Foreign Affairs, Mr. Ignacio Iribarren Borges, Caracas, 8 February 1966. All documents in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, pp. 66-69 (available at Peace Palace Library).

¹⁰⁸ Meeting at Ministerial level between the Venezuelan and British Foreign Secretaries on the Controversy over the Frontier with British Guiana, United Nations, Geneva, 16 February 1966 (**Annex 88**).

3.44. The formal sessions which opened at the *Palais des Nations* had a focus on restating the importance of moving forward with a formula agreeable to both parties, and, in particular, taking into account the impending independence of Guyana, which would effectively occur in May 1966.

3.45. That impending independence of Guyana is a major consideration, because it could be seen during the negotiations that they were distancing themselves from the stern British negotiating position. On the one hand, Mr. Stewart began the meetings by proposing a mild arrangement wherein the task of the Mixed Commission would be circumscribed to “examine the possibilities of extending the contacts between the two countries, diplomatic, trade, educational contacts, etc.”,¹⁰⁹ and with the understanding that “nothing in the Agreement implies the renunciation by either side of any territorial claims and that nothing done under the agreement should become basis for either denying or asserting territorial claims.”¹¹⁰ On the other hand, Mr. Burnham adopted a more conciliatory tone, and was willing to open the agreement beyond co-operation matters, for example, when stating that:

“It is difficult for us to agree to the yielding of any territory, but are aware that in international relations two positions may appear to be exclusive. However, with good will on both sides we may be able to arrive at a mutually acceptable solution, where honour is preserved.”¹¹¹

3.46. Due to the different positions of the parties, a significant portion of the work was done by drafting committees and agreements were concretised in various informal meetings.¹¹² The text of the Geneva Agreement was approved after being read article-by-article in a formal session and in the presence of the delegations. Before concluding the meetings on 17 February 1966, Mr. Iribarren, Mr. Stewart and Mr. Burnham, all expressed their satisfaction with the agreement reached,¹¹³ which was signed on the same day and a

¹⁰⁹ *Ibid.*, Stewart, pp. 2-3 (**Annex 88**).

¹¹⁰ *Ibid.*, Stewart, pp. 2-3 (**Annex 88**).

¹¹¹ *Ibid.*, Burnham, p. 4 (emphasis added) (**Annex 88**).

¹¹² See for example, *Ibid.*, Stewart, p. 4, Iribarren, p. 7 (**Annex 88**).

¹¹³ *Ibid.*, Iribarren, Stewart and Burnham, pp. 15-16 (**Annex 88**).

joint communiqué was issued.¹¹⁴ Venezuela diligently incorporated the Agreement into its domestic legal order¹¹⁵ and Guyana also expressed that “in accordance with well-established international practice, [it intended] to comply with all the obligations under that Agreement.”¹¹⁶ The international community took note of such commitments.¹¹⁷

3.47. As was stressed throughout the entirety of the negotiations, the key points were (i) the recognition of the importance of an amicable resolution to any outstanding controversy in a manner acceptable to both parties which constitutes the ultimate final object of the Agreement; and (ii) the need to establish mechanisms aimed at finding practical and satisfactory solutions for both parties to the controversy.

3.48. At this point, with the Geneva Agreement having been signed by the Parties, it is worth restating some elements corresponding to its object and purpose as was defined in its final form.

3.49. The final object of the Geneva Agreement is explicit in its title: “resolve the controversy over the frontier”.¹¹⁸ Had the Parties intended to put in motion a process for assessing the legal status of the 1899 Arbitral Award, or for agreeing on how to carry out

¹¹⁴ Joint Communiqué on the Ministerial Talks held in Geneva on 16 and 17 February 1966, between Dr. Ignacio Iribarren Borges, Minister of Foreign Affairs of Venezuela the Hon. Michael Stewart, UK Minister for Foreign Affairs and the Hon. Forbes Burnham, Prime Minister of British Guiana, 17 February 1966 (**Annex 94**).

¹¹⁵ Venezuelan Law approving the Geneva Agreement, 13 April 1966, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, p. 97 (available at Peace Palace Library).

¹¹⁵ Note of the Government of Guyana in response to the recognition by Venezuela, 19 August 1966, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, p. 104-105 (available at Peace Palace Library).

¹¹⁶ *Ibid.*

¹¹⁷ Excerpts from statements by representatives of various countries in the United Nations Security Council and full text of the statement by the representative of Venezuela, Mr. Pedro Zuloaga, on the admission of the new State of Guyana to the United Nations, with the reservation of Venezuela on Guayana Esequiba, 21 June 1966, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, pp. 106-109 (available at Peace Palace Library).

¹¹⁸ See *Aide-Memoire presented by Marcos Falcón Briceño to the Hon. R.A. Butler* (5 Nov. 1963), GM, Vol. IV, Annex 73. See also the Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967 (**Annex 150**). See also *Statement Made by Dr Ignacio Iribarren Borges, Venezuelan Foreign Minister, to the Ministerial Conference Held in London* (9 Dec. 1965), GM, Vol. IV, Annex 76.

such assessment, the text would have said so, and the agreement would have had to be titled “Agreement to determine in a definitive and binding manner whether the 1899 Award is valid”. This was *not* the Parties’ common will.

3.50. To the contrary, the very wording of the Geneva Agreement confirms that the Parties were only concerned with finding practical, satisfactory and mutually acceptable solutions of the territorial controversy between Venezuela and the United Kingdom/British Guiana, regardless of the validity or invalidity of the 1899 Award. This issue had already been superseded during the four years of negotiations between 1962 and the execution of the Geneva Agreement on 17 February 1966.

3.51. In fact, the parties specifically agreed that their controversy should be “amicably resolved in a manner acceptable to both parties” (preamble),¹¹⁹ in seeking “satisfactory solutions for the practical settlement” of their territorial controversy (Article I). This does not suggest, even remotely, and to the contrary excludes, that the Parties agreed on putting in motion a mechanism to determine who is right with respect to the question of the validity or invalidity of the 1899 Arbitral Award.

3.52. Rather, the parties were aiming to draft an agreement that was meant to provide for a holistic solution to their territorial controversy. This approach is reflected in the drafting of the preamble of the Geneva Agreement. In a Note Verbale dated 25 February 1966,¹²⁰ the Foreign Secretary of the United Kingdom stated that:

¹¹⁹ The case law confirms that the preamble of an agreement expresses the object and purpose the agreement. See *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, I.C.J. Reports 1952, p. 176, 197; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625 para. 51; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment - Preliminary objections, 17 March 2016, para. 39; 2020 Judgment, para. 73; *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)*, Judgment, 31 January 2024, para. 50.

¹²⁰ Mentioned in *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, *Jurisdiction of the Court*, Judgment, I.C.J. Reports 2020, p. 455 para. 133.

“[t]he Venezuelans also tried hard to get the preamble to the Agreement to reflect their fundamental position: first, that we were discussing the substantive issue of the frontier and not merely the validity of the 1899 Award and secondly, that this had been the basis for our talks both in London and in Geneva. With some difficulty I persuaded the Venezuelan Foreign Minister to accept a compromise wording which reflected the known positions of both sides.”¹²¹

3.53. Accordingly, when drafting the preamble, the United Kingdom took note of Venezuela’s position, and deliberately agreed with it. Put otherwise, the preamble to the Geneva Agreement reflects the position of Venezuela, namely that the Geneva Agreement was meant to address the substantive issue of the territorial controversy between Venezuela and British Guiana. This was clearly not out of any disinterested willingness on the part of the United Kingdom. It was rather a consequence of the reality which the United Kingdom was confronted with. Being aware of the overwhelming evidence presented by the Venezuelan experts, the Jesuits Hermann González Oropeza and Pablo Ojer, the United Kingdom and British Guiana agreed to drop the issue of invalidity, recognise Venezuela’s contention, and commit to a common search for a mutually acceptable solution.

3.54. All of this is further solidified when considering the following:

First, and significantly, at no point does the Agreement mentions that the United Kingdom or British Guiana oppose Venezuela’s contention that the 1899 Arbitral Award is null and void. The Agreement provides that the controversy arises from Venezuela’s contention but does not say that it arises from opposing views on the Arbitral Award. If it had been the case, the text would have mentioned explicitly that the controversy arises from Venezuela’s contention that the Arbitral Award is null and void and that such circumstance was rejected by United Kingdom / British Guiana. But this is not what the Agreement says.

Secondly, Article I of the Geneva Agreement entrusted the Mixed Commission “with the task of *seeking*” satisfactory solutions for the territorial controversy. Had the parties wanted to task the Mixed Commission (and hence also the other ensuing mechanisms

¹²¹ Note Verbale from the Foreign Secretary of the United Kingdom to the U.K. Ambassador to Venezuela, 25 February 1966, p. 7 (**Annex 69**); cf. GM, Annex 32.

contemplated in Article IV of the Geneva Agreement) to *decide* upon the validity or nullity of the 1899 Arbitral Award, it would have been most natural for them to provide for a different formula. As explained above, after the London talks had reached an *impasse* on this issue, it would be contradictory to hold that the Parties provided for more of the same. Notably, the parties would have then entrusted the Mixed Commission with the mandate ‘of *finding*’ (rather than *seeking*) a solution for the controversy by determining whether the award was valid or rather not. In other words, the Geneva Agreement is a future-oriented, forward-looking instrument, rather than one meant to address what had happened in the past. This is confirmed by the fact that the Mixed Commission was tasked to seek ‘*satisfactory* solutions’ or ‘*soluciones satisfactorias*’ in Spanish.

Thirdly, this controversy involves “questions”, plural (Article IV), which of course excludes the idea that the Parties desired to address a single question, namely the status of the 1899 Award. In fact, this was not an “issue” at all: the Parties had accepted “Venezuela’s contention that the Arbitral Award of 1899” is “null and void” as cause of their controversy, not as being “the” controversy. The controversy to be resolved under the Geneva Agreement “has arisen as the result of the Venezuela’s contention”, as written in Article I.

Fourthly, the object of the Geneva Agreement, which is to commit the parties to a search for *mutually acceptable satisfactory solutions* for the practical settlement of the territorial controversy, and not to put in motion a mechanism to determine who is right and who is not with respect to the 1899 Arbitral Award, is plainly confirmed by Article V(1) of the Agreement, which provides that:

“nothing contained in this Agreement shall be interpreted as a renunciation or diminution by the United Kingdom, British Guiana or Venezuela of any basis of claim to territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights of or claims to such territorial sovereignty, or as prejudicing their position as regards their recognition or non-recognition of a right of, claim or basis of claim by any of them to such territorial sovereignty.”

3.55. The meaning of this provision is crystal clear: the Geneva Agreement was not intended to enshrine any sort of renunciation by any of the Parties to any claim. Since “nothing” in the agreement can be interpreted as such renunciation, none of the processes referred to in the agreement can have the effect of obliging any of the parties to renounce to anything. The parties, in concluding the Geneva Agreement aimed at reaching a mutually acceptable, satisfactory, and *negotiated* solution, on the basis of the process put in motion by that Agreement. Article V, paragraph 1 assumes by necessary implication that the parties as well as third actors involved in the settlement of the controversy must strive for a solution taking into account the claims to territorial sovereignty by both sides. This excludes that a solution is being sought, much less imposed, that would necessarily involve either side completely giving up their claim to territorial sovereignty over the area in question.

3.56. On its own terms, the Geneva Agreement offers no basis for any of the Parties, or any organ, including judicial organ, to decide that the claim of one Party is rejected, thereby obliging this party to renounce its claim. In particular, nothing in the Agreement, upon its own terms, can lead to a rejection of Venezuela’s contention regarding the nullity of the 1899 Arbitral Award. The Agreement commits the Parties to a search for a mutually acceptable and satisfactory solution, which means a solution or solutions that they subsequently both agree with.

3.57. Put otherwise, the wording of the Geneva Agreement throughout its various provisions, and starting with its title and preamble, indicates that *any* of the means of settlement referred to in its Article IV must aim at bringing about mutually satisfactory solutions to the territorial controversy, rather than addressing the issue of the (in)validity of the 1899 Arbitral Award. That issue was never meant to be addressed, the Parties having accepted that Venezuela’s contention was there, and it is from this standing point that they committed to find a mutually acceptable and satisfactory solution to the resulting controversy.

3.58. Another point which is worth restating is that the Geneva Agreement, in its final form, although in terms different from those initially proposed by Venezuela during the

London meetings, established a tiered process for the mutually acceptable and satisfactory solution for the viable settlement of the controversy. This is what became Article IV.

3.59. This step-by-step process is clear in its formulation and is very much in line with the general context that an *amicable* solution to the controversy was paramount, and with the object of the Geneva Agreement, namely the finding of a mutually acceptable and satisfactory solution for the practical settlement of the controversy.

3.60. Yet again, there is no express mention whatsoever of the International Court of Justice as a pacific settlement mechanism. Moreover, Great Britain and Guyana did not even accept the formulation a legal means of pacific settlement. Second, the parties envisioned a scenario wherein any settlement between them must be mutually acceptable and satisfactory and lead to the practical settlement of the controversy.

IV. THE DEALINGS OF THE PARTIES AFTER THE SIGNING OF THE GENEVA AGREEMENT ILLUSTRATE WHAT THEY WERE WILLING TO COMPROMISE TO FIND A MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION FOR THE PRACTICAL SETTLEMENT OF THE CONTROVERSY

(i) THE WORK OF THE MIXED COMMISSION AND THE PROTOCOL OF PORT OF SPAIN

3.61. As recounted by Venezuela in its Memorandum,¹²² after the signature of the Geneva Agreement, the Mixed Commission set-up under Article 1 thereof initiated its work “with the task of seeking satisfactory solutions for the practical settlement of the 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.”¹²³

¹²² Memorandum of Venezuela, Annex, pp. 41-49.

¹²³ Venezuela and United Kingdom of Great and Northern Ireland, Agreement to Resolve the Controversy over the Frontier between Venezuela and British Guiana, Geneva, 17 February 1966, Art. 1 (**Annex 6**).

3.62. Without the need to restate the detail of said process, it is worth noting that from the outset, Venezuela's commissioners interpreted the role of the Mixed Commission as one which had been entrusted, under the terms of the Geneva Agreement, to search for practical solutions to the territorial controversy.¹²⁴ In contrast, the Guyanese commissioners wanted to focus on procedural matters, namely, clarifying the objective of the controversy between the two governments.¹²⁵

3.63. In an attempt to move forward with the implementation of the Geneva Agreement, in the IV Meeting (March 1967), Venezuela brought a broad proposal about the joint development of Guayana Esequiba. Guyana's reply to the proposal came in the VI Meeting (October-November 1967) which led to the creation of a subcommittee of experts to study plans of joint developments.¹²⁶ Two rounds of meetings (February and June 1968) resulted in a dead end because Guyana did not accept that the Joint Development Plan included Guayana Esequiba and that Venezuela participate in the administration of the Plan. Ultimately, Guyana used the discussions to exhaust the time allotted to the Mixed Commission, i.e., four years.¹²⁷

3.64. Indeed, in light of the slow progress caused by Guyana's commissioners, Venezuela went as far as to propose the extension of the work of the Mixed Commission provided that Guyana was willing to search in good faith for satisfactory solutions for the practical settlement of the controversy.¹²⁸ A restatement of the proposal was presented, the general lines being that: (i) All of Guyana's territory would be eligible for development projects; (ii) planning and execution of the projects would be carried out by a joint administration formula; (iii) funding of the projects would be through national, joint and international funding sources. The proposal was rejected by Guyana.¹²⁹

¹²⁴ Memorandum of Venezuela, Annex, p. 42.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, Annex, pp. 43, 45-47.

¹²⁷ *Ibid.*, Annex, p. 43.

¹²⁸ *Ibid.*, Annex, p. 48.

¹²⁹ *Ibid.*

3.65. Upon the stalemate resultant from the Mixed Commission wherein, “despite Venezuelan efforts, the search for a [satisfactory solution] was not even attempted,”¹³⁰ the time was running out to afford the parties the chance to find formulas for the resolution of the controversy, in that the four-year period established in Article I of the Geneva Agreement would lapse in 1970.

3.66. The parties concurred in their interest in making a further attempt at finding a mutually acceptable and satisfactory solution before having to resort to the procedure established in Article IV of the Geneva Agreement. This led to the Protocol of Puerto España (the “Protocol”) which was signed on 18 June 1970.¹³¹

3.67. In the Protocol the parties agreed to a 12-year term, counted from the day of its signature and renewable by agreement between them,¹³² during which they undertook not to assert any claims to territorial sovereignty arising from the contention referred to in Article I of the Geneva Agreement¹³³ and to defer the operation of Article IV of said Agreement.¹³⁴

3.68. Notably, the Port of Spain Protocol reconfirmed that the parties, in line with the Geneva Agreement, continued to seek a mutually acceptable and satisfactory solution to the substance of their boundary controversy, and could not be “interpreted in any way as a waiver or reduction of any of the rights that Venezuela might have on the date of its signature, nor as a recognition of any situation, use or claim that might exist by then.”¹³⁵

¹³⁰ *Ibid.*, Annex, p. 49.

¹³¹ Protocol to 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, 801 U.N.T.S. 183 (18 June 1970) (“Protocol of Port of Spain”). GM, Vol. II, Annex 46.

¹³² Guyana, United Kingdom of Great Britain and Northern Ireland, and Venezuela, Protocol to 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, Geneva, 17 February 1966 (“Protocol of Port Spain”), Port Spain, 18 June 1970, Art. V (**Annex 7**).

¹³³ *Ibid.*, Art. II (**Annex 7**).

¹³⁴ *Ibid.*, Art. III (**Annex 7**).

¹³⁵ Statement of Purpose of the draft law ratifying the Protocol of Port of Spain, 22 June 1970, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, pp. 131-135 (available at Peace Palace Library).

3.69. This is further confirmed by the preamble of the Port of Spain Protocol, according to which this instrument sought to promote “[...] mutual confidence and positive and friendly intercourse [...]” between the parties. It goes without saying that only an overall mutually acceptable settlement of the territorial controversy could achieve such an outcome.

3.70. This broad object and purpose of the Port of Spain Protocol, which was aiming to continue the same goal as the Geneva Agreement, is further emphasised by the wording of its Article I, according to which the two governments “shall explore *all* possibilities” of promoting the improvement of their mutual relations with the aim of bringing about a constructive advancement of those relations.

3.71. This ‘all possibilities’ formula entails that the parties, when concluding the Protocol, which in turn was meant to further implement the Geneva Agreement, were striving for an overall solution to their territorial controversy whilst improving their mutual relations.

3.72. As with many aspects of the situation concerning *Guayana Esequiba*, Guyana barely makes any mention of the Protocol and the significant advances made between 1970 and 1982,¹³⁶ which evidence possible criteria to achieve a mutually acceptable and satisfactory solution could be established.

3.73. The first important development within the framework of the Protocol, came about with the signing on 25 June 1974 of a Cultural Exchange Agreement and a commercial agreement to buy sugar. Then, in 1975, Venezuela President Pérez and Guyanese Prime Minister Burnham not only discussed the border controversy at length, but also outlined possible ways of practical solution.¹³⁷

3.74. Upon an improvement of the bilateral relations, on 3 November 1976, Guyana’s Prime Minister, Forbes Burnham, proposed to Venezuela President, Carlos Andrés Pérez,

¹³⁶ GM, pp. 47-50, paras. 2.55-2.60.

¹³⁷ Annual Report presented by the Ambassador of Venezuela to Guyana, No. G6/D/1515, 3 December 1975, p. 6 (**Annex 102**).

the possibility to achieve a definitive settlement of the territorial controversy, if Venezuela provided assistance in the construction of a hydroelectric project in Guyana in the Alto Mazaruni region in Guayana Esequiba – which Venezuela had initially offered. As stated in a letter from Prime Minister Burnham to his Venezuelan counterpart:

“(My Dear Carlos Andres)

A few days ago I had communication from your Ambassador who had recently returned from Caracas, concerning an offer from you to assist in the realisation of the Upper Mazaruni Hydro-Electric Project.

[...]

The suggestions which have been conveyed to me by your Ambassador contain interesting features, and I believe we should immediately nominate representatives from both sides to work out the details, alternatives and modalities before we meet for the final agreement.

As the same time, I wish to propose a regime which, proceeding by stages can result in mutually beneficial and material cooperation. That in my view would demonstrate to both our peoples the advantages to be gained by the settlement of outstanding issues, and the growth in friendly economic relations.

We have at hand now the Final Feasibility Study prepared by SWECO. That study offers alternatives of production of power in the first stage of the development of the project, of a range between 750 megawatts and 1200 megawatts.

I would see an advantage in a long term contract for the supply of power to Venezuela, coupled with a political arrangement which would remove from our relation the nagging problem of the border.

In other words, I would propose that simultaneously with the agreements for mutual cooperation with respect to the Upper Mazaruni Hydro-Electric Project and the supply of power to Venezuela, there should be signed, an Accord which would lay at rest the border question.

I am confident that the sense of mutual assurance and security thereby generated in Guyanese and Venezuelans minds by the signing of such an Accord, would make it easy for both our peoples to accept the implications of such a significant example of economic cooperation.

The question of the supply of wood from the area to be flooded, could easily be settled favorably against such a background.

Indeed, Guyana is anxious to have as much of the marketable timber as possible, removed from the area to be flooded, and believes that the supply of lumber therefrom to Venezuela is an obvious first choice. In such circumstances further benefits are sure to accrue to both countries from the development of our timber resources in the Mazaruni area as a whole, with Venezuela as an important market.

On the question of financing, we would of course welcome Venezuelan assistance. We are at present building a road of 180 miles to the dam site, and if you believe that the regime of cooperation I have outlined forms a basis for development of economic relations between our two countries, I would ask you to consider an early discussion at an official level with respect to the funding of that road.

While the proposals I have made, differ somewhat from those which your Ambassador has indicated, I trust that you will find them a basis for a stage development of cooperation between our two countries, which, having regard to the political realities of the present time and the nature and history of the relations between our two states, offers good prospect of being acceptable to both our peoples. I share with you the understanding that economic cooperation holds the best prospect for the development of South America.

[...]

It is for this reason that I would be most grateful if I could have an early indication from you as to your reaction to the matters I have raised in this letter.”¹³⁸ (Empasis added)

¹³⁸ Letter from Forbes Burnham to Carlos Andrés Pérez, 3 November 1976 (**Annex 72**).

3.75. With this development as a backdrop and with the objective of moving ahead with bilateral agenda, Guyana's Minister of Foreign Affairs, Frederick Rudolph Wills, visited Caracas from 30 November to 3 December 1977. The conversations advanced and, at all times, Venezuela's position was clear that bilateral cooperation with Guyana was contingent on resolving the boundary situation. Ambassador Morales Paúl prepared a report on this period of negotiations with Guyana (the "Morales Paúl Report"). Herein, he recalls the details of these meetings wherein he recounts as follows:

"[Guyanese Foreign Minister Frederick Rudolph Wills] a regional map of the border area with Venezuela, proposing a correction to the last section of the border lines, specifically at Punta Playa. The rectification consisted of changing the north-west orientation of the current border line and drawing it north-east. This correction would make it possible to modify the negative impact of this sector of the border, particularly in terms of its projection towards the Exclusive Economic Zone in the area bordering Trinidad, and to provide Venezuela with a more adequate maritime projection than the current one [...] Although this proposal was rejected as unsatisfactory, it should be noted that it was the first factual evidence of the Guyanese intention to seek a solution through bilateral negotiations."¹³⁹

3.76. For its part and in relation to the boundary in the territory of Guayana Esequiba, nine hypotheses were envisioned by Venezuela as follows:¹⁴⁰

"Hypothesis No. 1:

Starting from the point whose approximate coordinates are Latitude 6°55' N. and Longitude 60°22'30" W., where the Acarabisi River flows into the Cuyuni River, following the course of this river until its mouth into the Essequibo River, whose approximate coordinates are Latitude 6°27' N and Longitude 58°36' W.

Hypothesis No. 2:

¹³⁹ Confidential Report by Morales Paúl, Delimitation Guyana-Venezuela, 1979 (emphasis added) (**Annex 108**).

¹⁴⁰ *Ibid.*, pp. 1-4.

Starting from the point whose approximate coordinates are Latitude 6°55' N. and Longitude 60°22'30" W, follow the course of the Cuyuni River until finding the point whose approximate coordinates are of Latitude 6°44' N and Longitude 59°02'05" W, following the fountain easternmost direction towards the North along the divide until you find the source of the Wallaba River, continue along this river until its mouth falls into the Supenaam River following the course until its mouth into the Essequibo River.

Hypothesis No. 3:

Starting from the point whose approximate coordinates are Latitude 6°55' N. and Longitude 60°22'30" W., follow the course of the Cuyuni River until finding the point whose approximate coordinates are Latitude 6°50' N. and Longitude 59°16" W and from there in a straight line heading 46° Northeast to the headwaters of the Arunamai River and along the course of the estuary until its mouth in the Pomeroon River and along the course of this river until reaching the Arapiaco River. We continue along the course of the Arapiaco River in an easterly direction until it meets the Tapakuma Dam and in a straight line towards the east until finding the point with approximate coordinates of Latitude 7°13' N and Longitude 58°24'30" W.

Hypothesis No. 4:

Starting from the point whose approximate coordinates are Latitude 7°6' N and Longitude 60°15' W, continuing in a straight line towards Northeast heading 32° until you find the Barama River. Following the course of this river to the town of Coquerito (Kokerite), from there following the road heading southeast until reaching the Arakabusa River, continuing along this river until its mouth in the Imotai River, from there until its mouth in the Waini River and this until you find the Mariguara River (Mariwaru). You continue along the bed of this river to its sources following a southeasterly direction until you come across the headwaters of the Kaboraina River, from there to its mouth in the Issororo River, continuing its course until its mouth in the Pomeroon River, and from there until you find the town of Charity, take the Cozier Canal to its mouth into the Atlantic Ocean.

Hypothesis No. 5:

Starting from the point whose approximate coordinates are Latitude 7°6' N. and Longitude 60°15' W., continuing in a straight line towards the Northeast heading 32° until finding the Barama River. Following the course of this river to the town of Coquerito (Kokerite), from there following the road heading southeast until you find the Arakabusa River, continuing along this river until its mouth in the Imotai River, from there until its mouth in the Waini River and through it until you find the Mariguara River (Mariwaru). You follow the course of this river to its sources and from there in a straight line heading east of 79° until you meet the headwaters of the Wakapau River.

Following its course until its mouth at the Pomeroom River and from there in a straight line heading northeast of 45° until meeting with the Atlantic Ocean.

Hypothesis No. 6:

Starting from the point whose approximate coordinates are Latitude 7°6' N and Longitude 60°15' W. continuing in a straight line towards the Northeast heading 32° until reaching the Barama River. Following the course of this river to the town of Coquerito (Kokerite), from there following the road heading southeast until you find the river Arakabusa continues along this river until its mouth in the river Imotai, from there to its mouth in the Waini River and through it until it meets the Kuraru River. You continue along the Kuraru River to its sources and from there along the divide until you find the source of the Manawarin River and follow this river until its mouth in the Moruka River and along it to its mouth into the Atlantic Ocean.

Hypothesis No. 7:

Starting from the point whose approximate coordinates are Latitude 7°6' N. and Longitude 60°15' W continuing in a straight line towards Northeast heading 32° until you find the Barama River. Next follow the course of this river to the town of Coquerito (Kokerite), from there following the road heading southeast until you find the river Arakabusa continues along this river until its mouth in the Imotai

River, from there until its mouth in the Waini River we follow the course of this river until you find the Baramanni river and from there in a straight line heading northeast of 41° until meeting the Atlantic Ocean.

Hypothesis No. 8:

Starting from the point whose approximate coordinates are Latitude $7^{\circ}6'$ N. and Longitude $60^{\circ}15'$ W continuing in a straight line towards the Northeast with a heading of 32° until reaching the Barama River. Following the course of this river to the town of Coquerito (Kokerite), from there Following the road heading Southeast until you find the Arakabusa River, you continue along this river until its mouth into the river. Imotai, from there to its mouth at the Waini River. Follow the course of this river to the point whose approximate coordinates are Latitude $8^{\circ}7'$ N. and Longitude $59^{\circ}16'$ W and from there in a straight line to Punta Cocali, on the shores of the Atlantic Ocean.

Hypothesis No. 9:

Starting from the point whose approximate coordinates are Latitude $7^{\circ}6'$ N. and Longitude $60^{\circ}15'$ W, continuing in a straight line towards the Northeast with a heading of 32° until reaching the Barama River. Following the course of this river until you find the Huri River and from there until you find the town of Koriabo on the banks of the Barima River, you follow the course of this river until the point with approximate coordinates of Latitude $8^{\circ}2'30''$ N. and Longitude $59^{\circ}29'$ W, and from there in a straight line to Punta Cocali, on the shores of the Atlantic Ocean.”



Fig. 5.1: The nine hypotheses for negotiation of the territorial boundary identified by Venezuela and which could lead to a mutually acceptable and satisfactory solution for the practical settlement of the controversy with Guyana

3.77. These hypotheses were threaded by several points of import which have informed Venezuela's position even to this day, including, recuperating the territory of *Guayana Esequiba* in a manner which is mutually acceptable and satisfactory to both Venezuela and Guyana, and ensuring an adequate starting point (or terminus) of the land boundary to ensure Venezuela's projection into the Atlantic Ocean avoiding any encroachment of its Territorial Sea, Exclusive Economic Zone and Continental Shelf entitlements.

3.78. In order to examine the questions concerning economic cooperation and the resolution of the boundary situation formulated during the November meeting, a working meeting was scheduled for a few days later in Georgetown, Guyana, on 20 December 1977.¹⁴¹ Venezuela sent a delegation of highly qualified authorities that had extensive diplomatic and negotiation experience. It was composed of Ambassador Isidro Morales Paúl, alongside other officials of the Venezuelan Ministry of Foreign Affairs; Rear Admiral Rafael Luces Morales, who held the position of Director of Borders, Dr. Germán Nava Carrillo, as Director of International Policy; and lawyer Myriam Feil, as Counselor of the International Policy Directorate.¹⁴²

3.79. At the meeting, the following cooperation proposals were considered:¹⁴³

- Facilities for Guyana's acquisition of oil with a similar system to that as the Central American countries.
- Venezuela's Good Offices to access a credit from the OPEC Special Fund.
- Fuel supply to Guyanese fishing boats at Guiria at internal Venezuelan prices.
- Identification of five areas of commerce for which Guyana could use the line of credit given by Venezuela in 1976.
- Venezuela's purchase of Guyanese timber.
- A loan of US\$10 million, for a term of six months, renewable, at 8% per annum.

¹⁴¹ Notes taken during the first session of negotiations with the Government of Guyana, Georgetown, 20 December 1977 (**Annex 106**).

¹⁴² *Ibid.*, p. 7.

¹⁴³ *Ibid.*

- An extension of the Maiquetia [Caracas] - Port of Spain [Trinidad and Tobago] flight to Georgetown.
- Guyana reformulated its proposal so that Venezuela could participate in the development and financing of the construction of the Alto Mazaruni hydroelectric dam project, as well as the purchase of electricity.

3.80. At the working session on the boundary situation the Guyanese delegation was chaired by Attorney General, and later Member of the Court, Mohamed Shahabuddeen. Dr. Shahabuddeen adopted what was described as an “evidently evasive attitude”,¹⁴⁴ enquiring about the fate of the Port of Spain Protocol and pointing out that the talks should be based on the Minutes of the Joint Commission provided for in the Geneva Agreement – which, as described earlier, had not made any advances – and that “the Guyanese Delegation was not empowered to deal with border issues, let alone territorial cessions.”¹⁴⁵

3.81. For its part, the head of the Venezuelan Delegation replied recalling that the mission of the Venezuelan Delegation consisted of examining, “jointly with the Guyanese Delegation, the possibility of achieving a practical solution, which would put a definitive end to the territorial claim” that Venezuela maintains over *Guayana Esequiba*.¹⁴⁶ He also disagreed in that the Minutes of the Mixed Commission could contribute to achieve the aforementioned solution. Importantly, he stressed that Venezuela was not “inflexible in procedural matters” but that they “do not consider that a discussion on substantive legal issues can lead to a positive result”¹⁴⁷ – in other words, an integral approach to the settlement of the boundary issue was needed. Lastly, Ambassador Morales Paúl recalled that “the initiative to propose a practical solution came from Prime Minister Burnham himself, and was embodied in the Map presented by Chancellor Wills to President Perez on his recent trip to Caracas.”¹⁴⁸ After this intervention, Mr. Sahabuddeen apologised for

¹⁴⁴ Confidential Delimitation between Guyana and Venezuela by Isidro Morales Paúl, 18 September 1979 (**Annex 108**).

¹⁴⁵ Notes taken during the first session of negotiations with the Government of Guyana, Georgetown, 20 December 1977, p. 8 (**Annex 106**).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

not being “sufficiently prepared for the meeting and promised to expedite the study of the case and its alternatives for a future meeting.”¹⁴⁹

3.82. Ten months later, negotiations resumed in Georgetown, on October 18th, 1978, with the State visit of Venezuelan President Carlos Andrés Pérez, accompanied by Foreign Minister Simón Alberto Consalvi, Ambassador Isidro Morales Paúl, and Rear Admiral Rafael Luces Morales, amongst other officials. For Guyana the delegation was led by Prime Minister Forbes Burnham, General Attorney Shahabudeen and Minister of Foreign Affairs Rashleigh Jackson.¹⁵⁰

3.83. In this meeting, both Heads of State exchanged views on the need and convenience of a settlement for the boundary situation. Venezuelan President Carlos Andrés Pérez “expressed the need of a fair and equitable settlement, based on political, legal and strategic considerations”.¹⁵¹ For his part, Prime Minister Forbes Burnham formulated considerations related to the “territorial integrity of the Republic of Guyana and that any settlement should not affect the economic development possibilities of Guyana.”¹⁵²

3.84. It is said that Prime Minister Burnham requested for a map to be displayed so that he could reference himself geographically. Attorney General Shahabuddeen proceeded accordingly to display a map that contained a line that was known as the “Aberdeen modified line”. The Venezuelan delegation made it clear that a global evaluation had to be made to consider the effects in both the territorial front and the maritime projections of Venezuela in the Atlantic Ocean.¹⁵³

3.85. During the meeting at the request of Prime Minister Burnham, the Venezuelan technicians calculated the total size of Guayana Esequiba at 140.661 km². On this canvas three working hypothesis were formulated:

¹⁴⁹ *Ibid.*

¹⁵⁰ Confidential Delimitation between Guyana and Venezuela by Isidro Morales Paúl, 18 September 1979 (**Annex 108**).

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

“Hypothesis G:

This proposal would allow the full sovereignty of Venezuela of 14.657 km² that is, approximately 10% of the entire territory, and 127.004 km² or 90% allocated to Guyana (labelled as “G” in Figure 5.2 below). It would also locate the terminus of the land boundary to the southeast of Punta Playa at Punta Cocali (or Kokali) which would ensure a broader maritime projection from Venezuela into the Atlantic Ocean.¹⁵⁴

Hypothesis V^I:

A second option would afford Venezuela full territorial sovereignty of 19.817 km², approximately 14% of the entire territory in controversy, and 120.844 km² or 86% allocated to Guyana.

Hypothesis V^{II}:

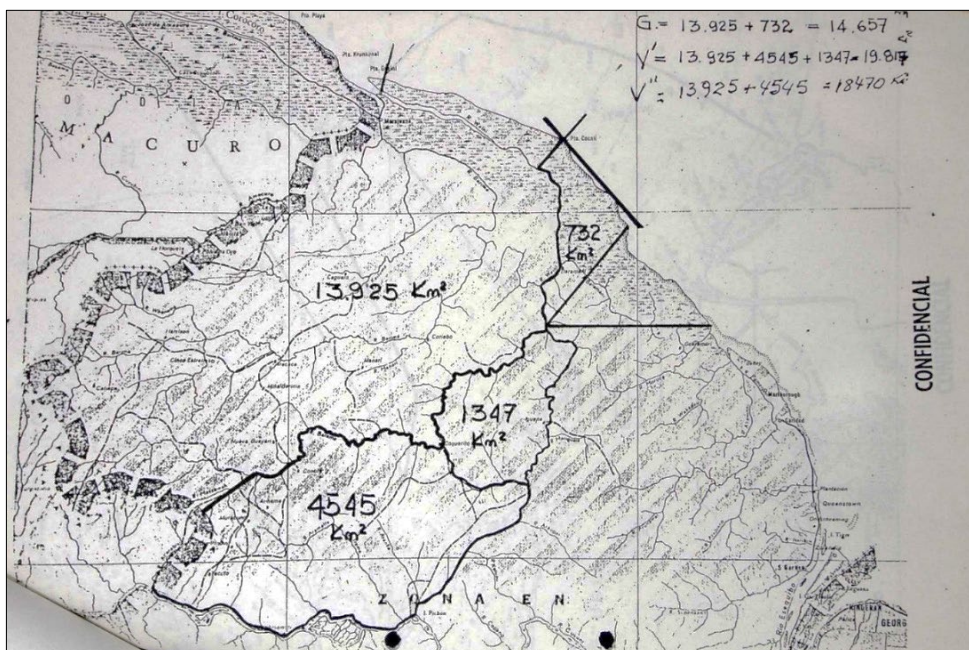
A third option would afford Venezuela full territorial sovereignty of 18.470 km², approximately 13% of the entire territory in controversy, and 122.271 km² or 87% allocated to Guyana.”¹⁵⁵

3.86. Further discussions were held during the meeting to ensure Venezuela’s access to the Atlantic Ocean and its full projection of maritime entitlements.¹⁵⁶

¹⁵⁴ *Ibid.*, p. 10.

¹⁵⁵ See Confidential Report by Morales Paúl, Delimitation Guyana-Venezuela, 1979 (**Annex 108**).

¹⁵⁶ *Ibid.*, p. 10.



Source: Confidential Report by Morales Paúl, Delimitation Guyana-Venezuela, 1979 (Annex 108).

3.87. Having laid out the working hypotheses, the Morales Paúl Report concludes by stating, *inter alia*, that:

“Although this exchange of views cannot be classified as a negotiation *per se*, it unquestionably reveals a real possibility of achieving a practical solution to the Guyana problem.”¹⁵⁷

3.88. In the ensuing years, diverse political developments on both sides as well as concerns on the feasibility and impact of the main point of cooperation, namely the construction of the Alto Mazaruni Hydroelectric Project, did not allow for the implementation of the hypotheses previously referred. However, they did show the different alternatives that Venezuela and Guyana were willing to ponder and indeed, compromise upon, to achieve a mutually acceptable and satisfactory settlement of the controversy concerning Guayana Esequiba. An important aspect of such a solution was that the territorial aspect could only be settled if other factors, such as access to maritime areas,

¹⁵⁷ *Ibid.*, p. 11 (emphasis added).

cooperation, and finance, were also considered. This integral or global approach is in line with the spirit of the Geneva Agreement and the need for a diplomatic settlement of the controversy, not a judicial one.

3.89. That such a practical solution to the overall controversy was intended is also further backed by later practice, as was confirmed by a Communiqué of the Ministry of Foreign Affairs of Venezuela of 4 April 1981, issued after the official visit to Venezuela of the President of Guyana, Forbes Burnham, and the meetings held with President, Luís Herrera Campíns, wherein it was informed that:

“President Herrera-Campíns recalled that Venezuela and Guyana are committed to seeking satisfactory solutions for the practical settlement of the pending dispute and reaffirmed Venezuela’s determination to continue exploring the most appropriate means to that end. [...]”¹⁵⁸

3.90. Similarly, in a communication to the United Nations Secretary-General dated November 2nd, 1981, Guyana stated that:

“The spirit generated by the Protocol of Port-of-Spain provided the climate for exploratory conversations *of substance* which took place in 1978 between the then President of Venezuela, Sr. Carlos Andrés Pérez, and Guyana’s then Prime Minister, Cde. Forbes Burnham. These conversations examined in considerable depth the state of relations between Guyana and Venezuela and were regarded as helpful in *advancing the objectives of the Protocol* and in *opening the way for a more ordered search for a settlement* of the controversy which stemmed from the Venezuelan contention that the Award of 1899 was a nullity.”¹⁵⁹

3.91. Guyana thereby confirmed that *substantive discussions* as to the overall territorial controversy indeed constituted the object of the Port of Spain Protocol. Put otherwise, in

¹⁵⁸ Communiqué of the Ministry of Foreign Affairs of the Republic of Venezuela, 4 April 1981, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, p. 140 (available at Peace Palace Library).

¹⁵⁹ Letter from the Permanent Representative of Guyana to the United Nations addressed to the Secretary-General, 9 November 1981, p. 11 (**Annex 148**) (emphasis added).

concluding the Port of Spain Protocol, the parties had reiterated their joint wish to reach a mutually acceptable solution by way of negotiations, as indicated in the Geneva Agreement.

(ii) THE AFTERMATH OF THE PROTOCOL AND THE GOOD OFFICES OF THE UNITED NATIONS (1982-2014) REVEALS THAT THE PARTIES CONTINUED TO PURSUE A MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION FOR THE PRACTICAL SETTLEMENT OF THE CONTROVERSY THROUGH A DIPLOMATIC AND INTEGRAL APPROACH

3.92. On 1 June 1982, that is a few weeks before the expiry of the Protocol, Venezuela invoked Article 33 of the United Nations Charter, proposing direct and bilateral negotiations with Guyana.¹⁶⁰

3.93. On 20 August 1982, Prime Minister Forbes Burnham rejected such a proposal and proposed, instead, the intervention of a third party through a judicial settlement.¹⁶¹

3.94. Three months after the expiration of the Protocol and following Article IV of the Geneva Agreement, since there was no agreement between the two countries on the choice of peaceful settlement,¹⁶² the UN Secretary-General had to be called upon to assume this task and make a recommendation to the parties. Although reluctant,¹⁶³ on the insistence of Venezuela,¹⁶⁴ Guyana finally agreed to accept this course of action on 28 March 1983.¹⁶⁵

¹⁶⁰ Memorandum of Venezuela, Annex, p. 71.

¹⁶¹ *Ibid.*, pp. 72-74.

¹⁶² Memorandum of Venezuela, Annex, p. 79 (Ref. Notes No. GM-210, GM-212 and GM-214 of 19 Sep. 1982); Note GM-212 from the Minister of Foreign Affairs of Venezuela, Dr. José Alberto Zambrano Velasco, to the Secretary of State for Foreign Affairs of the United Kingdom of Great Britain and Northern Ireland, Mr. Francis Pym, 19 September 1982 (**Annex 70**).

¹⁶³ Memorandum of Venezuela, Annex, p. 78 (Ref. 11 Oct. 1982 Intervention from Minister of Foreign Affairs of Guyana, Rashleigh Jackson, intervention 37th General Assembly).

¹⁶⁴ Note GM-212 from the Minister of Foreign Affairs of Venezuela, Dr. José Alberto Zambrano Velasco, to the Secretary of State for Foreign Affairs of the United Kingdom of Great Britain and Northern Ireland, Mr. Francis Pym, 19 September 1982 (**Annex 70**); Note GM-251, from the Minister of Foreign Affairs of Venezuela, José Alberto Zambrano Velasco, 15 October 1982 (**Annex 71**).

¹⁶⁵ Memorandum of Venezuela, Annex, p. 81; See also Press Release, Ministry of Foreign Affairs of Guyana, 30 March 1983 (**Annex 47**).

3.95. The period from 1983 to 2014 marked a significant chapter in the diplomatic efforts between Guyana and Venezuela.

3.96. Many of these developments have already been referenced by Venezuela in its Memorandum of 28 November 2019,¹⁶⁶ but some specific aspects are worth detailing in terms of the compromises the parties were willing to make to find a mutually acceptable and satisfactory solution for the settlement of the controversy. Some were recorded in the report produced by the Ambassador appointed for this matters, Mr. Emilio Figueredo Planchart, who served as facilitator for Venezuela during the Good Offices process (hereafter the “Figueredo Report”).¹⁶⁷ The facilitator for Guyana was Mr. Shridat Ramphall, then Secretary-General of the Commonwealth and former Attorney General and Minister of Foreign Relations.¹⁶⁸

3.97. The process began in 1983 when then UN Secretary-General Javier Pérez de Cuéllar sent Mr. Diego Cordovez on an exploratory mission to both countries. This period saw attempts to restore cordial relations. Simultaneously, informal procedure was initiated alongside the official one, with a meeting between the Foreign Ministers of Venezuela and Guyana and the UN Secretary-General in New York in September 1984. These efforts culminated in 1987 with the consensus to invite the Secretary-General to choose Good Offices as a means of settlement, a process that was formalised with the appointment of Mr. Alister McIntyre as the good officer in 1989.

3.98. Mr. Alister McIntyre’s tenure (1989-1999) was marked by numerous meetings aimed at exploring potential solutions to the controversy, focusing on numerous areas of interest between the parties.

3.99. For example, the parties’ facilitators met in New York on 13 August 1990, and discussed a solution to the controversy that could be approached by dividing it in three

¹⁶⁶ Memorandum of Venezuela, Annex, pp. 71-147.

¹⁶⁷ Report on the Work of Emilio Figueredo Planchart in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983 (**Annex 110**).

¹⁶⁸ Memorandum of Venezuela, Annex, p. 83.

main areas of interest: geographic, development, and cooperation. The Figueredo Report states that:

“In this first meeting it was pointed out that it would be convenient to break down the problem into three large areas of general interest: a coastal area, a central area or the Mazaruni zone, and an area where a binational park or ecological reserve [...].

The Guianese facilitator replied that he thought it would be interesting to approach the problem from the perspective of areas where it is possible to complement with cooperation formulas.”¹⁶⁹

3.100. This approach was further developed in a second meeting in New York on 29 October 1990, although the Guyanese facilitator enquired about the Mazaruni dam project and indicated that an ecological reserve “could not be contemplated” as Guyana “had recently decreed a large territory to be dedicated for the same purpose.”¹⁷⁰ He also observed that “the solution that is obtained should not be entirely favorable to some [anyone] of the parties”¹⁷¹ but in any case indicated a strong resistance from Guyana to solutions that significantly modify the cartographic aspect of the territory.¹⁷² He did however indicate that “the greatest contribution Guyana could make to overcoming the controversy was in the maritime area, he agreed with the corridor to the Atlantic, possibly accompanied by a small coastal strip.”¹⁷³ Concurrent with the idea of the integral solution that the controversy requires, Figueredo noted that “[t]he positive thing about this meeting was to perceive that the Guyanese facilitator is open to all the issues and geographical areas under discussion, and that we abandon a merely legal vision of the controversy.”¹⁷⁴

¹⁶⁹ Report on the Work of Emilio Figueredo in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983, pp. 4-5, see also p. 12 (emphasis added) (**Annex 110**).

¹⁷⁰ *Ibid.*, p. 5.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, p. 6.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

3.101. Then during the third meeting held in London on 26 January 1991, in a strong testimony as to how the parties were approaching their task to find a solution to the controversy, Mr. McIntyre expressed that, in the opinion of the UN Secretary-General, “the objective of the process was to reach an agreement to solve the border problem, tying it to a scheme of economic cooperation”,¹⁷⁵ to which the Guyanese facilitator expressed that “it was necessary to try to break with traditional schemes and look for innovative formulas that would allow us to get out of the impasse. He then suggested that, as a sign of goodwill and progress in the process, Venezuela and Guyana should develop a *modus vivendi* in fisheries.”¹⁷⁶

3.102. In a following meeting on 24 September 1993, UN Secretary-General, H.E. Boutros Boutros-Ghali underlined to the Ministers of Foreign Affairs of Venezuela and Guyana

“the importance of resolving the dispute between the two countries through a peaceful settlement mechanism, [and] stressed the importance of seeking political means and the importance of using the United Nations as a means (for him, a negotiated settlement must be the result of a process of continuous negotiation).”¹⁷⁷

3.103. Moreover, the Secretary-General indicated that the aim of his good offices, envisaged by Article IV of the Geneva Agreement, was to secure a “mutually satisfactory settlement of the controversy”, and that in trying to achieve this goal “creative options” must be explored.¹⁷⁸ While the parties would thereby acknowledge that Venezuela had title to sovereignty it was further discussed that simultaneously a “lease” in favour of Guyana of some portions of the territory would take place.¹⁷⁹

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.* (emphasis added).

¹⁷⁷ *Ibid.*, p. 8.

¹⁷⁸ Secretary-General reaffirms offer of his Good Offices to help resolve Controversy between Guyana and Venezuela, 24 September 1993 (**Annex 130**).

¹⁷⁹ Report of the Meeting between Sir Alister McIntyre, Carlos Ayala and Harry Ramkarran in New York, 14-15 December 1995, p. 2 (**Annex 132**).

3.104. For example, in meetings that took place on 14 and 15 December of 1995, the parties then discussed general parameters on maritime delimitation, as well as the possibility of providing that certain parts of the territory would revert back to Venezuela.¹⁸⁰

3.105. Despite these efforts, progress was slow, and the process was further complicated by Guyana's unilateral actions, such as the issuance of a decree on the exclusive economic zone of areas pending to be delimited between the parties, the issuance of licenses for the exploitation of oil and gold, amongst other unfriendly acts, which affected the good relations with Venezuela during this period.¹⁸¹

3.106. The appointment of Mr. Oliver Jackman as Good Officer between 1999 and 2007, introduced a new phase of diplomacy, emphasising the need for a clear roadmap for negotiations. However, incidents such as the arrest of fishing vessels and the granting of offshore exploration licenses by Guyana tested the resilience of this process.

3.107. For its part, Mr. Norman Girvan's appointment as Good Officer between 2009 and 2014 promoted a more structured approach, with workshops aimed at building trust and clarifying concepts related to the controversy. He observed that, the "United Nations remains committed to supporting the Parties in the search for a *mutually satisfactory* resolution of the border dispute".¹⁸² Despite these efforts, challenges persisted, notably Guyana's request for recognition of its continental shelf claim and the granting of offshore oil exploration licenses, which led yet again, to heightened tensions.

3.108. The Good Offices process to resolve the situation concerning *Guayana Esequiba* between Guyana and Venezuela, particularly under the auspices of the United Nations Secretary-General, highlighted several areas where both parties showed a willingness to compromise and cooperate in order to find a mutually acceptable and satisfactory solution

¹⁸⁰ *Ibid.*

¹⁸¹ Report on the Work of Emilio Figueredo in his capacity as facilitator within the envisaged Good Offices Mechanism aimed at achieving a practical settlement of the dispute between Venezuela and Guyana, 1983, p. 8 (**Annex 110**).

¹⁸² Letter from Norman Girvan, Personal Representative of the Secretary-General on the Border Controversy between Guyana and Venezuela, to the Foreign Minister of the Bolivarian Republic of Venezuela, Elias Jaua Milano, 29 October 2013 (**Annex 138**).

for the settlement of the controversy. These areas aimed at creating a conducive environment for dialogue and potentially paving the way for a practical settlement of the controversy. The key topics of compromise and cooperation included:

- **Economic Development and Cooperation:** Both parties expressed interest in exploring options for economic development that could benefit both countries. This included discussions on how economic cooperation could be enhanced as part of a broader settlement of the controversy.
- **Binational Dialogue:** The parties considered establishing a binational dialogue as a complementary process to promote exchange between the civil societies of both countries. This aimed at building trust and understanding beyond the governmental level.
- **Environmental Cooperation:** At various points, there was an acknowledgment of the importance of environmental protection and the potential for cooperation in this area. This included discussions on rational exploitation of natural resources and environmental impact assessments in Guayana Esequiba.
- **Fisheries:** The development of a *modus vivendi* in fisheries was suggested as a sign of goodwill and progress. This was aimed at addressing immediate practical concerns related to fishing rights and incidents in the maritime areas pending to be delimited by agreement.
- **Health, Trade and Agriculture:** Increased cooperation in areas such as health, trade and agriculture, was recognised as contributing to an atmosphere of confidence, which is crucial for the resolution of more contentious issues.
- **Cultural Exchange, Economic and Consular Integration:** The parties agreed to give a comprehensive and global approach to their common agenda, including cultural exchange and economic integration, which could foster a more favourable environment for resolving the controversy.

- Prevention, Investigation, and Peaceful Solution of Incidents: There was an agreement on establishing mechanisms to prevent, investigate, and find peaceful solutions to incidents that could escalate tensions, such as the detention of fishing vessels or unilateral economic activities.
- Mechanism for Maritime Delimitation: There was a willingness to discuss mechanisms for the delimitation of maritime boundaries. This was significant given the unsettled maritime areas and the granting of oil exploration licenses by Guyana in areas claimed by Venezuela, as well as Guyana's submission to the Commission on the Limits of the Continental Shelf.

3.109. These topics reflect a multifaceted approach to the controversy, recognising that a resolution might not only come from addressing the territorial issue directly but also through building a framework of cooperation and mutual benefit that could lead to a more amicable settlement. As noted by Venezuela:

“The Geneva Agreement imposes a duty on the concerned Parties to seek satisfactory solutions for the practical settlement of the issue. Therefore, Venezuela, from the beginning, has been willing to consider all the aspects involved in the matter, whether marine, political, cultural, economic or social, and not to restrict it to just the examination of the nullity of the inexistent Award of 1899 as Guyana seems to intend. Venezuela believes that a practical settlement is not possible without approaching first all the circumstances surrounding the matter as a whole and further considers that any behaviour against this constitutes a breach of the obligation to negotiate a satisfactory solution as it was agreed in the Geneva Agreement.”¹⁸³

3.110. Moreover, throughout the negotiation of the good office process, the parties were cognizant of the importance of finding a mutually acceptable and satisfactory solution for the settlement of the controversy, as per the terms of the Geneva Agreement. For example, the joint statement of 5 April 1993 called for “the peaceful resolution of issues within the

¹⁸³ Statement by the Ministry of Foreign Affairs of the Republic of Venezuela, 2 May 1981, in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas 1981, pp. 143-145 (available at Peace Palace Library).

framework of the 1966 Geneva Agreement”.¹⁸⁴ On 2 October 1996, the president of Venezuela recalled before the UN General Assembly the importance of reaching a “practical and lasting solution” within the framework of the Geneva Agreement.¹⁸⁵ On 23 July 1998 a joint communiqué again reaffirmed their intention to find a “mutually satisfactory solution to the territorial controversy between Venezuela and Guyana, and [...] reiterated their firm commitment to resolve it peacefully”; they also sought to “support [...] the McIntyre Process towards achieving a definitive settlement, as provided by the Geneva Agreement of 1966”,¹⁸⁶ that is, a formula which provides the parties with a mutually acceptable and satisfactory solution for the settlement of the controversy.

3.111. Soon thereafter in 1999, Venezuelan Foreign Minister, José Vicente Rangel, confirmed the solution to be found in the Good Offices process must be “reasonable, fair and equitable”.¹⁸⁷

3.112. Three Joint Communiqués followed in 2004, 2010 and 2013 respectively, and focused on practical and satisfactory solutions to be found for the territorial controversy as such.¹⁸⁸

3.113. In the same vein, on the conclusion of a visit of President of Venezuela Hugo Chávez to Guyana the two parties in 2004 referred to the “search for a peaceful and

¹⁸⁴ Government of the Cooperative Republic of Guyana and Government of the Republic of Venezuela, Joint Statement (5 Apr. 1993), p. 5. GM, Vol. III, Annex 67.

¹⁸⁵ U.N. General Assembly, 51st Session, Agenda item 9, U.N. Doc. A/51/PV.19 (2 Oct. 1996), p. 14. GM, Vol. III, Annex 69.

¹⁸⁶ Joint Communiqué issued on the occasion of the State visit to Venezuela to the President of the Cooperative Republic of Guyana, H. E. Mrs. Janet Jagan, Caracas, 23 July 1998 (**Annex 49**). See also Memorandum of Venezuela, Annex, p. 99; Government of the Cooperative Republic of Guyana and Government of the Republic of Venezuela, Joint Communiqué, 23 July 1998, GM, Vol. III, Annex 70.

¹⁸⁷ Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative of Guyana on March 29th, 2018.

¹⁸⁸ Joint Communiqué issued at the end of the State visit to Guyana of H. E. Hugo Chávez Frías, President of the Bolivarian Republic of Venezuela, 19-20 February 2004 (**Annex 51**); Joint Statement of Presidents Hugo Chávez Frías and Bharrat Jagdeo on the occasion of the official visit of the President of the Cooperative Republic of Guyana to the Bolivarian Republic of Venezuela, 21 July 2010, para. 11 (**Annex 52**); as well as Joint Declaration issued on the conclusion of the State visit to Guyana by H. E. Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela, 31 August 2013 (**Annex 53**).

practical settlement of the controversy” undertaken within the framework of the United Nations Good Offices Process”.¹⁸⁹

3.114. Likewise, in a Joint Communiqué of 2010, Guyana and Venezuela reaffirmed their confidence in the Good Offices process, which allowed them to move forward towards finding a *practical and satisfactory* solution to the *territorial* controversy. The relevant communiqué accordingly provided that the two parties:

“[...] reaffirmed their confidence in the Good Offices Process as a mechanism that would assist the Parties to advance towards a *practical and satisfactory solution* for the border controversy”.¹⁹⁰

3.115. This joint perception of the scope of the controversy, and how to solve it by way of a practical settlement, was reiterated on the occasion of a visit of President Maduro in Georgetown on 31 August 2013.¹⁹¹

3.116. Following the death of the good officer, Professor Norman Girvan (2014), it was expected by the consistent practice of both parties to continue the work undertaken by the good officer and proceed to mutually agree on another, as had been the custom for years. This was not the case: Guyana withdrew from its commitment to negotiate and embarked that year with ExxonMobil on an oil contract that required it to abandon the practice of the negotiation and search an accelerated and reductionist solution at the ICJ.

3.117. Despite Venezuela’s conviction that the good offices process should go ahead,¹⁹² Guyana had already resolved to circumvent the terms of the Geneva Agreement and have

¹⁸⁹ See p. 100, Annex to the Memorandum of Venezuela, 28 November 2019.

¹⁹⁰ Joint Statement of Presidents Hugo Chávez Frías and Bharrat Jagdeo on the occasion of the official visit of the President of the Cooperative Republic of Guyana to the Bolivarian Republic of Venezuela, 21 July 2010, para. 11 (**Annex 52**) (emphasis added).

¹⁹¹ Joint Declaration issued on the conclusion of the State visit to Guyana by H. E. Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela, 31 August 2013, para. 3 (**Annex 53**).

¹⁹² Letter from the Minister of the People’s Power for External Relations of the Bolivarian Republic of Venezuela to the Minister of Foreign Affairs of the Republic of Guyana (19 June 2015). GM, Vol. III, Annex 95.

the UN Secretary-General halt the process¹⁹³ and refer it, without Venezuela's consent, to the ICJ,¹⁹⁴ a forum which was neither foreseen as part of the pacific settlement mechanisms when the parties negotiated the Geneva Agreement.

3.118. In the light of the above, it is uncontroversial that the object of the Geneva Agreement is to put the parties on the path to finding a practical, mutually acceptable and satisfactory solution to the territorial controversy. The object of the Agreement was never related to the validity or invalidity of the Award.

¹⁹³ GM, p. 63, para. 2.77; Letter from the Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Minister of the People's Power for External Relations of the Bolivarian Republic of Venezuela (2 Dec. 2014). GM, Vol. III, Annex 8, and, See also Caribbean Community (CARICOM), Statement: Thirtieth Regular Meeting of Heads of Government, Guyana (July 2009). GM, Vol. III, Annex 75.

¹⁹⁴ GM, pp. 65-66, para. 2.81; Address of the President of the Republic of Guyana to the U.N. General Assembly, 70th Session, U.N. Doc. A/70/PV.16 (29 Sept. 2015), pp. 3-4. GM, Vol. III, Annex 99.

THE EFFORTS TO DENY VENEZUELA'S TITLE TO SOVEREIGNTY OVER GUAYANA ESEQUIBA THROUGH FRAUD AND ABUSE

I. INTRODUCTION

1. As has been irrefutably demonstrated in this Counter-Memorial, the Geneva Agreement gave rise to a new legal situation obliging both Venezuela and Guyana to find a practical and mutually satisfactory solution to the territorial controversy, through direct political and diplomatic negotiations. The determination of the invalidity of the 1899 Arbitral Award was therefore buried with the signing of the Geneva Agreement.

2. The Geneva Agreement is not intended, under any circumstances or under any interpretation, to determine the invalidity or validity of the 1899 Award as a precondition for the parties to comply with their obligation to find a mutually satisfactory solution. This may not be to Guyana's liking, but the commitments and obligations of the parties under the provisions of the Agreement are clear and irrefutable and must be complied with by them in good faith.

3. The object and *ratio legis* of the Geneva Agreement, confirmed by the subsequent practice of Guyana and Venezuela and the good offices work of the Secretary-General of the United Nations, is not the determination of invalidity or validity of the 1899 Award.

4. It is not unknown that territorial controversies, especially those arising out of crimes committed by (former) colonial powers of the time, are not disputes that can be resolved quickly, easily, or carelessly. These complex disputes require commitment and good faith from the parties in order to find negotiated solutions, and in the case of Guyana and Venezuela, an unaltered commitment to the obligations contained in the letter of the Geneva Agreement is also required.

5. However, Guyana, through an attitude based on lies and manipulation, left the negotiating table in 2015 to satisfy the economic interests of, mainly, Exxon Mobil, thus

affecting its obligation to resolve the territorial controversy through negotiation between two neighbouring nations.

6. In view of the historical account of the events and procedures that took place, it is clear that Venezuela was the object of a fraud at the end of the 19th century, which culminated in the arbitral award that deprived it of the territory of Guayana Esequiba.

7. Venezuela has consistently protested this dispossession, quickly realising that it had stemmed from a criminal fraud in which even U.S. government officials of the time participated, namely, the collusion between Mr. Olney (U.S. Secretary of State in 1897), Mr. Salisbury (UK Foreign Secretary) and the UK's Ambassador of the time, Julian Pauncefoot, as well as the active cooperation of Joseph Chamberlain, former Minister of the Colonial Office.¹⁹⁵

8. In negotiating the Washington Treaty, Chamberlain had argued that the negotiating counterparty had to be the US, because it could not negotiate with a lesser State such as Venezuela, which would be a dishonour to the UK and would cause a loss of prestige and affect the security of its colonial borders in the world.¹⁹⁶ This argument was accepted by Olney in exchange for the UK's acceptance of the United States' power over the Americas. Chamberlain proposed to Olney that there should be no Venezuelan judges, that the U.S. should be the negotiating counterparty, and the terms of the applicable law – which were singularly unfavourable to Venezuela.

¹⁹⁵ The announcement by the British chief counsel must be seen in the light of a further letter, sent to the Secretary of State for the Colonies, Joseph Chamberlain, on 19 July 1899. In this second letter, the British chief counsel also stated that he had “no intention of making any offer to the other side” in relation to the Point Barima question. As in his reply to Lord Salisbury, he had merely sought “to obtain your guidance from Chamberlain and let him know what I thought, so that I might be prepared in case the Court should ask me any questions either publicly or privately.” This was followed by the following paragraph: “If I find it necessary to take independent action, I will do so privately through our own Arbitrators and only when I am satisfied that, having regard to the expressions of opinion of any member of the Tribunal, it is desirable that our Arbitrators should appreciate our views...”

¹⁹⁶ Letter from Chamberlain to Olney, 9 September 1896 (**Annex 167**). Letter from Chamberlain to Olney, 28 September 1896 (**Annex 168**).

9. It is important to stress that this did not only result in the necessary nullity the 1899 Award – although this consequence is evident – but had broader, more important consequences.¹⁹⁷ As a result of this conspiracy, Venezuela has been fraudulently deprived of its sovereign territory by criminal acts committed in the second half of the 19th century, culminating in the 1899 Award and its subsequent derivatives, which have long prevented Venezuela from finding a remedy.

10. In particular, a singular obstacle to Venezuela's claim has been in dealing with an emerging state heir to the crime (Guyana), which against good faith and its commitment has obstructed Venezuela's claim with no compunction or understanding whatsoever. As a result, Venezuela has been a victim twice: when the unfair 1899 Award was handed down, and when Guyana decided to forego its entire responsibilities under the Geneva Agreement to benefit from this great larceny.

11. However, before delving further into the circumstances of that crime, it is essential to emphasise, as Venezuela has already done on multiple occasions, that the invalidity or validity of the 1899 Award is not subject to a factual or legal re-evaluation, or even a sort of *de novo* appeal. Guyana's unilateral capricious attitude of asking the Court to make a determination of the validity of the Award in the present case does not change, nor could it ever change, the fact that the parties have already recognised Venezuela's rejection of the Award in the 1966 Geneva Agreement and committed themselves by signing that Agreement to leave that issue aside and find a mutually acceptable and satisfactory solution.

II. THE ITER CRIMINIS OF FRAUD AND ITS CONFIGURATION

12. It is essential to begin this topic by reiterating that both the 1897 Treaty of Washington and the 1899 Arbitral Award (including the technical demarcation of 1905) are invalid as a matter of law.

¹⁹⁷ It is important to stress that until recently it was wrongly claimed that the question could be reduced to that of the nullity of an international act, and although this consequence is obvious, other legal conclusions are possible under the same facts.

13. A treaty can be held invalid by fraud. Under international law, fraud, the core of which is intentionally provoked error, is only possible through fraudulent intent to defraud. Only this term can describe the British representatives' plan to fraudulently usurp the territorial integrity of Venezuela by means of deception, simulations and falsehoods, in order to create a dispute that did not exist.

14. After acquiring the three Dutch commercial settlements west of the Essequibo River of Demerara, Berbice and Essequibo in 1814 - 1815, the UK continued to respect the young republic of Venezuela, which had declared itself independent in 1810 and promulgated its first Constitution in 1811, its second Constitution in 1819 and the third in 1821 to integrate the other newly independent States into what was popularly known as "Gran Colombia." All these Constitutions recognised Guayana Esequiba as an impregnable Venezuelan territory, to the point that diplomatic exchanges with the United Kingdom reflected this.¹⁹⁸

15. Subsequently, in 1825, the UK expressed its full recognition of the new integration of New Grenada (now Colombia and Panama) and Venezuela, as well as Ecuador, with its territory intact, as devised by the founding father of all those nations, Simón Bolívar. But in 1830, Simon Bolívar died and the United Kingdom decided to set up its new overseas colony, British Guiana in 1831, from the three small districts west and north of the Essequibo River that constitute the origin of present-day Guyana.

¹⁹⁸ The fact that by 1822 the United Kingdom had already begun its efforts to usurp Venezuelan territory cannot be overlooked. Of capital importance is the note of 1822 sent by J Rafael Revenga, Minister Plenipotentiary of Gran Colombia to the United Kingdom, in which he is instructed: "I may, however, draw your particular attention to article 2 of the draft treaty on the point of limits. The English now possess Dutch Guiana, on which side they are our neighbors. You agree, as accurately as possible, to fix the dividing line of the two territories, according to the last treaties between Spain and Holland. The settlers of Demerara and Berbice have usurped a large portion of land, which according to them belongs to us, on the side of the river Essequibo. It is absolutely indispensable that these settlers either place themselves under the protection and obedience of our laws, or that they withdraw to their former possessions. For this purpose, they will be given the necessary time as established in the project" (*Memoria histórica sobre límites entre la República de Colombia y el imperio del Brasil*, by José M. Quijano Otero). Border Collection No. 8, p. 447 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

16. From that decade onwards, the British evidenced their imperial desire to exploit the gold mines and mineral wealth of the territory of another State, and before the 1840s¹⁹⁹ a botanist was commissioned to draw what is known as the “Schomburgk map,” using an English tactic that put these supposed maps in opposition to historical tradition and geographical advances of the time, such as the contributions of Humboldt at the beginning of the century or the more precise and eloquent ones of the mid-century by the expert recognised by the French Geographical Society, Agustín Codazzi.

17. With this motive and tactic, the United Kingdom took the first steps to create a difference that would simulate a territorial controversy. To that end, the infamous Schomburgk map of 1840 was concocted, with a view to forging a territorial controversy, and taking advantage of the unequal relationship between the most powerful empire of the 19th century, whose expansionist psychosis had reached the point of depredation of almost the entire planet, in this case, against the young Venezuelan Republic. As well, the United Kingdom silently proceeded with an arbitrary exercise of plunder that was sometimes reinforced with occasional violent incursions to seize mining camps. Although Venezuela protested all these actions, the British pretended to consider this process of territorial usurpation to be complete.

¹⁹⁹ Governor Light, on 20 October 1841, wrote to Mr. Aranda, Venezuelan Minister of Foreign Affairs, telling him that, “Mr. Schomburgk's mission was purely for the purpose of the Colombian government. Schomburgk's mission was purely one of reconnaissance, with instructions from Lord Palmerston, Secretary of State in the Foreign Office, to place marks on the ground for the purpose of marking by means of permanent posts the boundary line thus claimed by Great Britain; it would then be for each of the three Governments, namely, those of Brazil, Venezuela and Holland, to present any objections they might raise against these boundaries (...).” In Fortique’s communication to Aberdeen, he states: “The undersigned has subsequently received orders from your Government to assure His Majesty's Government that the Commissioner Schomburgk, undoubtedly exceeding the terms of his authorization, has fixed at a point at the mouth of the Orinoco several posts with His Majesty's initials, hoisted at the said place, with the apparatus of armed force, the British flag, and perpetrated other acts of dominion and empire.” And Aberdeen, in reply to Fortique, pointed out on 11 December 1841 that the erection of the posts was merely a preliminary measure, and that they were not intended “to serve as signs of dominion and empire on the part of Great Britain,” and that “the British authorities have not occupied Punta Barima.” In: Border Collection No. 8, pp. 205, 206 and 207 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

18. In this regard, the note sent in 1899 from the Venezuelan Foreign Ministry, prepared by the special envoy Tomás Michelena in Paris, to the Foreign Office, is very explanatory, offering a clear vision of what had happened. The note says:

“[...] Your Excellency can hardly fail to perceive the insurmountable difficulties presented by these various frontier lines claimed or proposed by Her Britannic Majesty’s Government in 1841, 1881, 1886, 1890, and at the present time; and likewise the unvarying tendency shown to extend the limits of the Colony of British Guiana at the expense of the Venezuelan territory, and the manifest discordance which the propositions of Your Excellency in 1886 show, with the present request that Venezuela accept, without any compensation whatsoever, the enlarged ‘Schomburgk line,’ which dispossesses her, not only of the river Guiana (an important desire of the Foreign Office in 1886), but also deprives the Republic of the river Barima and the cape of that name, together its adjacent territories”.²⁰⁰

19. To this behaviour of falsehood, simulation and forging of a fabricated dispute, interspersed with arbitrary actions of local and furtive incursion to set up tiny but lucrative gold camps, was added the other method used by the British to consolidate their aim of dispossessing Venezuela of a seventh of its territory and its natural resources, namely, the alliance of American officials who, as in the case of Mr. Olney, ended up convinced that it was better to benefit themselves and their British allies than to stand by the justice of Venezuela’s claims.

20. For a better understanding of the injustice suffered by Venezuela in the 19th century, it should be noted that the agents of the United Kingdom and its colony were not acting without any motive; instead, they were demonstrably aware of the immense wealth of gold in Venezuelan lands, scattered in the Yuruari and Guayana Esequiba areas. As Joseph Chamberlain, British Colonial Secretary, stated in communication with

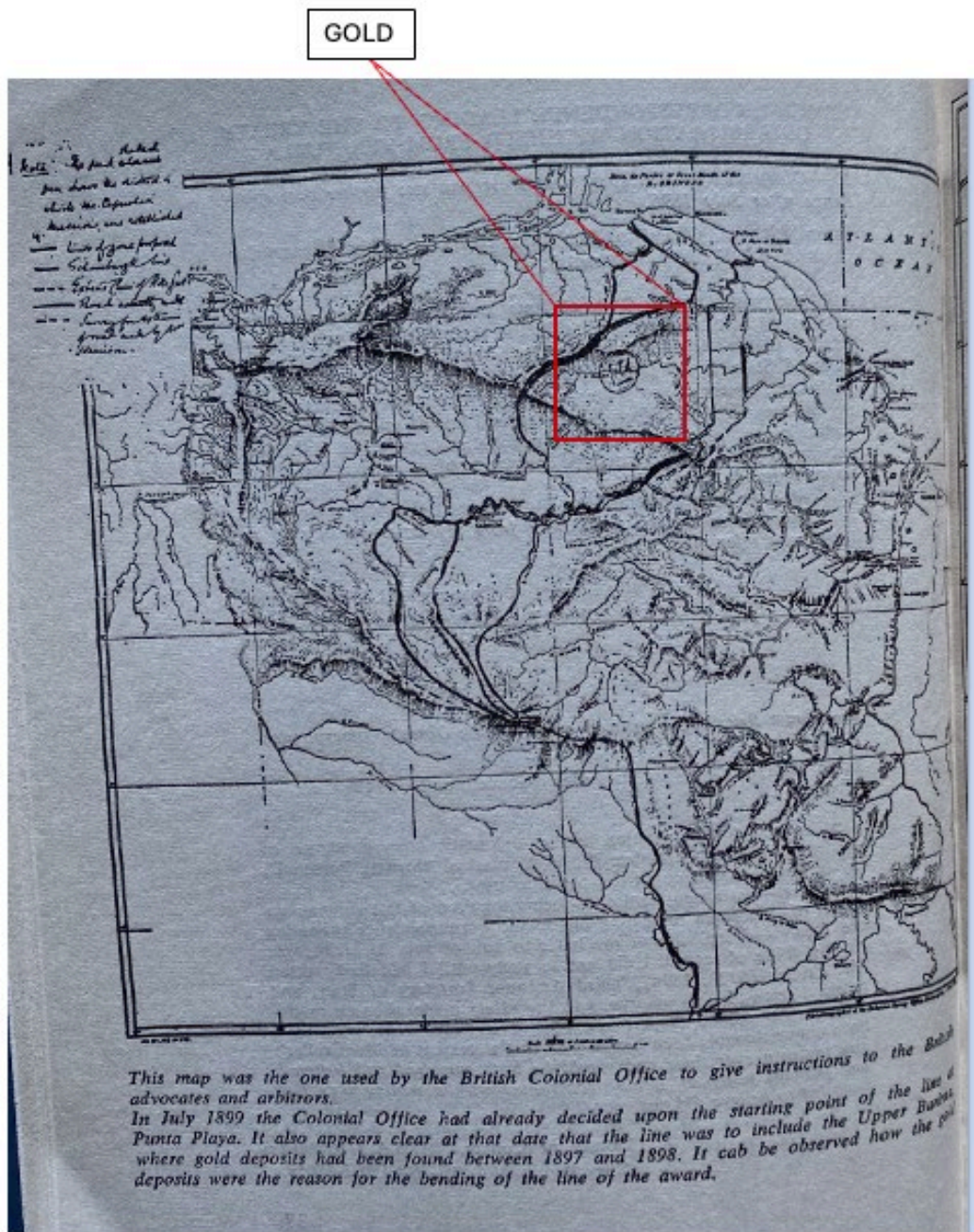
²⁰⁰ Letter from Dr. Michelena to Lord Rosebery, 29 September 1893 (**Annex 38**); La reclamación venezolana (...) Colección Frontera. No. 6., p. 194 ff (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

Salisbury on 4 September 1895, the latter “may have more gold than the Transvaal or Western Australia.”²⁰¹

21. Of course, just like greed for gold led the United Kingdom’s policy territorial usurpation and plunder against Venezuela in the 19th century, greed for black gold is now the principal motive of Guyana’s failure to comply with the Geneva Agreement.

22. As demonstrated by Venezuelan experts in their 1965 report, the Colonial Office had prepared a map as part of the British Government’s instructions to its two arbitrators in the process leading to the 1899 Arbitral Award, which were to ensure that the territory where the gold was located be awarded to the United Kingdom.

²⁰¹ S. A. Consalvi, *Grover Cleveland y la Controversia Venezuela-Gran Bretaña*, Tierra de Gracia Editores, 1992, p. 70 (available at: <https://www.mikeslibrary.com/pages/books/5365/simon-alberto-consalvi/grover-cleveland-y-la-controversia-venezuela-gran-bretana-bretana-la-historia-secreta>).



Source: Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 38 (**Annex 150**).

23. Venezuela's strong protests against British encroachments on its territory led to a suspension of diplomatic relations with the United Kingdom in 1887.²⁰² In 1895, by decision of then U.S. President Cleveland, a boundary investigation commission had been set up in the U.S. Congress. The impending historical inquiry functions of the new boundary investigation commission were the spur that moved to agree to arbitration.

24. In one of the few steps taken in line with principles of justice at that time, Mr. Olney, through the American representative in London (Bayard), sent a long note to Mr. Salisbury on 20 July 1895, in which he provided the Foreign Office with a very clear account of the situation and the injustice that the United Kingdom intended to do to Venezuela. Olney stated that:

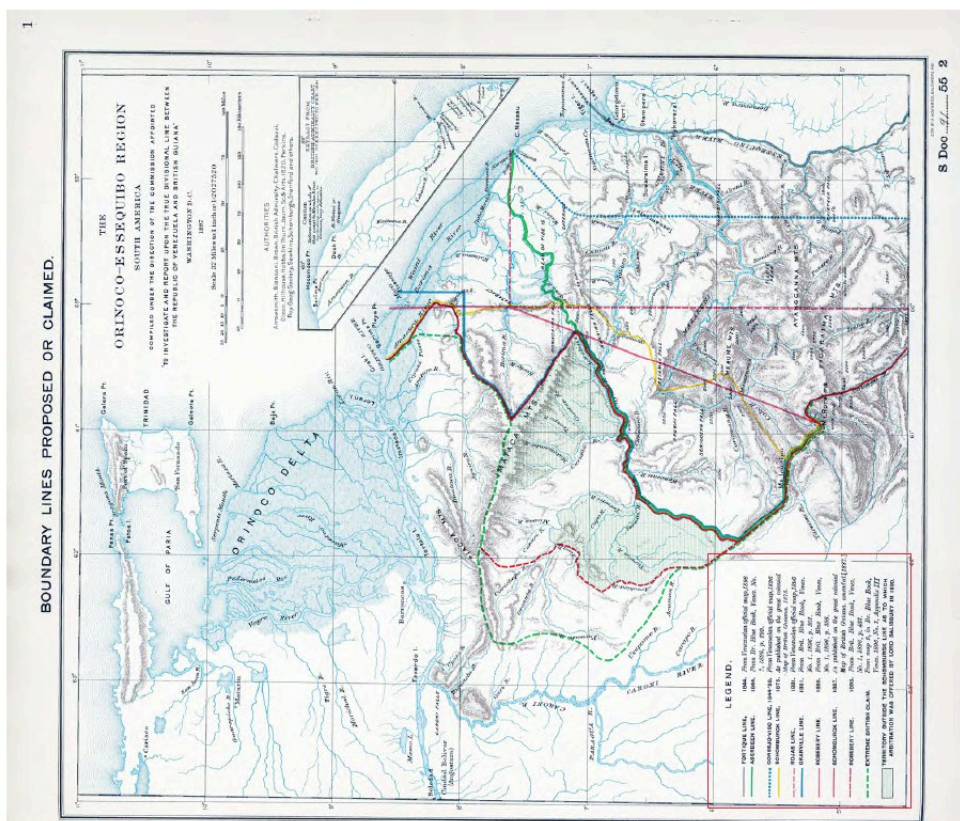
“The continued growth of the indefinite British claims, the fate of the various attempts to arbitrate the controversy, and the participation, up to that time, of the United States in the matter. As has been seen, the drawing of the Schomburgk line in 1840 was followed by the immediate protest of Venezuela (...) Each British advance action became more and more vigorous westward of the proposed line. The Granville line of 1881 fixed the starting point twenty-nine miles from the Moroco in the direction of Punta Barima. The Rosebery line of 1886 fixed it west of the Guaima River and by that time, if the *Statesman's Year Book* (an unofficial report of the Empire) is to be believed, the area of British Guiana was suddenly enlarged by 33,000 square miles, having been 76,000 square miles in 1885 and 109,000 in 1887. The Salisbury line of 1890 fixed the starting point at the

²⁰² The severance of diplomatic relations between Venezuela and the United Kingdom stands out in Venezuela's pleadings before the Paris Tribunal (which the latter, of course, ignored). In this respect, Venezuela stated that: “These facts having come to the knowledge of the Venezuelan Government, and the latter despairing of being able to settle in any way the boundary question with Great Britain, it resolved to establish a lighthouse at Punta Barima, and sent commissioners to Amacuro, Barima, Guaina and Georgetown, to protest against the usurpations of Great Britain and to notify the British colonists who were on Venezuelan soil.” On their return to Caracas, the Commission informed the Venezuelan Government that there were on the right bank of the Amacuro two British Commissioners acting there as Rural Commissioners with the authorization of the British Government. Consequently, on 26 January 1887, the Venezuelan Foreign Minister addressed a note to Mr. F. R. St. John, British Minister in Caracas, informing him of the above facts, protesting against such acts, demanding the immediate evacuation of the territory situated between the Orinoco and Pomaron rivers, and stating that, in the event of no reply, or a negative reply, diplomatic relations would be broken off: Letter from Diego B. Urbaneja, Minister in Venezuela, to F. R. St. John in Caracas, 26 January 1887 (**Annex 31**).

mouth of the Amacuro River, west of Punta Barima on the Orinoco. Another line, Rosebery's second, goes even further [...] in 1850 a compromise was agreed between the two sides to avoid such occupation until the dispute was resolved".²⁰³

25. The malicious intent to appropriate Venezuelan territories was clearly reflected in the following map.

²⁰³ *Ibid.* S. A. Consalvi, *Grover Cleveland y la Controversia Venezuela-Gran Bretaña*, Tierra de Gracia Editores, 1992, p. 51. On p. 169 of this text, there is a detail of Olney's communication to Bayard, meant to ensure that he would sufficiently inform Mr. Salisbury of the British actions in Venezuelan territory (available at: <https://www.mikeslibrary.com/pages/books/5365/simon-alberto-consalvi/grover-cleveland-y-la-controversia-venezuela-gran-bretana-bretana-la-historia-secreta>).



MAP 26. Boundary Lines Proposed or Claimed²⁰⁴

²⁰⁴ Map 1 of the Venezuela Boundary Commission Report Atlas, 1898 (Atlas).

THE ORINOCO-ESSEQUIBO REGION
compiled under the direction of the Commission appointed
to investigate and report upon the true divisional line between
the Republic of Venezuela and British Guiana

Venezuela Boundary Commission Report Atlas 1898
Map 1

Boundary Lines Proposed or Claimed

MAP 30

Source: David Rumsey Historical Map Collection

26. British civil servants, realising that the American government's intentions were serious,²⁰⁵ accepted the arbitration proposal. For his part, Mr. Olney hastened to dissolve the Commission set up by Cleveland. Thereafter, talks became more intense between Olney and Pauncefoot, and the result of these intense talks, or arrangements, was expressed by Salisbury on 9 November 1897, where he announced in a speech at the Lord Mayor's annual banquet at Guildhall that:

“the controversy was over. It is always surprising how through simple arrangements problems of great difficulty are solved and on the continent discovered by Columbus (...) The question has not been whether there should be arbitration, but whether arbitration should have unrestricted application (...) Our difficulty for many months lay in how to define the settlements and a solution has been found”.²⁰⁶

27. In other words, the UK had already assured itself through secret negotiations that it would obtain an outcome in its favour. Not surprisingly, shortly afterwards, Mr. Olney lost interest in the substance of the Venezuelan claim.²⁰⁷ Proof of this is that Mr. Olney did

²⁰⁵ Consalvi's analysis of John A.S. Grenville's *Lord Salisbury and Foreign Policy, the Close of the Nineteenth Century*, in Chapter III, “Anglo-American Misunderstandings, 1895-1897”, examines the Venezuelan-British question within the general context of imperial foreign policy at the end of the century and offers a perspective that allows Venezuelans to see more clearly (if one can speak of clarity) the fundamental aspects of the whole process. For it was unexpected and unthinkable to the British, Cleveland's message to Congress came as a shock, and even more so, the possibilities of war between the two countries, which were at first perceived as certain. “But there was never any possibility of war,” said Grenville. In S. A. Consalvi, *Grover Cleveland y la Controversia Venezuela-Gran Bretaña*, Tierra de Gracia Editores, 1992, p. 68 (available at: <https://www.mikeslibrary.com/pages/books/5365/simon-alberto-consalvi/grover-cleveland-y-la-controversia-venezuela-gran-bretana-bretana-la-historia-secreta>).

²⁰⁶ *Ibid.*, p. 66.

²⁰⁷ Mr. Olney knew the meaning of the so-called occupation clause, in that regard, in Venezuela's memorial to the Paris Tribunal it was noted that Mr. Olney's contention that Lord Salisbury's proposal was unfair to Venezuela in that it provided that, where there was territory occupied bona fide by subjects of Great Britain, “the line of division shall be diverted. Mr. Olney's contention that Lord Salisbury's proposal was unfair to Venezuela in so far as it provided that, where there was territory occupied bona fide by subjects of Great Britain, “the dividing line in all similar cases shall be so deviated as to make such territory part of British Guiana” prevailed, and the present Rule was inserted, which provided for the claims, not only of British occupiers in 1887, but those of British occupiers up to the date of the Treaty. But, instead of providing that such occupation should deprive Venezuela of territory which might be found to be hers by the line of 1814, provision was made in the Treaty that the Tribunal itself should adjust the relations between these British occupiers and the

not consult Venezuela when he sent his memorandum to the British and, to make matters worse, Venezuela was left out of the Treaty negotiations and the composition of the Arbitral Tribunal.

28. Venezuela did its best to ensure that an arbitration would proceed under the law. Venezuela trusted the “negotiators” that they would facilitate an arbitration supposedly based on the criteria of legal justice.

29. The main achievement of the stratagem was that only Olney and Salisbury, through Pouncefote, were the main protagonists of the 1897 Treaty,²⁰⁸ and thus Olney acceded to British pretensions to prepare a treaty tailored to British interests, in which Venezuela already had everything to lose. The 1897 Treaty itself anticipated Venezuela’s defeat, and its normative features focused on the advantages of one of the parties, the United Kingdom.

30. A palpable demonstration of this fraudulent action can be found in Pouncefote’s submission, in which it indicated that:

“There is no danger of Mr. Olney listening for a moment to the Venezuelan howl for a modification of our terms of Arbitration. [...] It may appear unfair that there should be two Englishmen on our side and no Venezuelan on the other, but the Venezuelans agreed to be represented by the U.S., and I certainly understood that the question would be arbitrated precisely as if the controversy were between Gr. Britain and the U.S. for the reason among other that we know of no Venezuelan jurist worthy of the name, or whom we could consent to entrust with the function of Arbitrator in such a case.”²⁰⁹

Venezuelan Government by considerations of reason, justice, the principles of International Law, and the equity of the case. In: Memorial of Venezuela, 15 December 1898, Paris Tribunal. In Frontier Collection 9, Arbitration (...) p. 63.

²⁰⁸ P. Reuter, quoted by Gross Espiell, could say: ‘The conditions under which Venezuela consented to be represented, without the existence of a protectorate or any other analogous institution, by a third state, are very rarely found in an arbitration proceeding and reveal a quasi-colonial sovereignty’, in M. Terentyef, *Russia and England in Central Asia*, Ediciones Presidencia de la República, Caracas, p. 21.

²⁰⁹ Christ Church College (Oxford), Salisbury Papers A/139, f.141, in Ministerio de Relaciones Exteriores, Reclamación de la Guayana Esequiba. Documents, Caracas, 1967, p. 36 (**Annex 150**).

31. With this reference it was already a given that Olney had agreed with the British, that Venezuela would not be given any chance to benefit from the treaty, let alone to appoint arbitrators, which in itself should suffice to invalidate the treaty and the arbitration.

32. Then, in other correspondence at the time of the signing of the 1897 Treaty, which would define the terms of the “legal” arbitration procedure, Olney himself, in a confidential letter dated 29 October, addressed to Pauncefote, suggested that the “1850 Agreement” should become a dead letter, reasoning that “an attempt to construe it will involve us in a protracted debate and indefinitely postpone the attainment of the object we now have in view”.²¹⁰ Mr. Olney, in the context of the negotiations on the basis of the Washington Treaty, made the following point:

“It is most desirable, I think, not to give the Agreement of 1850 any status on the face of the Convention even by reference – much less by an attempt to define its scope and meaning”.²¹¹

33. Thus, the U.S. and Britain deliberately excluded Venezuela from the negotiating process and kept some crucial decisions strictly confidential. The level of confidentiality was attested to by the fact that the relevant documents were not even allowed to “pass into the archives of the State Department”.

See also “I enclose a copy of a private letter I received from him, as well as my reply. He has not revived the matter, since the press here presumes that there is an agreement between Mr. Olney and Mr. Andrade regarding the appointment of a Venezuelan. But it seems to me that there has been an implicit agreement through all the correspondence and negotiation that two arbitrators on the Venezuelan side must be Americans, and I know of no precedent otherwise - a neutral sovereign chosen by the disputing parties to appoint a super-arbitrator - appoints of course a person of their own nationality. Likewise, Chamberlain suggests taking the same approach to Olney to prevent any Venezuelan from having any representation in the arbitration.” *Ibid.*

²¹⁰ Public Record Office (London) F.O 80/375, in Ministerio de Relaciones Exteriores Republica de Venezuela in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 40 (**Annex 150**).

²¹¹ Julian Pauncefote, British Ambassador in Washington, 29 October 1896, Ministerio de Relaciones Exteriores Republica de Venezuela in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 40 (**Annex 150**).

34. However, the fraud does not end here, but continued with Olney pressing for the 1897 Treaty to be signed by Venezuela, through an obvious threat of use of force, referring to “the dangerous consequences of the helplessness in which refusal would place Venezuela”.²¹²

35. As if that were not enough, and not content with having all the normative pieces of the arbitration treaty in its favour, during the arbitration process, the United Kingdom produced and presented adulterated maps (documentary forgery). This particular issue invalidates the documentary evidence presented by the British delegation before the 1899 arbitration tribunal – not to mention the chicanery of the arbitrators who colluded to harm Venezuela.

36. Furthermore, of key importance was that the British representatives went so far as to hide relevant maps from the Arbitral Tribunal (among them, the Foreign Office map of 1857 and the so-called “Stanford” map of 1875), and presented others drawn up by the Colonial Office, following a Schomburgk line that was not correctly represented, or whose qualifying notes were eliminated (among them, the so-called “Herbert” map of 1842, with a third Schomburgk line falsified in 1887). Herselt said in this regard:

“I suggested to the gentleman at the Colonial Office (Joseph Chamberlain) that they should at once get in communication with Stanford and get him to republish the Map properly coloured, removing the last two lines of the present note, and adding this note upon it: ‘Corrected to date, 1886’ and in the meantime suspend the sale of the incorrect copies so that the dispute with Venezuela in regard to this Frontier has become considerable, a claim will surely produce the best map on the subject, and if this is the best Map that S. M.’s Government can produce in support of their claim, general opinion cannot fail to pronounce largely, in favour of Venezuela, and against the justice of the British claim, that the Map is the best that the British Government can produce. M. can produce in support of its claim, general opinion cannot fail to pronounce largely in favour of Venezuela, and against the justice of the British claim. This

²¹² Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 33 (**Annex 150**).

question is so important that I would venture to suggest that the Office of the War Intelligence Department be immediately requested to prepare a map based on Schomburgk's maps and other official data, to be supplied by the Colonial Office (Joseph Chamberlain), supplemented by information on historical and Treaty points to be furnished by this Office. We could then cite this as our Official Map. I send herewith a sheet of the great Stanford map, and have shown, with a yellow coloured line, in what respect our present statement, which was marked on a map and handed to the Venezuelan Minister (Mr. de Rojas) on September 15, 1881, differs from the pink coloured line on the Colonial Office (i.e. Stanford) map of 1875, as denoting the British Boundary Line at that time.”²¹³

37. Chamberlain’s falsified maps in the Colonial Office, contrary to any legal and factual basis, were accepted by the Tribunal. This was aggravated by the lack of motivation in the Tribunal’s decision.

38. In this regard, Pablo Ojer observed that “[t]he ‘tribunal’ was substantially satisfied with a Schomburgk line adulterated by Great Britain twenty years after the alleged author’s death, with the result that the tribunal did not even recognise territories to the North of the Cuyuní (Alto Barima and Alto Barama) and to the South (Venamo and Camarang) that Great Britain had recognised as Venezuelan, out of all dispute, in all official publications of the second Schomburgk line, also called North-South, from 1840 to 1886, both inclusive”.²¹⁴

39. This certainly reveals a serious procedural defect, as it constitutes a false assumption of fact resulting in a delimiting criterion that affected the rights of one of the parties (Venezuela), without further explanation. Yet, this was only one part of the trickery deployed from the Treaty of Washington of 1897 onwards.

²¹³ VENEZUELA: Memo. British Guiana Boundary (Sir E. Hertslet). Bound: Mema, Reference: FO 881/5311 (available at: <https://discovery.nationalarchives.gov.uk/details/r/C3661874> [restricted]).

²¹⁴ P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 50.

40. The Arbitral Tribunal awarded Venezuela only a tiny portion of the territory to which it had indisputable rights. The tribunal's failure to explain this outcome shows the self-interested approach of the arbitrators to favour the British side.

41. Venezuela sought to protect its territory, which belongs to it on the basis of its just title sufficiently demonstrated before the Tribunal; it could have never expected that the vast forest and jungle territory invaded in tiny fractions by poaching mining camps and occupied *de facto* by British citizens and miners would be fraudulently taken away.

42. It should be stressed that Venezuelan officials trusted in good faith in the American efforts; no one imagined a fraud of the magnitude that had taken place, to the detriment of Venezuela. Although there was much resentment in Venezuela over the signing of the Treaty of Washington in 1897, Mr. Olney persevered in forcing Venezuela to sign the Treaty, under the excuse that the Cleveland government was ending, and he (Olney) could not know what might happen since the new U.S. president was a British-friendly character.²¹⁵ More lies designed to deceive Venezuela.

43. In the framework of the course of the fraudulent conduct, the artifice with deceit (that is notorious and sufficiently demonstrated here, was then to construct the lie, create a fictitious scenario and also act - *inter alia* - by means of silence). The U.S. official Olney, given his private knowledge of the information he had on the controversy and his role as Venezuela's negotiator, was obliged to tell the truth and even not to remain silent, which is what is known as silent fraud (through silence), as Impallomeni described so well.²¹⁶ In this case, Olney's complicit silence and his active actions caused Venezuela's official representation to fall into the deception and subsequent fraudulent error.²¹⁷

²¹⁵ Thus, according to Ojer: "Olney, in his well-known Harvard speech (1899), developed the thesis that the two countries, in order to emerge from their isolationism, should march together in brotherhood of peoples and community of interests (...)." In 1898, already in the midst of the arbitration process, news circulated that the Republican administration of President McKinley had signed a secret treaty of alliance with Great Britain". *Ibid.*, p. 41

²¹⁶ Stefano Impallomeni. Código Penal Italiano, volume III, Tirant lo Blach. p. 295.

²¹⁷ Therefore, the circumstances of the acts, their formation and consequences must always be assessed. In short, an essential defect in the formation of the legal act, caused by fraud, can be the

44. By way of corollary, under the above account and analysis, it can be affirmed that the conditions for considering the 1897 Treaty invalid for fraud are fulfilled.

45. *First*, the fraud came from one negotiating party, Great Britain, with the co-authorship of the chief U.S. representative (Richard Olney) who served as a representative of the interests of the United States and not of Venezuela.

46. *Second*, the fraud was a determining factor in coercing Venezuela to accept the Treaty (causing the error), as the fraudulent conduct affected the crucial issue concerning key aspects of the dispute which, properly analysed, constituted an inexcusable prejudice to Venezuelan interests.

47. *Third*, Venezuela was not and could not have been aware of the fraudulent conduct of Great Britain and the United States (good faith prevailed).

48. For all these reasons, the 1897 Treaty is considered invalid and without effect, as well as the consequent result of the arbitration, namely the award of 3 October 1899 and the technical demarcation verified in 1905.

III. QUID BASED ON THE UNEQUAL TREATIES ARISING FROM FRAUD AND COERCION

49. Before proceeding to the following chapters, it is relevant and crucially important to focus on the notion of political domination introduced in the 1897 Washington Treaty (i.e., the idea that “Adverse holding or prescription during a period of fifty years shall make a good title”), which was coined and used by the United Kingdom in the 19th century to exercise its territorial dominion and as an attempt to justify their expansionism.

50. In such circumstances, the aforementioned notion introduced in the Treaty of Washington has been discredited, for good reasons, as it would go against a principle of

trigger for nullity. The problem is that if the error is essential (inexcusable), it cannot be validated in any case, since the essential error is perceived to be detrimental. Therefore, what is important is the prejudice that may be caused to either party through the essential defect: *Pas de nullité sans grief* (no nullity without prejudice).

international *jus cogens* that makes it invalid to acquire territorial rights or territories, or securing titles, through a mere *fait accompli*. Therefore, the Treaty of Washington of 1897 today has no possibility of application, nor could it be used as support for obtaining territory and consequently, it is invalid as a matter of law. For the same reasons, the Paris Arbitral Award of 1899 is invalid.

51. The issue of territorial domination is all the more iniquitous that it frequently resulted in unequal treaties, i.e. those agreements that are negotiated under conditions of disadvantage, inequality and coercion, which disqualifies their validity. History is full of such treaties, and the 1897 Treaty of Washington in particular is no exception, since Venezuela, being a sovereign republic, was treated as a colony in the face of British power, a fact compounded by the coadjutant action of U.S. officials.

52. Venezuela was certainly a weak country and regarded as “uncivilised”, prompting the British to entrench their territorial political dominance in order to appropriate Venezuelan territory. The rejection of the doctrine of political domination advocates the revision, renegotiation or annulment of these treaties in order to correct such injustices and re-establish the necessary balance between the parties.

53. This is a long-standing position of Venezuela. Notably, in the context of negotiating the Vienna Convention on the Law of Treaties, Venezuela considered that the issue of acquiescence – *inter alia* – was a major obstacle to formalising complaints about unequal treaties. The Venezuelan diplomatic commission at the Conference on the Law of Treaties therefore disagreed with the Convention’s proposals on this point, and made its position very clear, in full that the Treaty of Washington of 1897 is the masterpiece or emblematic piece of an unequal treaty. What Venezuela expressed at the conference applies perfectly, which is why the Republic is not a party today. In this sense, the Venezuelan Foreign Ministry said:

“The Conference, which was concerned with the progressive development of international law, could not and should not recognize unequal treaties which had been imposed upon weaker nations by the more powerful nations of a former era. It had been alleged that acquiescence in the validity of a treaty, even for a comparatively

short time, was sufficient to confirm it; acceptance of that principle, however, would represent an obstacle to the revision of unequal treaties and would therefore be a step backward in the field of international law. It had been argued that article 42 provided certain safeguards against bad faith on the part of States parties to a treaty, but he wondered whether it afforded any protection against those who had originally been guilty of bad faith. In his opinion, the article only served to erect barriers against the revision of illegal instruments and thus to close the door to any honourable solution of situations which were patently unjust because they had been imposed by the strong upon the weak".²¹⁸

54. This Venezuelan affirmation before the UN leaves no doubt as to the firmness of its claim that arose in 1962, the serious situation that arose before and during the process of making the Washington Treaty of 1897, and the subsequent consequences that arose with the arbitration. The Treaty found its roots in inequality and discrimination, to the detriment of an emerging and sovereign republic, whose territory was subject to a relentless attack of usurpation by the United Kingdom at the end of the 19th century, as has been well recorded throughout this painful history.

IV. CONCLUSION

55. This introduction has demonstrated in a synthetic manner the British representatives' fraudulent action, with the complicity of the United States of America, aimed at usurping the territorial integrity of Venezuela, committed through fraudulent intent, that is, with the malicious intention of appropriating a territory that never belonged to them by means of falsehoods, deceit, simulations, and abuse, including violence and threats.

56. Given the issues sufficiently raised in the previous paragraphs, it is incontrovertible that the Treaty of Washington of 1897 is invalid, as is the Award of 3 October 1899.

²¹⁸ Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (resumed from the previous meeting), Articles approved by the Committee of the Whole (continued), Article 42.

57. Furthermore, the Tribunal's actions are invalid from the moment of the pronouncement of its decision when it manifestly exceeded its powers and between the lack of arguments (serious omissions) and functional and power excesses that allowed it to act without any legal limitations or sense of justice. It acted inconsistently with the scope of its powers as defined in Articles I and III by deciding matters outside the Washington Treaty; and ultimately, it acted inconsistently with its duty to make an award based on international law.

CHAPTER 4: VENEZUELA'S TITLE TO SOVEREIGNTY OVER GUAYANA ESEQUIBA

4.1. Spain since colonial times have always had the sovereignty title to Guayana Esequiba, as was recorded in the formation of the Captaincy General of Venezuela in 1777, and then by the independent Venezuela since 1810, whose successive Constitutions clearly confirm this sovereignty. This title was still in force when around 1814-15 the Netherlands ceded its small settlements of Demerara, Berbice, and Essequibo to Great Britain, who just in 1831 saw the opportunity to unite them to create its new colony of British Guiana and to give free rein to its greed to follow the path that would finally lead it to consummate the dispossession of Venezuela, so that overnight the Arbitral Award of 3 October 1899 changed an unaltered situation.

4.2. One simple glance to the cartography and the historical maps reveals this. Guyana attempts to trace its territorial origins to a nebulous past that goes back centuries in history. Never could the vastness of Guayana Esequiba, especially towards its centre and even less so to the Venezuelan south and west projected along the Essequibo River, have belonged to the Netherlands, let alone ceded it to the United Kingdom. There is not the slightest historical or geographical clue to this. The British manipulation later inherited by Guyana deceives the world by using the origins of Guyana determined between the eastern bank of the Essequibo River and the present Suriname – always to the east of the river – using as a “half lie” the natural and understandable fact of the settlements located on the west coast that crossed the western bank of the river at the height of its mouth into the sea and that, in any case, were always protested by Venezuela. On the other hand, it is well known that the three small provinces to the northeast of the Essequibo River, called Berbice, Demerara and Essequibo, are the cradle of the territory of the former British Guiana Colony barely born in 1831, which in 1966 became the Republic of Guyana. These three small settlements east of the Essequibo River, are the true current territory of Guyana, to the east of the Essequibo River.

4.3. For 150 years – from 1498 to 1648 – Spain was the sole sovereign State over Guayana Esequiba. This territory was internationally recognised as Spanish. In 1581, the Dutch renounced their allegiance to the King of Spain and waged a war that led to their

independence in 1648. With the Treaty of Münster of 30 January 1648, Spain ceded sovereignty to the Dutch over the territory they were occupying, and the Dutch agreed not to expand further into Spanish territory. But the bizarre historical narrative that Guyana is now trying to recreate in its Memorial can in no way be transposed to Guayana Esequiba. It further shows that the British Empire, motivated solely by its greed for the gold mines progressively discovered in the territory of Guayana Esequiba, embarked on a predatory policy, invented out of thin air, false maps, false dividing lines, growing claims based on nothing close to a legal right, to capture the territory of Venezuela. Venezuela consistently opposed British manoeuvres on the basis of its rights.

I. VENEZUELA SUCCEEDED SPAIN, WHICH WAS RECOGNISED BY THE DUTCH AS THE HOLDER OF THE TITLE TO SOVEREIGNTY OVER GUAYANA ESEQUIBA

4.4. At the time of its independence, Venezuela succeeded Spain as the holder of territorial sovereignty over Guayana Esequiba. Spain established its title at a time when international law accepted the discovery and occupation of *terra nullius* as a means of acquiring territorial sovereignty. The term *terra nullius* was not used as a synonym for uninhabited territory, but as a reference to a territory in which there was no State organisation,²¹⁹ as were the Americas. In this legal context, on the basis of a Bull of Pope Alexander VI,²²⁰ Spain and Portugal signed the Treaty of Tordesillas of 7 June 1494,²²¹ by which both Powers reciprocally recognised sovereignty over the territories located on either side of a straight line drawn between the two poles and situated three hundred and seventy leagues from the Cape Verde Islands. From this moment, Spain freely took possession of Guayana Esequiba through discovery and subsequent occupation. The Dutch

²¹⁹ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 39-40.

²²⁰ Bull of Pope Alexander VI, dated 4 May 1493, determining the line of demarcation in the dominions of the Crowns of Spain and Portugal in America. For the text, see *Blue Book 8*, cit. pp. 3-6 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

²²¹ Treaty of Tordesillas of 7 June 1494, by virtue of which the line of demarcation was to pass three hundred and seventy leagues (not one hundred as fixed by the Bull of Alexander VI) to the west of the Cape Verde Islands. This treaty can be consulted in *Blue Book 8, El Derecho Internacional Venezolano. Límites británicos de Guayana*, Ministerio de Relaciones Exteriores, Colección Fronteras, Caracas, 1988, pp. 7-18 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

recognised that the territory was Spanish territory and with the Treaty of Münster of 1648 they undertook not to expand further into the territory.²²² Great Britain succeeded in 1814 to the Dutch sovereignty over a territory to the east of the Essequibo River, made of the Demerara, Berbice and Essequibo establishments. Such was the established sovereignty rights over the relevant territory in the beginning of the 19th Century. In so far as international law is concerned, this situation never changed since then, even if, for a too long period, Great Britain, and now Guyana, have unlawfully administered and controlled Guayana Esequiba, on the basis of what is probably the most scandalous manipulation ever seen in recent history.

4.5. This section revolves around two key dates. On the one hand, 1648, the year in which Spain and the United Provinces of the Netherlands concluded the Treaty of Münster by which the Spanish Crown ceded to the Netherlands establishments located in Guyana.²²³ On the other hand, 1810-1811, the year Venezuela succeeded Spain in all its title to sovereignty over Guayana Esequiba.

(i) THE DISCOVERY AND OCCUPATION OF GUAYANA ESEQUIBA UP TO 1648

4.6. In 1499, a year after Christopher Columbus approached the Orinoco Delta, Alonso de Ojeda took possession of the Guiana coast and the lands he was discovering, starting at the Boca del Marañón (Amazon) and heading north and northwest, sighting the Essequibo – which took the name of Juan de Esquivel who first surveyed it – and Orinoco rivers.²²⁴ All these actions were carried out on behalf of the Spanish Crown.²²⁵

4.7. They were followed by many other Spanish expeditions during the 16th century, both along the Atlantic coast and inland to Guyana. When some Dutch navigators began

²²² Treaty of Peace between Philip IV, King of Spain, and the United Provinces of the Low Countries, Munster, 30 January 1648 (**Annex 1**).

²²³ The term Guyana identifies a large region of South America stretching from the Amazon to the Orinoco.

²²⁴ P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 9.

²²⁵ GM, Vol. III, Annex 8.

their voyages to Guyana, the Spanish had already been discovering, carrying out topographic surveying and occupying this territory, a vast region situated between the Orinoco River, the Amazon, the Atlantic Ocean and the sources of the Orinoco, the Rio Casiquiare and the Rio Negro.²²⁶

4.8. In the conquest of America, Spain made use of the *capitulations* as a way of making the occupation of the territory effective. A capitulation was a document authorising exploration and establishing a delegation of authority in favour of a private individual empowered to carry out civil and military activities in the discovered territory, thus making colonisation effective.

4.9. The Spanish Crown granted several capitulations related to Guayana Esequiba during the 16th century.²²⁷ One of the most important, due to its genesis, was granted on 21 July 1569 in favour of Gonzalo Jiménez de Quesada. It was succeeded by D. Antonio de Berrío,²²⁸ who discovered and explored the provinces of Guayana and El Dorado,²²⁹ and took possession and governed them.²³⁰

²²⁶ On this colonial period and the occupation and administration of the territory of Guayana Esequiba by Spain, see HUMBERT, J. *Los orígenes venezolanos (Ensayo sobre la colonización española de Venezuela)*, Biblioteca de la Academia Nacional de la Historia, núm. 127, Caracas, 1976; MARQUEZ, O. *La venezolanidad del Esequibo: reclamación, desarrollo unilateral, nacionalidad de los esequibanos*. 127, Caracas, 1976; MARQUEZ, O. *La venezolanidad del Esequibo: reclamación, desarrollo unilateral, nacionalidad de los esequibanos*, Caracas, 2002; DE VEGAMIAN, PFM, *El Esequibo frontera de Venezuela: documentos históricos y experiencias personales*, Raycar SA Impresores, Madrid, 1968, pp. 48-55, and CABRERA SIFONTES, H., *La verdad sobre nuestra Guayana Esequiba*, Monte Ávila Editores C.A., Caracas, 1970.

²²⁷ Some of the capitulations issued by the Spanish Crown can be found in *The Case of Venezuela*, 1899 (available at: <https://archive.org/details/venezuelabritis01venegoog/page/368/mode/2up>).

²²⁸ The capitulation in favour of D. Gonzalo Jiménez de Quesada and his succession by D. Antonio de Berrío can be consulted in (Annex 8).

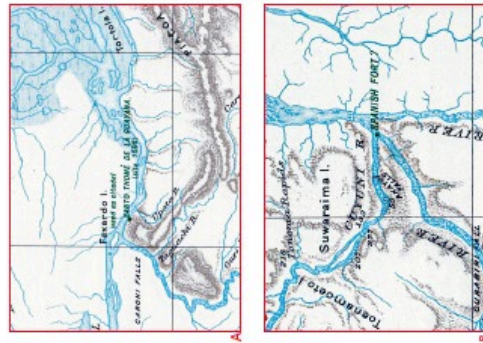
²²⁹ Letter from Antonio Di Berrío to the King, 2 December 1594 (Annex 8).

²³⁰ See *Blue Book 7 Arbitramiento sobre los límites de Venezuela y la Guayana Británica. Alegato y Contra-alegato*, Ministerio de Relaciones Exteriores, Colección Fronteras, Caracas, 1981, pp. 79-81, which contains the text of a letter stating that Domingo de Vera, representing Antonio de Berrío, took possession of the province of Guyana for Spain (available at: <https://kamuru.mppre.gob.ve/index.php/s/oiwST6o4wKpTETi>).

4.10. As a result of these expeditions and the lands discovered, the Council of the Indies created in 1595 a political-administrative entity called the Province of Guayana.

4.11. At this time there were no Dutch settlement west of the Essequibo River (Map 1).

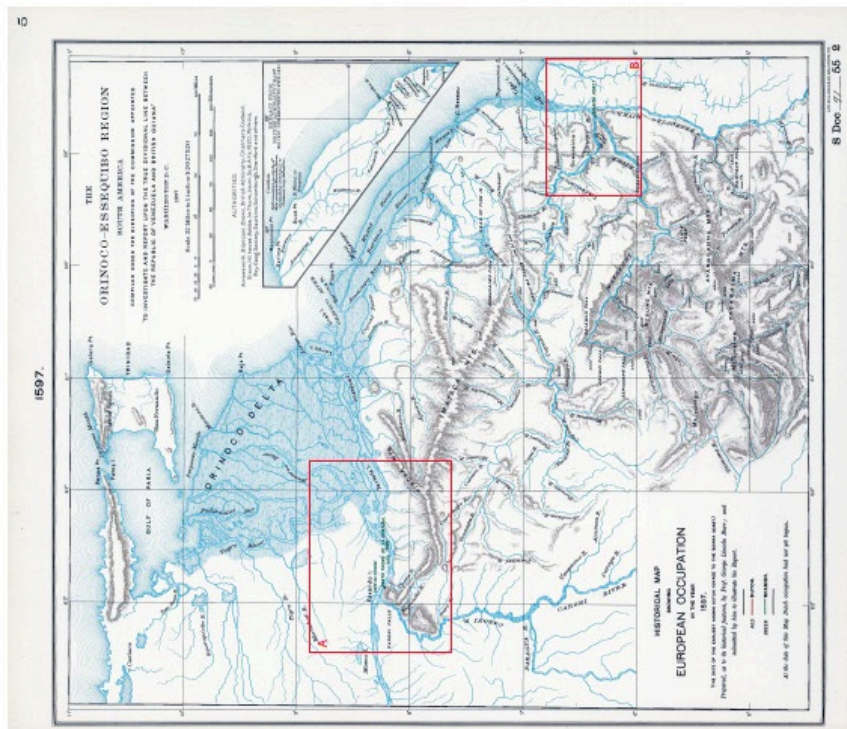
THE ORINOCO-ESSEQUIBO REGION
compiled under the direction of the Commission appointed
to investigate and report upon the divisional line between
the Republic of Venezuela and British Guiana



Venezuela Boundary Commission Report Atlas 1988
Map 5

Historical map showing European Occupation
in the year
1597

MAP 27



Source: David Rumsey Historical Map Collection

MAP 27. Historical map showing European Occupation in the year 1597²³¹

4.12. Guyana states in its Memorial that:

“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.”²³²

and that:

“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.”²³³

4.13. This is simply wrong. The reality is that while Spain had an already established title, the Dutch new settlements established at the time were all located east of, or in, the Essequibo River. The map of the Venezuelan Boundary Commission created by the United States Congress, entitled *European Occupation 1626*, shows this very limited Dutch presence in Guyana²³⁴ (map no. 2). This territorial situation remained unchanged during the first half of the 17th century and was therefore the same when Spain and the Netherlands concluded the Treaty of Münster. The aforementioned Boundary Commission

²³¹ Map 27 of the Venezuela Boundary Commission Report Atlas, 1898 (**Atlas**).

²³² GM, pp. 29-31, paras. 2.11-2.12.

²³³ GM, pp. 31-32, para. 2.14.

²³⁴ “European Occupation in 1626”, *David Rumsey Map Collection* (available at: https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~203930~3001725:European-Occupation-in-1626-?sort=pub_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date&qvq=w4s:/who%2FUnited%2BStates%2Bof%2BAmerica%2Fwhere%2FGuyana;q:Venezuela;sort:pub_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date%2Cpub_date;lc:RUMSEY~8~1&mi=10&trs=81).

also left a cartographic sample of this reality in its map entitled *European Occupation in 1648*²³⁵ (Map no. 3).

4.14. By the Treaty of Münster of 30 January 1648, Spain recognised the independence of the Dutch States General (Art. I), while the Dutch States General recognized as opposable to them Spain's title to territories over which the Dutch had no established settlements at this date.²³⁶ The Dutch possessions at the time became the Dutch colonies east of the Essequibo River. The Dutch also undertook not to expand further into Spanish territory. Indeed, as stated in Article V of the treaty, they were authorised to conquer and possess additional territories, but only to the extent that they were controlled by the Portuguese, not by Spain. With the adoption of the Treaty of Münster, Spain definitively consolidated its title vis-à-vis the Dutch States General.²³⁷

4.15. By stipulating that no subsequent conquest or occupation could contravene its provisions, the Treaty of Münster froze the Dutch's opportunity to lawfully conquer Spanish territory. Thus, any occupation of Spanish territory by the Dutch after 1648 would

²³⁵ "European Occupation in 1648", *David Rumsey Map Collection* (available at: <https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~203931~3001726:European-Occupation-in-1648->

?sort=pub_list_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date&qvq=w4s:/who%2FUnited%2BStates%2Bof%2BAmerica%2Fwhere%2FGuyana;q:Venezuela;sort:pub_list_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date%2Cpub_date;lc:RUMSEY~8~1&mi=11&trs=81).

²³⁶ "The navigation and traffic of the East and West Indies shall be maintained according to and in conformity with the concessions made thereon or hereafter made; for the security of which the present Treaty and the ratification thereof, which shall be procured on either side, shall serve; and all the Powers, Nations, and Peoples, with whom the said Lords States, shall be comprehended in the said Treaty. or those of the East and West India Company on their behalf, within the limits of the said grants, have friendship and alliance; and each is to wit, the said Lords King and States respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess." Treaty of Peace between Philip IV, King of Spain, and the United Provinces of the Low Countries, Munster, 30 January 1648, Article V (**Annex 1**).

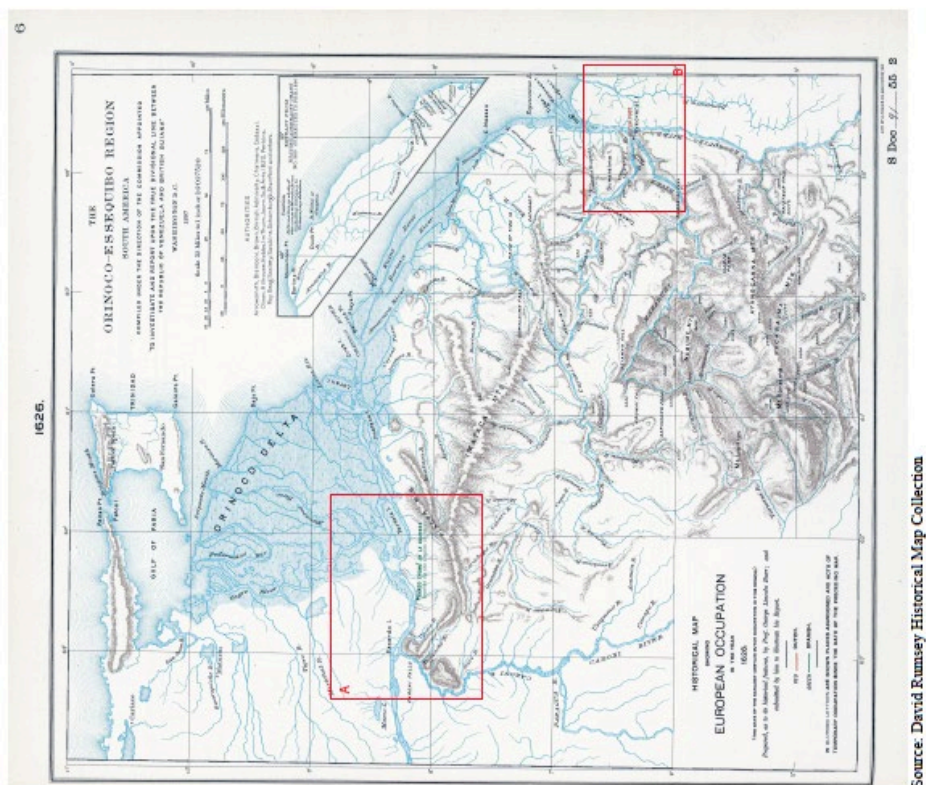
²³⁷ On the importance of the Treaty of Münster in the title of Spain and Venezuela and the other conventional sources that support it, see DE PEDRO FERNANDEZ, A., *La Historia y el Derecho en la reclamación venezolana de la Guayana Esequiba*, Ed. Mediterráneo, Madrid, 1969, pp. 29-35.

have been to be considered an illegal usurpation, lacking legal effect between the parties and unenforceable against Spain.

4.16. There is no doubt that at the time, there were no Dutch settlement west of the Essequibo River.²³⁸ The map showing the situation of the occupation in 1648 illustrates this reality (map no. 3).²³⁹

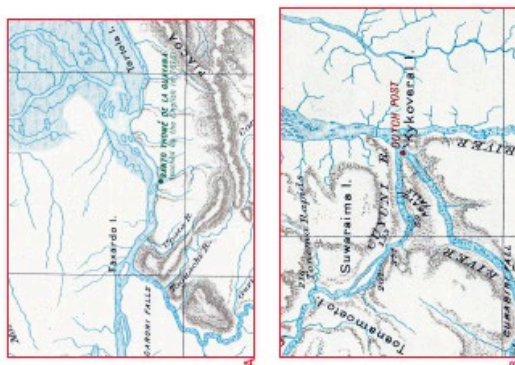
²³⁸ A. S. Reyner, W. B. Hope, "Guyana's Disputed Borders: A Factual Background", *World Affairs*, July, August, September 1967, Vol. 130, No. 2 (July, August, September 1967), p. 109.

²³⁹ "European Occupation in 1648", David Rumsey Map Collection (available at: https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~203931~3001726:European-Occupation-in-1648-?sort=pub_list_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date&qvq=w4s:/who%2FUnited%2BStates%2Bof%2BAmerica%2Fwhere%2FGuyana;q:Venezuela;sort:pub_list_no_initialsort%2Cpub_list_list_no_initialsort%2Cpub_date%2Cpub_date%2Cpub_date;lc:RUMSEY~8~1&mi=11&trs=81).



MAP 28. Historical map showing European Occupation in the year 1626²⁴⁰

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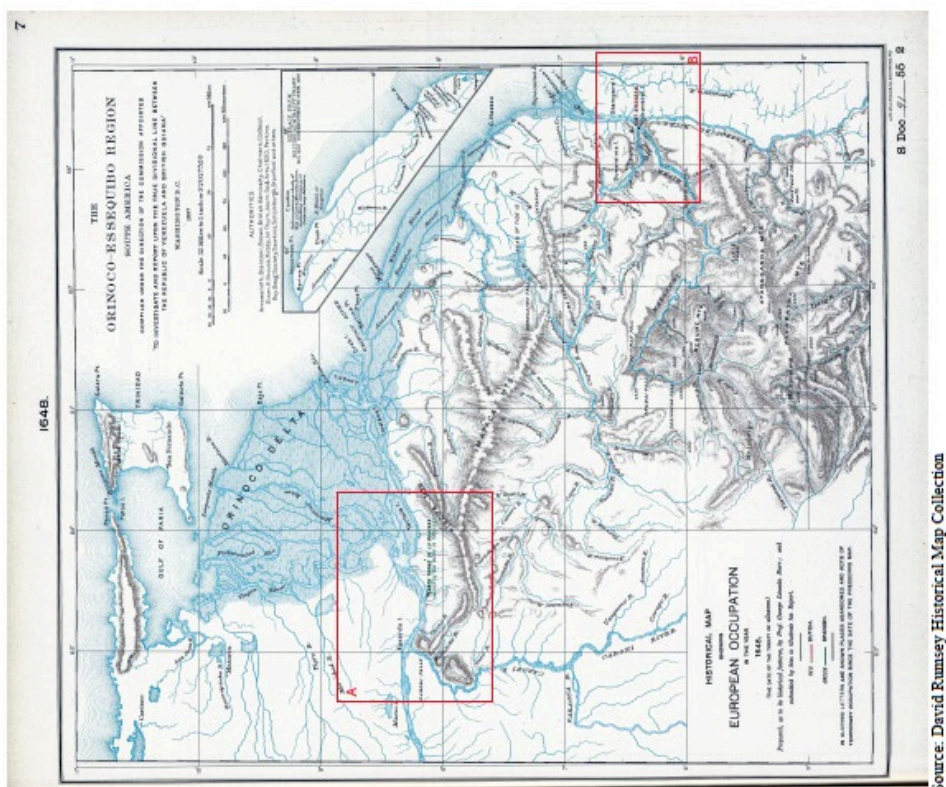
Venezuela Boundary Commission Report Atlas 1898
Map 6

Historical map showing European Occupation
in the year
1626

Source: David Rumsey Historical Map Collection

MAP 28

²⁴⁰ Map 6 of the Venezuela Boundary Commission Report Atlas, 1898 (Atlas).



MAP 29. Historical map showing European Occupation in the year 1648²⁴¹

²⁴¹ Map 7 of the Venezuela Boundary Commission Report Atlas, 1898 (Atlas).

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Venezuela Boundary Commission Report Atlas 1898
Map 7

Historical map showing European Occupation
in the year
1648

MAP 29

(ii) SPAIN'S ANIMUS *OCCUPANDI* AFTER THE TREATY OF MÜNSTER

4.17. In the 18th century, the Spanish Crown undertook a process of reform and modernisation of its imperial apparatus of government in the Americas (known as the Bourbon Reforms), which promoted the creation of administrative units and more efficient colonisation methods that allowed it to increase its presence and dominance in the area. The concrete expression of this was the strengthening of the method of conquest and colonisation through the presence of religious missions, which was successfully practised in three regions under the dominion of the Spanish empire: northern Mexico, Paraguay and Guayana Esequiba. Therefore, Spanish missionary occupation and settlement was a project of State expansion over the territory and population that were incorporated into the effective control of the State in a permanent manner, and without the use of violence typical of the Dutch system of slave exploitation.

4.18. For administrative purposes, Spain created in 1762 two commanderies, the general commandery of new towns and the entire Orinoco River, under the command of José de Iturriaga, and the General Commandery of Guayana, headed by Joaquín Moreno de Mendoza.²⁴² Spanish Guayana, then called “province of Guiana”, was firmly established on the political administration of the territory and gained autonomy.

4.19. In the dossier concerning the boundaries of Spanish Guiana with Dutch Guiana, which created the separate command of Guiana,²⁴³ it was stated that:

“The province of Guiana is bounded on the east by the whole coast on which are situated the Dutch colonies of Esquivo, Berbis, Demerari, Corentin and Surinan, and further to windward the Cayenne belonging to the French: to the North, the banks of the Orinoco, which dividing the provinces of Cumaná, Barcelona,

²⁴² Real Cédula por la cual la región de Guayana se escindió de la Nueva Andalucía y se erigió en Comandancia General Independiente, 4 June 1762, *Blue Book* 8, pp. 47-48 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>), also Ministry of Foreign Affairs, 1981, Venezuelan International Law: British Limits of Guyana, Collection “Fronteras” 8, Caracas (Annex 10).

²⁴³ *Blue Book* 8, pp. 45-48 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

Caracas, Barinas, Santa Fé and Popayan, formed a half circle returning to the East to seek its headwaters in the lagoon of Parime, as would be seen in a general map of the said provinces and river: to the South, with the dominions of King Fidelissimo in Brazil, the confines of these and the said province of Guayana being unknown, as well as what it contains in the centre”.

4.20. It goes on to reiterate that:

“the Dutch colonies of Esquivo, Demerari, Berbis, Corentin and Surinan are located to the east and on the coast of Guiana, according to the information acquired by Don Juan de Dios Valdez, commander of Guiana: that Esquivo consists of cane plantations that the Dutch had planted at a distance of 30 leagues along the banks of the Esquivo River”.²⁴⁴

4.21. However, because the separation of the previous Commandery into two and the defence plans established for the territory did not favour an increase in settlements, both commanderies were merged in 1768 under the authority of Manuel Centurión, General Commander of Guayana,²⁴⁵ who brought together civilian power (governor) and military power (commander)²⁴⁶ and promoted the creation of towns and the occupation of the territory. In the Royal Decree establishing this unification, the boundaries of the province were set out as follows:

“on the north, the lower Orinoco, the southern boundary of the provinces of Cumaná and Venezuela; / on the west, the upper

²⁴⁴ This is equivalent to 144.84 kilometers.

²⁴⁵ Cédula, 5 May 1768, confirming the provision that the Comandancia General de Nuevas Fundaciones del Bajo y Alto Orinoco y Rio Negro would remain under the governor and commander of Guayana, *Blue Book* 8, p. 49 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>), also in AHMPPRE-VEN, Archivo Antiguo, Colombia, Colección Verde, Volumen 146, Expediente 24, Doc. 1, Fs. 17-18, and Real Cédula of 10 January 1769 on the continuity of the unification (AGN-VEN. *Real Hacienda*, "Borrador de Cartas", Caracas, t. 99 (1752-1777)).

²⁴⁶ Manuel Centurión appointed Interim Commander of the Province of Guyana, 1 May 1766 (**Annex 11**).

Orinoco, the Casiquiare and the Rio Negro; on the south, the Amazon River; and on the east, the Atlantic Ocean”.²⁴⁷

4.22. In 1777, in order to improve the management of the territory and to avoid the inconveniences caused by the distance from the capital and for defensive needs, Guayana was separated from the New Kingdom of Granada and was added, politically and militarily, to the recently created Captaincy General of Venezuela.²⁴⁸

4.23. In addition to these administrative decisions, the authorities in Spanish Guiana exercised multiple powers, in particular those relating to the arrest of Dutch slave traders.²⁴⁹ The Spanish Crown was also involved in the defence of the territory, as illustrated by the orders issued for the defence of the city of Santo Tomé²⁵⁰ or the religious missions.²⁵¹ The Strategic Plan drawn up by José Solano y Bote in 1762 was based on the premise that it was essential to change the location of the towns at the mouth of the Orinoco River and move them inland. This would prevent the enemy from finding supplies and support in their coastal assaults and make it more difficult for them to invade the coastal area that had not yet been occupied. This approach to defence was later supplemented by the Plan for the Defence of the Province of Guiana of 15 March 1777, drawn up by Brigadier D. A. Crame and the interim Commander of Guiana.²⁵² In addition, the correspondence of the

²⁴⁷ See Letter from Centurión, 11 November 1773, which includes the text of the Royal Decree of 19 September 1776, in *Blue Book* 8, pp. 70-71 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

²⁴⁸ Royal Decree separating the Provinces of Cumaná, Guayana, Maracaibo Margarita and Trinidad from the New Kingdom of Granada, adding them in Government and Military matters from the Captaincy General of Venezuela, 8 September 1777 (**Annex 12**).

²⁴⁹ There are multiple references to these proceedings in the documentation submitted to the Arbitral Tribunal, which can be consulted in Venezuela-British Guiana Boundary Arbitration, see Ministerio de Relaciones Exteriores, (1981), *El derecho internacional venezolano. Límites Británicos de Guayana* (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>). Documents taken from Spanish sources nos. 361, 365, 366, 366-371, 371-385, 396 and 398. 361, 365, 366, 368-371, 378-385, 396 and 398. Vol 3, Documents from Spanish sources, nos. 5-7. See

²⁵⁰ Orders of Cristobal Felix Guzman, Governor of Guiana, to Francisco de Venavides, his Lieutenant of War of Santo Thomé de la Guyana, 7 July 1711 (**Annex 9**).

²⁵¹ See Orden del Rey de España al Gobernador de Cumaná, 30 March 1753, *The Counter-Case of the United States of Venezuela before the Tribunal of Arbitration to Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2*, Vol. 2, No. 643, p. 372.

²⁵² *Ibid.*, Vol. 2, No. 431.

Governor of Guiana, Miguel Marmión, records the carrying out of inspections in certain territories with the aim of establishing defensive constructions.²⁵³

4.24. The Spanish Crown's interest in occupying Guayana was evident. Proof of this can be found in Colonel Manuel Centurión's ideas on the management of the territory. In them, Centurión considered that:

“3rd- The population of the Orinoco should be extended on both banks, from the Angostura to its mouths, and the islands and fertile plains on this part of the river, which is the most precious part of it, should be cultivated, as it is the most fertile and closest to the sea, thus repealing the Royal Order of 5 June 1762 which deprives us of its utilities”.²⁵⁴

4.25. The evangelising purpose of Spanish colonisation gave the religious missions a key role in the occupation of the territory and allowed for the implementation of a model of social and cultural control with a structure similar to that of the cities of the metropolis – with a Cabildo made up of different positions held by indigenous people who executed the directives of the monks who were in charge of the mission.²⁵⁵

4.26. The missionaries received not only a religious but also a civil mandate from the King, and thus constituted one more piece in the effective occupation of the territory. The letter sent to the King by the Viceroy of Santa Fe, D. Manuel de Guirior, on 8 January 1776, reported, for example, the revocation of the appointment of corregidores²⁵⁶ and the

²⁵³ See for example *ibid.*, Vol. 3, Documentos de fuentes españolas No. 75.

²⁵⁴ Instrucción para el Gobierno de la Comandancia de Guayana. 1762, Ref. AHMPPRE-C. Archivo Antiguo. Colombia, Colec. Verde, t. 146, Exp.1, fs. 129-134.

²⁵⁵ On the religious missions and their importance in the colonisation of Guyana Esequibia, see P.B. de Carrocerá, *Misión de los Capuchinos en Guayana*, vol. 3, Academia Nacional de la Historia, Caracas, 1979.

²⁵⁶ A corregidor was a royal official in the Spanish empire whose office comprised the exercise of royal jurisdiction at various levels and locations, from provincial to municipal, and was the link between these territorial powers and the monarch. His positive jurisdiction was the corregimiento.

return to the previous situation in which the missionaries held the direction and civil government of the towns founded.²⁵⁷

4.27. When the Society of Jesus gave up its evangelising mission in the province of Guiana,²⁵⁸ it was the Catalan Capuchins who, following the Royal Decree of 7 February 1686, took on this task in the whole of Guayana Esequiba.²⁵⁹ From that time onwards, the territory would be dotted with population centres scattered throughout most of Guayana Essequibo.

4.28. The first Capuchins settled in the villages of Mariguaca, which they decided to name Montecalvario, and Belén de las Totumas, which was far from Santo Tomé. In addition, as indicated in the letter of Father Prefect Tomás de Barcelona to the superiors of the province of Catalonia, they founded two more centres, Platanal and Parapara.²⁶⁰

4.29. From 1724 onwards, mission towns began to be created with permanent subsistence, with the number of villages founded reaching sixty.²⁶¹ All of them appear on one or more of the old maps and bear witness to the firm, constant and undeniable presence of Spain in the Guiana region.

4.30. The importance of the Spanish religious missions in the effective occupation of the territory was clearly stated in Governor Diguja Villagómez's report on the Capuchin mission of Guayana following his visit (1763).²⁶² Diguja warns that it is to the mission of the Catalan Capuchins in the province of Guayana that the Dutch have not located

²⁵⁷ AGI, Caracas, 352, dossier on this matter, ff. 37-39.

²⁵⁸ AGI, Santo Domingo, 678.

²⁵⁹ AGI, Indiferente general, 2876, Registro de cédulas, Book FF-8, f. 85, BN Madrid, ms. 3561, f. 47 and ms. 20418/15.

²⁶⁰ P. B. de Carrocera, *Misión de los Capuchinos en Guayana*, Vol. 1, Academia Nacional de la Historia, Caracas, 1979, p. 121-123.

²⁶¹ The table in Appendix 3 shows the villages established by the Catalan Capuchins.

²⁶² AGI, Caracas, 411, ff. 39-45.

themselves in the centre of the province and that they are moving inland along the Cuyuni and Mazaruni rivers.²⁶³

4.31. Their presence in almost all of Guayana Esequiba and the resulting spread of Spanish culture and language was evident. This is attested to by the letter sent by the United States Consul in Demerara, Andrew Patterson, to Edwin Uhl, Deputy Secretary of State of the United States, on 27 February 1896 in which he noted that in the settlements visited in the disputed area, Spanish was spoken very well.²⁶⁴

4.32. Alongside the missions, there was also a proliferation of mixed villages, of which Centurión was a staunch supporter, as he made clear in his letter of 20 April 1771 sent to the Secretary of the Council of the Indies, informing him of the results of the transfer of four missionary villages.²⁶⁵ Their establishment, as well as the effective expansion of the existing settlements, was in many cases carried out with population imported from the metropolis or from other provinces.²⁶⁶

4.33. Despite these advances, there were still unoccupied areas in the territory of Guiana in which Spanish interest was evident. In the aforementioned Centurion Letter (1773) and the Cédula it contained; it was emphasised that:

“At that time nothing was known of the vast interior of that province other than the thirty leagues penetrated by the Catalan Capuchin missionaries, and that the geographical charts showed that even leaving between the foreign colonies and our establishments a desert of eighty or a hundred leagues to impede communication and trade, we still had many hundreds of leagues left to populate with great benefit to the State and Religion; but that by our misfortune it was all not only incognito to the Spaniards, but also abandoned to the foreign settlers who introduce themselves with the Caribs to the slave

²⁶³ Other documents of the Governor of Cumaná can be found in *The Counter-Case of the United States of Venezuela before the Tribunal of Arbitration to Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2.*, Vol. 2, Nos. 392 and 394.

²⁶⁴ Annex 4 Include the original of the letter.

²⁶⁵ AGI, Caracas, 228.

²⁶⁶ AGN-VEN, *Papeles del Gobernador Centurión*, Caracas, t. único, 1766-1776, f. 138.

trade of the barbarian nations that inhabit the centre of that vast country, and by this means considerably promote their establishments on the coast of the sea and river of Amazonas, leaving the land deserted and incapable of being occupied by us in the future, and finding no more natives with which to populate it unless prompt, effective measures are taken on our part, advancing to the frontiers of the foreigners to contain their raids and usurpations”.²⁶⁷

4.34. The Spanish Government of the Indies issued instructions for the occupation of the whole of eastern Guiana and, consequently, in 1778 the Intendant of Caracas established a Plan of Occupation and the officer José Felipe de Inciarte was commissioned to carry out a reconnaissance of the whole territory.²⁶⁸ The Instruction of Intendente D. José de Ábalos²⁶⁹ showed Spain's interest in the occupation of the Guayana Esequiba by stating (rule 1) that the main objective of populating the places it indicates is to “secure the limits” of the province of Guayana further indicating that:

“The first of the commissioners’ first concerns in the establishment to be made was ‘to get as close as possible to the aforementioned colony, trying to choose the most advantageous and useful place to found the first settlement, bearing in mind that on that border it may be necessary to build fortifications for the defence of the limits”.

4.35. In Rule 2 of the Instruction, after indicating the location of the Dutch establishments, it mentions the occupation of the territory:

“The said Dutch colony of Esquivo, and the others which the States General possess on that coast, are all generally found on the banks of the rivers close to the seashore, without penetrating far into the interior of the country, and therefore behind the Esquivo and other Dutch possessions, running eastward to French Guiana, and

²⁶⁷ *Ibid.* The raids and usurpations referred to in the letter were raids by slave hunters who spread terror among the indigenous populations, who turned to the villages of the Spanish missionaries for protection.

²⁶⁸ On his appointment see *The Counter-Case of the United States of Venezuela before the Tribunal of Arbitration to Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2*, Vol 3, No. 59.

²⁶⁹ *Blue Book* 8, pp. 87-90 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

southward to the river of the Amazons, the land is clear of part of them, and occupied only by Gentile Indians and a large portion of the Gentile Indians, running eastwards to French Guiana, and southwards to the river of the Amazons, the land is clear of part of them, and only occupied by the Gentile Indians and a growing portion of fugitive blacks, slaves of the Dutch, and also of the plantations of Guiana”.

4.36. Ábalos added that:

“The Commissioners shall endeavour to occupy the said lands, as belonging to Spain, its first discoverer, and not ceded or occupied at the present day by any other power, nor having title to it, advancing in the occupation on the eastern side as far as possible until it touches French Guiana, and also extending as far as they can on the southern side until they reach the limits of the crown of Portugal”,

and that:

(rule 4) "it would be very convenient that the aforementioned occupation of land and its population should begin at the back of the Dutch establishments in the immediate vicinity of French Guiana, and especially at the rivers that have been named Oyapoco and Aprovak,... because once the establishment of the limits has been verified, foreigners are prevented from trying to occupy what belongs to us, and they will try to do so if they continue to see it free, to which is added the fact that once we are situated on the frontier, in an advantageous place on it, it can be thought of if circumstances require it, if circumstances require it, and there are no other reasons to hinder it, it may be considered to build a small fortress to serve as an ante-mural for the security of the limits, and at the same time as a shelter for the new settlers against the incursions of the Gentile Indians and fugitive blacks who have risen”.

4.37. However, knowing the difficulties posed by the task of settling these places, the Instruction suggested (rule 5) that the first settlement should be erected in the most suitable place between the mouths of the Orinoco and the colony of Esquivo and that (rule 7) where it was not possible to found towns, all possible land should be occupied towards the east

and south by means of cattle herds “from distance to distance”, to prevent the new settlers from falling victim to the ferocity of fugitive blacks and Gentile Indians.

4.38. Capuchin missionary livestock farming was of great importance in the occupation and development of Guayana Esequiba. Its growth was significant in the region and generated an economy of productive chains that turned this region into one of the richest areas of the entire Captaincy General of Venezuela.

4.39. The Instruction (Rule 8) asks the Commissioners for information on:

“The places to which the Dutch in Esequivo, Surinam, Berbice and Demerara, and the French in French Guiana, have extended; the internations they have made; the cattle they have introduced and promoted; the dispositions in which they are found; the designs they discover or fear; the precautions that should be taken to stop their progress”.

4.40. As evidenced by the Report of 27 November 1779, which Inciarte presented to the Intendente General of Venezuela on the reconnaissance and population of the eastern part of the lower Orinoco,²⁷⁰ the commissioners examined the coastal area including the Moroco River and the area of the Pomaron River. On the Dutch Post on the Moroco, Inciarte noted:

“It is advanced from Esquivo towards the Orinoco, something of eighteen leagues, one being almost northwest and southeast of the other, and although at present it is a despicable house that has no more than two dismounted cannons with some stonework, it would be very convenient for the security of the new settlements that would be made, to dislodge the said Dutch from Esquivo in the term of twenty-four hours”.

²⁷⁰ *Blue Book* 8, pp. 91-96, at p. 94 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

4.41. The commissioners chose a site on the Moroco to locate a village and a fort that would prevent the passage of any enemy and another on the high Pomaron where they considered it appropriate to install a fortified village, as with it:

“The Dutch are deprived of communication, not only with the various nations of Indians that fall to the south of Esquivo and with all the channels of the Orinoco, but also with the whole of Parime, since there being no other passage for them than the said river, by cutting it off, they are prevented from all correspondence, since they can only achieve this with their compatriots in Surinam and the French of the Cayenne that are on the eastern side of the said Esquivo”.²⁷¹

4.42. Spain’s interest in occupying the area was thus evident and, furthermore, there was no claim by the Dutch to the territory, while as the Dutch governor of Esequibo was informed of Inciarte’s presence and his intentions to build settlements and/or forts, informed the Compañía de las Indias, and no protest was lodged with the Spanish Crown.

4.43. A consequence of Inciarte’s trip was the Royal Order of 1 October 1780 on the recognition and population of the eastern part of the Lower Orinoco, which authorised the expulsion of the Dutch from the Moroco River and the construction of the planned establishments on that river and on the Pomaron. In the same, instructions are given that in the event of any complaint from Holland it should be stated that:

“The matter has been and is proceeding in accordance with the laws and general instructions of good government of our Indies, which do not permit such intrusions by foreigners into Spanish dominions as these; for the same will be said here if any complaints or claims are made by the States General of Holland”.²⁷²

4.44. Inciarte’s plan was later expanded by Intendente Saavedra to also cover the banks of the Orinoco from Angostura to the delta at its mouth.

²⁷¹ *Ibid.*, p. 95.

²⁷² Royal Order to survey the region East of the Lower Orinoco, 1 October 1780 (**Annex 13**), pp. 97-98.

4.45. A second report by José Felipe de Inciarte, dated 5 December 1783, on the eastern part of the lower Orinoco under his care,²⁷³ pointed out the disadvantages of expanding the population and the advantages that would be derived from its settlement, and therefore recommended founding:

“two villages of Spaniards, one in the lands of the Orinoco to the south of the western head of the said island of Imataca and the other eight to twelve leagues to the east of the first... and to assign "eight missionaries with a sufficient escort for the reduction of the multitude of Mañosas, Guaraunos and Carib Indians who live in the vicinity”.

4.46. Intendente Saavedra, in a letter dated 1 February 1784, emphasised that:

“The population, in the opinion of all intelligent people, should begin with the lower Guiana, which is the flattest, most fertile and most suitable for the new foundations to flourish. From there it will be easy to extend them to the frontiers of Esquibo and Demerari in order to contain the Dutch, to the vicinity of the Rio Negro to border the Portuguese, to occupy the main canals of the Orinoco and to avoid clandestine introductions. Otherwise, none of these objects can be achieved, and if the population and fort projected in the vicinity of Esquibo is executed, keeping low Guayana deserted, the infinite cost to the Royal Treasury of an establishment so many leagues distant from the town will be a reservoir of abuses, a deposit of contraband, a precarious possession in time of war and a weak barrier against the bordering nations.”²⁷⁴

4.47. The interest in settling in the Barima River is reflected in the Letter from the Intendente General de Caracas D. José de Abalos to D. José de Gálvez,²⁷⁵ about the escort of 25 men for the mission of Guayana, sending missionaries and founding some Spanish villages among the Indians, 1780, which reads:

²⁷³ *Ibid.*, pp. 98-103.

²⁷⁴ Archivo General de Simancas, ‘El intendente sobre el regreso de José de Inciarte de explorar la frontera con los holandeses en busca de sitios para poblar 25/11/1779, Ref. SGU, LEG, 7305, 3, 42.

²⁷⁵ José Gálvez held the post of Secretary of the Indies.

“My Lord: [...] for which purpose Your Excellency commands me, by order of Your Majesty, that, in agreement with this Captain General and the Governor of Guayana, I should endeavour to erect in that province some Spanish villages among the Indians of the new reduction, wherever I consider them most suitable.

In your understanding and fulfilment, I must inform your Excellency that I have long had the same thought, the execution of which I am ordered to carry out, and with this same idea I discussed its practice with the previous Prefect of the missions, when he was here, and it seemed very convenient to him that it should be carried out, but both this and other plans, Your Excellency, have been detained due to a lack of settlers”.

However, from all that has been said, you may be persuaded that I will not lose sight of the royal commission to found some villages among those of the Capuchin missions of Guayana, and that I will do everything within my power and authority to do so”.²⁷⁶

4.48. In short, from 1648, the year of the conclusion of the Treaty of Münster, until the time of Venezuela's independence, the Spanish dominated the region politically and effectively occupied it. They also made their presence felt in the area of the Moroco and Pomarón rivers and claimed these territories as their own. In the Minuta de Carta reservada a Iturriaga, dated Madrid, 8 October 1753, Spain restated its plan to evict the Dutch.²⁷⁷

4.49. Crucially, the Dutch did not establish any permanent settlements west of the Essequibo that would have impinged on Spanish rights or deprived Spain of its title to the territory.

²⁷⁶ AGI, Caracas, 946.

²⁷⁷ A.G. Simancas, Secretaría de Estado, Legajo 7243, in *British Guiana Boundary Case presented on behalf of her Majesty's Government*, Appendix, vol II 1724-1763, London, 1898, p. 86 (available at: https://books.google.com.cu/books?id=DmcMAAAAYAAJ&printsec=frontcover&hl=es&output=html_text&source=gbg_summary_r&cad=0).

4.50. In its Memorial, Guyana gives an account of the Dutch presence with little rigour and scarce evidence, and of the period here analysed it only speaks of the fort of Zeelandia and the transfer of the seat of the administration to the same.²⁷⁸

4.51. The reality is that the Dutch did not venture west of the Essequibo River, except to a very scarce and limited extent, on the northernmost coastal side around the mouth of the river and without claiming any right to do so. The low productivity of the Essequibo colony led the Dutch at the end of 1657 to entertain some exploitation on western side of the river, between the Pomaron and the Moroco. However, the Dutch Pomeroon post, New Zealand fort and the town of Middelbrough did not constitute permanent establishments. Indeed, in 1689, the West India Company decided to abandon the Pomaron region, return to the Essequibo and reinforce the Kykoveral fort.²⁷⁹ In the same vein, when it was informed that a small post had been erected on the Barima River (1684), the West India Company Governor Beekman ordered to stop all traffic to the Orinoco.²⁸⁰

4.52. The same happened in the Cuyuni river basin where Dutch presence appeared and disappeared from one map to the next like a flower of a day. Furthermore, as indicated in the Comunicados conjuntos entre el Capitán General de Venezuela y el Padre Prefecto de la Misión de Guayana acerca del estado actual de los pueblos misionales (1778), the attempts of the Dutch to settle in lands above the Cuyuni, as was the case of Tocoropati and Aguigua, failed as they were expelled in 1758 and their settlements only reached the mouths of the Cuyuni and Mazaruni rivers.²⁸¹

4.53. In the report presented by D. Antonio López de la Puente, commissioned by the Governor of Guayana to explore the Cuyuni River up to the limits of the Dutch colony of Essequibo, on 26 February 1788, it is stated that:

²⁷⁸ GM, pp. 34-35, paras. 2.16-2.19.

²⁷⁹ *Blue Book* 7, pp. 127-128 (available at: <https://kamuru.mppre.gob.ve/index.php/s/oiwST6o4wKpTETi>).

²⁸⁰ *Ibid.*, pp. 116-117.

²⁸¹ AGI, Caracas, 946.

“having descended the river to the site of the Horqueta which it forms to drain into the Esequivo, which is where the possessions of the said Colony began, he found the first dwellings of the Dutch at the mouth of the Masuruni, that is to say, at the same site of the Horqueta, without until then having usurped new territories on this part”.²⁸²

4.54. The temporary character of the Dutch settlements was reflected in the Venezuelan Boundary Commission's *Grand View of European Occupation, 1597-1803 (1814)* map²⁸³ (map 5). The short life of these establishments can be seen by looking at the different maps marking the period (1674-1803)²⁸⁴ (maps 6-12).

²⁸² Report of Antonio López de la Puente upon his exploration of the Cuyuni River in 1788, 13 April 1788 (**Annex 14**).

²⁸³ “Grand View of European Occupation, 1597-1803 (1814)”, *David Rumsey Map Collection*, see, Atlas, VCM.

²⁸⁴ See the various maps produced by the United States Commission on the state of European occupation between 1674 and 1803 and relating to 1703, 1724, 1756, 1773, 1773, 1796 and 1803, *David Rumsey Map Collection* (**Atlas**).

[illegible]

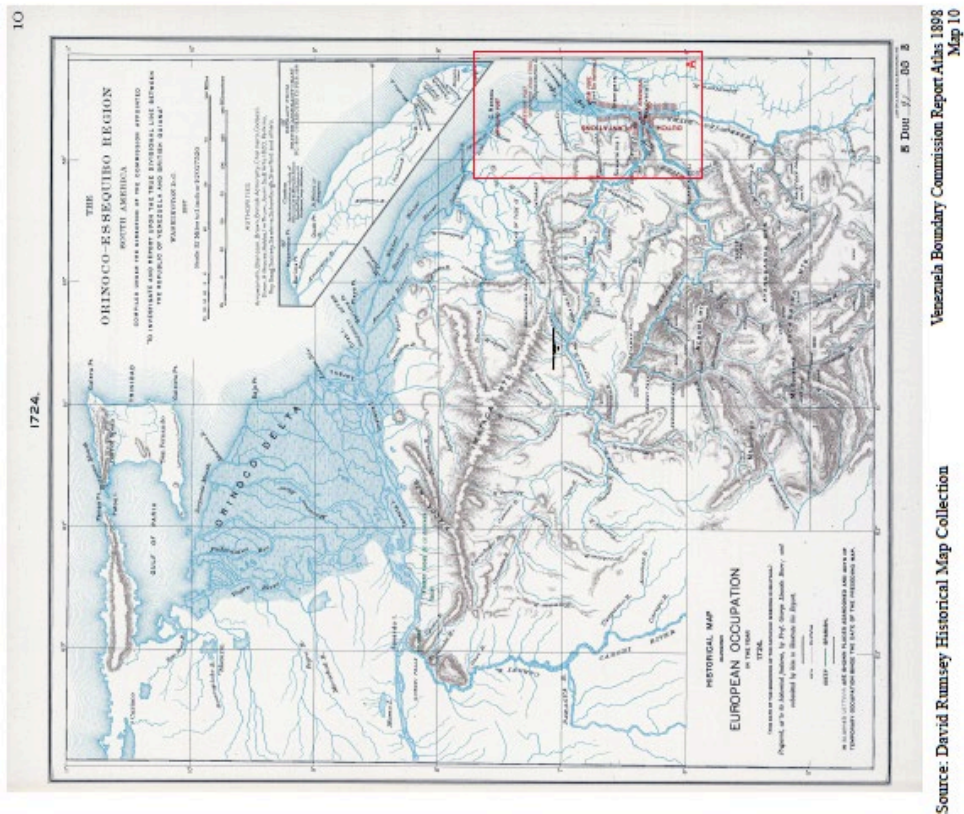
Historical map showing European Occupation
in the year
1674

MAP 30

²⁸⁶ Map 7 of the Venezuela Commission Report Atlas, 1898 (**Atlas**).

[illegible]

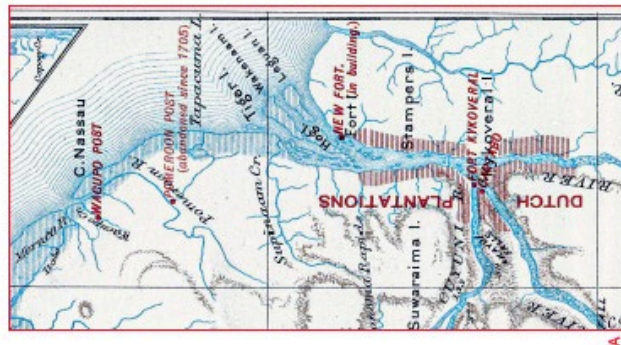
MAP 31



MAP 32. Historical map showing European Occupation in the year 1724²⁸⁸

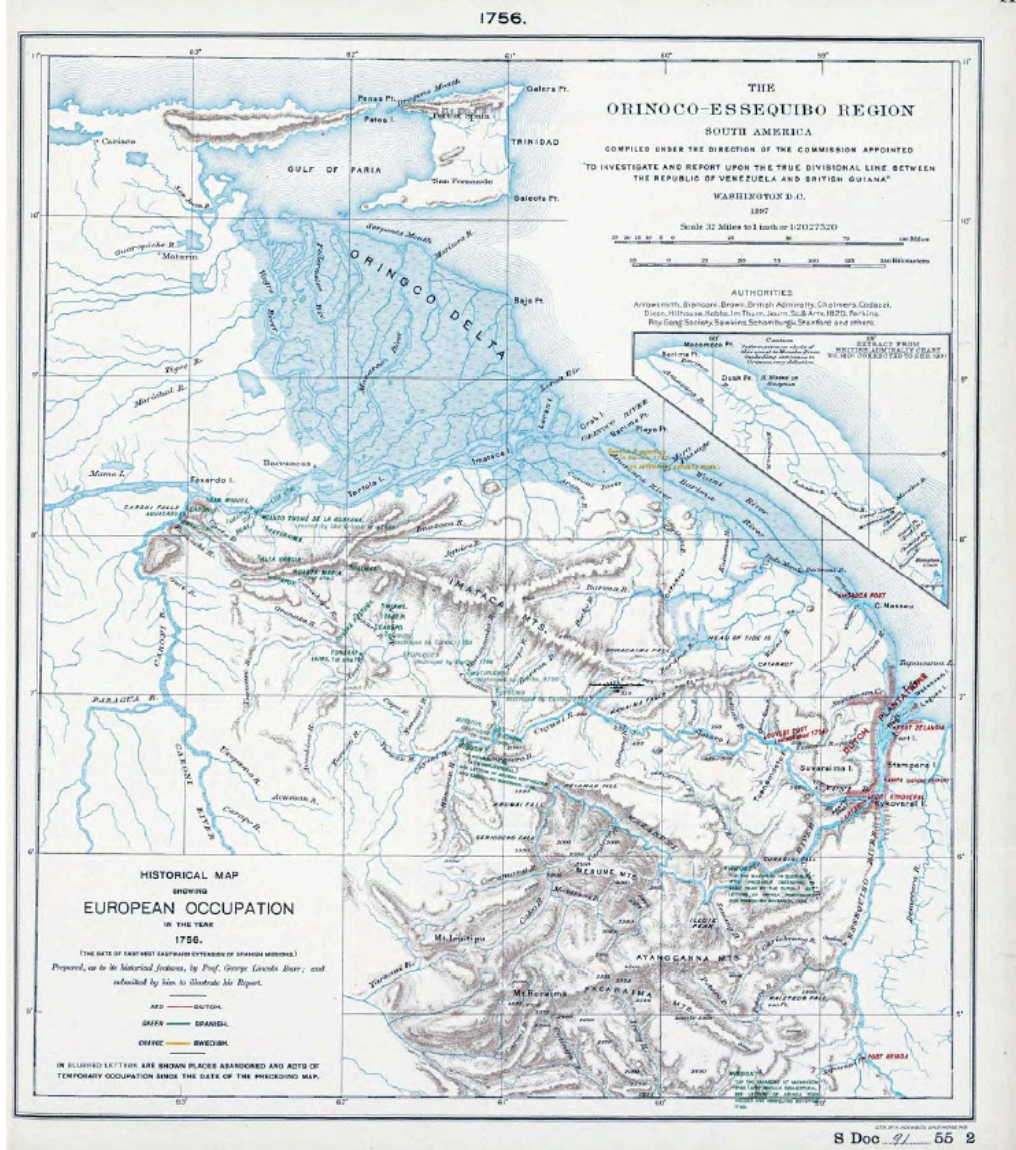
²⁸⁸ Map 10 of the Venezuela Commission Report Atlas, 1898 (Atlas).

THE ORINOCO-ESEQUIBO REGION
compiled under the direction of the Commission appointed
to investigate and report upon the true divisional line between
the Republic of Venezuela and British Guiana



Historical map showing European Occupation
in the year
1724

MAP 32

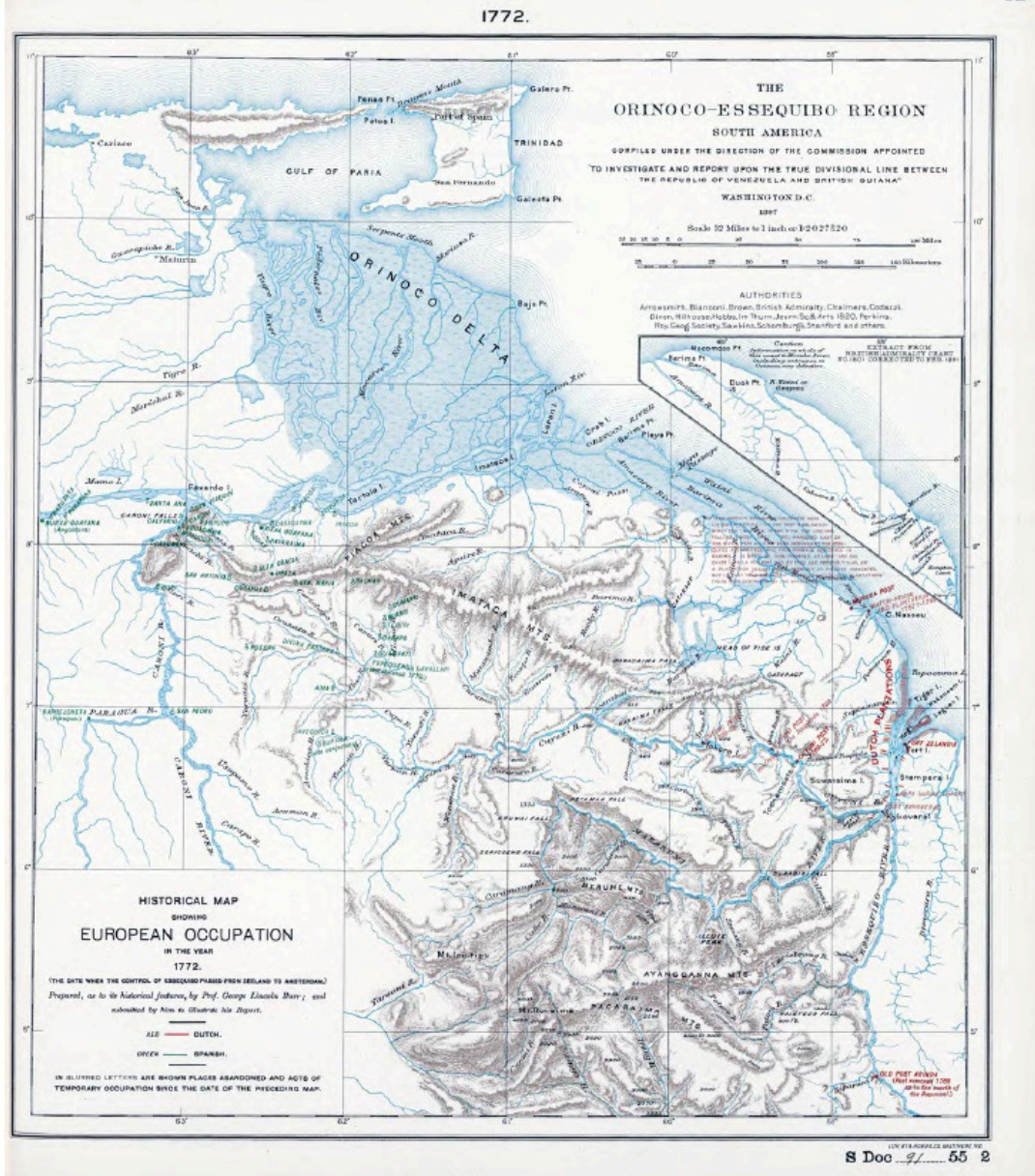


Source: David Rumsey Historical Map Collection

Venezuela Boundary Commission Report Atlas 1898
Map 11

MAP 33. Historical map showing European Occupation in the year 1756²⁸⁹

²⁸⁹ Map 11 of the Venezuela Commission Report Atlas, 1898 (Atlas).



Source: David Rumsey Historical Map Collection

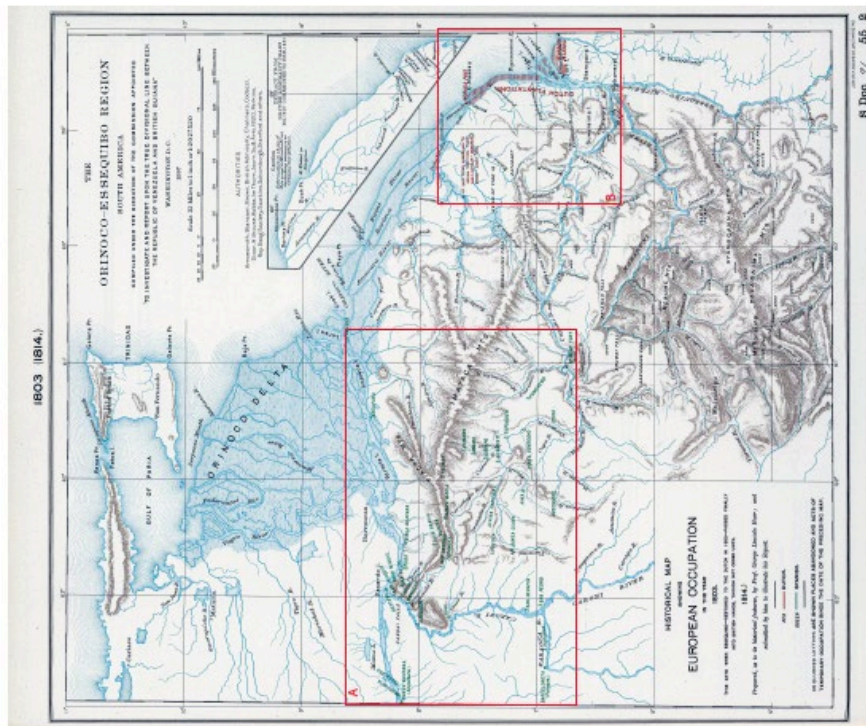
Venezuela Boundary Commission Report Atlas 1898
Map 12

MAP 34. Historical map showing European Occupation in the year 1772²⁹⁰

²⁹⁰ Map 12 of the Venezuela Commission Report Atlas, 1898 (Atlas).



²⁹¹ Map 13 of the Venezuela Commission Report Atlas, 1898 (**Atlas**).



Source: David Rumsey Historical Map Collection

THE ORINOCO-ESSEQUIBO REGION
compiled under the direction of the Commission appointed
to investigate and report upon the true divisional line between
the Republic of Venezuela and British Guiana



Venezuela Boundary Commission Report Atlas 1898
Map 14
Historical map showing European Occupation
in the year
1803

MAP 36

²⁹² Map 14 of the Venezuela Commission Report Atlas, 1898 (Atlas).

4.55. The very limited nature of the Dutch presence on the west bank of the Essequibo River was also maintained by Governor Beaujon, a Dutch who, when speaking of the boundaries of the colonies, considered the existence of settlements on the west bank of the Essequibo in the following terms:

“Demerara being on the windward side of the Essequibo extends from the creek of Abari the western boundary of Berbice to the stream of Bourasirie and from here begins the Essequibo which extends to the post of Moruca situated next to the Pomeron River below which begins the Spanish border”.²⁹³

4.56. The British were fully aware of this reality at the end of the 19th century. This is illustrated by a letter sent by Consul Churchill to the Marquess of Salisbury on 13 December 1896.²⁹⁴ In this letter Consul Churchill reports to the Marquis of Salisbury that as a result of his investigations ordered by Salisbury, he found Dutch documents from 1785, which proves Dutch presence up to the mouth of the Pomeroon River, explaining that it was not possible to expand agriculture towards the Moroco River since the Spaniards protected the runaway slaves from the Dutch plantations. He further states that an agreement with the Spaniards to return runaway slaves would return fugitive slaves and would allow agriculture to expand. Thus, it is clear that the Dutch knew the maximum limit of occupation to the west at the mouth of the Pomeroon River. The Treaty of Aranjuez of 1791 was the last Dutch-Spanish treaty in this region and its importance lies in the recognition of the slave problem and the sovereignty of the two States in their respective territories. Holland had no presence beyond the Pomeroon and aspired to reach the mouths of the Moroco. These two aspects were known to the English in 1899, as their internal correspondence shows, thus constituting important evidence of the real limit of occupation in 1814. It should be clarified that Holland (the Bavarian Republic, proclaimed on 19 January 1795 and ended on 5 June 1806), lost its independence in the last decade of the 18th century and did not advance in Guayana Esequibo territory after 1791. The West India

²⁹³ Colonial Office, III, 3, Governor Anthony Beaujon to the Duke of Portland, 15 June and 12 July 1799.

²⁹⁴ Letter from Consul Churchill to the Marquess of Salisbury, 13 December 1896 (**Annex 170**).

Company was dissolved in 1799, reflecting the loss of Dutch power in the region, to the point that some of its colonies were occupied by the British from 1796.

(iii) VENEZUELA SUCCEEDED SPAIN AS HOLDER OF TERRITORIAL SOVEREIGNTY

4.57. The Captaincy General of Venezuela, as a territorial and administrative entity, played a fundamental role in the management of the territory, but its work went beyond administration and defence. The ideas that culminated in Venezuela's independence and the creation of a new sovereign Republic were born within it.

4.58. On 19 April 1810, a major step was taken in the liberation process against Spain, which led to the dismissal of the governor appointed by the Spanish Crown, the signing of the Act of Independence on 5 July 1811 and the establishment of the new Constitution of 1811, which established the republic on the territory of the then Captaincy General of Venezuela, made up of all the provinces in accordance with the constitutional prescription of article 128.²⁹⁵

4.59. The Decree of 10 October 1817, by which Guyana became loyal to the Republic, referred to the limits of the Department of the Lower Orinoco, so that it can be seen that the Marroco was the maximum point of Dutch/English occupation. Its article 2.3^o reads:

“Department of Lower Orinoco. To the North: the streams of the Orinoco from the mouth of the Caroni to the mouth of the Rio Grande, and the coast of the sea as far as Fort Muruca Exclusive. To the East and South: the limits with foreign possessions. To the West: those that have been indicated to the Department of the centre by the East.”²⁹⁶

²⁹⁵ Federal Constitution of the States of Venezuela, 1811 (available at: https://www.cervantesvirtual.com/obra-visor/constitucion-federal-de-los-estados-de-venezuela-21-de-diciembre-1811/html/86de8dbc-4b14-4131-a616-9a65e65e856a_2.html).

²⁹⁶ Decree by the Liberator Simón Bolívar, 15 October 1817 (available at: <http://www.archivodellibertador.gob.ve/escritos/buscador/spip.php?article2283>).

4.60. In the constitutional texts of the Republic and in the laws on territorial division, the territory of Venezuela is identified by reference to that which corresponded to the Captaincy General of Venezuela before the political transformation that began on 19 April 1810.

4.61. There was graphic evidence of its extent, as noted above, such as Agustín de Codazzi's 1793 map of the Viceroyalty of Santa Fe and the Captaincy General of Venezuela²⁹⁷ and, for the Gran Colombia period, José Manuel Restrepo's 1827 map.²⁹⁸

4.62. Venezuela's ownership of the territory of the Captaincy General of Venezuela was ratified by the Treaty of Peace and Friendship of 30 March 1845 between Venezuela and Spain, in which the Spanish Crown recognised the Republic of Venezuela and the cession of its rights over the territory.²⁹⁹

4.63. Since its independence and until the Arbitral Award of 3 October 1899 fraudulently stripped Venezuela of this immense territory, Venezuela exercised its sovereignty over Guayana Esequiba. Examples include the Decree of 11 May 1843, which provided for the establishment of a lighthouse at the entrance to the Orinoco River, a notification from the Governor of Demerara, dated 3 December 1857, highlighting the prohibition of entry into Venezuela via the Cuyuni River, which had been decreed by the Government of the Republic.³⁰⁰

²⁹⁷ “Carta del Vireinato de Santafe y de la Capitanía General de Venezuela”, *David Rumsey Map Collection* (available at: https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~246181~5514967:Letter-from-the-Vireinate-of-Santafe-y-de?sort=pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no&qvq=w4s:/where%2FColombia;q:Restrepo;sort:pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no;lc:RUMSEY~8~1&mi=14&trs=29).

²⁹⁸ “Colombia”, *David Rumsey Map Collection* (available at: https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~20243~590076:Colombia-?sort=pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no&qvq=q:GRan%20Colombia;sort:pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no;lc:).

²⁹⁹ Treaty of Peace and Recognition between Venezuela and Spain, 30 March 1845 (**Annex 4**).

³⁰⁰ *The Counter-Case of the United States of Venezuela before the Tribunal of Arbitration to Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2, 1897*, vol. 3, nos. 98 and 87 respectively.

4.64. As will be further explained below, Venezuela also defended its territorial integrity by protesting and opposing British abuses, as highlighted in the letter sent on 15 November 1894 by Dr. José María Rojas to the Venezuelan Consul in Demerara, in which he refers to the decision of 13 May 1890:

“The Republic has never ceased to protest against the acts, the children of force alone, which have determined the possession by England of a considerable portion of Venezuelan Guyana. To prevent its continuation, in 1890 (13 May) it established the Barima-Pomaron and Esequibo-Cuyuní Districts; it later established a station at the confluence of the Yuruan, and the current Administration decreed the Alto Cuyuní Commissariat as the directing centre of others which will make the jurisdiction of Venezuela effective in those regions”.³⁰¹

II. THE BRITISH EXPANSIONIST POLICY AND VENEZUELA’S OPPOSITION

4.65. The following analysis shows first that there was no dispute whatsoever regarding the extent of the Venezuelan territory, until second, the British began to invent a dispute. The following presentation is structured in two parts. The first analyses the facts that demonstrate the British fraudulent strategy, distinguishing two series of events that occurred, first, from the exploration carried out by Robert Schomburgk until the rupture of diplomatic relations between Venezuela and the United Kingdom (1887) and, second, from this moment until the negotiations of the Treaty of Washington, a stage which saw the involvement of the United States into the settlement of the controversy. The second part demonstrates the impossibility of United Kingdom having acquired title to territorial sovereignty on the basis of prescription as a consequence of the constant Venezuelan protests, and also because the United Kingdom did not occupy the territory for the periods foreseen in the Treaty. Moreover, the British who entered the territory were private miners who came at their own risk, for short periods in search of gold, as stated by the British on multiple occasions. The temporary entry of these British subjects could hardly constitute settlements. In addition, the Treaty of London was signed in 1814, and any eventual

³⁰¹ *Blue Book 6, Historia oficial de la discusión entre Venezuela y la Gran Bretaña. Sobre sus límites en la Guayana*, Ministerio de Relaciones Exteriores, Caracas, 1981, p. 278 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

occupation made since that date would have been interrupted by the 1850 agreement. Indeed, Venezuela considered that the prescription clause was designed to refer exclusively to occupations prior to 1814 because the Treaty of 1850 interrupted the continuity of any occupation between 1814 and 1850, and therefore, such occupation did not comply with Rule A of the Treaty of Washington of 1897, *i.e.*, that 50 years of occupation would constitute good title.

(i) VENEZUELA'S UNCONTESTED TERRITORY

4.66. As legal history shows, Spain and then Venezuela had a sovereign title over Guayana Esequiba opposable to the Dutch, who recognised it in the Treaty of Münster. The Netherlands generally respected this Treaty, settling to the east of the Essequibo River where they were established at the time of its conclusion. This was the legal situation when the Netherlands ceded its possessions to Great Britain. The map established by Frederick Von Vouchenroeder, to which reference has already been made, illustrates this situation (map no. 12).

4.67. At the end of the Napoleonic Wars, Great Britain and the Netherlands concluded the Treaty of London of 13 August 1814,³⁰² by which the Netherlands ceded its settlements of Demerara, Berbice and Essequibo to the British crown, as they were in 1803. This cession is the only legal basis of the title that Great Britain held over the territories of the former Dutch colonies. Of course, the Netherlands only ceded in the Treaty of London what they had title to,³⁰³ *i.e.* what Spain had recognised as legitimately under Dutch control in the Treaty of Münster. It should also be recalled in this regard that the British Crown had committed in 1713 to restoring the Spanish dominions in the Americas as they were

³⁰² Convention between Great Britain and Holland relating to their Colonies, Holland cedes the colonies of Demerara, Essequibo and Berbice to Great Britain, 13 August 1814 (**Annex 3**).

³⁰³ As Arbitrator Max Huber warned in the *Island of Palmas* case, no one can cede more than they own; a connection that also conditions the validity of the title. See *Island of Palmas (or Miangas) Island of Palmas (or Miangas) (The Netherlands / The United States of America)*, PCA Case No. 1925-01, Award, 4 May 1928, p. 11.

under Charles II,³⁰⁴ whom reign finished in 1685, a few years after the conclusion of the Treaty of Münster.

4.68. The limits of the new British colony with Venezuela were therefore at the Essequibo River. However, since the Dutch plantations had been settled west of the Essequibo River, Venezuela considered of good policy to conclude a treaty with its new neighbour, including a boundary provision. Thus, in 1822, the Minister of Foreign Affairs of the Government of the Republic of Colombia instructed his plenipotentiary in London, J. Rafael Revenga, on how to deal with the boundary question with a view to concluding a treaty that would include a boundary provision.³⁰⁵ Although these instructions were never implemented, they are a further indication of the new Republic's interest in clarifying the boundary issue, as well as its plain knowledge of its settled rights.

4.69. There was nothing to suggest that a boundary dispute existed when Great Britain recognised the Republic of Venezuela, which was part of Gran Colombia, through the Treaty of Friendship, Commerce and Navigation of 18 April 1825. Then the state popularly known as Gran Colombia, a confederation formally called the Republic of Colombia, which according to Simón Bolívar's intentions had been conceived in 1819 for the integration of the republics of Venezuela and New Granada (now Colombia), defined the eastern border in the following terms:

“The Republic of Colombia is today composed by the countries known as Venezuela and Nueva Granada, and it is located within the heart of the torrid zone of South America. This beautiful and rich country extends by the Northern Sea, from the Essequibo River or

³⁰⁴ Treaty of Peace between England and Spain, Utrecht, 13 July 1713, Exp. 42 (**Annex 2**).

³⁰⁵ The instructions stated: “[...] Agree as exactly as possible to fix the dividing line [...] according to the latest treaties between Spain and Holland. The settlers of Demerara and Berbice have usurped a large portion of land which, according to them, belongs to us on the side of the Essequibo River. It is absolutely indispensable that these settlers either place themselves under the protection and obedience of our laws, or that they withdraw to their former possessions. For this purpose they will be given the necessary time [...]”: *Blue Book 6*, p. 498. See also *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, p. 6 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

the limits of the Province of Guayana, up to the Culebras River in the boundary with Guatemala.”³⁰⁶

4.70. Nor did it seem to make any difference when Great Britain again recognised in 1834 the Republic of Venezuela after its separation from Gran Colombia (1830), nor could the Republic of Venezuela have imagined what changes the British position would undergo and what their ambition would be when Her Britannic Majesty’s Minister in Caracas requested the construction of a lighthouse at Punta Barima to avoid the dangers to which ships were exposed. The letter sent on 26 May 1836 by Mr. Porter to Mr. Gallegos reads:

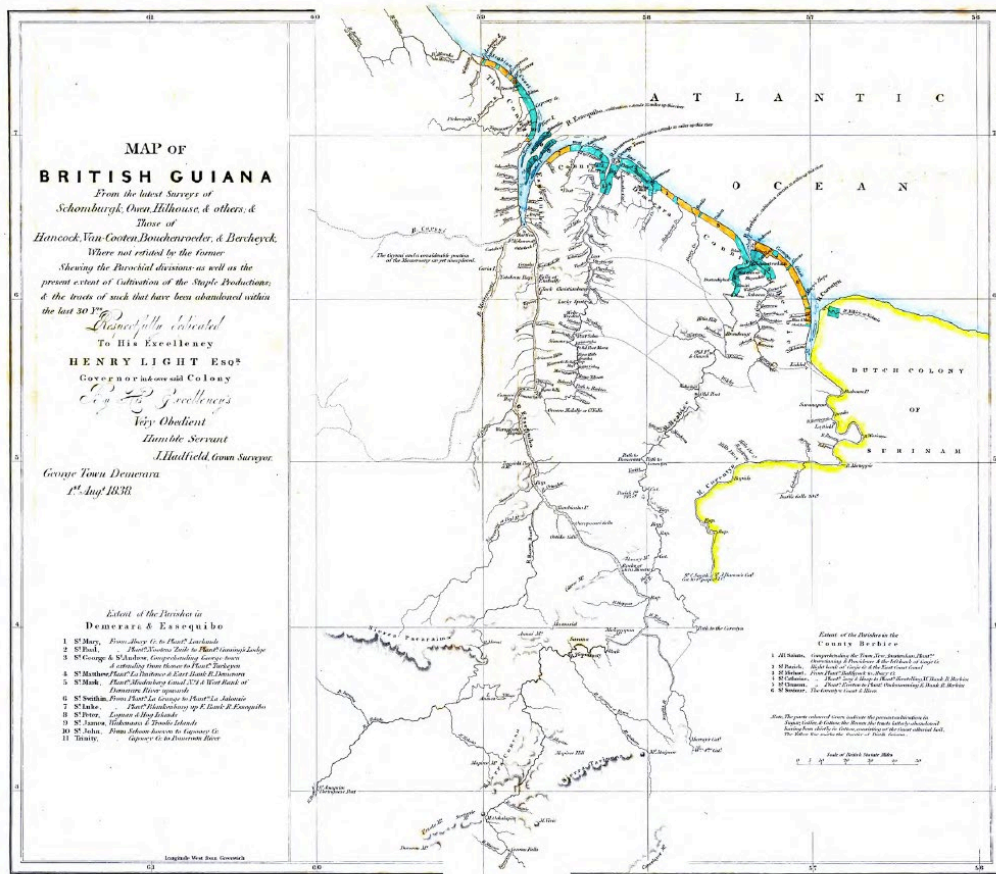
“[...] it falls to me by my official duties to represent to the Executive of this Republic the indispensable necessity, and this without further delay, of placing a fairly visible signal or lighthouse at the point of Barima which forms the great mouth of the Orinoco to the S. S. E. S., where I am informed that it can be done with the greatest facilities and advantages”.³⁰⁷

4.71. No one could it have imagined in August 1838 that the British intended to claim sovereignty beyond, at most, a narrow strip of land near the west bank of the Essequibo River. It was in this month that the British Crown surveyor and topographer, J. Hadfield, presented a gift to the Governor of British Guiana, H. Light. It was a map entitled *Map of British Guiana*, which had been commissioned by the House of Commons. This map was the result of a combination of the studies of the British colonial explorers and cartographers: Schomburgk, Owen, Hilhouse, Hancock, Van Cooten, Bouchenroeder and Bercheyck. It shows the parish divisions, as well as the widespread cultivation of the staple crops and all those lands that had been abandoned during the last 30 years, i.e. by 1808. All the indications on the map show that the settlements, until 1838, first Dutch and then British colonial, were located on a narrow strip of coastline to the north, a coastal strip that

³⁰⁶ Memorandum presented by the Plenipotentiary Minister of Gran Colombia José Manuel Hurtado to the Government of His British Majesty, London, 16-VII-1824, Public Record Office, F.O. 18/10 (**Annex 15**).

³⁰⁷ *Blue Book* 6, pp. 6-9 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).; *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 6-9 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

continuously bordered the Atlantic Ocean from the vicinity of the Moroco River, passing through the mouths of the Essequibo River and extending to the mouths of the Corinthian River. The map contains an inscription which emphasised that “the Cuyuní and a considerable portion of the Masaruny are still unexplored”, which unequivocally and early on denied, on the part of the English themselves, the British presence in the area (map 13).³⁰⁸



Source: Raremaps.com

MAP 19. Map of British Guiana, 1839³⁰⁹

³⁰⁸ An original copy is in the Venezuelan archives (BN /IGVSB). Map of British Guiana (available at: <https://www.raremaps.com/gallery/detail/64841/map-of-british-guiana-from-the-latest-surveys-of-schomburgk-arrowsmith>).

³⁰⁹ Map of British Guiana, Hadfield, 1839 (**Atlas, MAP 19**).

4.72. Nothing foreshadowed what was to come when the Governor of British Guiana, Henry Light, in September 1838, described the boundaries of British Guiana as follows:

“The Pomaroon river, at the western extremity of Essequibo, may be taken as a limit to the country, though there is a mission supported by the colony on the Maracca river or creek, a short distance westward, where 500 Spanish Indians are collected in a settlement under a Roman-catholic priest, recommended from Trinidad for that purpose; he is reported to be effecting good.”³¹⁰

III. THE BRITISH BASELESS CLAIM FRAUDULENTLY CREATED AND ARGUED HAS BEEN CONSTANTLY REJECTED BY VENEZUELA

a) The British invention of a territorial dispute and British ever-growing territorial claims

4.73. The elements that give concrete expression to the unlawful British expansionist policy are to be found in the explorations carried out by Robert Schomburgk and in British unilateral actions that disregard the rights of Venezuela.

4.74. By acting unilaterally, Great Britain created a territorial dispute where there was none and fed it with territorial incursions, the drawing of lines that reflected its illegitimate pretensions and with which, when its interests required it, it tried to change the character of the territory from undisputed Venezuelan territory to disputed territory, and finally to British territory. Its final trick was to whitewash as prescriptions what was nothing more than usurpations contrary to basic international law and the treaties concluded between the two parties or their predecessors. In short, Britain was creating a fictitious environment that would allow it to satisfy its ever-growing territorial aspirations.

4.75. Two periods can be distinguished, before and after Venezuela broke off diplomatic relations with Great Britain (1887), which marked the intervention of the United States in the dispute. Great Britain's shameful manipulation of maps as a mechanism for rewriting

³¹⁰ Extracts from Letter of Henry Light, Governor of British Guiana to Lord Glenelg, 1 September 1838 (**Annex 16**).

history and as a means of supporting its illicit claims will be presented separately as an undisputable proof of the British manipulation.

b) From Robert Schomburgk's "exploration" to the severing of diplomatic relations

4.76. The implementation of Britain's expansionist policy began with the exploratory mission to Guiana entrusted to Robert Schomburgk.³¹¹ He had already worked for the Royal Geographical Society and the Colonial Office on the reconnaissance of the terrain in 1834 and entertained an exploration of the area in 1835. At this time, the boundary line had already been described by Alexander von Humboldt, a learned and neutral observer who confirmed without hesitation that the border between Venezuela and British Guiana was in the Essequibo River,³¹² except at the point on the coast where the Moroco River flows into it.³¹³

³¹¹ When O'Leary, the British Consul General, informed the Venezuelan Foreign Office of the appointment of R. Schomburgk to recognize and demarcate the boundaries of British Guiana, Venezuela considered that the most appropriate course of action was to conclude a boundary treaty and then proceed with the joint demarcation, but this wise proposal was not heeded by Great Britain.

³¹² On Robert Schomburgk and his lines, see the work of P. Ojer, *Robert H. Schomburgk, explorador de Guayana y sus líneas de frontera*, Universidad Central de Venezuela, Caracas, 1969.

³¹³ Humboldt wrote: "The following are the present boundaries of the republic of Colombia, according to the information I obtained on the spot, particularly at the southern and western extremities; that is at Rio Negro, Quito, and in the province of Jaen de Bracamoros. Northern coast, that of the Caribbean Sea, from Punta Careta (lat. 9° 36', long. 84° 43'), on the eastern border of the province of Costa Rica (belonging to the state of Guatemala), to the rivers Moroco and Pamaroun, east of Cape Nassau. From this point on the coast (lat. 7° 35', long. 61° 5'), the border of Colombia extends across the savannahs, in which some small granitic rocks protrude, first to the S. W., then to the S. E., towards the confluence of the Cuyuni River with the Masuruni River, where a Dutch post was formerly established opposite the Caño Tupuro. Crossing the Masuruni, the boundary runs along the western banks of the Essequibo and Rupunuri, to the point where the Pacaraimo Range (4° N. latitude) gives way to the Rupunuri River, which is a tributary stream of the Essequibo; then, following the southern declivity of the Pacaraimo Range, which separates the waters of the Caroni from those of the Rio Branco, it goes successively westward, by Santa Rosa (nearly lat. 3° 45', long. 65° 20'), to the sources of the Oroonoko, lat. 3° 40', long. 66° 10'); S. W., to the sources of the Rio Mavaca and the Idapa (lat. 2°, long. 68°), and, crossing the Rio Negro at the island of San Jose (lat. 1° 38', long. 69° 58') near S. Carlos del Rio Negro; W. S. W., across entirely unknown plains, to the Gran Salto del Yapura, or Caqueta, situated near the mouth of the Rio de los Enganos (lat. south 0° 35'); and finally makes an extraordinary turn to the S. E. at the confluence of the Rio Yaguas with the Putumayo, or Iça (lat. south 3° 5'); the point ...": A. de Humboldt, A. Bonpland, *Personal narrative of travels to the equinoctial regions of the New Continent, during the years 1799-1804; with maps, plans, &c.*, written in French by A. de Humboldt, and translated into English by H. M. Williams, London, Longman, Hurst, Rees, Orme and Brown, Vol. 6, Part. 1, 1826, pp. 154-155.

4.77. When O’Leary, the British Consul General, informed the Venezuelan Foreign Office of the appointment of R. Schomburgk for the elaboration of a map and the unilateral demarcation of the border on the ground, Venezuela considered that the best course of action was, to the contrary, to conclude a boundary treaty and then proceed with the joint demarcation. But this wise proposal was not heeded by Great Britain.

4.78. While for the Republic the codification into a Treaty of the existing boundary between Venezuela and British Guiana was a priority, Britain’s interest was obviously different. The letter from Lord Aberdeen, British Foreign Secretary, to Dr. Fortique, the Venezuelan Minister in London, dated 21 October 1841, is revealing of this difference. It reads:

“[w]ith regard to the proposal of the Venezuelan Government that the Governments of Great Britain and Venezuela should conclude a treaty as a preliminary step to the demarcation of the boundaries between British Guiana and Venezuela, let the undersigned observe that it appears to him, that if it should be necessary to adjust a treaty on the subject of the boundaries in question, such a measure should follow, rather than precede, the operation of the survey”.³¹⁴

4.79. In 1841, the publication of the Schomburgk line of 1840 in the *Parliamentary Papers* prompted the British government to issue instructions for the mapping and unilateral demarcation of the border on the ground:

“I come to instruct you that the course of proceedings which Lord Palmerston would suggest for Lord Russell's consideration is, that a map of British Guiana be made according to the boundaries described by Mr. Schomburgk; that such map be accompanied by a descriptive and detailed memoir of the natural features which define and constitute the boundaries in question, and that copies of such map and memoir be transmitted to the Governments of Venezuela, Brazil, and Holland as a statement of the British claim. That in the meantime British commissioners shall be sent to erect milestones on the ground, for the purpose of marking with permanent marks the boundary line claimed by Great Britain. It shall then be the duty of

³¹⁴ *Blue Book 6*, p. 11 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

each of the above governments to present such objections as they may have to those boundaries and to state the reasons on which those objections are based, and Her Majesty's Government would then make the appropriate and just reply thereto.”³¹⁵

4.80. The actions of the British commissioners, led by Schomburgk, provoked Venezuela's protest and evidenced its insistence on defining the legal border.³¹⁶ The British were forced to assert that the marks erected by the Prussian technician constituted “a provisional measure, not an act of possession”,³¹⁷ and Her Majesty's Government ordered their removal.³¹⁸ Aberdeen, then Britain's Foreign Secretary, acknowledged in 1842 that the posts that had been erected were not “indications of dominion and empire on the part of Great Britain”. Rather, they were “were only a preliminary step subject to future discussion between the two Governments”.³¹⁹ This statement was a clear acknowledgement that the British claim was not based on any legal title; it was simply trying to create out of nothing a perfectly fictional claim.

4.81. The line now drawn by Schomburgk was quite different from the one that had been known until then although he did himself recognise that:

“It must be generally acknowledged that Alexander de Humboldt, of all others, was best acquainted with the history of the former Spanish Colonies, and his long sojourn in Venezuela, and subsequent study

³¹⁵ F. O. to C. O. 18-III-1840. Also available at [https://www.google.com/books/edition/Accounts_and_Papers_of_the_House_of_Comm/1nFbAA AAAAQAAJ?hl=en&gbpv=1&dq=ACCOUNTS+AND+PAPERS,++\(COLONIES\)+1840+Vol+X XXIV&pg=PP7&printsec=frontcover](https://www.google.com/books/edition/Accounts_and_Papers_of_the_House_of_Comm/1nFbAA AAAAQAAJ?hl=en&gbpv=1&dq=ACCOUNTS+AND+PAPERS,++(COLONIES)+1840+Vol+X XXIV&pg=PP7&printsec=frontcover).

³¹⁶ Letter from Alejo Fortique to Lord Aberdeen, 5 October 1841 (**Annex 21**).

³¹⁷ *Ibid.*; *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, p. 10 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

³¹⁸ Exchange of Letters between Alejo Fortique and Lord Aberdeen, 10 January 1842, 31 January 1842 (**Annex 17**); Letter from Henry Light, Governor of British Guiana to Mr. Daniel F. O'Learly, 9 March 1841 (**Annex 17**); Letter from Mr. Daniel F. O'Learly to Mr. Aranda, 8 April 1841 (**Annex 17**); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp.16-20.

³¹⁹ Lord Aberdeen's letter of 31 January 1842 (**Annex 17**).

of its history, authorizes his opinion to [be given] weight and consideration.”³²⁰

4.82. What were the reasons that led Schomburgk to change the line described by Humboldt?³²¹ The confidential letter that Schomburgk sent to Governor Light on 23 October 1841, shows that the reasons had nothing to do with any sort of international legal title:

“The example of the difference which has arisen between Her Majesty’s Government and the United States with regard to the limits of Canada prove the necessity that to prevent future misunderstandings where limits are to be determined between adjacent territories, permanent or natural boundaries ought to be selected, such as rivers, ridges of hills, &c., which, ascertained with astronomical precision, leave no grounds for dispute.

[...] The Barima, and the uncultivated forests on marshy ground, present an impenetrable barrier against the interior, and debarkation from the Orinoco might be put under the fire of any number of guns — and the land reproaches on that soil could be easily rendered inaccessible to an invading force.

This is the importance which Colonel Moody in a military respect has attached to this point ...

Finally, trusting to the prospects of prosperity and a continued emigration to British Guiana, there could not be a more favourable position for a commercial settlement than Point Barima.”³²²

4.83. Confirmation that geopolitical reasons were laying behind the Schomburgk line can be found in O’leary’s letter to Henry Light on 4 August 1841. It warns of the strategic

³²⁰ R. Schomburgk to Governor Light, 23 October 1841 (available at <https://archive.org/details/venezuelabritis01venegoog/page/368/mode/2up>).

³²¹ P. Ojer, *Robert H. Schomburgk, explorador de Guayana y sus lineas de frontera*, Universidad Central de Venezuela, Caracas, 1969, p. 77. This work is essential to understand what happened with the so-called Schomgurgk lines.

³²² R. Schomburgk to Governor Light, 23 October 1841 (available at <https://archive.org/details/venezuelabritis01venegoog/page/368/mode/2up>).

importance of Barima Point as a commercial, political and military control point. The British, which already controlled Trinidad and British Guiana, would gain control of the interior of the continent with Punta Barima.

4.84. The letter of 4 March 1842 sent by Henry Light, Governor of the British Guiana Colony, to Lord Stanley, Minister of Colonies, is also enlightening:

“I have the honour to state that, were British Guiana/a well-peopled Colony, capable of employing a surplus population in the cultivation of the extensive tracts of waste land between the Pomaroon and the Orinoco, it might be necessary to insist strongly on every point marked by Mr. Schomburgk as the natural boundaries of this province.

Limited as is the population both of Venezuela and British Guiana, the Governments of neither country can derive any benefit from the boundary in question for at least a century to come; yet it is the hereafter that we must consider.

We have no claim to the Amacura River, west of the Barema, though in the old map of Major L. von Bouchenroeder, published in 1798, the first river is marked east of the second, both flowing into the Orinoco.

Mr. Schomburgk’s map, as well as Codazzi’s, place these rivers in their proper position, the Amacuro entering the Orinoco south-west of the Barema. [...]

Mr. Schomburgk assumes the Amacura as a boundary, I believe, only by a right of expediency. [...]

Neither the Barima nor the Amacura can now be of any importance to Great Britain, and could only be occupied at an expense of life and money which could not be expedient; but care should be taken that some more important Power than that of Venezuela should not get possession of them.”³²³

³²³ Letter from Governor Henry Light to Lord Stanley, 4 March 1842 (**Annex 18**).

4.85. It is relevant to note that this evidence that the British knew that they had no legal claim to the Amacuro River, west of the Barima River, was not presented before the Arbitral Tribunal in 1899, because it was then a secret British archive. However, by this letter, Governor Henry Light made clear that the British knew of the illegitimacy of the second Schomburgk line, and that Britain had no title to justify the appropriation of Punta Barima, contrary to what they claimed before the Arbitral Tribunal.

4.86. The Schomburgk line marked a British aspiration outside any legal title and could in no way be understood as the boundary of the hitherto disputed territory. Correspondence in 1844 between Dr Fortique, the Venezuelan minister in London, and Lord Aberdeen, head of the Foreign Office, on the establishment of the border shows that the territory that England was then trying to claim was between the Esequibo and the Moroco.

4.87. In his note of 31 January 1844, Dr. Fortique warned that:

“it cannot be denied that the Essequibo has been considered as the dividing line between the two possessions, either on account of difficulty in crossing it, its current being so strong that the natives called it ‘the brother of the Orinoco,’ or that the kings of Spain, being unable to control such a vast expanse of coast, reserved to themselves particularly that part lying between the Essequibo and the Orinoco, without, however, resigning the right they had to the rest of the territory.”³²⁴

4.88. Lord Aberdeen proposed in his note of reply the Moroco River as a border, as a form of “concession”, which of course it was not.³²⁵ At the time the British were not open to any “cession” of anything they thought they had. Lord Aberdeen’s “concession” was nothing more than a negotiating trick, pretending to relinquish an inexistent claim to obtain recognition of a likewise inexistent other claim.

³²⁴ Letter from Alejo Fortique to Lord Aberdeen, 31 January 1844 (**Annex 19**).

³²⁵ Note of Lord Aberdeen, 30 March 1844 (**Annex 22**).

4.89. Although it is not known if an agreement on such terms could have been reached, the British offer was rejected by Venezuela³²⁶ and Fortique's death the following year stalled contacts for the establishment of the boundary.³²⁷ In any case, it clearly shows that the British had not serious thought at the time that they could have a territorial title further west of the Moroco River, which is immediately west of the Pomeran River, but far east of the Orinoco.

4.90. International news revealing British intentions to take over Venezuelan Guayana triggered strong reactions of protest in the local Venezuelan press and massive demonstrations of repudiation in the capital. The British Chargé d'Affaires in Venezuela, Mr. Belford Winton Wilson, on behalf of the British government, proposed an agreement to the Venezuelan government whereby the British government undertook not to usurp or advance in the disputed territory in exchange for the Venezuelan government giving the British government a communication in which it undertook to do the same. This is one of the most important commitments in the history of the border dispute, known as the 1850 Agreement. Thus, in the note of 18 November 1850, the British representative stated:

“The Government of Venezuela, without being unjust to Great Britain, cannot for a moment distrust the sincerity of the formal declaration, now made in the name and express order of Her Majesty's Government, to the effect that Great Britain has no intention of occupying or usurping the disputed territory; so, in the same spirit of good faith and friendship, the Government of Venezuela can have no objection to make to Her Majesty's Government a similar formal declaration, to the effect that Venezuela itself has no intention of occupying or usurping the disputed territory. [...] His Majesty's Government will neither order nor sanction such usurpations or occupation on the part of British authorities, and the undersigned is persuaded that, should there ever be misunderstanding as to the determination of his Government on this point, he would gladly renew his orders in the matter; I therefore

³²⁶ To confirm this assessment, it is sufficient to read the Extract from the Instructions of the Government of Venezuela to Mr. Dr. Alejo Fortique, Venezuela's Minister in England, September 1841 (**Annex 20**).

³²⁷ This is stated in the Memorandum of 15 July 1882, prepared by Mr. Rojas, pp.191-218 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

cherish the conviction that, in accordance with the friendly directions of His Majesty's Government, that of Venezuela will not hesitate to send to the Venezuelan authorities in Guiana positive instructions to refrain from taking measures which the British authorities may justly regard as aggressive.”³²⁸

4.91. The Government of Venezuela, by a note of 20 December 1850, acceded to the request, declaring that it had no intention of occupying or usurping any part of the territory whose dominion was newly disputed by Great Britain, nor would it be indifferent to any other course of action on the part of Great Britain. It also ordered the British authorities to refrain from taking any steps which would violate the obligation which, by virtue of what had been declared, the Government had contracted, and which might lead to disastrous results.³²⁹

4.92. With this agreement, both Parties undertook to maintain the *status quo* without occupying the disputed territory. The conclusion of the agreement thus nullified any title that the Parties might claim against each other on the basis of an occupation carried out after that year and delegitimised any claim that would alter the existing *status quo*. This agreement was to be of central importance in the negotiation of the terms of the 1897 Treaty of Washington, which defined the rules of arbitration for the adjudication of the disputed territory.

4.93. At this moment the Venezuelan territory claimed by Great Britain was located between the Essequibo and the Pomeroon Rivers – Venezuela's understanding, which it stated on successive occasions when it pursued its policy of control of the territory or protested against British violations³³⁰ – or, according to an expanded British claim, between

³²⁸ AHMPRE, Old Archive, Country: Great Britain, Gestiones Diplomáticas, Vol. 9, 1884-1896, Fs.10-11.

³²⁹ Letter from Ezequiel Rojas to José Andrade, 9 December 1896 (**Annex 59**).

³³⁰ AHMPPRE, Actas relativas a las Comisiones venezolanas designadas para el estudio de los planos de las bocas del río Orinoco. Archivo Antiguo, País: Gran Bretaña, Periodo 1886-1887, Vol. 148, N° 12, Folios 22-45. 1886; AHMPPRE, Archivo Antiguo, Comunicación del Doctor Diego Urbaneja al Señor Saint John, País: Gran Bretaña, Periodo 1886-1887, Tomo II, Vol. 148. Folios 74-79. 1887; AHMPPRE, Archivo Antiguo, Queja sobre la actitud del Comisario Británico en Amacuro y por la extracción de oro en territorio venezolano. Demanda por el atrevimiento de Gran

the Essequibo and the Moroco. In any event, the territory in question was far from including the entire area between the Orinoco and Essequibo rivers, claimed later on by Great Britain.

4.94. However, Great Britain has no intention to respect its commitment in good faith, and to the contrary developed a creeping strategy based on increasing, without any sort of legal basis, its territorial claims, and re-qualifying the territory. Although it had committed not to usurp more territory, Great Britain developed a contrary strategy and gradually increased its claim over Venezuelan territory.

4.95. The discovery of the Yuruari region between 1850 and 1880 and the unleashed gold rush were some of the reasons behind the British actions in Guyana.³³¹ Indeed, the location of the main gold-bearing basins, the Hoyas del Cuyuní, del Callao and del Dorado, explain the fraudulent reasons behind the different lines claimed by the British and the reclassifications of territory not in dispute in a disputed territory, with which Britain tried to dispossess Venezuela.

4.96. Of course, the British were aware that the gold deposits were located in Venezuelan territory. The British Vice Consul in Ciudad Bolívar, Kenneth Mathison, who brought the

Bretaña de tomar jurisdicción sobre el Orinoco. Recapitulación de negociaciones desde 1840. Demanda de arbitramento o suspensión de relaciones. País: Gran Bretaña, Periodo 1886-1887, Vol. 148, Exp. 12. Folios 83-119. 1887; AHMPPRE, País: EUA, Protesta de Venezuela ante la usurpación de su territorio y el decreto del Gobernador de Demerara, Charles Bruce, que declara Barima puerto colonial inglés, además de crear una estación de policía. Venezuela protesta contra el acto de jurisdicción que la colonia británica pretendió ejercer sobre tierra de Venezuela. Exp. 471, Pieza 4, Folios 82-83. 1889; AHMPPRE, Archivo Antiguo, Sobre el derecho de Venezuela al territorio y el apoyo del gobierno venezolano al súbdito alemán Faull, quien fue autorizado para construir una casa y labranza en el margen derecho del Cuyuni. Menciona la denuncia del alemán, quien se quejó ante la autoridad venezolana de la presencia de hombres armados (ingleses) que le impidieron continuar con su labor, ante la denuncia fueron enviados policías ante toda agresión. País: Gran Bretaña, Tomo 164, Folio 328-329. 1894; AHMPPRE, Archivo Antiguo, Informe sobre los sucesos ocurridos en las riberas del Cuyuni. Defiende los derechos de Venezuela sobre el territorio y la evolución del poblamiento del territorio por parte de venezolanos. Señala que antes de 1890 existían propiedades pertenecientes a venezolanos. También denuncia la ocupación inglesa y los conflictos generados entre 1894-1895. País: Gran Bretaña, Tomo 164, Folio 201-220. 1895.

³³¹ J. Almécija Bermúdez, *La estrategia Imperial Británica en la Guayana Esequiba*, Universidad Católica Andrés Bello, Caracas, 1987: points out that it was the agricultural and mineral wealth, particularly the gold seams in the Yuruari basin, which, together with the economic crisis that shook the British colony between 1850 and 1880, motivated the implementation of this strategy of usurping Venezuelan territory.

discovery of the gold deposits to the attention of his superiors, also reported that the district in which the discovery had been made belonged to Venezuela.³³² This did not seem to be an inconvenience for Mathison, as he himself had already suggested the possibility of annexing Venezuelan Guiana to His Majesty's Crown.³³³

4.97. In 1863 the British Governor of the Colony refrained from granting concessions for the exploitation of gold mines on the grounds that they were in disputed territory.³³⁴ The British Government issued a notice on 30 January 1867, making it clear that it could not undertake to offer protection to British subjects invading the disputed territory, but would only recognise them as a community of British adventurers acting on their own responsibility and at their own risk and expense.³³⁵

4.98. The incursions that the British made into Venezuelan territory were individual incursions that did not have State authorisation and were limited to a few mining camps. The establishment of some camps followed the discovery of gold deposits in Barima from 1887 onwards. At the same date, in June 1887, the British government continued to ensure that adventurers entering the territory did so at their own risk and had no legal protection from their government. Despite the assertion of this private, limited and provisional character, the British changed their position and used the installation of the camps after 1887 to support the existence of an occupation that would somehow allow it to claim the acquisition of a title to territorial sovereignty by prescription.

³³² This is evidenced by Mathison's communications to Belford H. Wilson, British Consul in Caracas on 14 and 15 June 1850, The National Archives UK, Guiana Boundary, Vol. 4, Ref. FO 80/109.

³³³ *Ibid.*

³³⁴ Hincks to Newcastle, dispatch of 16 April 1863, C.O.111/333, The National Archives UK, Correspondence from 'offices' (Government departments and other organizations) and individuals on matters relating to British Guiana, Ref. FO 80/109. However, although the colonial authorities refrained from granting concessions, they did encourage prospectors to venture out in search of gold by promising them protection in case they were disturbed.

³³⁵ *The case of the United States of Venezuela before the tribunal of arbitration to convene at Paris*, Vol. 1, pp. 182 (available at: <https://archive.org/details/venezuelabritis01venegoog/page/368/mode/2up>).

4.99. All this would have led any *bona fide* observer to consider, during the arbitration proceedings that culminated in the award of 3 October 1899, that the territory lying west of the Essequibo River had not been occupied by the British until 12 years before the arbitration and that the existing occupation at that time had been rejected as having no legal effect by repeated warnings from both the Venezuelan and British governments.³³⁶

4.100. The conclusion is obvious: there was no British occupation. The British knew it well: they had no right whatsoever on the territory they coveted for its gold. It was therefore essential for Great Britain to manipulate the law and the facts, and to elaborate a sort of legal strategy based on the notion of acquisitive prescription, and for that purpose they inserted as a clause giving effect to this notion in the Treaty of Washington of 1897.

4.101. The question of the boundary between Venezuela and British Guiana was not discussed again until the 1870s. On 14 November 1876, the Venezuelan Foreign Minister, Dr Eduardo Calcaño, sent a letter drafted by the President of the Republic, Guzmán Blanco, to Lord Derby, Secretary of State at the Foreign Office. In this letter, Venezuela asserted and supported in Spain's title its right to establish the boundaries with British Guiana on the Essequibo River;³³⁷ a position reiterated in February 1887 by José María Rojas, who had been appointed Venezuelan Minister in London.³³⁸

4.102. From 1880 onwards, contacts between the Foreign Office, the Minister of the Colonies and Venezuela's representatives in London, as well as between the Venezuelan foreign ministers and the British representatives in Caracas, intensified. Successive communications up to February 1887 are written proof of British manipulation and of Venezuela's constant opposition to accepting as valid the usurpations of territory carried out by Britain in violation, among others, of the 1850 agreement.

³³⁶ *Ibid.*, p. 187.

³³⁷ *Blue Book* 8, pp. 504-51 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

³³⁸ Memorandum of Dr. Rafael Seijas, 15 July 1882 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

4.103. The map drawn up by the Venezuela Boundary Commission, entitled *Boundaries Claimed or Proposed*³³⁹ shows the different lines proposed or claimed by the Parties, showing that the British lines are moving, with no reason at all, except British greed, deeper and deeper into Venezuelan territory (map 16).

4.104. On 10 January 1880, Lord Salisbury, Secretary of State in the *Foreign Office* and known to have been an imperialist who worked for the maximum extension of the British Empire, sent a letter to José María Rojas in which he expressed his interest in a negotiated border that was not based on strict legal grounds and that would satisfy the interests of both countries. In it, the author “identified” the boundaries that Great Britain could claim, based in inexistent “ancient treaties with aboriginal tribes” and Dutch cession:

“The boundary which the Government of S. M. claims, by virtue of ancient Treaties with the aboriginal tribes and subsequent cessions from Holland, begins at a point at the mouth of the Orinoco west of Punta Barima, passes thence in a southerly direction to the mountains of Imataca, which line it follows north-west, passing from them through the high lands of Santa Maria, just south of the town of Upata, until it meets with a mountain range on the eastern bank of the river Caroni; following this southwards until it touches the great spine of the Guiana District, the Roraima Mountains of British Guiana, and from there, still southwards, to the Pacaraima Mountains.”³⁴⁰

4.105. He also warned that Great Britain could never accept the Venezuelan position of considering the Essequibo River as a boundary, as it would imply, as he wrote in a straightforward lie:

³³⁹ Venezuela-British Guiana Boundary Commission, *Boundaries Claimed or Proposed*, David Rumsey Map Collection, 1897 (available at: https://www.davidrumsey.com/luna/servlet/detail/RUMSEY~8~1~203924~3001803:Boundaries-Claimed-or-Proposed-?sort=pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no&qvq=q:Guiana;sort:pub_list_no_initialsort%2Cpub_date%2Cpub_list_no%2Cseries_no;lc:RUMSEY~8~1&mi=40&trs=220).

³⁴⁰ *Blue Book* 6, p. 44 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

“the abandonment of a province now inhabited by 40,000 British subjects and which Holland and Britain have successively possessed without interruption for two centuries”.

4.106. Of course, contrary to Salisbury's assertion, the territory was far from having such a large number of British subjects. Harrison proved this before the Paris Tribunal in 1899 by citing British censuses for the years 1831, 1851 and 1891. The British inflated the number of settlers to exaggerate the occupation and argue inexistent difficulties in withdrawing from the territory, as well as likewise inexistent need to protect their subjects. Subsequently, when the case came up for debate in the 1899 Tribunal, the British presented false population numbers to create a title of prescription that was in fact unsubstantiated both by the time of occupation as well as by number of occupants. Thus, the population argument became another false proof similar to the manipulation of the maps.

4.107. In view of the alarming change of position that such an approach implied with respect to previous British aspirations, Dr. Rojas asked Lord Salisbury first, and then Lord Granville who had succeeded Salisbury in office, whether Great Britain, as it had done in 1844, would agree to accept the Moroco River as the starting point of the border.³⁴¹ The British refusal³⁴² was followed by a new proposal by Dr. Rojas fixing the beginning of the border one mile north of the Bocas del Moroco.³⁴³ (map 16)

4.108. Great Britain's reply in a letter from Lord Granville, Secretary of State in the Foreign Office, dated 15 September 1881, was incorporated in a Memorandum in which, besides rejecting Venezuela's proposal, made a proposal considered to be in accordance with Schomburgk's original line.³⁴⁴ (map 16). This proposal was unacceptable to

³⁴¹ *Blue Book* 6, pp. 45-46 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

³⁴² Letter from Lord Granville to Dr. José María Rojas, 12 February 1881 (**Annex 23**).

³⁴³ Letter from Dr. José María Rojas to Lord Granville, 21 February 1881 (**Annex 24**).

³⁴⁴ Memorandum on the Boundary Question between British Guiana and Venezuela, *Blue Book* 6, pp. 50-52 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

Venezuela, which was already persuaded that obtaining an amicable settlement was unfeasible and that a solution in accordance with the law was necessary.³⁴⁵

4.109. In his memorandum Lord Grandville dared to assert a completely newly invented claim, abandoning its predecessor's brilliant idea of referring to inexistent "Ancient Treaties with aboriginal tribes":

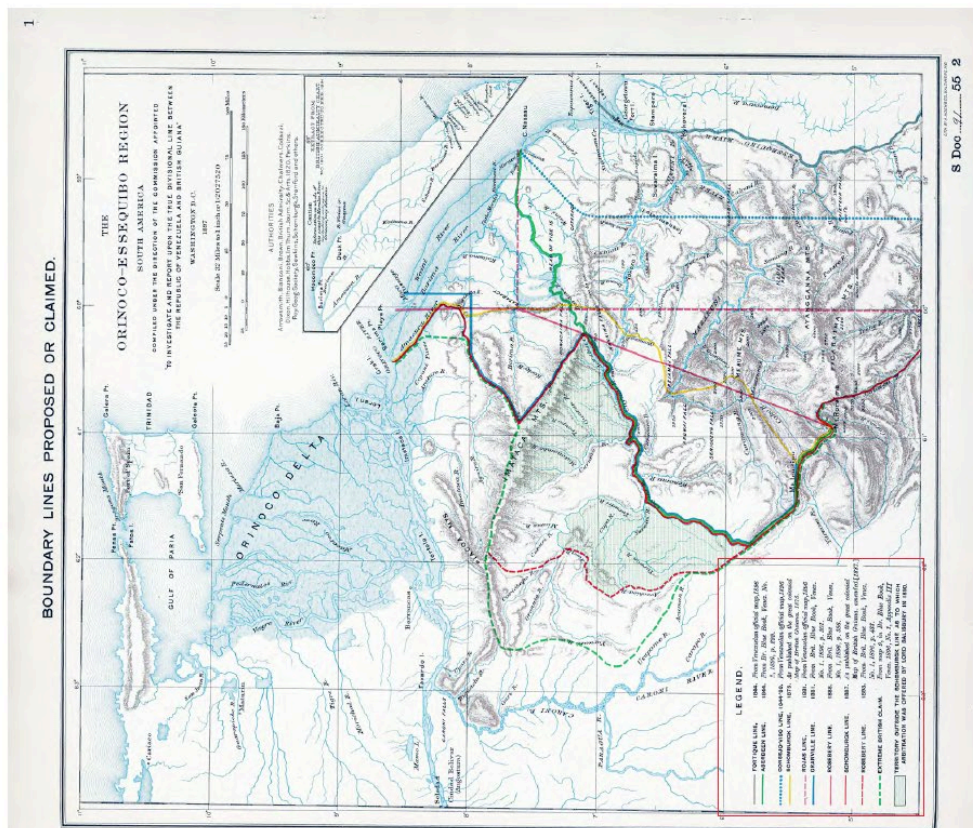
"As to that portion of the territory which lies between the Morocco and the Boca del Orinoco, the Government of H.M. believes that no impartial person, after studying the archives, can avoid the conviction that the Barima was undoubtedly before, and at the time of the conclusion of the Treaty of Münster (1648) possessed by the Dutch, and that consequently the right of the Government of H.M. to the territory up to that point is unassailable".³⁴⁶

4.110. Such assertion is of course factually untenable. To recall, in 1836, Great Britain knew and accepted that Punta Barima was Venezuelan and, precisely for that reason, asked the Venezuelan government to install a lighthouse. But it also demonstrates that in 1881 the British, as successors to the Dutch states, knew that they could never have claimed against Venezuela, as successor to Spain, anything that was not under Dutch rule according to the Treaty of Münster.

4.111. The insurmountable differences over the boundary question gave Venezuela, which was sure of its rights, the impetus to the search for an arbitration solution. The negotiation of a treaty of friendship, commerce and navigation opened the door to the possible incorporation of a general arbitration clause, but this door was closed with the dismissal of Granville as Secretary of State and his succession by Lord Salisbury, again appointed as Foreign Secretary, who proposed changes to the arbitration commitment made by his predecessor.

³⁴⁵ Memorandum of Dr. Rafael Seijas, 15 July 1882 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

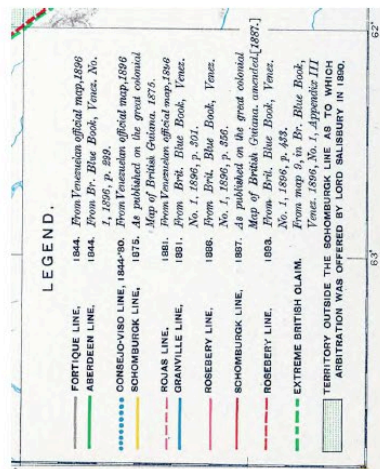
³⁴⁶ Item 5 Memorandum, *Blue Book* 8, pp. 191-218 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).



MAP 26. Boundary Lines Proposed or Claimed³⁴⁷

³⁴⁷ Map 1 of the Venezuela Boundary Commission Report Atlas, 1898 (Atlas).

THE ORINOCO-ESEQUIBO REGION
compiled under the direction of the Commission appointed
to investigate and report upon the true divisional line between
the Republic of Venezuela and British Guiana



Venezuela Boundary Commission Report Atlas 1898
Map 1

Boundary Lines Proposed or Claimed

MAP 30

Source: David Rumsey Historical Map Collection

4.112. The subsequent replacement of Lord Salisbury by Lord Rosebery at the head of the Foreign Office prompted the presentation of bases for negotiation.³⁴⁸ The one concerning boundaries reads:

“It is proposed that the two Governments shall agree upon considering as territory disputed between the two countries the land situated between the two boundary lines indicated, respectively, in the eighth paragraph of Senor Rojas's note of February 21st, 1881, and Lord Gransville's note of September 15th, 1881, and to draw a dividing line within the limits of this territory, either by arbitration or by a mixed commission, on the principle of equal division of said territory, and in due regard to natural boundaries. The Government of Her Majesty give especial importance to the possession of the River Guaima by British Guiana, and wish, therefore, to make the stipulation that the boundary line is to begin at the coast point, and a proper compensation to be found in any other part of the disputed territory for this deviation from the principle of equal division. In connection with the boundary there shall be considered the cession of the Island of Patos to Venezuela.”³⁴⁹

4.113. The basis of the negotiation put forward by Lord Rosebery once again showed Great Britain's fraudulent intent, through and the changing and shifting character it attributed to the disputed territory, which was increasingly distant from British Guiana and deeper into the territory of Venezuela. This attitude once again provoked displeasure and rejection on the part of Venezuela, which is evident in the notes of its representative in London, Guzmán Blanco, dated 28 and 29 July 1886.³⁵⁰ The first note states that:

“the acts committed to the detriment of Venezuela lack all possible justification” and “naturally, because of this, and because they come from agents of a great and powerful nation, with whom Venezuela

³⁴⁸ Letter from Earl Rosebery to General Guzman Blanco, Minister of Venezuela in Great Britain, 20 July 1886 (**Annex 26**).

³⁴⁹ Memorandum relating to the Question of Limits between Venezuela and British Guiana, presented to the Honorable W. Q. Gresham, Secretary of State, by José Andrade, 31 March 1894, p. 305 (**Annex 39**).

³⁵⁰ *Blue Book* 6, pp. 107-128 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>) and *Blue Book* 8, pp. 547-567 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

has lived in ancient and cordial friendship, they have considerably excited public opinion and awakened feelings that had been calm since 1841”.³⁵¹

4.114. It expressly mentions the 1850 Agreement, its validity and effects, stating that:

“If such an agreement means anything, neither Great Britain nor Venezuela has been able to occupy disputed places, the specification of which should have been made, and was not made, on that occasion as an integral part of the agreement. But the rational meaning of the agreement is that it was intended to maintain the *status quo*. This has been the understanding of the Republic, which, claiming as its own places of which Great Britain has de facto possession as far as the Essequibo, has provisionally left them there”.³⁵²

4.115. The note sets out the Venezuelan position on what was the disputed territory at the time of the conclusion of the 1850 agreement and records the British outrages and changes of position.

4.116. Between December 1886 and February 1887 contacts took place in Caracas between Diego B. Urbaneja Alayón, Chancellor under the new Guzmán Blanco presidency, and the British Minister in the capital, F.R. Saint John, whose only novelty was the sending of a commission to inspect part of the territory. Commissioners Muñoz Tébar and Rodil travelled to the Delta and toured the Amacuro River, the Brazo Barima and Caño Morajuana, and the Barima, Arauca and Guaima Rivers, and in all these places the commission made a public declaration that the territory belonged to Venezuela and appointed police commissioners representing the authority of Venezuela.

4.117. The result of the Commission’s work was reported by Urbaneja to St. John and highlights the change in Britain's position from 1841/1842 to the time he writes his note and records that Venezuela:

³⁵¹ *Ibid.* pp. 115-116 and p. 554 respectively.

³⁵² *Ibid.*, pp. 117 and 556 respectively.

“has never understood that the ownership of the places situated beyond the mouth of the Pomaron, but only of those between that river and the Essequibo, was disputed; and it is quite clear from Lord Aberdeen's proposal that he was satisfied with the mouth of the Morocco as the western limit of British possessions”.

4.118. The note concludes with the following request:

“[T]he President of the Republic demands from Her Majesty the evacuation of Venezuelan territory from the mouth of the Orinoco to the Pomaroon, which she (Great Britain) has unjustly occupied with the understanding that if by 20th February next, at the meeting of Congress, to whom the Government is bound to render an account of everything, no reply should be received, or should be negative, the diplomatic relations between the two countries shall be broken off”.³⁵³

4.119. The British reply, dated 31 January 1887, merely denied the official nature of the request made in 1836 for the construction of a lighthouse at Punta Barima and, once again, manipulating reality, cynically allowed itself to communicate that it was prepared to give Venezuela permission to build the aforementioned lighthouse.³⁵⁴

4.120. The Venezuelan reaction was not long in coming, and on 31 January 1887 Urbaneja sent a letter to St John in which, in addition to expressing the President of the Republic's displeasure and reiterating his request of 26 January, he made it clear that the Venezuelan government was not prepared to accept the request:

“This is the first occasion on which the Government of H.M. discloses its claims to the Orinoco River [...] Before now, everything had been limited to the acts of one party alone, foreign to the knowledge of the other; but today the latter is notified of what is

³⁵³ Letter from Diego B. Urbaneja, Minister in Venezuela, to F. R. St. John in Caracas, 26 January 1887 (**Annex 31**).

³⁵⁴ *Blue Book* 6, pp. 164-165 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>) and *Blue Book* 8, pp. 604-605 (available at: <https://kamuru.mppre.gob.ve/index.php/s/f4EgYB65s3N4JHY>).

being carried out, and it is hoped to obtain its approval of acts and claims contrary to its rights”.³⁵⁵

4.121. The British response could not have been more unfortunate and on 20 February 1887, Urbaneja sent a note to Saint John in which he pointed out:

“Venezuela's complaints have gone unheeded. They have not even met with a response. It seems that they have been taken as a pretext for the aggravation of the offences. With the news of the latest events, the President of the Republic called Your Excellency on 6 December 1886 and asked you for any reports you might have on the unbelievable occurrences. He also informed your Excellency that the construction of a lighthouse at Punta Barima was to be ordered, as had been recommended since 1836, with the most earnest urging, by Sir Robert Ker Porter, Chargé d'Affaires of Great Britain. Your Excellency refused to give the explanations requested, on the ground that the President had not consented to defer the execution of his purpose until your Excellency had consulted your Government in the case. That is to say, Your Majesty wished the President not to perform an administrative act in the territory of Venezuela without obtaining permission for the purpose from Her Britannic Majesty, who without any right has occupied and retained it.

[...]

It has seemed to the Republic the most unusual thing that the Convention of 1850, violated by Great Britain, should be invoked against it; with the allegation of the Convention, the British Cabinet acknowledges the duty of complying with it, and its conduct is in singular contrast with what should be the norm for it.

[...]

20 February has arrived.

[...]

³⁵⁵ *Ibid.*, pp. 162-164 and pp. 605-608 respectively.

Great Britain has violated the territory of Venezuela by entering it through forbidden places, by appointing Commissioners, by establishing Government offices in which the English flag flies, by seizing, judging and punishing an employee of Venezuela, by sending there with armed police officers a judge who has notified those places to be British, by decreeing prohibitions of commerce, by going with a coastguard through the space between Amacuro and Barima, by including these rivers in the jurisdiction of the Governor of Demerara, and by authorising the benefit of mines included in the soil of Demerara, decreeing prohibitions of commerce, travelling with a coastguard the space between Amacuro and Barima, comprising these rivers in the jurisdiction of the Governor of Demerara, authorising the benefit of mines included in the soil of the Republic, and exercising acts of dominion.

Britain has arrogated to itself the right to decide for itself and on its own behalf a question that concerns it as much as Venezuela.

[...]

Consequently, Venezuela, not being obliged to maintain friendly relations with a State that thus insults it, suspends them as of this day.

And protests [...] against the acts of despoilment which to its detriment have been consummated by the Government of Great Britain, and which it will not at any time, nor for any reason, recognise as capable of altering in the least the rights which it has inherited from Spain, and on which it will always be ready to submit to the judgment of a third power”.³⁵⁶

c) From the severance of diplomatic relations to the negotiation of the Washington Treaty

4.122. The breakdown of diplomatic relations in 1887 which weighed more heavily on Venezuela strengthened Great Britain, which now dared to be much more demanding. It

³⁵⁶ *Blue Book* 6, pp. 167-174 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>) and *Blue Book* 8, pp. 610-618 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

was at this point that the United States entered into diplomatic contacts with the aim of attempting to settle the dispute.

4.123. Attempts to re-establish diplomatic relations provoked new disagreements between the British authorities – Thomas Sanderson, Under-Secretary of the Foreign Office and Lord Rosebery, Secretary of State of the Foreign Office – and the Venezuelan confidential agents – Messrs. Urbaneja, Lucio Pulido and Michelena –, and again demonstrated British intransigence both on the territorial controversy and on the recourse to arbitration.³⁵⁷

4.124. On 10 February 1890, Britain sent through Th. Sanderson, Under-Secretary of the Foreign Office, the conditions necessary to resolve the outstanding issues between the two states. In the Pro Memoria attributed to Salisbury, it can be seen how, regarding the boundary question, Great Britain now warned that it:

“could not accept as satisfactory any arrangement which did not admit as English property the territory within the line demarcated by Sir R. Schomburgk”.

and that:

“[w]e would be prepared to submit to arbitration the claim of Great Britain to certain territories west of that line”.³⁵⁸

4.125. In a communication dated 19 March 1890 Lord Salisbury, writing from Thomas Sanderson, advised that:

³⁵⁷ British Memorandum in reply to Mr. Pulido’s Memorandum (**Annex 33**); Letter from Lord Rosebery to Dr. Michelena in response to the Pro-Memoria, 3 July 1893 (**Annex 35**); Letter from Dr. Michelena to Lord Rosebery, 31 July 1893 (**Annex 36**); Letter from Dr. Michelena to Dr. Rojas, 30 August 1893 and Letter from Dr. Rojas to Dr. Michelena, 4 August 1893 (**Annex 37**); Letter from Lord Rosebery to Dr. Michelena, 22 September 1893 (**Annex 41**); Letter from Dr. Michelena to Lord Rosebery, 29 September 1893 and Letter from Dr. Michelena to Lord Rosebery, 6 October 1893 (**Annex 38**).

³⁵⁸ The Pro Memoria setting out these conditions is included in *Blue Book 6*, p. 175 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, p. 175 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

“Britain’s claim to the whole of the Cuyuni and Yuruari basin is well founded, and the greater part of the district has been for three successive centuries colonised by the Dutch and by the English, their successors.

[...]

Her Majesty's Government has constantly maintained that in strict law the whole region within the line described in Lord Salisbury's note to Lord Rojas of 10 January 1880, that is to say, as far as the Upata mountains, if not as far as the Orinoco itself, belongs to her; and that any establishment of Venezuela east of that line is considered an encroachment upon the rights of Great Britain [...].³⁵⁹

4.126. The change in the British position was outrageous, again, in that it now considered any area east of the Schomburgk line to be undisputed British sovereignty, a line which was no longer identified with the one effectively drawn by the Prussian in 1841, but with the one that Lord Salisbury had named as such after the manipulation of the maps that will be explained below, and which was actually an extension of the Schomburgk line (Map 16 showing the enlarged Schomburgk line).

4.127. Venezuela’s response to Salisbury’s proposal was received by Sanderson on 24 June 1890 through Lucio Pulido. In his memorandum, Venezuela sets out its basis for concluding an agreement to re-establish diplomatic relations:

“1° The Government of the United States of Venezuela would formally declare that the Essequibo River, its banks and the lands covering it, belong exclusively to British Guiana; and Her Majesty's Government would formally declare that the Orinoco River, its banks and the lands covering it, belong exclusively to the United States of Venezuela.

³⁵⁹ Minute NQ 3353 of 25-11-1890, C.O. 111/458. The translation is that found in *Blue Book 6*, pp. 178-179 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 178-179 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

2° Whereas the region west and north-west of the Essequibo River towards the Orinoco River is not well known officially; and whereas the explorations made by the explorer Mr. Schomburgk cannot be invoked as title to property against the United States of Venezuela, just as the explorations made by various Venezuelan explorers cannot be invoked as title to property against His Majesty's Colony of British Guiana, both Governments should agree, as a matter of course, to appoint a Joint Commission, composed of two Chief Engineers and their respective staffs, to proceed to make without delay and within a year maps and chorographical, geographical or hydrographical charts of the said region, to determine officially the exact course of the rivers and streams, the exact position and situation of the mountains and hills, and all other valuable details which will enable both Governments to have a reliable official knowledge of the territory now in dispute.

3° Such official maps and charts would enable both Governments to determine, in a spirit of mutual friendship and goodwill, a boundary with full knowledge of the facts; and a natural boundary between British Guiana and the United States of Venezuela should in every case be preferred and determined”.³⁶⁰

4.128. Great Britain's rejection of the bases proposed by Venezuela was communicated to Venezuela on 24 July 1890 by a note sent by Mr. Sanderson in which Great Britain persisted in maintaining its refusal to accept Venezuela's title and took a qualitative leap when it threatened Venezuela for exercising its sovereignty.³⁶¹ In the aforementioned note, in relation to some Decrees passed by the Venezuelan government, the following can be read:

“But Lord Salisbury has received with great surprise, within the last few days, notice that the Government of Venezuela has issued two decrees [...] for the establishment of Venezuelan Administrations in the district between Punta Barima and the Pomaron River, and in the neighbourhood of the point where the Cuyuni flows into the Essequibo. Such notices can have no practical effect, and any attempt

³⁶⁰ *Ibid.*, pp. 184-186.

³⁶¹ *Ibid.*, pp. 186-189.

to put them into execution could only be considered as an invasion of the Colony and would be dealt with accordingly”.

4.129. A period of silence followed, with contacts resuming in the spring of 1893 with Lord Rosebery, Secretary of State in the Foreign Office, and Tomás Michelena as Confidential Agent with full powers to settle outstanding differences and resume diplomatic relations.³⁶²

4.130. The first step was the *Pro Memoria de bases para la conclusión de un Convenio preliminar* presented on 26 May 1893 by Mr. Michelena, which provided for recognition of the 1850 Agreement as the *status quo* on the boundary question to be maintained until a treaty was concluded after examination of the titles and documents invoked by the parties.³⁶³

4.131. The text of the Memorandum proposed:

“Basis for the conclusion of a preliminary agreement between the Governments of H. M. Britannica and the United States of Venezuela, for the purpose of re-establishing diplomatic relations and amicably settling the various questions pending.

1° *First.* - The Government of Great Britain, claiming certain territories in Guiana, as successor to the rights of the Netherlands, and the Government of Venezuela, claiming a portion of the same lands, as heir of Spain, animated by amicable dispositions and desiring to put an end to the differences which have arisen in this matter, each respecting the titles which prove their respective jurisdiction and ownership of the territories under discussion, agree and stipulate that, official relations between the two countries being re-established, upon the ratification of this preliminary agreement by their respective Governments, one or more Delegates shall be appointed by each party, with full powers to conclude a boundary

³⁶² *Blue Book*, 6, pp. 194-195 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 194-195 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

³⁶³ *Ibid.*, pp. 195-197.

treaty, based on the conscientious and careful examination by them of the documents, titles and antecedents which legitimise the respective pretensions, It being further agreed that the decision of doubtful points or demarcations of a boundary line, on which the appointed Delegates cannot agree, shall be submitted to the final and unappealable decision of an arbitrator *juris*, who shall be appointed, as the case may be, by common agreement of the two Governments.

[...]

4° *Fourth*. - It shall be recorded in the preliminary agreement that both the Government of H. M. Britannica and the Government of Venezuela recognise and declare as the *status quo* of the boundary question that which existed in the year 1850, when the Honourable Sir Belford Hinton Wilson, Chargé d’Affaires of England at Caracas, made the formal declaration on behalf and by express order of the Government of H. M. Britannica, that no part of the territory in dispute would be occupied, requiring the same declaration from the Government of Venezuela, as was obtained. This *status quo* shall be maintained until the conclusion of the treaty of limits mentioned in Base 1^o.³⁶⁴

4.132. On 3 July 1893, Lord Rosebery sent to Dr. Michelena a note in which he rejected the Venezuelan proposal and proposed changes. With regard to point 1, the British considered that it should be drafted as follows:

“Inasmuch as the Government of Great Britain claims certain territory in Guiana, as successor in title to the Netherlands, and the Government of Venezuela claims the same territory, as heir of Spain; Both Governments, inspired by friendly intentions and desirous of putting an end to the differences which have arisen in this matter, and both Governments desiring to give their respective value to the titles alleged by each to prove their jurisdiction and rights of ownership over the territory in question, agree and stipulate that as soon as official relations are restored between the two countries, and after the ratification of this preliminary agreement by both Governments, one or more Delegates shall be appointed by each party with full powers to conclude a boundary treaty, based on a thorough and complete

³⁶⁴ *Ibid.*

examination by the Delegates of the documents, and background supporting the claims of each party, it being *agreed that the said disputed territory lies to the West of the line placed on the map sent to the Government of Venezuela on March 19, 1890, and to the East of a line to be marked on the same map running from the source of the Cumano River, following down its current and up the Aima, along the Sierra Usupamo*, and that the decision of doubtful points and the delineation of the frontiers, if the Delegates should be unable to arrive at a settlement, shall be submitted to the final decision, from which there shall be no appeal, of a juridical Arbitrator, who shall be appointed, if the case arises, by common agreement between the two Governments.”³⁶⁵

4.133. In relation to point 4, the Rosebery Letter expressed Great Britain's rejection of the 1850 Agreement in the following terms:

“As to the fourth clause of the Memorandum, in which it is proposed that both His Majesty's Government and the Government of Venezuela shall recognise and declare that the *status quo* of the boundary question is that which existed in 1850, His Majesty's Government considers that it is quite impossible for it to consent to go back to the *status quo* of 1850 and to evacuate what has constituted for some years an integral part of British Guiana. It deplores, of course, that it is unable to accept this proposition”.³⁶⁶

4.134. Great Britain's proposed modification is further proof of its fraudulent strategy in relation to Venezuelan territory. What in 1841 were merely British aspirations subject to negotiation with Venezuela had become Britain's undisputed rights; territory that was indisputably Venezuelan in 1841 had become, according to Great Britain, indisputably British territory without the possibility of its treatment by an arbitral tribunal as disputed territory.

4.135. Moreover, Great Britain was again distorting reality when it considered the recognition of the *status quo* of 1850 as if it were a new proposal by Venezuela. What is

³⁶⁵ The highlighted text corresponds to the modification incorporated by Great Britain. *Blue Book 6*, pp. 199-200 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

³⁶⁶ *Ibid.*, p. 198.

envisaged in the fourth point of Mr. Michelena's Memorandum is simply that the treaty to be signed should *state* that both parties recognise the *status quo* which they undertook to respect as a consequence of the 1850 Agreement. It was not a question of accepting anything new, but of recording the existence of the commitment made.

4.136. The same fraudulent tactic was in play in Great Britain's allegation that it was impossible to evacuate what had allegedly constituted for some years an integral part of British Guiana. Britain was an illegal occupier, and usurper of territory in contravention with General International Law and the 1850 Agreement and could not consider the territory it had illegally dispossessed Venezuela of to be an integral part of British Guiana.

4.137. The new line resulting from the British proposed change in the identification of the disputed territory was rejected by Venezuela. In his note of 31 July, Dr Michelena pointed out that such a modification:

“[...] only alters the extreme claim of the Government of Great Britain and corrects in part the capricious line drawn by the explorer Schomburgk, all in complete opposition to another demarcation which was proposed by the Earl of Rosebery in 1886 and which reduced the British claim to narrower limits”.³⁶⁷

4.138. The constant disagreement led Michelena to denounce the incoherence of the British position, Great Britain's persistent tendency to increase the colony's boundaries at the expense of the Republic's territory, and the more than likely lack of solidity of the titles that Great Britain could claim.³⁶⁸ In his lengthy note of 29 September 1893, Michelena warned that:

“the refusal of her Britannic Majesty's Government to consider acceptable and practicable the proposition to submit the question of limits to a Commission of Delegates and, as a last resource, to the judgment of *arbiters juris*, without restrictions, would entirely frustrate the desire, which Your Excellency assures me is cherished by Her Britannic Majesty's Government to arrive at an amicable

³⁶⁷ *Ibid.*, p. 202.

³⁶⁸ Letter from Dr. Michelena to Lord Rosebery, 29 September 1893 (**Annex 38**).

settlement, and to consider any practicable proposition to that end. I must be allowed to say that the rejection of the offer made, and the last declared purpose to consider any practicable proposition for a settlement, seem to me to be wholly incompatible.”³⁶⁹

4.139. It also drew attention to:

“Your Excellency can hardly fail to perceive the insurmountable difficulties presented by these various frontier lines claimed or proposed by Her Britannic Majesty’s Government in 1841, 1881, 1886, 1890, and at the present time; and likewise the unvarying tendency shown to extend the limits of the Colony of British Guiana at the expense of the Venezuelan territory, and the manifest discordance which the propositions of Your Excellency in 1886 show, with the present request that Venezuela accept, without any compensation whatsoever, the enlarged ‘Schomburgk line,’ which dispossesses her, not only of the river Guaima (an important desire of the Foreign Office in 1886), but also deprives the Republic of the river Barima and the cape of that name, together its adjacent territories”³⁷⁰

4.140. Michelena wonders:

“What is the nature of the titles and of the documents upon which the present enlarged and extended British claim is supposed to rest; a claim so diverse and elastic, and so foreign to antecedents, to unity and precision? If any titles at all exist, and they be as conclusive as the British Foreign Office now assumes them to be, why not submit them to examination by an impartial tribunal?”³⁷¹

4.141. And, finally, it denounced that:

“Great Britain has never once produced any historical or other lawful title to show with any degree of certainty the true and legitimate origin of any one of the many lines which she pretends that Venezuela ought to accept as ‘indisputable.’ Lacking these lawful

³⁶⁹ Letter from Dr. Michelena to Lord Rosebery, 29 September 1893 (**Annex 38**).

³⁷⁰ *Ibid.*, p. 213.

³⁷¹ *Ibid.*

titles, and violation all that was stipulated and promised by Sir Bedford Wilson in 1850, to wit, that both countries should hold as neutral the then disputed territory until the conclusion of a Definite Treaty of boundary, Great Britain has proceeded to occupy de facto the area comprised within the 'Schomburgk line' which was once formally disclaimed by the British Government.”³⁷²

4.142. The Memorandum of José Andrade,³⁷³ Venezuelan Minister in Washington, dated 31 March 1894, is very expressive of the British strategy. Mr. Andrade considers that:

“Great Britain has not listened to the Powers who have been good enough to offer the interposition of their good offices, nor has she been willing to accept their mediation. And as for direct discussion, it has not admitted it as an effective means of clarifying the reasons in support of the claims of the one or the other party, but only to make their conciliation less possible by their increasingly immoderate demands”.

“Venezuela has always believed itself entitled to establish the Essequibo River as the boundary between itself and British Guiana; but it has not for that reason failed twice to show itself ready to reduce its claim in return for an amicable accommodation, when the national constitution allowed it to do so.

Great Britain, which before 1840 had not advanced from Pomarón, in that year attempted to make a leap to Barima and to make the dividing line of the two Guianas start from there - Schomburgk line; in 1844, retrograding, it proposed that the line should start from the Moroco River, between Pomarón and Punta Barima - Aberdeen line; in 1881, from a point 29 miles from the Moroco to Punta Barima - Granville line; in 1886, from a place on the coast west of the Moroco to Punta Barima - Granville line; in 1886, from a place on the coast west of the Guaima, between the above point and Punta Barima - Rosebery line; in 1890, from the mouth of the Amacuro, west of Punta Barima on the Orinoco - Salisbury line; and, finally, in 1893, from west of the Amacuro, proceeding steadily inland west and

³⁷² *Ibid.*

³⁷³ *Ibid.*, pp. 223-264.

south, to the source of the Cumano river and the Usupamo range - new Rosebery line”.³⁷⁴

4.143. Furthermore, Andrade summarised the position that Great Britain has maintained with Venezuela, as it was clear that:

“Britain has insisted on treating Venezuela as a minor state, dictating to it the sacrifice it must make of its rights and territory, and deciding for itself which belong to it indisputably and without further discussion. Venezuela has not been able to enforce its legal equality. To every violation of it it has made a representation and a solemn protest”.³⁷⁵

4.144. The dispatch of the Andrade Memorandum to Great Britain by the Secretary of State, Mr. Gresham, through the U.S. Minister in London, Mr. Bayard, on 13 July 1894, allowed Gresham to highlight Great Britain's successive refusals to the Venezuelan proposals for the resumption of diplomatic relations and the submission of the dispute to arbitration, and to warn that he saw only two equitable solutions: arbitration or agreement.³⁷⁶

4.145. In the autumn of 1894, José Andrade had the opportunity to meet with Gresham and Bayard, and on 1 December 1894, Gresham wrote to Bayard:

“I cannot believe that the Government of H.M. holds that the validity of its claims to the territory long disputed between the two countries is to be conceded as a condition precedent to the arbitration of the question whether Venezuela has a right to the other territory, which until very recently was never questioned. [...] There is no doubt that you quietly exercise your influence in favour of any honourable plan of settlement”.³⁷⁷

³⁷⁴ *Ibid.*, pp. 263-264.

³⁷⁵ *Ibid.*, p. 264.

³⁷⁶ Letter from Mr. Gresham to Mr. Bayard, 13 July 1894 (**Annex 40**).

³⁷⁷ *Blue Book* 6, pp. 280-281 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

4.146. On 3 December 1894, in his annual message to the United States Congress, communicated by Gresham to Andrade and thanked by the Venezuelan authorities,³⁷⁸ President Cleveland, in relation to the boundary question between Venezuela and Great Britain stated:

“I shall renew the efforts hitherto made to bring about the re-establishment of diplomatic relations between the disputants, and induce them to submit to arbitration, a means which Great Britain so conspicuously favours in principle and respects in practice, and so ardently solicited by her weaker adversary”.³⁷⁹

4.147. The Venezuelan authorities, in a letter from Mr. Andrade to Mr. Gresham dated 19 December 1894, informed the United States of the proposal of the Demerara Legislative Chamber of 24 October 1894 regarding the construction of a road between the sources of the Barima and the Upper Cuyuní or Yuruán. In it, Andrade warned that the conflict had entered a threatening phase given the attitude of the colonial government and the risks posed by Britain's domination of the mouth of the Orinoco.³⁸⁰

4.148. The following month, the Senate and House of Representatives of the United States of America, meeting in Congress, on 10 January 1895, agreed that:

“the direction made by the President in his last annual message to this Body, namely, that Great Britain and Venezuela submit their boundary dispute to amicable arbitration, be strongly recommended for the consideration of both parties concerned.”³⁸¹

4.149. A few days later, on the 17th of the same month, having learned of Great Britain's refusal to submit the dispute to arbitration, which was of course because Great Britain knew

³⁷⁸ Communication of 20 December 1894 from the Minister of Foreign Affairs, Ezequiel Rojas, to the United States Minister in Caracas, Seneca Haselton, forwarded by the latter to Secretary of State Gresham on the 21st; communication from the Venezuelan Minister in Washington, José Andrade, to Secretary of State Gresham on the 31st.

³⁷⁹ *Blue Book* 6, pp. 280-282 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>).

³⁸⁰ *Ibid.*, pp. 282-284.

³⁸¹ *Ibid.*, pp. 287-288.

it had no title to the territories it claimed, President Cleveland read a speech to the Foreign Affairs Committee in which he stated:

“The conduct to be pursued by this Government, in view of the present situation, does not appear to be open to serious doubt. Having laboured strenuously for long years to induce Great Britain to submit this dispute to impartial arbitration, and having now been definitely informed of her refusal to do so, there remains but to accept the situation, to recognise her palpable demands, and to proceed accordingly [...].

Assuming, however, that the attitude of Venezuela does not change, the dispute has reached a point which imposes upon the United States the duty of taking steps to determine with sufficient certainty, for its justification, what is the true dividing line between the Republic of Venezuela and British Guiana. The investigation conducive to this end must, of course, be made in a careful and judicial manner, giving due weight to all the evidence and all the facts which may be adduced in support of the claims of both parties.

In order that this examination may be fully and satisfactorily made, I would suggest to Congress to appropriate an adequate sum to cover the expenses of a Commission, appointed by the Executive, to make the necessary investigation or report on the matter with the least possible delay. This report having been made and accepted, it will, in my opinion, be the duty of the United States to oppose by every means in their power, as to a direct attack upon their rights or interests, the appropriation by Great Britain of any lands or the exercise of her authority in any territory which the investigation may show to belong by right to Venezuela.”³⁸²

4.150. The way forward had already been outlined, and the planned Commission, chaired by the Honourable David J. Brewer, was set up and its work compiled in a nine-volume edition.³⁸³ The impressive work of the Commission proved very effective in warning Great

³⁸² Communication of 20 December 1894 from the Minister of Foreign Affairs, Ezequiel Rojas, to the United States Minister in Caracas, Seneca Haselton, forwarded by the latter to Secretary of State Gresham on the 21st; communication from the Venezuelan Minister in Washington, José Andrade, to Secretary of State Gresham on the 31st, p. 292.

³⁸³ U.S. Commission on Boundary between Venezuela and British Guiana, Washington 1896-1897.

Britain that a neutral observer of the law would recognise the rights claimed for so long by Venezuela. This convinced Great Britain that it would better off manipulating an arbitration, on the basis of the Treaty of Washington on 2 February 1897, drafted entirely to sustain its baseless claim. This manoeuvre brought the Venezuelan Boundary Commission's work to a close before it proceeded to define the actual boundary line.

4.151. In addition to what has been analysed so far, it should be noted that in the years prior to the conclusion of the Arbitration Treaty, Great Britain had formulated a new territorial claim in which the boundary of the disputed territory moved further into Venezuelan territory. Great Britain's claim, identified as the *Extreme British Claim*, was then located much further west of the Essequibo than the Schomburgk line of 1841 and sought to usurp from Venezuela a significant portion of its territory (Map 16).

4.152. In short, Great Britain pursued a policy of usurping Venezuelan territory by making increasingly aggressive claims and rejecting all proposals made by Venezuela. The reason for the failure of the negotiations can be understood when one reads the insulting letter sent by Lord Salisbury to Pauncefoot in 1895 in which he states that Great Britain:

“[...] cannot consent to hear and submit to the arbitration of another power, or of foreign jurists, however eminent, claims founded on the extravagant pretensions of Spanish officials of the last century, and involving the transfer of large numbers of British subjects, who for long years have enjoyed the stable Government of a British colony, to that of a nation of a different race and language, whose political system is subject to frequent disturbances, and whose institutions do not yet afford adequate protection to life and property. No such result has ever been involved in the questions which Great Britain and the United States have consented to submit to arbitration, and His Majesty's Government are convinced that under the same circumstances the Government of the United States would equally firmly reject propositions of that nature.”³⁸⁴

³⁸⁴ *Blue Book 6*, pp. 325-336 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

4.153. In addition to this attitude revealing the illegality and bad faith that characterised British claims, there was the fraud committed through the manipulation of maps and the presentation to the Arbitral Tribunal of adulterated maps with the aim of consummating the aggression against Venezuela and the usurpation of its territory.

d) The manipulation of the maps

4.154. As noted above, the Schomburgk line of 1840 constituted the first ruse of the deception that Great Britain had made to Venezuela; a ruse that recognised as undisputed Venezuelan territory the whole of the upper Barima and the whole of the Cuyuní, from its sources to its mouth.

4.155. This line, which crossed the Cuyuní and the southern basin, was reproduced, with minor variations derived from new knowledge of the geography of the area, in the numerous maps published by the British Government and the Colonial Office, such as the Walker map published in 1872 or the Brown and Stanford maps published in 1875. The map published by Stanford is known as the Schomburgk map. It contains a note stating that the boundaries laid down on it “must not be taken as authoritative [...] And an engagement subsists between the Governments of Great Britain and Venezuela by which neither is at liberty to encroach upon or occupy territory claimed by both”.

4.156. When the Schomburgk line began to prove insufficient for British interests, or, as Sir Edward Hertslet, librarian to the *Foreign Office*, noted in his memorandum of 1 June 1886, appeared too favourable to Venezuela,³⁸⁵ the British Government and the Colonial Office decided to have the maps modified and in 1886 presented a new version of the Stanford map with the Schomburgk line modified and without the accompanying note. The map, altered in 1886, retained, however, the date of 1875, in order to hide the manipulation.

4.157. The modification of the Stanford map of 1875 and the removal of the note accompanying that map were a significant element of British fraud. It had become vital for

³⁸⁵ Memorandum of Sir E. Hertslet about the British Guiana maps, 1 June 1886 (**Annex 25**).

Britain to make the Schomburgk line meet its current interests, which could only be achieved by altering the line and claiming that it was now the line drawn in 1840.

4.158. The adulterated Schomburgk line was not the Prussian's work, as he had been dead for more than two decades. It incorporated the entire Cuyuni basin as British-claimed territory. Hertslet pointed out in his memorandum of 5 August 1886 that the British claim based on Schomburgk line was lacking any credibility:

“I should say we could not submit the case to arbitration with the slightest hope of success in face of the contradictory claims which have been put forward in the English published maps, for, in addition to what has been stated above, the map was published by Mr Stanford, under the auspices of the Colonial Office and with everything upon the face of it to denote that it had official sanctions and the boundary marked thereon was approximately the same as that marked on the map which was laid before Parliament in 1840; and, therefore, embracing considerably less territory than was claimed in 1880 or in 1883; besides which it has been considered that ‘the argument on the ground of strict right would be hopeless’”.³⁸⁶

4.159. Before the Venezuela Boundary Commission created by the U.S. Congress, attorney James Storrow and legal counsel William Scruggs on behalf of Venezuela warned about Salisbury's lies:

“The new line, invented or first asserted in 1886, thus appeared as if it were the original line of 1875 [...]. However, the Foreign Secretary, Lord Salisbury, referred to that line on 13 February 1890 as “the line drawn by Sir Richard Schomburgk in 1841.”³⁸⁷

³⁸⁶ Transcription of the Memorandum by Sir E. Hertslet, Librarian of the Foreign Office, 22 October 1886 (**Annex 28**).

³⁸⁷ Further documents relating to the Question of Boundary between British Guiana and Venezuela, presented to both Houses of Parliament by Her Majesty (1896), London: Printed for Her Majesty Stationary Office, p. 9 (available at: <https://books.google.co.ve/books?id=ejw8AAAAMAAJ&pg=RA1-PA9&lpg=RA1-PA9&dq=the+new+line,+invented+or+first+asserted+in+1886,+thus+appeared+as+if+it+were+the+original+line+of+1875&source=bl&ots=jesTM4HzMn&sig=ACfU3U3aqQNQzTvCyz-RYAy6Iq->

4.160. Hertslet also noted that this was a corrected map in which a note on the original map had been removed. As said above, the note from the map that had been intentionally deleted read:

“The boundaries indicated on this map are those established by the late Sir Robert Schomburgk, who was engaged in exploring the Colony during the years 1835 to 1839, under the direction of the Royal Geographical Society. The boundaries thus established between Brazil, on the one hand, and Venezuela, on the other, and the Colony of British Guiana are not, however, to be considered reliable, as they have never been adjusted by the respective Governments, and there is a compromise between the Governments of Great Britain and Venezuela by which neither of them is at liberty to invade or occupy the territory claimed by either.”³⁸⁸

4.161. In Great Britain's fraudulent strategy, it was essential to eliminate any trace of the existence of the 1850 Agreement, and this affected the aforementioned note which warned of the existence of an undertaking regarding the impossibility of occupying the disputed territory.

4.162. Proof of the fraud and manipulation was provided by the jurists Storrow and Scruggs when they noted that in June 1886, Sir Robert Herbert, Permanent Under-Secretary of State for the Colonies, had, on the orders of Earl Granville, Secretary of State for Foreign Affairs, “ordered the boundaries to be corrected and all existing copies of the map to be destroyed”.³⁸⁹

4.163. The British knew in 1886 that their official maps had claims so diverse and inconsistent with each other that it was impossible to justify them legally, and that a court

[z5o_8Dw&hl=en&sa=X&ved=2ahUKEwj7rvezJ6FAxW5mIQIHTc8CGIQ6AF6BAgsEAM#v=onepage&q=the%20new%20line%2C%20invented%20or%20first%20asserted%20in%201886%2C%20thus%20appeared%20as%20if%20it%20were%20the%20original%20line%20of%201875&f=false\).](#)

³⁸⁸ Misterio de Poder Popular para Relaciones Exteriores, Archivo de Fronteras, Memorandum on the Guiana Boundary Maps by Sir. E. Herslet, Bibliotecario del Foreign Office, 1886, Box: E-04 (**Annex 177**).

³⁸⁹ *Ibid.*

of law could never grant these claims. The expansion of the territorial encroachment drawn on each of the lines on the map was a planned dispossession by a strong country against a weak country, and the impossibility of legally supporting the alleged expansion explained the British refusal to submit the dispute to an arbitral tribunal.

4.164. It was from 1896 that Britain decided to accept arbitration over the disputed territory as part of an overall settlement of its relations with the United States. This unthinkable situation for the British before 1896 changed their approach to the dispute. If previously they had used published maps to impose non-existent lines by the use of force, now the maps became evidence against British arguments and were proof that the British arguments were legally untenable. The historical reality is that the maps were not designed for the Tribunal but for the British aggression against Venezuela in the previous decades. Once they became public documents they could not be denied, and their adulteration concealed from the Paris Tribunal. The embarrassing situation was to be resolved before the Arbitral Tribunal by inventing the excuse that it was a mistake. It was certainly not. The Hertslet memorandum is proof of the British conscience that a territorial expansion plan supported by falsification of maps was being pursued.

4.165. Shocking as they are, these stratagems were used once again by the British to deceive the Paris Tribunal in 1899.

IV. VENEZUELA'S PROTESTS AGAINST THE ILLEGAL CLAIM TO ACQUIRE TITLE BY PRESCRIPTION

4.166. The British strategy was aimed at securing an alleged title to Venezuelan territory by prescription, which required effective occupation and the assent of the sovereign state of the territory. Neither occurred in this case.

4.167. As has already been noted, there was never any effective occupation by Great Britain of the territory that was intended to be taken from Venezuela. And although there were incursions aimed at exploiting the territory's mineral resources, Venezuela was steadfast in its opposition. Venezuela's protest against the British claims precluded any possible statute of limitations and support the thesis that Venezuela was misled about the

scope of Article IV of the Washington Treaty and that its incorporation sought to legitimise the illegal usurpation of Venezuelan territory.

4.168. An analysis of Venezuelan practice in the face of the British onslaught leaves no doubt that Venezuela constantly challenged and rejected these practices. This can be seen in the Venezuelan reactions to British boundary proposals, which are evidence of its opposition.

4.169. As already noted, Venezuela expressed its refusal to accept the 1840 Schomburgk line as the boundary between Venezuela and British Guiana, which forced Great Britain to remove the pillars and posts. The same happened with Granville's proposal of 15 September 1881. Venezuela's rejection of it on 15 July 1882 included protests and criticism of the line drawn.³⁹⁰

4.170. The proposal of a new line by Rosebery again provoked Venezuela's rejection, which is evident in the notes of its representative in London, Guzmán Blanco, dated 28 and 29 July 1886, to which reference has already been made.

4.171. The Schomburgk line set out in Salisbury's Pro Memoria of 1890 was also rejected by Venezuela in two notes, dated 13 February 1890, sent to Mr. Saint John. The first of these reads:

“The present Government of Venezuela, a constitutional, prudent, and pacific Government which has given no cause of complaint to Great Britain, but, on the contrary, is desirous of renewing the diplomatic relations with Her British Majesty, was in hopes that the conditions imposed by Her British Majesty's Government with this object would be less severe for Venezuela than those formerly demanded of the Government representative, who in 1887, interrupted the diplomatic relations with Her British Majesty's

³⁹⁰ Memorandum de Urbaneja, 15 July 1882, AHMPPRE, Archivo Histórico, Memorandum. Declara que Venezuela no acepta la proposición hecha por Granville el 15 de septiembre de 1881 y expone las razones. Sobre los límites de Venezuela y su derecho. Hace un recorrido de las negociaciones con Gran Bretaña y de la ocupación del territorio venezolano. País: EUA, N° 471, pieza 3. 1882.

Government, and of whom Her British Majesty's Government may have cause of complaint".³⁹¹

4.172. The same happened with Rosebery's proposal of 1893, as attested to in the Memorandum of Mr. José Andrade accompanying the note sent to Mr. Gresham,³⁹² in which he warns that if previous proposals had already been rejected, there was all the more reason to reject this one, and indicates that this is what Mr. Michelena did.³⁹³

4.173. The events preceding the severance of diplomatic relations demonstrate Venezuela's opposition to the British excesses, as evidenced by the Muñoz Tebar and Rodil Commission. When Venezuela learned of the acts of jurisdiction being carried out by the British authorities in Amacuro, Barima, Cuabana, Guariramuri and the exploitation of the gold mines located between the Cuyuni and Mazariuni rivers, Dr. Urbaneja brought it to the attention of Mr. Saint John.³⁹⁴ When the latter replied that these places were British territory,³⁹⁵ Venezuela asked the British Minister in Caracas for explanations and, as these did not satisfy him, the Bolivarian Republic demanded the evacuation of the occupied territory from the Orinoco to the Pomarón and the submission of the dispute to arbitration.³⁹⁶

³⁹¹ Notes sent to Mr. Saint John, 13 February 1890 (**Annex 34**).

³⁹² Memorandum relating to the Question of Limits between Venezuela and British Guiana, presented to the Honorable W. Q. Gresham, Secretary of State, by José Andrade, 31 March 1894 (**Annex 39**).

³⁹³ *Ibid.*

³⁹⁴ Letter from Diego B. Urbaneja, Minister in Venezuela, to F. R. St. John in Caracas, 26 January 1887 (**Annex 31**).

³⁹⁵ Letter from Chas Bruce to Manuel L. R. Andrade, Consul of Venezuela in Georgetown, 6 January 1887 (**Annex 30**); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 153-154 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

³⁹⁶ Letter from F. R. St. John in Caracas to Diego B. Urbaneja, Minister in Venezuela, 11 February 1887 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 155-156 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

4.174. Venezuela took the same attitude when Great Britain denied having authorised Mr Porter's request for the construction of a lighthouse at Punta Barima³⁹⁷ and when it opposed Great Britain's cynical authorisation for its construction.³⁹⁸

4.175. The moment when diplomatic relations were broken off allowed Venezuela to protest against the acts of dispossession committed by Great Britain and to draw up a list of grievances. In the note sent by Dr. Urbaneja to Mr. Saint John on 20 February 1887,³⁹⁹ it is stated that:

“Great Britain has violated the territory of Venezuela by entering it through forbidden places, by appointing Commissioners, by establishing Government offices in which the English flag flies, by seizing, trying, and punishing an employee of Venezuela, by sending there with armed police officers a judge who has notified those places to be British, decreeing prohibitions of commerce, travelling with a coastguard the space between Amacuro and Barima, comprising these rivers in the jurisdiction of the Governor of Demerara, authorising the benefit of mines included in the soil of the Republic, and exercising other acts of dominion.

³⁹⁷ Note from Dr. Urbaneja to Mr. Saint John, 31 January 1887, *Blue Book* 6, pp. 162-164 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 162-164 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

³⁹⁸ Letter from F. R. St. John in Caracas to Diego B. Urbaneja, Minister in Venezuela, 7 February 1887 (Annex 32); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 161-165 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>). The note of 31 January can also be consulted in AHMPRE, Archivo Antiguo, Petición de Sir Robert Ker Porte, colocación de faro en Punta Barima. Desconocimiento de autoridad de Sir Ker Porte por parte de G. B. Gran Bretaña reclama derechos sobre Punta Barima. Punta Barima es propiedad exclusiva de Venezuela. Ninguna de las propuestas de Lord Aberdeen, Lord Granville y Lord Rosebery, incluyen la Isla Barima. País: Gran Bretaña, Vol. 148, Exp. 12, Folios 129-141. 1887.

³⁹⁹ *Blue Book* 6, pp. 167-174 (available at: <https://kamuru.mppre.gob.ve/index.php/s/XSLfiiQbn2mtAF4>); *Official history of the dispute between Venezuela and Great Britain on their Guiana boundaries*, pp. 167-174 (English version available at: <https://www.loc.gov/item/04010002/>; Spanish version: <https://www.loc.gov/item/31020869/>).

Britain has arrogated to itself the right to decide for itself and before itself and on its own behalf a question that concerns it as much as Venezuela.

Great Britain has declared itself the owner of the Orinoco, the great river artery of northern South America, seizing the Barima channel, one of its mouths, and by this means the trade of vast regions belonging to several countries.

Britain has followed a course of action with Venezuela that it has condemned in others.

Great Britain has been founded to declare as its own the places where it has just settled, where its boundaries are in dispute with Venezuela.

Great Britain has violated to its advantage the agreement which it itself proposed to Venezuela on 18 November 1850, and occupied the territory guaranteed by it.

Britain intends to make the establishment of a lighthouse at Punta Barima, over which its Chargé d’Affaires on 26 May 1836 spontaneously recognised Venezuela’s sovereignty, subject to conditions.

Britain does not want to apply to Venezuela the arbitration it applied to the United States of America in 1827 and 1871 to settle boundary issues, in the latter case at its repeated insistence.

Britain has been progressively increasing its advances from Essequibo to Pomaron, Moroco, Guaima, Barima and Amacuro.

Great Britain has thus violated Venezuela’s rights of sovereignty and independence by depriving it of the holiest and most inviolable property of a nation, namely that of its territory.”⁴⁰⁰

⁴⁰⁰ *Ibid*, p. 173.

4.176. After this rupture, Venezuela continued to protest every act that were an attack on its sovereignty. Ezequiel Rojas gave a good account of these protests in the letter sent on 16 November 1894 to the Venezuelan Consul in Demerara in which he noted that:

“As soon as the occupation of the territories stretching as far as the Cuaima, Barima and Amacuro was effected, he raised his voice in protest against the conduct of Great Britain. On December 16, 1889, he denounced before the civilised world, as an attack on the principles governing the international treatment of educated countries and as a mockery of morality and justice, Sir Charles Bruce's decree of the 4th of the same month and year, which declared Barima a British colonial port. At the same time, he reiterated his protests of 20 February 1887 and 15 June and 29 October 1888 against previous encroachments on Venezuelan territory, and did the same with regard to the act of jurisdiction which the Colony had attempted to exercise over Venezuelan land by authorising the construction of a road linking Demerara with the then Federal Territory of Yuruary. On September 1, 1890, he also lodged a formal protest against a provision issued in Georgetown by order of the Governor of Demerara, where under the pretext of establishing an additional District under the name of "Pomaron" and altering the demarcation of the District called "North-West," boundaries were fixed contrary to our law and visibly aimed at extending the radius of usurpation.

The establishment of the so-called Government and Police Station in Alto Cuyuní was opposed by Venezuela by means of a protest, also solemn, which it raised before all the civilised peoples of the world on 30 December 1891, and in which it declared that the acts of Great Britain referred to in the same document were considered to have been exercised in territory whose absolute possession the Government of the Republic demanded with irrecusable historical titles and in the name of the principles of the Law of Nations.

Finally, on 26 August 1893, when an *ad hoc* agent was discussing in London, on instructions from the Government of the Republic, the matter of boundaries, in search of a decent settlement, the attention of Her Majesty's Department of Foreign Affairs was drawn to the fact that plans for exploitation were announced, This territory has been maintained by Venezuela with arguments of law, which are as

firm and valid today as at the time of its first exposition. On the following 6th October, a solemn protest was made to the aforesaid claim, since the British Government had not attended to it as was just.

Never, either before or since the conduct of England in this question has shown the character of intransigence which for some time has been pointed out, has the Government of Her Britannic Majesty presented any proof or argument which could disprove a single one of the protests referred to. While England gives as reasons facts of force, Venezuela exhibits titles of high value, and, animated by the most conciliatory spirit, urges with eagerness for the termination of the dispute in a manner equally decorous to both parties. She embraces the practice of arbitration, judging it to be the most consonant with the ideas of Modern Law, and is, today as yesterday, ready to settle the vexatious boundary dispute with the Colony of Demerara, if Great Britain, more forgetful of her material resources than of her marks of a civilised and cultured Nation, does not oppose humiliating restrictions to the proposal of the Government of the Republic.

The execution of the projected road from the headwaters of the Barima to the Cuyuní or the Yuruán would undoubtedly produce a collision with the Venezuelan authorities in that area, and would be the cause of new acrimony in a controversy that it is in the interest of both parties to bring to more conciliatory ground”.⁴⁰¹

4.177. Regarding this last claim by the Colony, Venezuela’s note of protest once again makes clear Great Britain’s bad faith and recalls the commitment made in the 1850 Agreement. Its text reads as follows:

“In the periodical called the Daily Chronicle, of Demerara, British Guiana, there is a decree of the colonial governor, Sir Charles Bruce, dated December 4, 1889, in which Barima, or the great mouth of the Orinoco River, is declared to be an English colonial port, and the line known as "the Shomburgk line" is assumed to be the boundary between British and Venezuelan Guiana. Now, according to Lord Aberdeen’s statement, made to Mr. Fortique, the Venezuelan

⁴⁰¹ *Ibid.*, pp. 278-280.

Minister in London, Shomburgk was never authorized to occupy any part of our territory, not even that inhabited by tribes of savage Indians; that the stakes and signs placed by him were only intended to indicate a line which would be the subject of future negotiation between the two nations; and that no military stations or posts were known to have been established, nor the British flag to have been hoisted over the disputed territory. This was in 1841, and the Venezuelan Government soon sought the removal of the marks and posts indicated.

Now, however, following its system of previous usurpations, the Demerara Government does not hesitate to declare Barima a colonial port, set up a police station there and take possession of the neighboring country; all without permission or license and in open disregard of all those principles of justice which govern the international relations of civilized nations.

The Government of the United States of Venezuela therefore finds it necessary to protest, and hereby formally and solemnly protests, against the acts of the Government of Demarara in declaring Barima a colonial port; and does so in the same form and manner as expressed in its protest of February 27, 1887, and of June 15 and October 29, 1888, against previous usurpations of Venezuelan territory.

It also protests against the act of jurisdiction that the same colony has recently pretended to exercise over Venezuelan land by authorizing the construction of a road that will put Demerara in the federal territory of Yuruary. That territory belongs exclusively to the Republic and is under its sole and exclusive jurisdiction, never having been considered as disputed territory between Venezuela and Great Britain.

Moreover, the last named power is prohibited from claiming or occupying it by the very terms of the agreement which it itself proposed and concluded with Venezuela in 1850 through Mr.

Bedford Hinton Wilson, then British Chargé d’Affaires in this capital”.⁴⁰²

4.178. In short, Venezuela has never ceased to express its opposition to the excesses of Great Britain, making clear the intention of the Government of the Republic never to recognize, for any reason whatsoever, the violent possession by the British of places whose dominion belongs to Venezuela.

4.179. In view of the above, the conclusion is obvious: Great Britain never had title to territorial sovereignty over the territory of Guayana Esequiba and this was made clear by President Guzmán Blanco in the communication he made to Mr. J. A. Olavarria, Chargé d’Affaires of Venezuela on 17 May 1888 in which he warned that:

“It is thus pretended that the usurpations made on the left of the Essequibo are legitimised by Venezuela, with the abandonment of the claims up to that river, pointing out as an alinderable space what is outside of what is possessed by the English. They plead in their favour prescription; but I have made it appear that it would in this case be contrary to the treaties, and that as the Dutch or British possession has been the subject of constant complaints and claims, resisted by force of arms, supported only by the violence of the usurpers, not consented to even once, and of a date which cannot be considered but recent in the life of nations, it has not the characters of peaceful, uninterrupted, and durable which might justify it. [...] On the other hand, if the mere fact of possession is a means of acquisition, as the English have taken possession since 1884 of Barima and Amacuro and other places, and are holding on to them by force, tomorrow or another day they will maintain that the territory belongs to them because Venezuela has not thrown them out. This is all the more extraordinary because it is linked to the attempt to dispossess the Republic of what it possesses with

⁴⁰² AHMPPRE, Old Archives, Great Britain, Guyana Boundaries, 1889-1890, Vol. 153, File No. 22, folio 367-373 (available at: <https://history.state.gov/historicaldocuments/frus1890/d487>).

unimpeachable titles, such as the mining territory of the Yuruary.”

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⁴⁰³ AHMPPRE, Comunicación sobre el proyecto de tratado para ser presentado a Lord Salisbury. Guzmán Blanco propuso la evacuación del territorio entre el Orinoco y el Pomarón, además del arbitramiento para decidir la controversia general hasta el Esequibo (límite que sostiene Venezuela). Menciona el despojo a la fuerza de parte del territorio venezolano. País: EUA, Exp. 471, Pieza 4, Folios 20-24. 1888.

CHAPTER 5: THE BRITISH-USA SWINDLE DISGUISED AS AN ARBITRATION PROCESS LEADING TO A FRAUDULENT, ABUSIVE AND UNJUST OUTCOME

5.1. The preceding Chapter demonstrates that for sustaining a growing sovereignty claim over the Guayana Esequiba that never found any legal basis, the British Empire claimed for itself Venezuelan territory for the sole reason of its Imperial desire of territorial expansion, and that it manipulated, lied, pressured, threatened, concluded the 1850 agreement not to honour it in good faith but to mislead Venezuela's trust, all while stubbornly refusing to resort to legal arbitration where the law, only the law, would rule on the dispute. If the British finally accepted to enter into an arbitration process, it was under the U.S. pressure, and to ward off the risk of seeing the work of the Venezuelan Boundary Commission concluding, as it had to, that the "true boundary" had always been the one claimed by Venezuela.

5.2. But, as will be shown in this Chapter, accepting arbitration did not mean, for Great Britain, that it was ready to let its claim arbitrated according to international law. It had repeatedly made it very clear that any outcome which would not be in line with its interests would be rejected. The U.S., only focused on its objective which was to give substance to the Monroe Doctrine, not on the objective of securing a sound legal solution to the dispute, shown itself open to bend the arbitration process to suit with the interests of Great Britain.

5.3. As a matter of fact, the 1899 Arbitral Award, issued on the basis of the 1897 Treaty, marked the culmination of a series of "political transaction[s] carried out behind Venezuela's back and sacrificing its legitimate rights",⁴⁰⁴ making Venezuela the victim of a corrupted arbitral process, or, in other words, of an "arbitration fraud".

5.4. The list of peculiarities that mar the entire arbitration process is, no doubt, a textbook case of what can corrupt such a process:

⁴⁰⁴ Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations, 14 February 1962 (**Annex 140**).

- Venezuela has been compelled to conclude a treaty that was *patently* prejudicial to its interests, retroactively retaining rules on “adverse holding” that had always been rejected as legally irrelevant by Venezuela, and that were never argued by the British, the 1850 agreement enshrining the reverse rule, namely that no Party had the intention to occupy the disputed territory;
- Venezuela has been precluded from having *any* effective role in the negotiation of the Washington Treaty.
- The arbitral proceedings, in turn, conducted on the basis of this Treaty, were marked by grave irregularities and violated essential principles of the administration of justice, resulting, in the words of a close observer, in “the general discrediting of the cause of arbitration”.⁴⁰⁵
- As a result, Venezuela found itself to be victim of an award that has no relation whatsoever with the application of international law but represents the result of a bargaining process dictated by political considerations. Such award cannot be anything but null and void.

5.5. In several official documents, including in statements before the United Nations, Venezuela has provided a detailed and extensive account of the background to the conclusion of the 1897 Treaty and of the proceedings resulting in the Arbitral 1899 Award.⁴⁰⁶ The rich historical analysis contained therein remains valid until today. For the sake of conciseness, this chapter will focus on some of the key episodes in the larger history of the injustice committed against Venezuela in the period between 1896 and 1899.

⁴⁰⁵ From Richard Olney to President Grover Cleveland (27 December 1899): Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 43 (**Annex 150**).

⁴⁰⁶ See, among others, Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations, 14 February 1962 (**Annex 140**); Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 43 (**Annex 150**); Ministerio de Relaciones Exteriores República de Venezuela, Los límites de Venezuela con la Guayana Británica (1962); Ministerio de Relaciones Exteriores República de Venezuela, Reclamación de la Guayana Esequiba: documentos 1962-1981 (available at: <https://peacepalace.on.worldcat.org/placeholder/formData/oclcNum>).

5.6. The chapter is divided into two sections. The first addresses the negotiation of the *compromis* and the conclusion of the 1897 Treaty. The second section deals with the conduct of the arbitral proceedings resulting in the Arbitral 1899 Award.

SECTION I: THE NEGOTIATION OF THE *COMPROMIS* AND THE CONCLUSION OF THE 1897 TREATY

5.7. Contrary to what a normal situation would have required, where two equally sovereign States negotiate a treaty as crucial as a treaty establishing an arbitral tribunal in charge of determining their common boundary, the 1897 Treaty was not the result of exchanges between Great Britain and Venezuela.

- Venezuela had no role in the negotiations, which were conducted *exclusively* by the United States and Great Britain.
- The result was a text that was patently prejudicial to the interests and dignity of Venezuela in respect to crucial issues, including *the composition of the future tribunal* and *the definition of the applicable law*.
- The text of the treaty, which was negotiated by United States Secretary of State, Richard Olney, on the one hand, and by Great Britain's Prime Minister, Lord Salisbury, the Secretary of State for the Colonies, Joseph Chamberlain, and Great Britain's Ambassador in Washington, Sir Julian Pauncefote, on the other, was complemented by a number of informal decisions taken by the two parties. Venezuela was never informed of these decisions, even less was it requested to consent to them.
- Finally, the consent given by Venezuela to the text agreed upon by the United States and Great Britain was far from being a free one. Acceptance of the text was the only option available to Venezuela in order to avoid being exposed to the aggressive conduct of Great Britain.

I. VENEZUELA SIDELINED FROM NEGOTIATIONS: “*UNE SITUATION QUASI-COLONIALE*”

5.8. In negotiating the Arbitration Treaty, the United States and Great Britain behaved as if Venezuela were not a sovereign State. Indeed, they took advantage of the situation of weakness in which Venezuela found itself in the last decade of the 19th century. As one authoritative scholar, Paul Reuter, observed, the conditions in which Venezuela was relegated during the negotiations of the arbitration treaty, and later before the Arbitral Tribunal, “révèlent une situation quasi-coloniale”.⁴⁰⁷

5.9. No doubt, recourse to arbitration was a long-standing aspiration of Venezuela. As shown in Chapter 6 above, before 1896 Venezuela had repeatedly proposed to Great Britain to settle the territorial dispute by arbitration and on the basis of international law. Until that time, however, Great Britain had systematically refused such solution, or had subjected recourse to arbitration to unacceptable conditions.⁴⁰⁸ In a letter of 26 November 1895, Great Britain’s Prime Minister, Lord Salisbury, made clear that “Her Majesty’s Government cannot in justice to the inhabitants offer to surrender to foreign rule”.⁴⁰⁹

5.10. It is also a fact that Venezuela requested the protection of the United States in order to resist Great Britain’s aggressive conduct and reach a peaceful solution of the territorial dispute. It was clear that the possibility of submitting the dispute to arbitration could have materialised only with the support of the United States. It was therefore natural that, when,

⁴⁰⁷ P. Reuter, “La motivation et la révision des sentences arbitrales à la Conférence de la paix de la Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Vénézuéla”, in *Mélanges Offerts À Juraj Andrassy*, Springer, Dordrecht, p. 246. A similar view was expressed by other authors. See H. Gros Espiell, “Estudio preliminar”, *Academia Nacional de la Historia* (1981), p. 21 (“Las condiciones en las que Venezuela consintió en hacerse representar por dos jueces norteamericanos, sin que existiera un protectorado o cualquier otra institución análoga, se encuentra muy raramente en un procedimiento arbitral y ponen de manifiesto una soberanía cuasi colonial”); C. Sosa Rodríguez, “El Acta de Washington y El Laudo de París”, in T. Carrillo Batalla (ed.), *La reclamación venezolana sobre la Guayana Esequiba*, Biblioteca de la Academia Venezolana de Ciencias Políticas y Sociales, 1983, p. 146 (“Venezuela es tratada como si fuera una colonia o un país bajo mandato”).

⁴⁰⁸ On the several attempts made by Venezuela to settle the dispute by arbitration, see also Letter from Richard Olney to Thomas Bayard, 20 July 1895 (**Annex 152**).

⁴⁰⁹ Letter of Lord Salisbury to Sir Julian Pauncefote, 26 November 1895 (available at: <https://history.state.gov/historicaldocuments/frus1895p1/d530>).

in 1895, the United States intervened in the dispute, Venezuela accepted, and even encouraged, its mediation.

5.11. At no time, however, had Venezuela asked the United States to negotiate the arbitration agreement on its behalf. The initiative to negotiate such an agreement was taken unilaterally by the United States, without consulting Venezuela. Nor was Venezuela consulted about the content of the agreement.

5.12. Great Britain accepted arbitration only because of the pressure put on it by the United States. In December 1895, the United States Congress had authorised the establishment of a commission “to investigate and report on the true divisional line between the Republic of Venezuela and British Guiana”.⁴¹⁰ The establishment of such a commission represented an existential threat to Great Britain’s plan to usurp the territories belonging to Venezuela. Only at that point Great Britain accepted to negotiate an arbitration agreement, as confirmed by the Secretary of State for the Colonies, Joseph Chamberlain, in February 1896. Two main reasons were at the basis of Great Britain’s change of position. First, by accepting to negotiate an arbitration treaty, Great Britain hoped to put an end to the work of the commission established by Congress, as it indeed happened. *Second*, and more fundamentally, Great Britain realised that it could use arbitration as a means for pursuing its plan to usurp the territory of Guayana Esequiba.⁴¹¹

5.13. To obtain that result, it was indispensable for Great Britain to impose certain conditions concerning the composition of the future arbitral tribunal and the law to be applied. This explains why, since the beginning, Great Britain sought to negotiate the arbitration agreement exclusively with the United States. In particular, Great Britain first accepted the United States’ proposal, made behind Venezuela's back, that no Venezuelan arbitrators would sit in the tribunal and then insisted in order to have this proposal

⁴¹⁰ See United States 54th Congress, Act of the United States Congress, Public Act No. 1 (21 Dec. 1895), reproduced in GM, Annex 82.

⁴¹¹ As observed by P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 47, “bajo apariencia de arbitramento de derecho, se despejó el camino para que Gran Bretaña retuviera el territorio, marginando a Venezuela y haciendo caso omiso de sus derechos”.

integrated into the arbitration agreement.⁴¹² Keeping Venezuela outside the negotiation process and, subsequently, outside from the arbitration proceedings was for Great Britain the best guarantee for the success of its plan.

5.14. The two negotiating States were aware that, ultimately, they would be able to coerce Venezuela into accepting their conditions; they did not hesitate to exploit their situation of strength vis-à-vis Venezuela. The negotiator for Great Britain, Sir Julian Pauncefote, said it in unequivocal terms:

“There is no danger of Mr. Olney listening for a moment to the Venezuelan howl for a modification of our terms of Arbitration”.⁴¹³

5.15. The position of the United States was enunciated in equally clear terms by the United States Secretary of State, Richard Olney:

“Today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition. Why? It is not because of the pure friendship or good will felt for it. [...] It is because, in addition to all 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”.⁴¹⁴

⁴¹² Telegram from Lord Salisbury to Sir Julian Pauncefote, British Ambassador in Washington (5 June 1886), in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 36 (**Annex 150**), “We should also accept its application to Venezuela if, for this purpose, the United States will stand in the place of Venezuela”.

⁴¹³ Private letter from Sir Julian Pauncefote, British Ambassador in Washington, to Lord Salisbury, 8 December 1886, in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 36 (**Annex 150**).

⁴¹⁴ Letter from Mr. Olney to Mr. Bayard, 20 July 1895 (available at: <https://history.state.gov/historicaldocuments/frus1895p1/d527>).

5.16. The evidence confirms that the United States and Great Britain systematically avoided to request the consent of, or to consult, Venezuela during the different stages of the negotiations.⁴¹⁵

5.17. On 20 July 1895, Secretary of State Olney sent a note to Great Britain by which he forcefully requested Great Britain to submit the Venezuelan boundary question in its entirety to impartial arbitration.⁴¹⁶ This note represented the first act of active involvement of the United States in the territorial dispute. As already observed, the reason that prompted this initiative had nothing to do with the intention to protect Venezuela's interests. The United States seized the opportunity offered by Great Britain's aggressive conduct against Venezuela to affirm its role as emerging power. Venezuela was used as a piece of a broader negotiation process in which the main objectives were that of reaffirming the centrality of the Monroe doctrine and of promoting the project of general convention on arbitration as well as other arbitrations with different states. President Cleveland recognised this expressly:

“I hope there are but few of our fellow-citizens who, in retrospect, do not now acknowledge the good that has come to our nation through this episode in our history. It has established the Monroe Doctrine on lasting foundations before the eyes of the world; it has

⁴¹⁵ On the scandalous lack of any involvement of Venezuela in the negotiations see Academia Nacional de la Historia, “Declaración acerca del problema de los límites de Venezuela con la Guayana Británica” (1965), reported in Boletín de la Academia Nacional de la Historia, 2004, p. 167; P.F.M. De Vegamian, *El Esequibo, frontera de Venezuela: documentos históricos y experiencias personales*, SA Impresiones (1968), p. 171; H. Gros Espiell, “El conflicto limítrofe entre Venezuela y Guyana en un Libro Reciente”, in *Humanitas: Anuario del Centro de Estudio Humanísticos*, 1980, p. 684; J. A. Zambrano Velasco, *The Esequibo. Our Historical Claim*, Imprenta Nacional (1982), p. 8; H. González Oropeza and M. Donis, *Historia de las Fronteras de Venezuela*, Cuadernos Lagoven (1989), p. 161; E. Herrera, *Por qué se ha reducido el territorio venezolano?*, Alfadil (1990), p. 75; J. C. Rey, *La Reclamación Venezolana sobre la Guayana Esequiba*, Instituto Internacional de Estudios Avanzados (IDEA) (1990), p. 10; M. Bello, “Formación de los límites terrestres de Venezuela”, in *Aldea Mundo, Revista sobre Fronteras e Integración*, 2008, p. 14; R. Sureda, *Venezuela y la Guayana Esequiba*, in *GeoVenezuela*, 2008, p. 351; G.R. Salas, “Las controversias limítrofes pendientes en América del Sur. La cuestión del Esequibo”, in *Revista de la Facultad, Universidad Nacional de Córdoba* (2011), p. 71; C.A. Briceño Monzón, *La cuestión fronteriza en la conformación de la política internacional en Argentina y Venezuela: Siglos XIX-XX*, Universidad Nacional de La Plata (2014), p. 277.

⁴¹⁶ Letter from Mr. Olney to Mr. Bayard, 20 July 1895 (available at: <https://history.state.gov/historicaldocuments/frus1895p1/d527>).

given us a better place in the respect and consideration of the people of all nations, and especially of Great Britain; it has again confirmed our confidence in the overwhelming prevalence among our citizens of disinterested devotion to American honor; and last, but by no means least, it has taught us where to look in the ranks of our countrymen for the best patriotism.

In these circumstances neither the character of the people claiming the soil as against Great Britain, nor the value of the lands in dispute, was of the least consequence to us; nor did it in the least concern us which of the two contestants had the best title to any part of the disputed territory, so long as England did not possess and colonize more than belonged to her-however much or however little that might be. But we needed proof of the limits of her rights in order to determine our duty in defense of our Monroe Doctrine; and we sought to obtain such proof, and to secure peace, through arbitration”.⁴¹⁷

5.18. This explains why, since the beginning, the United States did not contemplate to involve Venezuela in the negotiations. As remarked by a leading British historian:

“[n]ot a word was said to Venezuela about the note, though its proposals affected her deeply. What seems to have been uppermost in Olney's mind, indeed, was not the interests of Venezuela but the interests of the United States, the vindication of the Monroe Doctrine, and, I would add, of the paramount position of the United States in the western hemisphere”.⁴¹⁸

⁴¹⁷ S. A. Consalvi, *Grover Cleveland y la Controversia Venezuela-Gran Bretaña*, Tierra de Gracia Editores, 1992, p. 120-122 (available at : <https://www.mikeslibrary.com/pages/books/5365/simon-alberto-consalvi/grover-cleveland-y-la-controversia-venezuela-gran-bretana-bretana-la-historia-secreta>). The link between the solution of the Venezuelan question and the proposal of a general convention for the settlement by arbitration of all controversies between the United States and Great Britain emerged clearly from the Telegram from Olney, Department of State of the United States, to Bayard, Ambassador to London, 16 January 1896 (**Annex 57**). For the relations existing between the Venezuelan arbitration and other contemporary arbitrations, see Letter from Choate to Hay, 20 September 1899 (**Annex 172**).

⁴¹⁸ R. A. Humphreys, *Anglo-American Rivalries and the Venezuela Crisis*, *Transactions of the Royal Historical Society*, Vol. 17, 1967, pp. 131-164, at 151. On the real motivation behind the intervention of the United States see also P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 40 (“los Estados Unidos se propusieron aprovechar la cuestión guayanesa pasa

5.19. As already said, in December 1895, the President of the United States, Cleveland, asked the Congress to establish a commission for determining the line of division between Venezuela and British Guyana and, “[o]nce again, Venezuela was not consulted”.⁴¹⁹

5.20. Negotiations of the text of the arbitration agreement only started in 1896. A first round of negotiations took place between February and June 1896. The result of this negotiation only was made available to Venezuela through the publication of the correspondence between the United States and Great Britain.

5.21. A second round of negotiations then took place in the fall of the same year. In September 1896, the Secretary of State for the Colonies, Joseph Chamberlain, who had a key role in the negotiations, made a visit to the United States and had “a private interchange of opinion” with Secretary of State Olney on the “Venezuelan question”.⁴²⁰ Chamberlain expressed its conviction that “neither party [the United States and Great Britain] can desire a solution which would be humiliating to the other and it must be possible to find an arrangement free from this objection”.⁴²¹ Chamberlain made clear that Great Britain regarded the possibility of an arbitration based on law which could result in the recognition of Venezuela’s legitimate right of sovereignty over Guayana Esequiba as an “humiliating solution”. Chamberlain made also clear the conditions he regarded as indispensable to avoid that “humiliating solution”: to have the United States as the only counterpart in the negotiation of the arbitration treaty and subsequently in the arbitral proceedings, and to include in that treaty rules on “adverse holding” on which Great Britain could rely to justify

salir de su aislacionismo, y pasar al plano de gran potencia, mediante la provocación artificial a Gran Bretaña para que los lomara en cuenta y aceptara su doctrina Monroe, es decir la doctrina justificativa de su predominio exclusivo en todo el Continente”); H. González Oropeza and M. Donis, *Historia de las Fronteras de Venezuela*, Cuadernos Lagoven (1989), p. 93 (“Pero no se crea, como se ha sostenido en diversas oportunidades, que la intervención de Estados Unidos fue producto de la defensa de la integridad territorial de Venezuela en virtud de la Doctrina Monroe. Tampoco su preocupación por las ambiciones territoriales de Gran Bretaña. Tanto el mensaje presidencial como la Nota diplomática obedecieron a otros intereses: los Estados Unidos decidieron aprovechar el caso venezolano para salir de su política aislacionista y entrar en el escenario mundial como potencia emergente”).

⁴¹⁹ *Ibid.*, at 155.

⁴²⁰ Letter from Chamberlain to Olney, 28 September 1896 (**Annex 168**).

⁴²¹ *Ibid.*

its unfounded claims.⁴²² This new round of negotiation led to the adoption, on 12 November 1896, of a protocol containing the essential points of the future agreement. This second round was conducted through confidential exchanges between the negotiators. Venezuela was only informed of the conclusion of the protocol and was asked to accept it, without, in fact, being given any possibility to amend it.

5.22. The position of Venezuela during these different stages of the negotiations is carefully reflected in the message of then Venezuelan President, Joaquin Sinforiano De Jesus Crespo, to the Venezuelan Congress of 20 February 1897. He stated:

“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

⁴²² *Ibid.*

accepted a compact which, in his opinion, was just and advantageous”.⁴²³

5.23. This statement, which is reported also in Guyana’s Memorial and whose correctness Guyana does not dispute,⁴²⁴ confirms:

that in the first stage of the negotiation, Venezuela was not consulted by the negotiating states and became aware of the existence of a negotiation only through the publication of the relevant correspondence;

that the last document pertaining to the negotiation and made available to Venezuela was a correspondence that took place in June 1896;

that Venezuela was then consulted only on one point but that its opposition in relation to that point was made irrelevant by the conclusion of the protocol of 12 November 1896;

that Venezuela was not informed of the content of the negotiation which took place in the fall of that year; and

that in the end Venezuela was simply placed before the alternative of accepting or not accepting the text agreed upon by the United States and Great Britain.

5.24. All this evidence speaks loudly about the lack of involvement of Venezuela in the negotiations. As it has been noted, “the United States, with British concurrence, acted on Venezuela's behalf, but Venezuela herself was not consulted, or, rather [...] she was not consulted till the very end of the negotiations, and then only perfunctorily”.⁴²⁵ In fact,

⁴²³ Message from President Joaquín Sinforiano De Jesús Crespo to Congress, 20 February 1897, reprinted in Odeen Ishmael, “Chapter 13: The Arbitral Tribunal and the Award” in *Trail of Diplomacy*, GNI Publications, 1998 (available at: http://www.guyananeews.org/features/trail_diplomacy_pt3.html).

⁴²⁴ GM, p. 188.

⁴²⁵ R. A. Humphreys, “Anglo-American Rivalries and the Venezuela Crisis”, in *Transactions of the Royal Historical Society*, Vol. 17 (1967), pp. 131-164, at p. 158. See also J. Aguilera, *Las fronteras de Venezuela*, Ediciones Minci (1976), p. 69 (“Investigaciones recientes han demostrado que Venezuela fue dejada de lado en el curso de las negociaciones entre Estados Unidos y Gran Bretaña, particularmente en la fase final de las mismas, que por cierto fue la más importante”).

Venezuela reacted vehemently against the exclusion of Venezuelan arbitrators, as well as against the inclusions of the rule on “adverse holding”. However, its efforts to obtain an amendment to the project of treaty were vain. On the one hand, the person who should have represented the interests of Venezuela in the negotiation, James J. Storrow, a U.S. lawyer who was appointed as Venezuelan representative because of his strong connection to the U.S. Secretary of State Olney, failed to defend the legitimate requests for amendments of its client and in fact acted essentially as an agent of the United States having the task of convincing Venezuela to accept the text as it was. The intense correspondence between Storrow and Olney reveals that Storrow acted constantly under the instructions of the U.S. Secretary of State, and not that of the Government of Venezuela. On the other hand, as will be shown later, the United States made clear that, without the acceptance of the text, it would not have defended Venezuela against the aggressive conduct of the Great Britain. In sum, Venezuela was in fact coerced into accepting the text as it was.

II. THE VERY IDEA OF VENEZUELAN ARBITRATORS RULED OUT

5.25. The most unfair and humiliating manifestation of this quasi-colonial treatment was the extraordinary decision to exclude the presence of any Venezuelan on the bench of the Arbitral Tribunal. Not only did Article II of the 1987 Treaty provide that the Tribunal was to be composed of two English and two American jurists, it also denied Venezuela any say as to the selection of the arbitrators in case of death, absence, or incapacity to serve of any of the four arbitrators named in that provision.

5.26. Venezuela was in fact denied its role as party to the dispute. In the words of Sir Julian Pauncefoot, “the question would be arbitrated precisely as if the controversy were between Great Britain and the U.S.”⁴²⁶

5.27. The way in which the decision over the key question of the composition of the Tribunal was taken is revealing of the approach followed by the two negotiating States over

⁴²⁶ Private letter from Sir Julian Pauncefoot, British Ambassador in Washington, to Lord Salisbury (8 December 1896): Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 36 (**Annex 150**).

the course of the entire negotiation. The proposal was first advanced by the United States Secretary of State, Richard Olney. In a telegram of 14 January 1896, sent to the United States Ambassador in London, Thomas F. Bayard, he asked to communicate to Great Britain the following proposal: “Tribunal to consist of two members of present American Commission, of two persons chosen by Great Britain, and of a fifth agreed upon by the two Governments [...]”.⁴²⁷ The exceptional circumstance of the exclusion of any Venezuelan arbitrator did not escape the attention of the United States Ambassador, who immediately stated that “Venezuela does not appear to have any [...] participation, nor any voice, in the tribunal of settlement”.⁴²⁸

5.28. The answer of Olney reveals how little consideration he had for Venezuela, which was nonetheless the main party concerned: “Communicate contents of my cable of fourteenth without delay, leaving British Government, if it thinks it important, to raise question of Venezuela assent”.⁴²⁹ Yet, the British Government, which had no consideration at all for Venezuela, did not find it important to inform it that it would have no arbitrator on the bench. As reported on 26 January 1896 by the U.S. Ambassador in London, “they [Great Britain] consider that Venezuela must be represented in arbitration, but if United States stipulate for Venezuelan concurrence, I believe that would suffice”.⁴³⁰

5.29. As a result, neither the United States nor Great Britain had found it necessary to consult Venezuela of the decision to exclude Venezuelan arbitrators – a decision which was both unfair and clearly prejudicial to Venezuela’s interests. As Sir Pauncefote candidly admitted, such decision was the result of “an implied understanding with us throughout the

⁴²⁷ Translation of the Cipher Telegram relating to a letter that Olney sent to Bayard, American Ambassador in London, 14 January 1896 (**Annex 55**). For the importance of this letter in showing that, since the beginning of the negotiations, Venezuela was used by the United States as a piece of a broader negotiation process in which the main objectives were that of reaffirming the centrality of the Monroe doctrine and of promoting the project of general convention on arbitration as well as other arbitrations with different States.

⁴²⁸ Letter from Thomas Bayard to Richard Olney, 15 January 1896 (**Annex 56**).

⁴²⁹ Telegram from Olney, Department of State of the United States, to Bayard, Ambassador to London, 16 January 1896 (**Annex 57**).

⁴³⁰ Letter from Thomas Bayard to Richard Olney, 15 January 1896 (**Annex 56**).

whole correspondence and negotiation that the Arbitrators on the side of Venezuela should be American”.⁴³¹

5.30. Great Britain defended the decision on the arrogant ground that “we know of no Venezuelan jurist worthy of the name and whom we could consent to entrust with the function of Arbitrator in such a case”.⁴³² In fact, there were plenty of distinguished Venezuelan legal scholars who could have been chosen to sit as arbitrators.⁴³³ The real reason lies elsewhere and is revealing of Great Britain’s expectations about the attitude of the American arbitrators during the arbitral proceedings.

5.31. Great Britain was aware that the United States, unlike Venezuela, had no national sensibility or interest as regards the delimitation of the contested territory, except eventually in relation to the question of the navigation of the Orinoco River. In the words of Sir Pauncefote, the position of the United States in respect of the dispute between Venezuela and Great Britain was that of a “neutral sovereign”. In the same vein, the arbitrators appointed by the United States were closer to “an umpire” than that of arbitrators appointed by one of the two contending parties.⁴³⁴ By contrast, the British arbitrators were appointed specifically to be open to British arguments.

5.32. In sum, it is obvious that, behind the decision to exclude any Venezuelan arbitrator, a fraudulent strategy aiming at predetermining the result of the arbitral proceedings was at play. As asked by one commentator, “would the U.S. Arbitrators representing Venezuela have proceeded in the same way, if what they had decided had been a territorial portion of their country?”. It was clear that, in the eyes of the United States arbitrators and lawyers,

⁴³¹ Private letter from Sir Julian Pauncefote, British Ambassador in Washington, to Lord Salisbury (8 December 1886): Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 36 (**Annex 150**).

⁴³² *Ibid.*

⁴³³ A non-exhaustive list includes the following names: Pedro Manuel Arcaya, José Loreto Arismendi, Juan Bautista Bance, Aníbal Dominici, Ramon F. Feo, Esteban Gil Borges, José Gil Fortoul, Carlos F. Grisanti, Carlos León, Rafael Marciano Rodríguez, Cristóbal L. Mendoza, Néstor Luis Pérez, Simón Planas Suarez, José Santiago Rodríguez, Julio Cesar Salas, Alejandro Urbaneja, Guillermo Tell Villegas, Nicomedes Zuloaga Tovar. See Rogelio Pérez Perdomo, *Los Juristas Académicos de Venezuela: Historia Institucional y Biografía Colectiva* (2013).

⁴³⁴ *Ibid.*

“after all, it was a piece of land of the ‘barbarian’ Venezuela that was in dispute, and it was not worth dragging serious consequences for that cause.”⁴³⁵ Great Britain was aware of it. It was aware that the appointment of two Venezuelan arbitrators would have made the Tribunal less malleable. Hence its interest in excluding the presence of Venezuelan arbitrators.

III. THE RETROACTIVE IMPOSITION OF A LEGAL BASIS FOR THE BRITISH UNFOUNDED CLAIM

5.33. Another manifestation of the fraudulent and unjust treatment of which Venezuela was the victim was the decision to expressly include, among the rules applicable by the Tribunal, the recognition that fifty years’ occupation constituted a valid title. In fact, as shown in Chapter 7, the territory of Guayana Esequiba had never been occupied by Great Britain, which had only conducted local incursions. Yet, in the absence of any other territorial title, introducing a provision which recognized “adverse holding” as a valid title represented for the United Kingdom the only means for seeking to legitimize its usurpation of Venezuelan territory. To that end, Article IV (a) of the 1897 Treaty established that:

“Adverse holding 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”.

5.34. This rule was clearly prejudicial to Venezuelan interests. Indeed, Venezuela had persistently opposed to recognise effective occupation, of whatever antiquity, as a valid title to the disputed territory. It had exposed its position on the matter on several occasions, including in exchanges with the United States.

⁴³⁵ R. Chalboud Zerpa, “Los límites entre Venezuela y el Estado de Guyana: Bosquejo histórico de la controversia existente”, in *Revista de la Facultad de Derecho de la Universidad Católica Andrés Bello* (1987), p. 328 (“Hubieran procedido los árbitros norteamericanos representantes de Venezuela en la misma forma, si lo que hubiesen decidido hubiera sido una porción territorial de su país?... al fin y al cabo, era un pedazo de tierra de la Venezuela ‘bárbara’ lo que se disputaba y no valía la pena arrastrar graves consecuencias por esa causa”).

5.35. In a letter sent to the United States Secretary of State, Richard Olney, on 5 February 1896 – a few weeks, then, after the beginning of the negotiations between the United States and Great Britain –, the Venezuelan Foreign Minister, Pedro Ezequiel Rojas, referring to the work of commission established by President Cleveland, insisted on the importance for Venezuela that “the rights of the two parties to the dispute” be deduced from “arguments of legal or historical force, instead of those based upon fortuitous circumstances or upon the fact of local occupation”.⁴³⁶

5.36. At the beginning of the negotiations, the United States appeared opposed to the possibility of recognising effective occupation as a valid title. In the note sent to Great Britain on 20 July 1895, the United States Secretary of State, Olney, observed:

“It is, indeed, intimated that the British claim to this particular territory rests upon an occupation, which, whether acquiesced in or not, has ripened into a perfect title by long continuance. But what prescription affecting territorial rights can be said to exist as between sovereign states?”.⁴³⁷

5.37. In a letter sent to the British Ambassador in Washington, Sir Pauncefote, on 12 June 1896, the United States Secretary of State changed his position by proposing to leave to the tribunal to decide whether occupation was to be regarded as a valid title under international law. He suggested a text to the effect that:

“if territory of one party be found in the occupation of the subjects or citizens of the other party, such weight and effect shall be given to such occupation as reason, justice, the rules of international law, and the equities of the particular case may appear to require”.⁴³⁸

5.38. This proposal was not accepted by Great Britain, which regarded Olney’s text as not yet providing sufficient guarantees for the recognition of its claims by the future

⁴³⁶ Letter from Mr. Rojas to Mr. Olney, 5 February 1896 (available at: <https://history.state.gov/historicaldocuments/frus1895p2/d767>).

⁴³⁷ *Ibid.*

⁴³⁸ Letter from Mr. Olney to Sir Julian Pauncefote, 12 June 1896 (available at: <https://history.state.gov/historicaldocuments/frus1896/d182>).

tribunal. To overcome the resistance of the counterpart, Secretary of State Olney changed again his position. In order to reassure Great Britain that the Arbitral Tribunal would recognise effective occupation as a valid title, and in fact rule in its favor, he advanced the following proposal:

“Can it be assumed that Her Majesty’s Government would submit to unrestricted arbitration the whole of the territory in dispute provided it be a rule of the arbitration, embodied in the arbitral agreement, that territory which has been in the exclusive, notorious, and actual use and occupation of either party for even two generations, or say for sixty years, shall be held by the arbitrators to be the territory of such party?”⁴³⁹

5.39. Effective occupation thus became the rule that should have guided the arbitrators. After further modifications made to accommodate some additional requests of Great Britain, Olney’s proposal became Article IV (a) of the Arbitration Treaty, which, as seen, established that “[a]dverse holding or prescription during a period of fifty years shall make a good title”. The rule was strongly contested by the Venezuelan Government, which however was not in a position to oppose its insertion in the arbitration agreement. In a pathetic attempt to convince the Government to accept the clause, Storrow presented the rule on “adverse holding” as a great success, thus revealing that his real role was that of protecting the interests of the United States, and not that of Venezuela.⁴⁴⁰

5.40. In sum, the United States Secretary of State did not hesitate to sacrifice the rights of Venezuela to see its title recognised, favouring the British illegitimate and fabricated claim, in order to affirm the role of the United States in the American continent. Venezuela was never informed of the change of attitude of the United States: “The bargaining took

⁴³⁹ *Ibid.*

⁴⁴⁰ Letter of J. J. Storrow to Secretary of State Olney, 29 November 1896, Richard Olney Papers, Vol. 67, No. 11878-11887, Library of Congress, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 15 (“But, we said, it was not a concession. Prescription was, I thought, our strongest ground, and I wanted G.B. to agree to it; and of all possible terms, fifty years was the best for us”).

place, of course, without Venezuela's acceptance (or even knowledge)".⁴⁴¹ Venezuela was made aware of the decision taken by the two States only at the end of the negotiations, when "it became apparent that Venezuela would have to be cajoled or coerced into signing the treaty".⁴⁴²

IV. KEY DECISIONS TAKEN BY THE UNITED STATES OF AMERICA AND GREAT BRITAIN DURING THE NEGOTIATIONS CONCEALED FROM VENEZUELA

5.41. As already observed, during the most delicate phase of the negotiation, which took place in the fall of 1896, Great Britain and the United States decided not to take public record of their exchanges and to keep their correspondence strictly confidential.

5.42. This circumstance finds confirmations in the words of the United States Secretary of State, Olney:

"I have yours of the 25th of June and have delayed answering only to get assurance from Washington that the last thing of record relative to the British-Venezuela Boundary Dispute in the Department of State is my letter of July 13, 1896. Mr. Cridler – Third Assistant Secretary – so writes me, and his statement accords with my own recollection. When Sir Julian and myself returned to Washington in the fall of that year, the negotiations proceeded with great activity at personal and informal interviews of which I at least kept no memoranda".⁴⁴³

5.43. In a letter of 24 May 1899 to the British Ambassador, Sir Pauncefote, Olney described the second round of negotiations as follows:

⁴⁴¹ E. Mondolfi, *El Presidente Benjamín Harrison y la mediación de los Estado Unidos en la controversia de límites entre Venezuela y Gran Bretaña*, Biblioteca de la Academia Nacional de la Historia (2000), p. 175 ("El regateo tuvo lugar, claro está, de espaldas a la aceptación (cuando no al simple conocimiento) por parte de Venezuela").

⁴⁴² George B. Young, "Intervention under the Monroe Doctrine: The Olney Corollary", in *Political Science Quarterly*, 57(1942), p. 276.

⁴⁴³ Letter from Richard Olney to Benjamin Harrison, 8 July 1898, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p 23.

“When you and I returned to Washington in the Fall of 1896 and went to work on the Venezuela business industriously and kept at it continuously. But we did so mostly by informal personal talks or, so far as the negotiations were in writing, by equally informal and private notes, none of which were regarded by me as of an official character or were allowed to go on to the files of the State Department”.⁴⁴⁴

5.44. No explanation was given of the reason why the exchanges between the two negotiating States were kept strictly private and confidential in the most intense phase of the negotiation. The reason became clear only during the arbitral proceedings in Paris, when Great Britain made use of the confidential correspondence exchanged between Olney and Pauncefote to compel the American lawyers defending Venezuela to accept their interpretation of fundamental clauses of the 1897 Treaty.

5.45. The evidence makes clear that, during the decisive phase of the negotiation, the United States Secretary of State and the British Ambassador took a number of decisions over the interpretation to be given to the text under negotiation. These “interpretative agreements”, which in fact were later treated as complementing and being an integral part of the text of the treaty,⁴⁴⁵ were contained in the confidential correspondence exchanged between them.

5.46. As the United States Secretary of State made it clear,⁴⁴⁶ such correspondence had to remain confidential. In fact, the Government of Venezuela was never informed about the decisions taken by the negotiating parties.⁴⁴⁷

⁴⁴⁴ Letter from Richard Olney to Sir Pauncefote, 24 May 1899, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 25.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Letter from Richard Olney to Sir Pauncefote, 24 May 1899, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, p. 25.

⁴⁴⁷ See Academia Nacional de la Historia, “Declaración acerca del problema de los límites de Venezuela con la Guayana Británica” (1965), reported in Boletín de la Academia Nacional de la Historia, 2004, p. 169 (“Respecto de importantes cláusulas del Tratado, se le dio a Venezuela una interpretación distinta de la convenida por los negociadores”) and J. A. Zambrano Velasco, The

5.47. This fact was known to English and American counsel who took part to the arbitral proceedings in Paris. At a meeting between Harrison and Webster – respectively, the United States appointed lead counsel for Venezuela and the British lead counsel – Harrison, speaking of this confidential correspondence, confessed that “he did not believe the Venezuelan Government has seen it”.⁴⁴⁸

5.48. The two following examples are revealing as regards the impact of these informal agreements on the interpretation of the 1897 Treaty.

**(i) THE CONCEALED INTERPRETATIVE UNDERSTANDING OF THE
PRESCRIPTION RULE SET OUT IN ARTICLE IV OF THE 1897 TREATY**

5.49. As already observed, Article IV (a) of the 1897 Treaty recognized the role of effective occupation by providing that “[a]dverse holding or prescription during a period of fifty years shall make a good title”. However, this provision did not clarify when the period of prescription was meant to start. In particular, it is not clear what the relationship between Article IV and Article III of the 1897 Treaty is. Article III establishes that, as a first step in the determination of the boundary, the Tribunal had to investigate the extent of the territories belonging to the contending parties “at the time of the acquisition by Great Britain of the Colony of British Guiana”, that is in 1814. Given the importance assigned by Article III to the determination of the territory belonging to each party in 1814, Article IV could reasonably be interpreted to the effect that effective occupation was a valid title only if it occurred in the period before 1814.

5.50. In its written memorial submitted to the Arbitral Tribunal, Venezuela defended the argument that Article IV must be read in conjunction with Article III, and that therefore Rules A and B of Article IV of the Treaty had no application to the period subsequent to

Esequibo. Our Historical Claim, Imprenta Nacional (1982), p. 8 (“While these negotiations were in process, U.S. Secretary of State Olney hid from his own officials, from Venezuela’s lawyers and from the Venezuelan government the sense and scope of the commitments which he had acquired with Great Britain”).

⁴⁴⁸ Letter with Annexure of Great Britain's Leading Counsel, Sir Richard Webster, to Sir Thomas Sanderson (13 June 1899), reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 27.

1814, when Great Britain acquired the Colony of British Guiana. In any event, since the dispute began in 1841, no good faith adverse holding or prescription can have occurred since then and, therefore, no effective occupation recorded after 1841, if any, could have had any legal effect.

5.51. In a private note of 2 February 1899, addressed to counsel for Venezuela, Mallet-Prevost, Great Britain expressed its surprise for this argument, suggesting that the position defended by Venezuela was in contrast to the interpretation of the relevant clauses as agreed during the negotiation of the 1987 Treaty. Great Britain went so far as to request the United States counsels defending Venezuela to withdraw that argument.⁴⁴⁹

5.52. The method of sending *ex parte* notes to counsels of an adverse Party, asking them to withdraw such or such argument, is in itself contrary to all rules of justice. Mallet-Prevost made it known in responding that not only he informed the Government of Venezuela of this request of Great Britain, but also that “the counsel for Venezuela [...] must determine for themselves what arguments may be fairly brought forward”.⁴⁵⁰ In replying to this request, Venezuela forcefully instructed the United States lawyers not to accede to this request, noting:

“The Government of Venezuela cannot understand by what authority the British Lawyers demand the Lawyers of Venezuela to retract the points of our defence”.⁴⁵¹

5.53. With a letter of 22 April 1899, Mallet-Prevost accordingly refused to “withdraw our argument as to the prescriptive period”.⁴⁵²

5.54. A few weeks later, the British Ambassador, Sir Pauncefote, raised the issue directly with the United States Secretary of State, Olney. He stressed that:

⁴⁴⁹ Letter from Mallet-Prevost to Sir Richard Webster, 22 April 1899, GM, vol. III, Annex 32.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Letter from Calcaño to José Andrade, 23 March 1899 (**Annex 61**).

⁴⁵² Letter from S. Mallet-Prevost to Sir Richard Webster, 22 April 1899, GM, vol. III, Annex 32.

“the period of prescription which we had in contemplation throughout the negotiation was a period (ultimately fixed at fifty years) immediately prior to the date of the Treaty”.

5.55. He also communicated that it was the intention of Great Britain to use the diplomatic correspondence exchanged at the time of the negotiation, including a note - “marked at the time ‘strictly personal’” - sent by Olney to Pauncefote on 29 October 1896.⁴⁵³

5.56. Olney responded in a quite alarmed way:

“I confess myself quite appalled at the possible and not improbable consequences of our opening up such a field of investigation and inquiry as the letter in question naturally points to”.⁴⁵⁴

5.57. The question was settled on 13 June 1899 during a private meeting between the lead counsel of Great Britain, Sir Webster, and the American lead counsel for Venezuela, Harrison. Webster emphasised to Harrison that “the good faith of the United States, through whom the Treaty was made, was involved in the matter”.⁴⁵⁵ Harrison replied, ignoring straightforwardly the position expressly stated by Venezuela, by giving assurances that American counsel for Venezuela “would argue the case on the assumption that Great Britain was right in her contention as to the application of the fifty years rule”.⁴⁵⁶ This was indeed the position thereafter taken by the United States counsel in their oral statements before the Arbitral Tribunal.⁴⁵⁷

5.58. As this episode reveals, a crucial legal issue for the destiny of Venezuela’s claim over the contested territory was consensually and informally settled by the United States

⁴⁵³ Letter of Former British Ambassador at Washington, Sir Julian Pauncefote, to the Former Secretary of State Olney, 12 May 1899, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, p. 24.

⁴⁵⁴ Letter from Richard Olney to Sir Pauncefote, 24 May 1899, in *Ibid.*, p. 25.

⁴⁵⁵ Letter with Annexure of Great Britain’s Leading Counsel, Sir Richard Webster, to Sir Thomas Sanderson, 13 June 1899, in *Ibid.*, p. 27.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Verbatim record of the 1899 proceedings, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, pp. 28-30 (available at the Peace Palace Library).

and Great Britain without consulting or asking the consent of the Venezuelan Government, and, worst, running directly against Venezuela's position that the argument should be maintained.

5.59. This episode is worth being insisted on: Venezuela had never been informed of the correspondence exchanged between Olney and Pauncefote during the negotiation; Venezuela was not even informed of the change in legal strategy that was agreed upon by Great Britain and the United States lawyers defending Venezuela. This change was directly contrary to the instructions of the Venezuela's Government with regard to the argument concerning the period of the prescription were clear:

“do not to withdraw the contention in any way, but to insist that it is for the Tribunal to rule on the dissent between the parties as to the meaning of the Treaty”.⁴⁵⁸

5.60. Harrison was aware of the position of the Venezuelan Government. As he said to Webster, “[h]is client, Venezuela, would not let him make a public withdrawal”.⁴⁵⁹

5.61. Yet, the instructions of the Venezuelan Government remained a dead letter. Harrison reassured Webster that he “could trust his word, that the Venezuelan argument would proceed upon the basis that the contention of Great Britain respecting the application of the rule was right”.⁴⁶⁰ Indeed, during the proceedings before the Arbitral Tribunal, Harrison, referring to this private correspondence, openly admitted that:

“I would not be candid if I did not say [these personal and confidential notes] seem clearly to indicate that Mr. Olney and Sir Julian Pauncefote understood that the prescriptive period applied to the years after 1814”.⁴⁶¹

⁴⁵⁸ Letter from Calcaño to José Andrade, 7 April 1899 (**Annex 62**).

⁴⁵⁹ Letter with Annexure of Great Britain's Leading Counsel, Sir Richard Webster, to Sir Thomas Sanderson, 13 June 1899, in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, p. 27.

⁴⁶⁰ *Ibid.*

⁴⁶¹ For the relevant excerpts of the proceedings, see *ibid.*, p. 29.

**(ii) THE 1850 GREAT BRITAIN/VENEZUELA AGREEMENT SET ASIDE WITHOUT
VENEZUELA'S CONSENT**

5.62. As explained in the previous Chapter in 1850, Venezuela and Great Britain concluded an agreement by which the two States engaged not to occupy the disputed territory. The importance of the 1850 Agreement for Venezuela was clear. By freezing the territorial claims of both parties, the agreement precluded Great Britain from claiming that the period of time after 1850 could be taken into account for the purposes of determining “adverse holding or prescription” within the meaning of Article IV of the 1897 Treaty.

5.63. During the negotiation of the arbitration treaty, the United States Secretary of State Olney was aware of the importance of the 1850 agreement for Venezuela. He discussed this issue with Mr. Storrow, the lawyer charged to represent Venezuela's interests during the negotiation. As reported by Olney himself, Olney and Storrow “considered it legally impossible that there could be any adverse holding or prescription as against the agreement of 1850”. Olney also assured that the British Government had committed itself to recognise that position “in the most public and emphatic manner”.⁴⁶² Storrow also observed: “I do not think that the truce of 1850 could be waived or impaired or that it ought to be”.⁴⁶³

5.64. Despite the assurances given by Secretary of State Olney about the position of Great Britain with respect to the 1850 Agreement, Venezuela insisted that the arbitration treaty should include an explicit reference to that agreement. On 9 December 1896, the Minister of Foreign Affairs of Venezuela, Pedro Ezequiel Rojas, requested that the text of the protocol drafted by the United States and Great Britain be modified in order to include

⁴⁶² Postscriptum from Richard Olney to Benjamin Harrison, Chief Venezuelan Counsel, 29 July 1898, in Ministerio de Relaciones Exteriores Republica de Venezuela in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 40 (**Annex 150**).

⁴⁶³ Storrow, James to Olney, Richard, September 17, 1896. Manuscript Division, Library of Congress, Washington, D.C. Richard Olney Papers. General Correspondence and Related Material, 1830-1925 (BOX, 60-62, REEL 22), (1896: Agost 19 - Sept 29) (**Annex 176**).

a provision which read as follows: “the High Contracting Parties confirm the agreement concluded between them on 18 November and 20 December 1850”.⁴⁶⁴

5.65. This request was rejected by the United States and Great Britain. The reason is simple: “Olney was two-faced with regard to the Agreement of 1850”.⁴⁶⁵ In fact, the United States and Great Britain had already found an agreement about the treatment to be accorded to the 1850 agreement. The terms of this agreement were contained in a “strictly personal letter” written by the United States Secretary of State, Olney, to the English Ambassador, Sir Pauncefote, on 29 October 1896. In this letter, Olney wrote:

“It is most desirable, I think, not to give the Agreement of 1850 any status on the face of the Convention even by reference – much less by an attempt to define its scope and meaning”.⁴⁶⁶

5.66. In Olney’s letter, there is no trace of the “public and emphatic engagement” of Great Britain to recognise the effect of 1850 agreement. He simply observed: “[t]he Agreement will come, and should come, before the arbitral Tribunal in the natural course of things and will be interpreted by that Tribunal [...]”.⁴⁶⁷ Olney was behind the decision not only to eliminate from the draft treaty any reference to the 1850 agreement but also to include the provision which later became Article IV c), according to which, “in determining the boundary-line, if territory of one Party 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”.⁴⁶⁸ Both amendments were clearly detrimental to the interests of Venezuela. Olney proposed them

⁴⁶⁴ Letter from Ezequiel Rojas to José Andrade, 9 December 1896 (**Annex 59**).

⁴⁶⁵ H. González Oropeza and M. Donis, *Historia de las Fronteras de Venezuela*, Cuadernos Lagoven (1989), p. 101 (“Olney tuvo al menos dos caras con respecto al Acuerdo de 1850”).

⁴⁶⁶ Strictly personal letter from Richard Olney, Secretary of State, to Sir Julian Pauncefote, British Ambassador in Washington, 29 October 1896, *Ministerio de Relaciones Exteriores Republica de Venezuela in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts*, 1967, p. 40 (**Annex 150**).

⁴⁶⁷ *Ibid.*

⁴⁶⁸ For the text proposed by Olney, see Letter from Pauncefote to Salisbury, 29 October 1896 (**Annex 169**).

in order to overcome the resistance of Great Britain, which had asked several times to limit the effect of the 1850 agreement.⁴⁶⁹ Indeed, a few days later, the two States approved the draft text of the arbitration treaty.

5.67. Unsurprisingly, before the Arbitral Tribunal Great Britain contested that the 1850 Agreement could be of any relevance for calculating the adverse possession period under the terms of Article IV (a). It argued that “the parties very soon appear not to have agreed what is meant [by that Agreement]” and that, in any case, “before 1886, the arrangement had come to an end”.⁴⁷⁰ The lead counsel for Great Britain, Sir Webster, relied on “the fair inference to be drawn from that correspondence [between the United States Secretary of State and Great Britain’s Ambassador]” to defend the view that “Rule (a) [of Article IV] was inserted in the interest of both parties to protect the rights of both parties in respect of what happened during the period immediately antecedent to this Treaty”.⁴⁷¹

V. THE ODIIOUS DILEMMA IMPOSED ON VENEZUELA: RATIFY OR SUFFER “DANGEROUS CONSEQUENCES”

5.68. Venezuela signed the Treaty of Washington on 2 February 1897. The signature was anything but a free manifestation of consent. Venezuela has in fact been coerced into signing the treaty. In case of refusal, it would have been exposed to the risk of a military reaction by Great Britain, without any possibility of relying on the protection of the United States.

5.69. In the years preceding the conclusion of the 1897 Treaty, Venezuela had been increasingly threatened by the aggressive attitude of Great Britain. The two States were on the verge of a war that would have had catastrophic effects for Venezuela given the

⁴⁶⁹ Letter from Pauncefoot to Salisbury, 29 October 1896 (**Annex 169**).

⁴⁷⁰ See the intervention of the lead counsel of Great Britain, Sir Webster, in *Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela Proceedings*, vol. III-IV, Paris, 1899, pp. 741-742.

⁴⁷¹ *Ibid.*, vol. I, p. 25.

disparity of military power. The intervention of the United States in the dispute between Venezuela and Great Britain was also prompted by this situation of military tension.⁴⁷²

5.70. As already mentioned, the support of the United States was fundamental for Venezuela. It represented the only means to effectively contrast any military appropriation of Venezuelan territory by Great Britain.

5.71. It is therefore clear that, when the President of the United States, Cleveland, asked Venezuelan authorities to sign the unjust and unfair text drafted by Olney and Pauncefote, Venezuela was confronted with a dramatic choice. In case of a refusal to sign the treaty, Venezuela would have lost the protection of the United States and would have remained alone in responding to the aggressive attitude of Great Britain.

5.72. The existence of a threat pending on Venezuela is clearly evidenced in the message by which the Venezuela Minister of Foreign Affairs, Pedro Ezequiel Rojas, informed the Venezuelan Ambassador in the United States, José Andrade, of the Venezuelan decision to accept in principle the draft treaty submitted to it. In a letter dated 9 December 1896, Rojas wrote:

“Although the project [of treaty] raises serious difficulties, the Government, taking into consideration, on the one hand, what it owes to the United States of America, and on the other, the dangerous consequences of the abandonment in which the refusal would place Venezuela, has decided to accept, not simply and flatly, but with certain modifications, the proposed articles, in whose preparation, unfortunately, it was not included.”⁴⁷³

5.73. The “dangerous consequences” referred to by the Venezuelan Foreign Minister were a clear allusion to the risk of a military aggression incumbent on Venezuela in case of non-acceptance of the text. This is also attested by an additional request advanced by Venezuela. In a telegram sent on 7 December 1896, the United States Secretary of State

⁴⁷² On the historical context that prompted the intervention of the United States, see Letter from Mr. Olney to Mr. Bayard, 20 July 1895 (available at: <https://history.state.gov/historicaldocuments/frus1895p1/d527>).

⁴⁷³ Letter from Ezequiel Rojas to José Andrade, 9 December 1896 (**Annex 59**).

Olney was informed that, in exchange of the acceptance of the Treaty, Venezuela expected, “by treaty or by diplomatic correspondence through you, agreement to prevent aggressive or unfriendly acts near line of contact and also that no new mine concessions shall be granted”.⁴⁷⁴

5.74. Venezuela’s requests to modify the text negotiated between Great Britain and the United States and to obtain assurances against aggressive acts from Great Britain were flatly rejected by the United States. In a telegram sent on 12 December 1896 Olney replied:

“Matter closed as between Great Britain and United States. Changes Treaty must be made between Great Britain and Venezuela. Would it help were it agreed by exchanges of notes accompanying treaty that British Judges should not appoint arbitrator from British Guiana and that United States Judges should not appoint arbitrator from Venezuela. Earliest practicable restoration diplomatic relations most desirable. Present Venezuelan attitude offensive – tends to block all negotiations”.⁴⁷⁵

5.75. Secretary of State Olney’s response could not be clearer. On the one hand, he humiliated Venezuela by assimilating the appointment of an arbiter from Venezuela – a sovereign State – to the appointment of an arbiter from British Guiana – a colony of Great Britain. On the other – and most importantly –, he presented in a crude way the alternative faced by Venezuela: either accepting the *pax Americana* – ratify a treaty which was so evidently adverse to Venezuela’s interests and, as a sign of gratitude to the negotiating States, re-establish diplomatic relations with Great Britain – or being abandoned by the United States and remaining exposed to the reaction of Great Britain.

5.76. In sum, the non-acceptance of the Treaty would have entailed exposing Venezuela to the illegal appropriation of its territory by the United Kingdom through military means and without the protection of the United States. Given the threat it was confronting, Venezuela had no other option but to accept a treaty which was clearly prejudicial to its

⁴⁷⁴ Telegram received in Cipher from José Andrade to Olney, 7 December 1896 (**Annex 58**).

⁴⁷⁵ Telegram from Olney to Storow, 12 December 1896 (**Annex 60**).

rights.⁴⁷⁶ The undue pressure to which Venezuela was submitted can certainly be qualified as coercion under the meaning of Article 52 of the 1969 Vienna Convention on the Law of Treaties. Under this provision, “[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”. It would therefore be justified to consider the 1897 Treaty to be invalid because of coercion, the more so since the principle prohibiting the threat or use force, of which the ground of invalidity set forth in Article 52 constitutes a corollary, predates the conclusion of the Charter of the United Nations.⁴⁷⁷

SECTION II: THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL AND THE 1899 AWARD

5.77. The conduct of the proceedings before the Arbitral Tribunal resulting in the 1899 Award confirmed and exacerbated Venezuela’s improper and unjust treatment. Having been required to accede to an arbitration agreement that prejudiced her interests, Venezuela participated in the arbitral proceedings conducted in Paris in a position of significant disadvantage. It did so nonetheless, hoping that an arbitral process conducted in line with the demands of international law would bring justice. These hopes proved in vain: the arbitral process not only did not rectify the grave irregularities that were committed during the negotiations of the 1897 Treaty; it dramatically compounded them. This was a process that was neither fair nor based on law, and that did not take due account of Venezuela’s rights under international law. While the hearings were extensive and conducted in an atmosphere of nominal procedural propriety, at crucial stages, they deviated from essential

⁴⁷⁶ On the coercion exercised on Venezuela, see A. J. Aguilera, *Las fronteras de Venezuela*, Grafica Continente (1976), p. 74; M. Donis, *El Esequibo es nuestro: una contestación a Guyana*, Konrad Adenauer Stiftung (2018), p. 55; J. Caldera Ynfante, Jesús, “El Esequibo es venezolano: El litigio estratégico de Venezuela contra Guyana en la Corte Internacional de Justicia”, in *Opción* (2020), pp. 423-425.

⁴⁷⁷ In particular, the existence of such fundamental principles has since long time been recognized by Latin American States. As authoritatively stated by Yepes in 1930: “le Nouveau Monde a toujours été unanime à condamner la guerre”: J.-M. Yepes, “La contribution de l’Amérique latine au développement du droit international public et privé”, in *Collected Courses of the Hague Academy of International Law*, Vol. 32, 1930-II, p. 743.

requirements of an arbitral process based on law. Above all, during the hearings the Tribunal manifestly exceeded its powers under the *compromis*.

5.78. The following sections begin by offering a general account of the proceedings (I) and highlight the parties' insistence that the dispute between them be resolved in a 'judicial' manner and in line with requirements of international law (II). Against this background, they assess the outcome of the Award (III), the use in the proceedings, by Great Britain, of tampered evidence (IV), the conduct of the arbitrators and party representatives (V), and the deliberations of the arbitrators and drafting of the Award (VI).

I. THE PROCEEDINGS IN OUTLINE

5.79. The arbitral proceedings were comprised of a written and oral phase, conducted in 1898 and 1899.⁴⁷⁸ The parties submitted written pleadings in 1898, consisting of their respective 'cases', 'counter-cases' and 'final argument', in line with Articles VII-IX of the Washington Treaty. Significantly, Venezuela's written pleadings were prepared without knowledge of the above-mentioned understandings reached between US-American and British negotiators.

5.80. Between 15 June and 27 September 1899, oral arguments were presented to the arbitral tribunal over the course of 54 sessions. Venezuela was represented by a team of mostly US-American counsel led by Benjamin Harrison, assisted by Benjamin F. Tracy, Severo Mallet-Prevost and James Russell Soley as counsel. Leading Counsel of the United Kingdom was Sir Richard Webster, Attorney General, assisted by Sir Robert Reid, G.R. Askwith, S.A.T. Rowlatt and F. Webster as counsel.

⁴⁷⁸ For an analysis of the proceedings see E. Núñez, *Tres momentos en la controversia de límites de Guayana: el incidente de Yuruán, Cleveland y la Doctrina Monroe*, 1962, pp. 96-101; E. Mondolfi, *El Presidente Benjamín Harrison y la mediación de los Estados Unidos en la controversia de límites entre Venezuela y Gran Bretaña*, Biblioteca de la Academia Nacional de la Historia, 2000, pp. 217-242; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, pp. 33-77; R. Sosa, "El Acta de Washington y el Laudo de París", *La Reclamación de Venezuela sobre la Guayana Esequiba*, Segunda Reimpresión, Academia de Ciencias Políticas y Sociales, 2008, pp. 151-152.

5.81. The parties' arguments on points of law were detailed and broad in scope, in what Lauterpacht later described as "a lengthy legal contest on such questions as acquisition of title by occupation, discovery, and prescription, and on such procedural technicalities as the function of estoppel in relations between States".⁴⁷⁹ In that 'lengthy legal context', as noted by Harrison, "counsel ha[d] 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."⁴⁸⁰

II. THE PARTIES' INSISTENCE ON "AN ABSOLUTELY IMPARTIAL, JUDICIAL TRIBUNAL"

5.82. During the pleadings, the U.S. and British lawyers not only set out the parties' positions as to the course of the boundary, but also specified their understanding of the mandate of the tribunal. The respective statements are significant, as they illustrate the importance both sides attached to the need for an award based upon law, and for a tribunal operating as a judicial tribunal. Both sides were emphatic that this was not a matter of choice for the tribunal, but a defining feature of its competence, which did not extend to considerations of political expediency.

5.83. Venezuela's view on the matter reflected its general approach to the arbitral process, which – despite all its many flaws, and as noted above – it considered to be its only chance to defend its position, as an independent republic facing a powerful imperial State set on a course of territorial expansion in violation of standards of international law and justice. Venezuela's insistence on the legal foundation of the arbitration concerned both the decision-making process and the role of the arbitrators. Even before the beginning of the proceedings, the Venezuelan foreign minister, Pedro Ezequiel Rojas, had clarified that he would not countenance "the result of an arbitration decision where the arbitrator receives the authority of a friendly adjuster, and pursuant thereto adjudicates territories to

⁴⁷⁹ H. Lauterpacht, "The Function of Law in the International Community", *British Contributions to International Law*, 1933, p. 157.

⁴⁸⁰ Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela. Proceedings, Verbatim Record, p. 3087 (available at the Peace Palace Library).

one of the litigants of the both”. Rather, “Venezuela has urged arbitration, but judicial, as the only one compatible with the Constitutional provisions which prohibit the alienation of any part of her territory (...)”.⁴⁸¹

5.84. In its written case, Venezuela noted that:

“Venezuela has no direct representative on this Tribunal; and, by this fact, it is more nearly assimilated to the great courts of justice from which the idea of representation is wholly absent. No other international tribunal has presented this feature. They have been too much the conferences of representatives, rather than the consultations of judges, to whom the parties are quite indifferent. The one tends to unsatisfactory compromises, the other to decrees that establish rights. In the very constitution, therefore, of this Tribunal, we have the strongest appeal to the sense of impartial justice and the surest ground of hope that the judgment may confirm the faith of those who believe that it is possible to bring the nations to a bar that will treat them with the same impartiality that is shown to individual litigants. When that confidence is fully established, the era of universal peace will be near.”⁴⁸²

5.85. At the end of the oral hearing, Venezuela’s lead counsel once more emphasised the need for a judicial process and contrasted it to forms of dispute settlement in which arbitrators acted as representatives of parties. He explicitly distinguished two different modes of settling international controversies, noting that “if th[e] 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. If conventions, if accommodations, and if the rule of give-and-take are to be used, then let the diplomatists settle the questions. But when these have failed in their work, ... it seems to me necessarily

⁴⁸¹ Letter from Rojas to Olney, 28 March 1896 in Notes from the Venezuelan Legation in the United States to the Department of State, 1835-1906, Roll 7, Vol. 7, April 19, 1893 - March 28, 1896, The United States National Archives and Records Administration (NARA), Microcopy No. T-93, Roll 7, Vol. 7, April 19, 1893 - March 28, 1896.

⁴⁸² Boundary between the Colony of British Guiana and the United States of Venezuela, Case of the United States of Venezuela, 1898, p. 765.

to imply the introduction of a judicial element into the Tribunal.”⁴⁸³ These notions, far from being abstract, should guide the settlement of the boundary question opposing Great Britain and Venezuela, he continued, stressing that “these nations have adopted that [judicial] basis in the constitution of this Tribunal”:⁴⁸⁴

“[T]he purpose of this Treaty Arbitration was to bring in just this judicial element, and to exclude the representative element which has appeared in many former arbitrations [...] There is no Venezuelan here. This latter provision distinctly excludes the idea of representation, for when that idea is allowed, the representation is direct and equal. Venezuela, then, Mr. President, comes to this tribunal as to a great court. She gives to each member of it her fullest confidence, and submits her case to be judged upon the principles of international law and the rules of the treaty, and not to be compounded or compromised upon suggestions of political expediency.”⁴⁸⁵

5.86. Again, these were not statements made out of a sentiment of politeness. They reflected Venezuela’s view of the tribunal’s mandate under the 1897 Treaty of Washington. Significantly, Venezuela’s view was shared by Great Britain. This appears clearly from the British statements during the pleadings.

5.87. During the oral proceedings, Sir Richard Webster put matters in the clearest of terms: like his Venezuelan counterparts, he described the tribunal as a “judicial Tribunal” and insisted on the need for a decision that reflected the principles of the treaty. In his express terms: “[t]he tribunal is not here to draw compromise lines”.⁴⁸⁶ As Venezuela, Great Britain was emphatic that its appeal was to “principles of law and of justice and of equity” – “to those principles alone I appeal”. And further: “it would be a death blow to

⁴⁸³ Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela, Proceedings, Verbatim Record, p. 2982 (available at the Peace Palace Library).

⁴⁸⁴ *Ibid.*, p. 2983.

⁴⁸⁵ *Ibid.*, p. 2984.

⁴⁸⁶ *Ibid.*, p. 731.

arbitration if it is to be imagined that by making a claim to territory to which they have no legal title, a nation can get a slice of it”.⁴⁸⁷

III. THE AWARD OF 3 OCTOBER 1899

5.88. On Wednesday, 27 September 1899, the tribunal’s President, the jurist Fyodor de Martens, closed the oral hearings.⁴⁸⁸ On the sixth day after the closure of the hearings (a weekend included), the tribunal had completed its award and presented it to the Parties’ representatives. It was an award without reasoning whose substantive part consisted of two sections: (i) two paragraphs reflecting the tribunal’s position on the boundary; and (ii) a further paragraph setting out a regime of navigation on the rivers Amakuru and Barima, two tributaries of the Orinoco.

5.89. The tribunal’s decisions on these questions were prefaced by one paragraph in which the tribunal described its approach in the following terms:

“[T]he 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”.

5.90. The bulk of the tribunal’s decision on the boundary described the course of the boundary in the following terms:

“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

⁴⁸⁷ *Ibid.*, p. 865.

⁴⁸⁸ For details see R. Badell, *Venezuela’s Claim to the Essequibo Territory*, Academia de Ciencias Políticas y Sociales, 2023, p. 121; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, pp. 78-83.

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 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”.

5.91. The implications of this lengthy description of the course of the boundary were as follows: Great Britain would have title just under 160,000 km² of the territory in dispute, an area roughly the size of Bangladesh, and twice as large as the combined territories of Belgium, The Netherlands and Luxemburg. Venezuela was awarded title to a total area of 15,000 square kilometres, including Point Barima at the mouth of the Orinoco river and a stretch of territory of circa 50 miles to the east, to Punta Playa, the latter around circa 10,000 square kilometres. The award satisfied Great Britain’s expansionist policies almost completely, as it was awarded more than 90% of the Venezuelan territory it had progressively claimed since 1841.

5.92. In the words of one of the arbitrators, pronounced immediately following the reading of the award, “[i]f [...] judged from the standpoint of the Venezuela claims” this outcome was “disastrous”.⁴⁸⁹ The President of the tribunal agreed, noting that “the British

⁴⁸⁹ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

got the lion's share" and "nearly all they demanded".⁴⁹⁰ However, this assessment was borne out not simply by comparing the size of territory awarded to Great Britain and Venezuela, respectively. Two additional points are worth noting.

5.93. First, the award gave Great Britain control over the gold mines in Guiana, which had driven its aggressive policy of territorial expansion.⁴⁹¹ The Tribunal's President's assessment is telling: The British, he noted:

"should be extremely pleased with the decision by which they got all the gold mines".⁴⁹²

5.94. By contrast, another arbitrator described the inland area to the south of the Barima river, making up the bulk of the territory awarded to Venezuela, as "principally low-lying swamp – largely covered by the sea at High Tide".⁴⁹³ In other words, the largest part of the territory awarded to Venezuela was land to which Great Britain's officials "attache[d] no importance",⁴⁹⁴ and which a newspaper commentator would describe in the following terms: "The territory that the Award granted to Venezuela is not worth a five-pound bill".⁴⁹⁵ A comment by Sir Richard Webster shows that this assessment was shared by Great Britain: "As to the effect of the award, it was perfectly true that we did lose a small piece

⁴⁹⁰ Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, AVPR, opis 787, delo 9, ed.k hr. 1-7 (**Annex 149**). Commentators agree with this assessment, see for example J.A. Braveboy-Wagner, *The Venezuela-Guyana Border Dispute*, 1984, p. 106; H. Gros Espiell, "El Conflicto Limitrofe entre venezuela y Guyana y un libro reciente", *Humanitas* 21, 1980, p. 684; Estudio preliminar, *Academia Nacional de la Historia*, 1981, p. 21; R. Badell, *Venezuela's Claim to the Essequibo Territory*, Academia de Ciencias Políticas y Sociales, 2023, p. 121; P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 49.

⁴⁹¹ During the negotiations of the 1897 Treaty, both sides were aware of maps showing the location of gold mines in the disputed territory. In fact, a map showing the different "gold centres" included among the Richard Olney papers in the U. S. Library of Congress holdings: U. S. Library of Congress, Manuscript Division, Richard Olney Papers, Reel 25.

⁴⁹² Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, AVPR, opis 787, delo 9, ed.k hr. 1-7 (**Annex 149**).

⁴⁹³ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

⁴⁹⁴ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**) (referring to the views of Mr Everard in Thurn, British official and explorer of Guiana and later governor of the Fiji islands).

⁴⁹⁵ Cite in R. Badell, *Venezuela's Claim to the Essequibo Territory*, Academia de Ciencias Políticas y Sociales, 2023, p. 125.

of territory at the mouth of the Orinoco, called Barima Point, which was, apart from the sentimental aspect of the question, really of no importance to us. What was of vital importance to this country was the preservation of the waterways by Great Britain for the commerce of the world. Those waterways were far more important to Great Britain than any question of a few miles of swamp (...).⁴⁹⁶

5.95. Second, while the award recognised Venezuela's title to the mouth of the Orinoco, the tribunal's decision on this point reflected the Parties' pleadings on the matter. As noted by Lord Russell, during the proceedings, Great Britain had "explicitly admitted that the Orinoco was Venezuelan",⁴⁹⁷ and thus effectively conceded this part of the disputed territory.⁴⁹⁸ The most relevant part of the territory awarded to Venezuela "inevitably had to be recognized as Venezuelan on the simple and preclusive ground of an admission by Great Britain".⁴⁹⁹

5.96. Both considerations affirm the assessment, by one of the arbitrators, that this was a "disastrous" outcome for Venezuela: not only did the Tribunal award the European imperial power country the "lion's share" of the territory disputed with a Latin American republic not considered worthy of being represented on the tribunal. What is more, the limited Venezuelan gains in the process were either of limited relevance or had previously been conceded by the British. To the extent that the Award reflected a 'compromise' (as discussed below), it was a deeply imbalanced one, reflecting (just like the 1897 Arbitration

⁴⁹⁶ The Venezuelan question, *The Standard* London, 15 February 1900 (**Annex 174**).

⁴⁹⁷ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

⁴⁹⁸ This in fact appears from the British written Counter-Case in which it had recognized that "The Spaniards entered, explored, settled, and effectively defended the Orinoco", see *Boundary between the Colony of British Guiana and the United States of Venezuela*, Counter-Case of the Government of Her Britannic Majesty (Paris 1898), 28. Venezuela did not fail to note this concession (see *Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela. Proceedings (Verbatim Record)*, e.g. at pp. 928, 942, 1127, 2595, 3123, 3203-3204) (available at the Peace Palace Library). During the oral proceedings, Great Britain was forced to defend the (untenable) claim that the Barima and Akamura rivers were not tributaries of the Orinoco, and thus not covered by its admission: see e.g. *ibid.*, at 235, 799-802.

⁴⁹⁹ J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 48.

Treaty) dramatic power imbalances between the litigants and based on a deeply irregular process.

IV. A DEEPLY IRREGULAR PROCESS

5.97. For all its nominal propriety, the Award was based on an irregular process that did not reflect the parties “strongest appeal to the sense of impartial justice”.⁵⁰⁰ As will be discussed below, the Tribunal was not guided by any sense to deliver justice based on law, let alone the rules of applicable international law prescribed by the 1897 Treaty. What is more, the conduct of the arbitral process was irregular, notably as regards the use of tampered maps and the relationship between arbitrators and counsel.⁵⁰¹

5.98. As regards the former aspect, Chapter 6 has given an account of Great Britain’s deliberate use of falsified maps to support its policy of territorial usurpation. More specifically, it has been shown how, in the run-up to the arbitral proceedings, Great Britain had tampered with official maps depicting the official British position on the territory disputed with Venezuela. It did so by presenting maps claiming large swathes of Venezuelan territory as official maps and falsely asserting that these maps were based on Schomburgk’s surveys – which, *per se*, were not representing any legal assessment of the territorial divide, but came to be cited as the first line claimed by the British, before extending it always further west. As has also been shown, this involved the suppression of language from maps that could have undermined British claims – in particular the reference to the 1850 Agreement and its legal effect.

⁵⁰⁰ Boundary between the Colony of British Guiana and the United States of Venezuela, Case of the United States of Venezuela, 1898, p. 765.

⁵⁰¹ For an analysis of the different pieces composing the “procedural fraud” that took place in Paris, see, in addition to the authors already cited in this chapter, H. Cabrera Sifontes, *La verdad sobre nuestra Guayana Esequiba*, Monte Ávila Editores, 1988, p. 139 ff.; J. Sucre Reyes, *El despojo del siglo: la Guayana Esequiba*, Publicaciones Seiven, 1981; M. A. Carrillo Zamora, “La impugnación internacional del laudo arbitral por fraude procesal: especial referencia a la reclamación venezolana sobre el territorio de la Guayana Esequiba”, *Revista de derecho público*, 2023, p. 89 ff.; A. R. Brewer-Carías, *Derechos de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales, 2023, p. 130 ff.

5.99. During the arbitral proceedings, the maps falsely ascribed as official and based on Schomburgk's work, played a central role. To illustrate, in the transcript of the oral proceedings, 'Schomburgk' appears 920 times. British counsel of course did not claim that Schomburgk himself could allocate territory but claimed the mantle of his authority. Lord Reid's statement is illustrative:

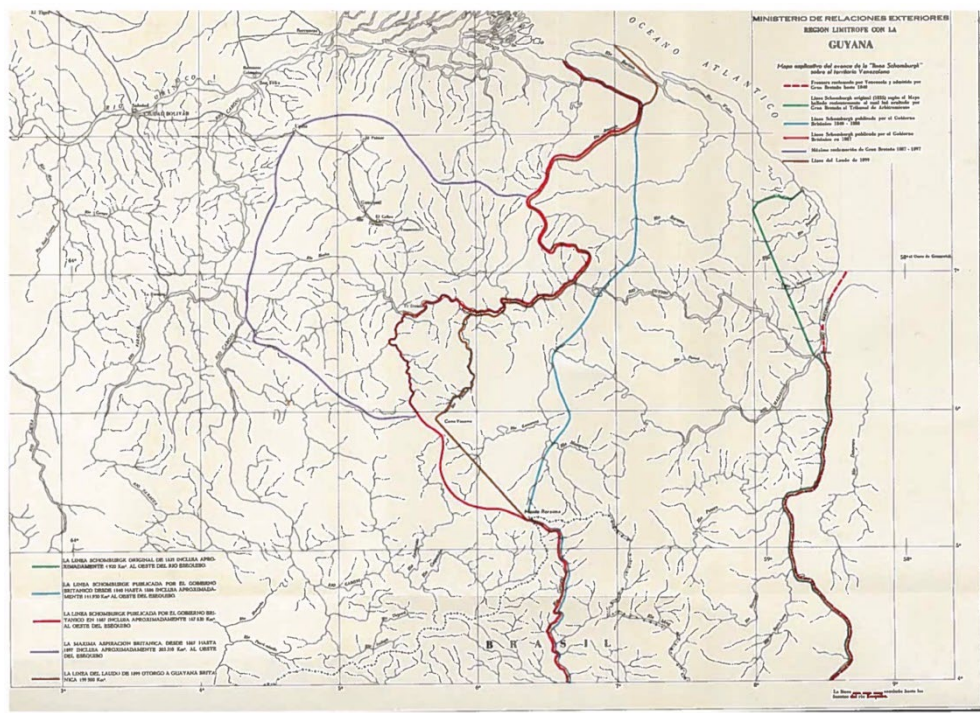
"Schomburgk went and he marked out what was clearly the true Schomburgk line, and here I may be permitted to observe that Schomburgk was a gentleman who served Great Britain as a gentleman and a man of honour, and whom we desire to speak of with the utmost respect, but we have never claimed this boundary is the true boundary merely because Schomburgk drew it. What we do claim is that Schomburgk described and wisely drew what in fact was the true boundary."⁵⁰²

5.100. But as is clear from Lord Reid's statement, far from distancing itself from its falsification of maps, Great Britain persisted in relying on improper evidence, conjured up from the late 1880s as part of Great Britain's expansionist strategy to support extreme British claims on Venezuelan territory. As is clear from the Award, this strategy ultimately proved successful.

5.101. The following map highlight that the Award in essence followed the alleged 'Schomburgk line' – drawn in fact years after Schomburgk's death, as conjured up by Great Britain. It also indicates that in only two respects, the award departs from the fictitious line,

⁵⁰² Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela, Proceedings, Verbatim Record, p. 2368 (available at the Peace Palace Library).

namely the territories to the east of Punta Barima (described by Lord Russell as “principally low-lying swamp”⁵⁰³) and to the west of the Marazuni river.⁵⁰⁴



5.102. In his assessment of the Award, Lord Russell made the point with clarity: “the result is a signal vindication of Schomburgk’s ability and fairness. In two points only is there any departure from his line”.⁵⁰⁵ His assessment is echoed in the summary of the British senior lawyer and agent: According to Sir Richard Webster, “[t]he history of [the] arbitration showed [...] that Schomburgk’s investigations were absolutely justified by history”.⁵⁰⁶ In his summary of the decision, the British agent, Buchanan, succinctly noted

⁵⁰³ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

⁵⁰⁴ See Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967 (**Annex 150**).

⁵⁰⁵ *Ibid.*

⁵⁰⁶ The Venezuelan question, *The Standard* London, 15 February 1900 (**Annex 174**).

that the award “follows the Schomburgk line”.⁵⁰⁷ The “signal vindication”, far from endorsing “Schomburgk’s ability and fairness”, reflected a successful exercise in tampering with crucial pieces of evidence.

5.103. Quite apart from its reliance on tampered maps, the arbitral proceedings were irregular also in that they involved improper contacts between counsel and arbitrators.

5.104. This irregularity is particularly stark because it went against the parties’ insistence on a judicial process. “[T]he purpose of this Treaty Arbitration was to bring in just this judicial element, and to exclude the representative element”, explained the American lead counsel, Benjamin Harrison, and in so doing formulated the expectations of the parties, further emphasising that the idea of arbitrators representing a party in the arbitral proceeding was impossible to countenance, for the simple reasons that “[t]here is no Venezuelan here”.⁵⁰⁸ The documentary record indicates that this expectation was not heeded. It indicates that there were contacts between the arbitrators and the parties’ legal teams that went far beyond routine interactions that are part of any arbitration proceeding. Two points stand out.

5.105. For one, the British viewed the arbitrators as a point of contact to place and solicit information about matters debated between the parties. This appears clearly from two letters written by the British lead counsel, in the middle of the oral proceedings.⁵⁰⁹

5.106. The first letter was written by Sir Richard Webster to Lord Salisbury, in response to a note in which Lord Salisbury had insisted the British representatives make no concessions on the question of Point Barima (which the tribunal had discussed in previous

⁵⁰⁷ Letter from Buchanan, 5 October 1899 (**Annex 66**). Commentators agree with this assessment: see for example C. L. Joseph, “The Venezuela-Guyana Boundary Arbitration of 1899: An Appraisal: Part II”, *Caribbean Studies*, Vol. 10, No. 4, January 1971, p. 67 (“The award closely followed the Schomburgk line”).

⁵⁰⁸ Arbitration between the Governments of Her Britannic Majesty and The United States of Venezuela. Proceedings, Verbatim Record, pp. 2982-2984 (available at the Peace Palace Library).

⁵⁰⁹ For criticism of the award on this point see also R. Badell, *Venezuela’s Claim to the Essequibo Territory*, Academia de Ciencias Políticas y Sociales, 2023, p. 185.

sessions, and to which it would return). In his response, dated 19 July 1899, Sir Richard Webster assured Lord Salisbury that he did “not propose to make any concessions”:

“I was however anxious to obtain the guidance and approval of yourself [...] in the event of questions being put to me by members of the Tribunal. [...] If I have any reason to believe the Tribunal is against me on this part of the case, I shall endeavour to let the British arbitrators know our view of the position”.⁵¹⁰

5.107. The British lead counsel’s announcement is to be seen in light of a further letter, sent to the Secretary of State for the Colonies, Joseph Chamberlain, on 19 July 1899. In this second letter, the British lead counsel equally affirmed that he had no “intention of making any offer to the other side” concerning the question of Point Barima. As in his response to Lord Salisbury, he had merely sought “to get your [Chamberlain’s] guidance and to let you know my mind, so that I might be prepared should the Tribunal put any questions to me publicly or privately.” This was followed by the following paragraph:

“If I find it necessary to take independent action I shall do so privately through our own arbitrators and only when I am satisfied that having regard to expressions of opinion on the part of some member of the Tribunal it is desirable that our arbitrators should appreciate our views.”⁵¹¹

5.108. The two letters, written by the senior counsel to the senior British authorities in charge of the arbitral process, offer relevant insights into the conduct of the arbitral proceedings and the approach adopted by the tribunal. To begin with, it appears from the letter to Chamberlain that the tribunal might put questions to counsel ‘publicly *or privately*’. Both letters state expressly that the British lead counsel would not hesitate to share *with the British arbitrators* the strength the British government’s view on a legal question placed before the tribunal for an impartial assessment and binding decision. It is also clear that such information would not be shared through the regular interaction in the proceedings, but ‘privately’, which in the context must mean in direct discussion between

⁵¹⁰ Letter from Sir Richard Webster to Lord Salisbury, 19 July 1899 (**Annex 63**).

⁵¹¹ Letter from Sir Richard Webster to Joseph Chamberlain, 19 July 1899 (**Annex 64**).

Sir Richard Webster and the British arbitrators. Lastly, the final paragraph of his letter to Chamberlain suggests under which circumstances Sir Richard Webster would approach the British arbitrators, namely when the discussions during the oral hearing made it “desirable that our Arbitrators should appreciate our views.”⁵¹²

5.109. Sir Richard Webster’s intention could hardly be formulated more clearly. The letters of Great Britain’s lead counsel reflect proceedings where the arbitrators are considered as representatives of a side – ‘our arbitrators’ – that could be approached privately by “their side, and trusted to receive information about Great Britain’s strongly-held position on legal issues that were sub judice”.

5.110. The British lead counsel’s desire to approach ‘our arbitrators’ privately and advise them of crucial British concerns paint a picture of an arbitral process conducted in a highly irregular manner.⁵¹³

V. THE ARBITRATOR’S DELIBERATIONS AND THE AWARD’S DRAFTING

5.111. The preceding sections highlighted one aspect of the Tribunal’s decision-making process. Troubling as it was, there is more: the fact that U.S. Arbitrators sought advice on how to cast their vote, evidencing a wholly unusual and improper process of crude bargaining and coercion that ended (as discussed more fully below) with the President using an antisemitic slur to describe the conduct of other arbitrators, and leaving some arbitrators disillusioned with arbitration as a means of dispute resolution.⁵¹⁴ Yet while the record of mutual incriminations is significant, there is, by contrast, no hint that the Tribunal applied the rules set out in the 1897 Treaty to reach a decision based on law.

⁵¹² *Ibid.*

⁵¹³ Wetter aptly notes that the meetings described by Mr. Mallet-Prevost “add another dark dimension to the proceedings in the Venezuela-Guyana case”: J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 349.

⁵¹⁴ Reuter speaks of a “marchandise purement politique”: see P. Reuter, “La motivation et la révision des sentences arbitrales à la Conférence de la paix de la Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Venezuela”, *Mélanges Offerts à Juraj Andrassy*, Springer, Dordrecht, p. 237. See further P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 51.

5.112. Instead, the arbitrators rushed to a decision. As noted above, after lengthy written pleadings, the parties had presented their oral arguments in “a lengthy legal contest”⁵¹⁵ comprising 56 sessions, running to 3200 pages of transcript. Perhaps anticipating a ‘lengthy legal contest’ bearing on complex matters, Article X of the Treaty of 1897 stipulated that the Tribunal would render its decision, “if possible [...] within three months from the close of the argument on both sides”.

5.113. In the event, after the close of the session of 27 September 1899, the tribunal saw fit to resolve the various complex legal issues in the space of less than six days, before pronouncing its unreasoned award on mid-day of 3 October 1899. These six days included a weekend during which at least one arbitrator was “away from Paris”, while the President, in his diary, anticipated he would “leave [...] to Baden- Baden”.⁵¹⁶

5.114. The unreasoned award contains no trace of any form of debate about the strength of the legal arguments advanced in the context. There is no evidence whatsoever, in the text of the Award, that legal rules and principles, or that their weighing and balancing, played any role in the decision-making of the Tribunal. To illustrate, nowhere does the Award refer to Article IV of the Washington Treaty, and the words ‘law’, ‘rule’, ‘international law’, or any similar terms do not appear in the decision.

5.115. The documents produced by participants directly involved in the decision-making process (or exposed to it, such as Mr. Mallet-Prevost) do not suggest that legal considerations played any relevant role. Rather, they clarify that the unreasoned award was the result of a process of crude ‘give-and-take’ driven by extra-legal considerations and the Tribunal’s President’s determination to procure a unanimous award “at all costs”. This is clearly brought out by the diary entries and private correspondence of the arbitrators and

⁵¹⁵ H. Lauterpacht, “The Function of Law in the International Community”, *British Contributions to International Law*, 1933, p. 149.

⁵¹⁶ Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, AVPR, opis 787, delo 9, ed.k hr. 1-7 (**Annex 149**).

close observers, which – while reflecting deep personal animosities and containing *ad hominem* attacks – overlap in material aspects.⁵¹⁷

5.116. Mr. Mallet-Prevost's account of his meeting with the U.S. arbitrators has been reproduced already. For present purposes, its description of the Tribunal's President's approach to decision-making is central. It records Arbitrator Brewer as stating:

“Martens has been to see us. He informs us that Russell and Collins are ready to decide in favor of the Schomburgk Line, which starting from Point Barima on the coast would give Great Britain the control of the main mouth of the Orinoco; and that if we insist on starting the line on the coast at the Moruca River he will side with the British and approve the Schomburgk Line as the true boundary.”⁵¹⁸

5.117. Arbitrator Brewer's account then indicates Martens' 'anxiety' to produce a unanimous decision, and the length to which he was prepared to go to secure it:

“However [...] Martens is anxious to have a unanimous decision; and if we [the two U.S. Arbitrators] will agree to accept the line which he proposes he will secure the acquiescence of Lord Russell and Lord Collins and so make the decision unanimous.’ What Martens then proposed was that the line on the coast should start at some distance southeast of Point Barima so as to give Venezuela control of the Orinoco mouth; and that the line should connect with the Schomburgk Line at some distance in the interior leaving to Venezuela the control of the Orinoco mouth and some 5,000 square miles of territory around that mouth”.

5.118. The statement is clear that, in his 'anxiety' to ensure a unanimous award, the Tribunal's President threatened the two US-American Arbitrators with endorsing a decision that would have offered Great Britain the main mouth of the Orinoco River. By contrast, were the US-American Arbitrators to accept the so-called 'compromise' granting

⁵¹⁷ See further P. Ojer, *Sumario Histórico de la Guayana Esequiba*, Maracaibo, San Cristobal, 1982, p. 51; R. Badell, *Venezuela's Claim to the Essequibo Territory*, Academia de Ciencias Políticas y Sociales, 2023, pp. 187-193.

⁵¹⁸ Memorandum of Mr. Severo Mallet-Prevost, reproduced in the *American Journal of International Law*, 1949, p. 529.

Great Britain 90% of the disputed territory, de Martens would extract a concession from the two British arbitrators.

5.119. Lord Russell's account clarifies how this limited concession was extracted from the British arbitrators. It appears in clear terms from Lord Russell's letter sent to Lord Salisbury immediately following the Award, which corroborates Mallet-Prevost's account, and which describes the Tribunal's President's *modus operandi* in the following terms:

“I must say here that in one very important respect L. J. Collins and I were grievously disappointed by the attitude assumed by Mr. de Martens. [...] [H]aving expressed his opinion on the governing principle in favour of the British contention, he, instead of applying that principle rigidly and fearlessly, 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. 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 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.”⁵¹⁹

5.120. Lord Russell's account could not be clearer in describing how the Tribunal's President brought about the so-called compromise. Just as he had threatened the American arbitrators to bring about a total British victory were they not to endorse his approach, so he threatened the two British arbitrators with endorsing Venezuela's position were they not to agree to a 'reduction' of the British claims. What is more, in light of the memorandum produced by Mr Mallet-Prevost, it is clear that Lord Russell was right to surmise that the President 'spoke in an opposite sense' to the American arbitrators, pressuring them into accepting his award. Arbitrator Brewer equally noted that only “by the greatest conciliation and mutual concessions [...] a compromise was arrived at”; and offered insights into some

⁵¹⁹ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

of the extra-legal considerations that seemed to have guided the tribunal members: “Being asked whether political considerations influenced the award, justice said he could not admit that, as such an admission would reflect on the judges, but there was no doubt, that the present insurrection in Venezuela, and the consequent feeling of instability weighed to a certain extent in the balance”.⁵²⁰

5.121. Significantly, de Martens’ diary entries confirm the account of the British and American arbitrators. They are candid in their admission of how the President managed to obtain the unanimous award that he so strongly favoured. The key passage recounting the decision-making process is worth quoting in full. Having failed to persuade the British and American arbitrators to agree, the President “decided to get down to this issue in a diplomatic way”:

“I went to Chief Justice Fuller and persistently urged him to make one more small concession. The old man was very fond of me and promised to speak to his colleague Brewer. I then went to Lord Collins and explained to him that the British also had to make another concession. But Collins, with whom I had hitherto been on better terms, flatly refused and said he preferred a simple majority (considering me on his side) to unanimity for further concessions. The next day, early on Monday morning, I went again to see Brewer and persuaded him. I learned from him that dearest Fuller had been with him the night before for two hours, and after much deliberation they agreed to make a new concession. I was very glad and considered that the basis for an agreement had been found. I went again to Lord Collins, but found him even less accommodating than the day before. But then I explained to him that England was not interested in forcing me over to the American side. This made him think. I told Fuller and Brewer that if they did not make a concession, then I would be forced *à contre coeur* to side with the English, because I could not wish and allow a scandal, i.e. a situation where the tribunal could not decide the case because the 4 arbitrators cannot agree among themselves, and the super-arbitrator refuses to cast his vote!

⁵²⁰ Letter from Choate to John Hay, 1 November 1899 (**Annex 173**).

I did not speak to Lord Russell on Sunday because he was not in Paris. But Lord Collins, at my request, told him all about these negotiations. These conversations, and in particular the fear that Lord Collins communicated to him that I would go over to the American side, simply pissed him off.”⁵²¹

5.122. Reflecting on the eventual outcome, the President noted that the British arbitrators had “bargained like *zhids*” (a racist Russian term used to describe Jews), but that he had “literally forced them to be more flexible”: “it was obvious that if the British had not agreed to my compromise, I would have joined the Americans rather than them.”⁵²²

5.123. The account emerging from the diaries of de Martens and the accounts of Lord Russell and Mr. Mallet-Prevost/Judge Brewer is further corroborated through statements made by observers and participants closely involved in the arbitral process, and made in the immediate aftermath of the award. These came from every party to the arbitral process (American and British counsel, Venezuelan observers) as well as from members of the tribunal; and they expressed bewilderment at the way the award was ‘produced’. The following are illustrative.⁵²³

5.124. Lord Russell’s private secretary, JR Block, who had followed the proceedings closely, had a single line in his diary on the day the Award was finalised, 2 October 1899, “Venezuela. Martens’ deal [has] given us victory”.⁵²⁴

5.125. In a minute dated 4 November 1899, Charles Alexander Harris, of the British Colonial Office, who had been seconded to work on the boundary arbitration, offered an

⁵²¹ Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, AVPR, opis 787, delo 9, ed.k hr. 1-7 (**Annex 149**).

⁵²² *Ibid.*

⁵²³ For other relevant statements and reactions to the Arbitral Award see also E. Mondolfi, *El Presidente Benjamín Harrison y la mediación de los Estado Unidos en la controversia de límites entre Venezuela y Gran Bretaña*, Biblioteca de la Academia Nacional de la Historia, 2000, pp. 217 ff; M. Donis, *El Esequibo es nuestro: una contestación a Guyana*, Konrad Adenauer Stiftung 2018, p. 20 ff.

⁵²⁴ Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967 (**Annex 150**).

equally pithy assessment: referring to the arbitration, he noted that “[t]he thing was a farce”.⁵²⁵

5.126. Members of Venezuela’s counsel team agreed with this assessment and offered further context. In an interview with *The Times* of London, conducted immediately after the rendering of the award, General Harrison and Mr. Mallet-Prevost elaborated on the role of law and diplomacy in the decision-making process. They were quoted as follows:

“The President of Tribunal had in his closing address today commented on the unanimity of the present judgment and referred to it as a proof of the success of the arbitration. It did not, however, require much intelligence to penetrate behind this superficial statement and see that line drawn was a line of compromise and not a line of right. If the British contention had been right, the line should have been drawn much further west. If it had been wrong, then it should have been drawn much further east. There was nothing in the history of the controversy, nor in fact in the legal principle involved, which could adequately explain why the line should be drawn as it was now found. So long as arbitration was to be conducted on such principles it could not be regarded as a success, at least by those who believed that arbitration would result in an admission of legal rights and not in compromises really diplomatic in their character. Venezuela had gained much, but she was entitled to much more, and if the arbitrators were unanimous it must be because their failure to agree would have confirmed Great Britain in the possession of even more territory”.⁵²⁶

5.127. General Harrison who (as he would later note) had devoted “two years” to the matter, offered further comment. In a letter penned to W.H. Dodge a few months later, he did not hesitate to describe the award as a “robbery” and rejected any idea that it could have been brought about by a “judicial spirit”:

“As to Lord Russell’s advice that a judicial spirit be exercised in these matters, I have only to say that neither he nor his British

⁵²⁵ Minute, 4 November 1899, in COVRI White paper, p. 63 (available at: <http://covri.com.ve/wp-content/uploads/2020/12/White-Paper-COVRI-3.pdf>).

⁵²⁶ *The Times*, in *Ibid*, pp. 61-62.

associates practised that good doctrine. I could tell, but will not write, some incidents that would surprise you. I believe that it is possible for an American judge, and perhaps for judges of some other nations, to exercise that judicial spirit in international controversies; but I do not believe it is possible for an Englishman. In controversies between individuals the English courts are conspicuously fair and independent, but when it comes to a question of extending the domain of Great Britain, and especially when gold-fields are involved, it is too much to hope. The decision in the Venezuelan case, as a compromise, gave to Venezuela the strategic points but robbed her of a great deal of territory which I do not question would have been given to her by an impartial judicial tribunal. The modern European idea is that there is nothing illegal or even immoral in the appropriation of territories of weaker states”.⁵²⁷

5.128. As regards the decision-making process, Harrison’s “experience at Paris [...] led him to a very emphatic opinion that any form of arbitration agreement [...] constituted as the Venezuelan was, will necessarily result in a compromise instead of an actual judicial determination of the treaty line”.⁵²⁸ In a later comment, Benjamin Harrison went further in assessing how the decision had been brought about, and was clear about the guiding principles:

“the case was practically decided by Professor de Martens, the Russian member of the Arbitral Tribunal, without regard to the determining principles of law and without regard to the facts. [...] He judged the case as one to be resolved as a political expedient, and not as something to be decided according to law. It is difficult to suppose that he was free to consider the Russian interests. A decision in favor of Great Britain could not but be expected to foster sentiments of friendship towards Russia by the English, whose navy was the most powerful in the world. Venezuelan friendship was too insignificant a matter to care about. It is true that the United States of America belonged to one of the world powers; but he had no

⁵²⁷ Harrison, in *Ibid*, pp. 62-63.

⁵²⁸ Letter from Choate to John Hay, 1 November 1899 (**Annex 173**).

interests to stake. The matter was only of practical interest to Venezuela”.⁵²⁹

5.129. Harrison’s assessment was shared by Mr. Mallet-Prevost who, writing in late October 1899, described the pressure brought to bear on U.S. arbitrators in the following terms:

“The decision was forced upon our Arbitrators and, in strict confidence, I have no hesitation in saying to you that the British Arbitrators were not swayed by any consideration of right or justice, and that the Russian Arbitrator was probably induced to take the stand which he took by considerations entirely foreign to the question. [...] The result is, in my opinion, a blow to arbitration”.⁵³⁰

5.130. Significantly, contemporary accounts reflect that the perception of General Harrison and Mr. Mallet-Prevost was shared by the American arbitrators sitting on the tribunal: “Fuller and Brewer returned to the country quite sick of arbitration”: this is how former U.S. Secretary of State and senior diplomat and legal adviser, John W. Worster, is quoted by Secretary of State Richard Olney in a letter to President Cleveland.⁵³¹ In the same letter, Olney recounts Mallet-Prevost’s “intense wrath and bitterness of soul at the course and decision of the arbitral tribunal” and his assessment that “both the Chief Justice [Fuller] and Brewer are down on arbitration as a mode of settling international disputes unless some new safeguarding of the rights of Parties can be provided”.⁵³² Tellingly, when discussing the procedure for settling the Alaska boundary, U.S. American negotiators flatly

⁵²⁹ Harrison, as quoted in the memorandum of August L. Mason, reproduced in Benjamin Harrison Papers, *Volwiler Collection of Harrisoniana*, Series 15, Library of United States Congress, Washington, cited in COVRI paper, p. 64 (available at: <http://covri.com.ve/wp-content/uploads/2020/12/White-Paper-COVRI-3.pdf>).

⁵³⁰ Mallet-Prevost, memorandum to Burt, Ministerio de Relaciones Exteriores Republica de Venezuela, Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 42 (**Annex 150**).

⁵³¹ Olney to Cleveland, Ministerio de Relaciones Exteriores Republica de Venezuela: Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 42 (**Annex 150**).

⁵³² *Ibid.*

rejected British proposals to agree on an arbitration treaty based on the model of the 1897 Paris Agreement.⁵³³

5.131. Based on these accounts, crucial aspects of the tribunal's decision-making process can be established beyond doubt. They can be summarised in four points:

- *First*, the tribunal took less than six days to produce its Award.
- *Second*, the Award provides no evidence on how the line drawn in it was agreed upon. Neither the text of the Award nor the documentary evidence indicates how the Tribunal understood its tasks mentioned in Article III of the 1897 Treaty and what rules of law enumerated in Article IV it applied.
- *Third*, the contemporary documentary evidence produced by participants and close observers bears out that (as noted by a commentator) de Martens "saw the two American arbitrators and Lord Justice Collins separately, stating that unless they voted affirmatively on a compromise boundary designed by de Martens, he would join his vote to those of the other two arbitrators with the effect of making Venezuela or Great Britain, as the case might be, lose substantial territory [...] It [...] appears that all of [the other arbitrators] felt constrained to accept the line proposed by the President".⁵³⁴
- *Fourth*, significant contemporary evidence, emanating from members of the tribunal and participants, suggests that de Martens' approach was perceived as a deliberate choice to render a political or diplomatic decision rather than a legal one.

VI. A FRAUDULENT, ABUSIVE AND UNJUST PROCESS THAT CANNOT BE THE BASIS EITHER OF A VALID AWARD OR OF MUTUALLY ACCEPTABLE AND SATISFACTORY SOLUTION

5.132. The facts summarised in the preceding sections yield an historical truth: under the guise of an arbitral process, Great Britain managed to secure large swathes of territory,

⁵³³ See for example Letter from Choate to John Hay, 1 November 1899 (**Annex 173**).

⁵³⁴ J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications, New York, 1979, p. 348.

which it had come to claim without any legal basis in the course of the second half of the 19th century. Contemporary international observers had little doubt as to the expansionist British Empire's attitude and approach. Andrew Carnegie's observation, offered in 1896, is astute:

“[Great Britain] begins modestly to claim a boundary; Venezuela asks it to submit its claims to arbitration; this is refused; the matter rests a while, when it appears that the boundary of England has been much displaced and embraces more territory adjoining Venezuela; another protest from Venezuela, and another rest. When the question is revived, Britain discovers that it was wrong again and did not claim enough, and its third claim extends far beyond the second. Finally, a fourth line is drawn which extends over valuable gold deposits and actually places Britain on the banks of the Orinoco”.⁵³⁵

5.133. What Carnegie could not have foreseen is that the arbitral tribunal eventually accepted by Great Britain would ‘ratify’ the territorial usurpation – which even in the late 19th century, could not have been brought about by conquest – almost in toto: with the exception of the banks of the Orinoco, on which the British claim had effectively been given up, the tribunal's award was indeed “disastrous”⁵³⁶ for Venezuela.

5.134. As shown throughout this Chapter, this was not an arbitral process worthy of its name, or remotely respecting internationally agreed standards. Rather, Venezuela was presented with a deeply unequal treaty negotiated behind its back that set up a tribunal that flouted basic requirements of international justice.

5.135. Venezuelan reactions to the outcome were characterised by a mixture of shock, suspicion and realist resignation. In a letter to the Minister of Foreign Affairs, Venezuela's agent, José María de Rojas, qualified the decision as “derisory and a manifest injustice” and “inexplicable surprise” brought about by the actions of the President of the Tribunal, Mr. de Martens, and added “[w]hat we may never know is Mr. de Martens' motive for

⁵³⁵ A. Carnegie, “The Venezuelan Question”, *The North American Review*, Vol. 162, No. 471, 1896, pp. 133-134.

⁵³⁶ Letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

proceeding in this way”.⁵³⁷ Venezuela’s envoy to Great Britain, Jose Andrade, equally confirmed that “[t]he Award does not appear to be based on reason and justice”, noting that “the Venezuelan arbiters only gave their adhesion in order to avoid an ever greater flouting of the essential attributes of any faultless judgment”.⁵³⁸

5.136. The circumstances obtaining in 1899 made it impossible for Venezuela to challenge the award. The full details of the tribunal’s decision-making process had yet to be revealed; they would become clear only some decades later. Moreover, when Great Britain quickly proceeded to establish boundary posts at Punta Playa, the geopolitical situation rendered it simply unthinkable that Venezuela could oppose to the execution of the Award. Acts of coercion by foreign powers – such as those later culminating in the Venezuelan crisis of 1902-1903, in which European powers, including Great Britain, subjected Venezuela to a crushing naval blockade to enforce their alleged claims – were the rule. In ordinary circumstances, such acts reduced dramatically the room for manoeuvre enjoyed by a Latin American Republic at the turn of the 20th century. In the case of Venezuela, the room for manoeuvre was non-existent, squeezed as it was between the pressure exerted at the same time by Great Britain and the United States.

5.137. Once those circumstances had changed, Venezuela articulated its claims, and established that indeed, “[t]he award was the result of a political transaction carried out behind Venezuela’s back and sacrificing its legitimate rights”, resulting in a decision that took “no account [...] of the specific rules of the arbitral agreement or of the relevant principles of international law.”⁵³⁹ Venezuela’s claim led to the conclusion of the Geneva Agreement that now imposes on the parties to find a mutually acceptable and satisfactory solution to their territorial dispute.

⁵³⁷ Letter from Rojas to the Foreign Officer Minister of Venezuela, 4 October 1899 (**Annex 65**).

⁵³⁸ Letter from José Andrade to General J. Calcaño, Minister of Foreign Affairs of Venezuela, 7 October 1899 (**Annex 68**).

⁵³⁹ Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations, 14 February 1962 (**Annex 140**).

5.138. As demonstrated in the next chapter, this evidence clearly supports Venezuela's historical claim that the 1899 Award is null and void. More broadly, the evidence clearly shows to what extent Venezuela was the victim of a fraudulent, abusive, and unjust process.

5.139. In this respect, the facts reported in the present chapter – to the extent that they show the prejudice suffered by Venezuela as a consequence of this process – are crucial for assessing what could be a mutually acceptable and satisfactory solution, as required by the Geneva Agreement. It is clear that a deeply flawed and invalid award cannot be the basis of a mutually acceptable and satisfactory solution. Since the evidence clearly supports the invalidity of the Award, this is sufficient to reject Guyana's claim to sovereignty over the entire contested territory.

5.140. Irrespective of the invalidity of the Award, it is also clear that a territorial delimitation which is the result of a fraudulent, abusive and unjust process can in no way represent the basis of a mutually acceptable and satisfactory solution. Also, in this case, therefore, Guyana's claims must be rejected.

CHAPTER 6: THE INVALIDITY OF THE 1899 AWARD

6.1. The fraudulent, abusive, and unjust practices described in Chapter 6 cannot but lead to an inevitable conclusion: the 1899 Arbitral Award is null and void. Because of its nullity, it cannot determine the course of the boundary between Venezuela and Guyana, nor serve as a basis for a mutually acceptable solution of the territorial controversy that led to the adoption of the Geneva Agreement of 1966 and the joint communiqué of 14 December 1965 signed between the United Kingdom, Venezuela with the presence of British Guiana, now the Co-operative Republic of Guyana.

6.2. The present chapter sets out Venezuela's longstanding position that the 1899 Arbitral Award is null and void. It does so in two steps:

6.3. Section I outlines the legal rules governing the invalidity of arbitral awards. It also summarizes the applicable rules governing the burden and standard of proof in disputes about the validity or invalidity of awards.

6.4. Section II demonstrates that the grave irregularities that took place in the process resulting in the 1899 Arbitral Award, looked at separately and when considered together, vitiate the Award, which is invalid for three alternative reasons: (A) because it was rendered on the basis of an invalid Treaty; (B) because the Award failed to state the reasons on which it was based; and (C) because the Tribunal manifestly exceeded its powers conferred upon it by the Treaty. These three elements, which are analysed here in concrete terms, are key components of the configuration of a fraudulent procedure – a fraud consummated with the award - characterised by simulations, undue and extortive pressure, prevarication, deceit, abuse of power and falsehoods of all kinds.

I. THE LAW ON THE NULLITY OF ARBITRAL AWARDS AND ITS APPLICABILITY TO THE 1899 AWARD

(i) THE NULLITY OF ARBITRAL AWARDS IN INTERNATIONAL LAW

6.5. Arbitral awards are final and binding only if they satisfy the conditions for their validity provided under international law. In the absence of one of these conditions, they do not produce legal effect. If an award is null, it does not have the force of *res iudicata*.

6.6. The possibility of nullifying arbitral awards is inherent in the very nature of arbitration. The power of an arbitral tribunal to render a binding award relies on the agreement of the parties as contained in the arbitral *Compromis*. If that *Compromis* is invalid or if the arbitral tribunal does not conform to the rules agreed upon by the parties in the *Compromis*, a party is entitled to invoke the nullity of the award. As Judge Lachs put it, “[i]t is the inherent right of any party to proceedings, let alone a government with a nation's permanent interests to defend, to seek to have the result declared a nullity if it is convinced that the decision taken is basically flawed. This is so even in respect of decisions characterized as final [...]”.⁵⁴⁰

6.7. Being an inherent right of any party to proceedings, there is no need that the *Compromis* expressly recognises the possibility of nullifying the award. Nor does the fact that the *Compromis* contains a clause establishing that the award is “binding and final” precludes the possibility of nullifying the award. Only a “valid” award can be considered to be “binding and final”.⁵⁴¹

6.8. This also applies to the 1899 Arbitral Award. Article XIII of the 1897 Treaty provides that the award is to be considered “as a full, perfect, and final settlement of all the questions referred to the Arbitrators”. This provision simply establishes the mutual

⁵⁴⁰ *Arbitral Award of 31 July 1989*, Separate Opinion of Judge Lachs, *I.C.J. Reports 1991*, p. 92.

⁵⁴¹ See, among others, Rundstein, “La Cour permanente de Justice internationale comme instance de recours”, in *Recueil des cours*, 1933-1, p. 18 (“si le ‘texte’ se prononce sur le caractère définitif et sans appel d’une sentence, il serait inadmissible de conclure que chaque décision arbitrale, *parce qu’elle est définitive*, soit, de ce chef, et en vertu d’une présomption ‘légale’ dispensant de toute preuve contraire, absolument *valide* en tant qu’acte juridique liant les Parties”).

engagement of the parties to consider the award to be “final”. It does not address the question of its validity or nullity. Guyana’s argument that Article XIII of the 1897 Treaty precludes any challenge against the 1899 Arbitral Award is therefore groundless.⁵⁴²

6.9. Theory and practice widely confirms that any party to proceedings has the inherent right to invoke the nullity of an award and that, in case of nullity, “the State concerned is not bound to carry it into effect”.⁵⁴³ It would be very easy to make a long list of citations from “judicial decisions” and from “the teachings of the most highly qualified publicists of the various nations” recognising the existence under international law of a number of grounds of nullity of arbitral awards. Given the large agreement existing over this issue and for the sake of brevity, a reference to a few of the most significant cases and texts will be sufficient.

6.10. In 1804, the nullity of an award for excess of power by the arbitral tribunal was emphatically affirmed by Commissioner Gore. In his opinion in the *Betsey* case, he observed that international law, English common law, and common sense dictated that “une partie n’est pas liée par la décision des arbitres lorsque l’espèce ne rentre pas dans les termes du compromis: une telle décision est une lettre morte; ce n’est pas une décision.”⁵⁴⁴

6.11. In August 1875, the *Institut de droit international* adopted the Draft Regulations for International Arbitral Procedure. This text, which represents the first authoritative attempt at codifying the principles governing international arbitration, included a provision on the nullity of arbitral awards. Article 27 provided as follows: “The arbitral award is null

⁵⁴² For this argument, see GM, pp. 154-155, para. 6.17.

⁵⁴³ Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, UN doc A/CN.4/92, p. 105 (“Theory and practice abundantly demonstrate that when one or more of the fundamental conditions for the validity of an award are lacking, the State concerned is not bound to carry it into effect”).

⁵⁴⁴ *Affaire du Betsey* (cap. Furlong), 24 February 1804, De Lapradelle et Politis, *Recueil des arbitrages internationaux*, Pedone, Paris, 1905, Vol. 1, 69.

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”.⁵⁴⁵

6.12. In 1910, the arbitral tribunal in the *Orinoco Steamship* annulled for excess of powers an award rendered in 1904 by Umpire Barge in the claims opposing the Orinoco Steamship Company against Venezuela. The Protocol conferring jurisdiction to the tribunal, concluded in 1909 between the United States and Venezuela, asked the tribunal to decide whether the 1904 award was void “under the principles of international law”. In particular, the Protocol expressly mentioned the existence of “causes which by universal jurisprudence give rise” to the nullity of an award, including “an excessive exercise of jurisdiction”, “the corruption of the judges”, and “an essential error in the judgment”.⁵⁴⁶

6.13. In 1958, the International Law Commission adopted the *Model Rules on Arbitral Procedure*. Article 35, dealing with the nullity of arbitral awards, provides as follows: “The validity of an award may be challenged by either party on one or more of the following grounds: a) that the tribunal has exceeded its powers; b) that there was corruption on the part of a member of the tribunal; c) that there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure; d) that the undertaking to arbitrate or the *compromis* is a nullity”.⁵⁴⁷

6.14. This brief overview of significant episodes in the history of arbitration is sufficient to conclude that under international law arbitral awards have always been regarded as being inherently subject to nullity. Moreover, there has been always wide agreement about the grounds that may justify the nullity of arbitral awards.

⁵⁴⁵ Institut de droit international, *Draft Regulations for International Arbitral Procedure*, available at <https://www.idi-iil.org/en/publications/i-projet-de-reglement-pour-la-procedure-arbitrale-internationale/>.

⁵⁴⁶ Protocol of an Agreement Between the United States of America and the United States of Venezuela for the Decision and Adjustment of Certain Claims, Signed at Caracas on 13 February 1909, 11 RIAA 234.

⁵⁴⁷ *Yearbook of the International Law Commission 1958*, vol. II, p. 83.

**(ii) THE POSSIBILITY OF NULLIFYING ARBITRAL AWARDS WAS GENERALLY
RECOGNISED WHEN THE 1899 ARBITRAL AWARD WAS RENDERED**

6.15. The 1899 Arbitral Award between Great Britain and Venezuela was rendered twenty-four years after the adoption by the *Institut de droit international* of the Draft Regulations for International Arbitral Procedure. Ten years later, the United States and Venezuela – that is, the State which negotiated, and one of the States who concluded, the 1897 Treaty – stipulated an agreement expressly recognising “principles of international law” on the nullity of arbitral awards and “causes which by universal jurisprudence give rise” to such nullity. There is no doubt, therefore, that, when the 1897 Treaty was concluded and the 1899 Arbitral Award was rendered, there was wide recognition that an arbitral award could be nullified under international law.

6.16. Remarkably, in its oral submissions in the *Orinoco Steamship* case the United States even referred to the possibility of the 1899 Arbitral Award being declared null for excess of power. The United States observed that, in case of nullity, neither Great Britain nor Venezuela would have been bound by the award.⁵⁴⁸ This observation, made by the State who negotiated the 1897 Treaty, is revealing of how at that time States were aware of the existence of grounds of nullity in international law. It is probably also revealing of the doubts already existing about the validity of the 1899 Award.

6.17. In its Memorial, Guyana appears to suggest that, when the 1899 Award was rendered, international law did not admit the possibility of nullifying arbitral awards.⁵⁴⁹ Guyana’s argument relies essentially on the fact that neither the 1899 Hague Conference nor the 1907 Hague Conference led to the adoption of common rules dealing with the grounds of nullity of awards or with a procedure for nullifying awards, despite certain

⁵⁴⁸ Argument of the United States of America on Behalf of the Orinoco Steamship Company against the United States of Venezuela (1910), p. 67 (“Can it be suggested that either Great Britain or Venezuela would have been bound to submit to the result of this arbitration if the arbitrators had declined to regard fifty years of possession as conclusive evidence of title and had proceeded to decide, for instance, that it required one hundred years’ possession to give title or that no title based on prescription growing out of possession could be recognized in international law? The question answers itself”).

⁵⁴⁹ GM, paras 6.47-6.49.

States had advanced proposals to that effect. According to Guyana, this circumstance would demonstrate that at that time there was no general agreement about the grounds of nullity or the possibility itself of nullifying awards under international law.

6.18. The fallacy in this argument had already been emphasised by a number of authors. As observed by Brierly in 1928, the history of The Hague Conferences gives no support to the view that, at that time, international law did not admit the possibility of nullifying arbitral awards. The fact that no rules on the nullity of awards were approved by the Conference was only dictated by the circumstance that “the Conference, deeming it impracticable to propose a satisfactory *procedure* for adjudicating on allegations of nullity, thought it best to say nothing about the *substantive law* of nullity”.⁵⁵⁰

6.19. Most importantly, this argument had already been advanced without success before the International Court of Justice in the *Arbitral Award of the King of Spain* case. The case concerned an award rendered in 1906 on the basis of a *compromis*, the 1894 Treaty between Honduras and Nicaragua, that, like the 1897 Treaty between the Great Britain and Venezuela, had expressly recognised that the award was final and did not contain any reference to the possibility of invoking its nullity. Relying on the results of the two Hague Conferences, Honduras argued that international law did not admit the possibility of nullifying the award unless the *compromis* admitted such possibility.⁵⁵¹ Nicaragua objected

⁵⁵⁰ Brierly, ‘The Hague Convention and the Nullity of Arbitral Awards’, in *British Yearbook of International Law*, 1928, p. 116. See also Fauchille, *Traité de droit international public*, 8th ed., Paris, 1926, p. 566; Raestad, ‘Le recours à la Cour Permanente de Justice internationale contre les sentences des tribunaux d’arbitrage internationaux pour cause d’incompétence et d’excès de pouvoirs’, in *Revue de droit international et de législation compare*, 1932, p. 307.

⁵⁵¹ Plaidoirie de M. Guggenheim (Honduras), in *Case concerning the Arbitral Award made by the King Of Spain on 23 December 1906 (Honduras v. Nicaragua)*, I.C.J. Pleadings, Vol. II, p. 60 (“Déjà l'article 81 de la convention de La Haye de 1907 pour le règlement pacifique des différends internationaux n'est pas parvenu à indiquer les griefs de nullité opposables à une décision arbitrale, à la seule exception du recours en révision à la suite de la découverte d'un fait nouveau. Dans ces conditions, on est arrivé à la conclusion que, hors d'un compromis particulier, il n'est pas possible d'invoquer un motif de nullité de la sentence”).

that The Hague Conventions had never intended to deny the possibility of nullifying arbitral awards.⁵⁵²

6.20. By accepting to establish whether the 1906 Award of the King of Spain “proved to be a nullity having no effect” on ground of excess of jurisdiction, essential error and lack or inadequacy of reasons,⁵⁵³ the Court in fact endorsed the position of Nicaragua on this point. By so doing, the Court’s judgment in the *Arbitral Award of the King of Spain* authoritatively confirms that arbitral awards rendered at the turn of the twentieth century were clearly subject to nullity under international law. Moreover, the Court implicitly recognised that excess of jurisdiction, essential error and lack or inadequacy of reasons were grounds of nullity under international law and that they could be applied for assessing the validity of the 1906 Award. There is no reason for considering that the same is not true as regards the 1899 Arbitral Award.

II. THE CONSEQUENCE OF THE FRAUD: THE INVALIDITY OF THE 1899 AWARD

6.21. The facts set out in Chapter 5 highlight the serious and manifold deficiencies affecting the 1899 Award. They also illustrate that the fraud committed against Venezuela was a composite act, consisting of a series of interlinked actions and facts, whose combined effect was to deprive a sovereign country of its territory and to cloth this in the form of an arbitration procedure. As discussed in the following sections, even taken individually, many of these actions and facts would result in the invalidity of any award including the Arbitral Award of 1899.

6.22. This section will present the grounds vitiating the 1899 Award that verify its nullity under international law. The existence under international law of such grounds of nullity is so unanimously recognised by authors and in international practice that there is no need to

⁵⁵² Plaidoirie de M. Rolin (Nicaragua), *ibid.*, p. 334 (“personne, parmi les auteurs, n’a jamais attribué à ce texte de la Convention de La Haye [...] la portée de biffer l’éventualité de nullité de sentences arbitrales dans le droit international”).

⁵⁵³ *Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960, I.C. J. Reports 1960*, p. 214.

provide an extensive demonstration. Nor is there any need to respond to Guyana's argument that the grounds of invalidity applicable to the 1899 Arbitral Award can only be the grounds recognised under international law at the time when the award was rendered.⁵⁵⁴ There is no doubt, as Guyana itself concedes,⁵⁵⁵ that the grounds of nullity invoked by Venezuela as vitiating the 1899 Award exist today as they existed at the end of 19th Century. There is thus no question of intertemporal law at issue in the present case.

6.23. Reflecting the legal regime governing the invalidity of arbitral awards, the subsequent analysis is divided in three sections.

- a) Section 1 demonstrates that the 1899 Award is invalid because it was rendered on the basis of an invalid Agreement.
- b) Section 2 demonstrates that the 1899 Award is invalid because it failed to state the reasons on which it was based.
- c) Section 3 demonstrates that the 1899 Award is invalid because, in rendering it, the Tribunal manifestly exceeded its power under the 1897 Washington Treaty.

6.24. Significantly, each of these three alternative grounds renders the 1899 Award null and void. That said, in engaging with sections 1-3, Venezuela would like to stress the interrelated nature of the different grounds of invalidity, and the need to consider them holistically, bearing in mind their combined effect. Put simply, since its publication over 120 years ago, the 1899 Award has been attacked from multiple angles and decried as “une marchandage purement politique”⁵⁵⁶, an “act of injustice being perpetrated”⁵⁵⁷, “una expresión de prepotencia y arbitrariedad colonialista”.⁵⁵⁸ The central question facing the

⁵⁵⁴ GM, paras 6.43-6-49.

⁵⁵⁵ *Ibid.*, para 6-49.

⁵⁵⁶ P. Reuter, *La motivation et la révision des sentences arbitrales à la Conférence de la paix de la Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Venezuela*, in *Mélanges Offerts à Juraj Andrassy*, Springer, Dordrecht, p. 238.

⁵⁵⁷ J. Gillis Wetter, *The International Arbitral Process: Public and Private*, p. 350.

⁵⁵⁸ H. Gros Espiell, “Federico Martens, John Westlake y el laudo de 1899”, in *Boletín de la Academia Nacional de Historia* 1983, p. 1029.

Court is whether an Award displaying so many defects can be upheld as valid. The subsequent sections demonstrate why it cannot.⁵⁵⁹

(i) THE INVALIDITY OF THE 1897 TREATY

6.25. The first ground for nullity is the invalidity of the *compromis*. This ground is expressly provided in Article 27 of the 1875 Draft Regulations for International Arbitral Procedure.⁵⁶⁰ Article 35 of the International Law Commission's *Model Rules on Arbitral*

⁵⁵⁹ In several official documents, including in statements before the United Nations, Venezuela has provided a detailed and extensive demonstration of the grounds of nullity affecting the 1899 Award. They include the following: 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) (**Annex 140**); Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 43 (**Annex 150**); Question of Boundaries between Venezuela and the Territory of British Guiana: Statement of His Excellency, Dr. Marcos Falcon Briceno, Minister for External Relations of Venezuela, at the 348th Meeting of the Special Political Committee on 12 November 1962 (**Annex 143**); Ministerio de Relaciones Exteriores Republica de Venezuela, Reclamación de la Guayana Esequiba: documentos 1962-1981 (1981), available at the Peace Palace Library A non-exhaustive list of works on the grounds of invalidity of 1899 Award includes the following work: Academia Nacional de la Historia, "Declaración acerca del problema de los límites de Venezuela con la Guayana Británica" (1965), reported in *Boletín de la Academia Nacional de la Historia*, 2004, p. 167ff.; P.F.M. De Vegamian, *El Esequibo, frontera de Venezuela: documentos históricos y experiencias personales*, SA Impresiones (1968), p. 195 ff.; J. G. Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications (1979), pp. 1-350; P. Ojer, *Sumario histórico de la Guayana Esequiba*, Colección Sumario (1982), p. 50 ff.; C. Sosa Rodríguez, "El Acta de Washington y El Laudo de París", in T. Carrillo Batalla (ed.), *La reclamación venezolana sobre la Guayana Esequiba*, Biblioteca de la Academia Venezolana de Ciencias Políticas y Sociales (1983), p. 149 ff.; H. González Oropeza and M. Donis, *Historia de las Fronteras de Venezuela*, Cuadernos Lagoven (1989), p. 164 ff.; J. Sucre Reyes, *El despojo del siglo: la Guayana Esequiba*, Publicaciones Seleven (1981), p. 10 ff.; R. Sureda, *Venezuela y la Guayana Esequiba*, in *GeoVenezuela*, 2008, p. 351; C.A. Briceño Monzón, *La cuestión fronteriza en la conformación de la política internacional en Argentina y Venezuela: Siglos XIX-XX*, Universidad Nacional de La Plata (2014), p. 286 ff.; M. Donis, *El Esequibo: una reclamación histórica*, Universidad Católica Andrés Bello (2016), p. 104 ff.; W. Dávila Barrios (ed.) *Libro Blanco: La reclamación venezolana del territorio Esequibo*; H. Faúndez Ledezma, R Badell Madrid (eds), *La Controversia del Esequibo*, Editorial Jurídica Venezolana (2022), p. 283 ff.; R. Badell Madrid, *La reclamación de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023); A. R. Brewer-Carías, *Derechos de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), p. 130 ff.

⁵⁶⁰ Institut de droit international, *Draft Regulations for International Arbitral Procedure*, (available at: <https://www.idi-iil.org/en/publications/i-projet-de-reglement-pour-la-procedure-arbitrale-internationale/>).

Procedure establishes that the award is invalid if “the undertaking to arbitrate or the *compromis* is a nullity”.⁵⁶¹ As the binding force of the award is based on the agreement of the parties as set out in that *compromis*, it follows logically that if the *compromis* is invalid, the award cannot produce any legal effect.

6.26. The evidence presented in the previous chapters demonstrates that the 1897 Treaty is invalid for error (a) or/and fraud (b).⁵⁶² As recognised by Guyana,⁵⁶³ the conditions for determining the invalidity of a treaty as a consequence of error or fraud are set forth in, respectively, Articles 48 and 49 the 1969 Vienna Convention on the Law of Treaties. These provisions reflect rules of customary international law. Venezuela also affirms that such invalidity conditions can be found in international law and law in general, particularly criminal law knowledge and possible overlaps with the law of treaties.

6.27. Now, from the perspective of international law, the key element of any legal act, and in particular for the law of treaties, is the manifestation of will. In this regard, article 7 states that:

“for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers”.

6.28. In other words, there are two distinct scenarios, one formal and the other implied. The first case does not pose any problem, except in cases of falsification of the act in the granting of powers. However, the second case may cause difficulties, in particular if the representation was valid, but the agent acted in bad faith, or in complex moments regarding the legitimacy of the person exercising the representation and did so to the detriment of the

⁵⁶¹ *Yearbook of the International Law Commission 1958*, vol. II, p. 83.

⁵⁶² As to the invalidity of the Treaty as a consequence of the coercion exerted on Venezuela, see Chapter 7, paras. 64-72.

⁵⁶³ GM, p. 175, para. 7.5.

principal. Hence, an excusable error may occur in favour of the State invoking nullity, depending on the particular situation of each case.

6.29. In the unique case of the Treaty of Washington of 1897, two rather heterodox and irregular situations occurred, one being that the negotiator of the Treaty turned out to be a representative of a foreign state: Richard Olney. The existence of any special power to legitimise his intervention for the negotiation of the Treaty is not precisely known (therefore, it is a presumed representation). The problem is that the negotiation was detrimental to Venezuela, which means that the formation of the representative's will was affected in its essence and constituted a fraudulent conspiracy, as there was fraudulent intent to induce an essential error in the Venezuelan representative (ambassador) when he signed the treaty, given that artifice and deception were present to facilitate the fraud.

6.30. Although the 1897 Treaty was signed by José Andrade, Venezuela's representative to the United State, he referred to the President of the Republic at the time, Joaquín Crespo, that Venezuela had been marginalised from the negotiation process and in the integration of the Paris Tribunal. Therefore, Venezuela was unable to appoint arbitrators. This situation was enough to make clear the trace of injustice and perspicacity in the consummation of the fraudulent Award of 1899.

6.31. The United States and Britain not only limited themselves to excluding Venezuela from the negotiation process but kept some crucial decisions strictly confidential. The level of confidentiality was attested to by the fact that even the relevant documents were not allowed to "pass into the archives of the State Department".

6.32. This Counter-Memorial show the fraudulent actions of the main negotiators of the Washington Treaty of 1897 with respect to the exclusion of Venezuelans in the arbitration, in addition to other relevant aspects no less important, such as: (a) the exclusion of the agreement reached by the exchange of notes of 1850 (*status quo*); (b) the ruse of a forged 50-year statute of limitations in favour of the usurper of the territory; (c) the relevant exclusion of the motivation of the award, which was crucial for the due substantiation of the arguments of the parties and the law invoked; d) the way in which *uti possidetis* was to be interpreted, as a general principle, which was relativised and would not be a valid

premise for determining the dividing line; e) the enshrinement of three rules in the articles of the treaty that contradict the general principle of *uti possidetis*, which gave rise to a serious exceptional right against the stability of the sovereignty of the territory whose dispute the United Kingdom had forged; f) a strange rule on prescription was enshrined, where alleged political domination is equivalent to acquisitive prescription, whereas universally the rule is different: time and peaceful possession are equivalent to prescription. Certainly, the architects of these fraudulent conversations were Mr. Julian Pouncefote, Mr. Salisbury and Mr. Olney, which led to the fraud.

6.33. Thus, the error caused to the detriment of Venezuela by means of fraudulent deceit can be inferred from what is expressed in the provisions of the 1969 Convention in its double dimension, both in terms of the subject-matter or object of the treaty. Hence, Article 48 states: “[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”. In the case of consent affected by an error, the error must be excusable, that is to say, the person affected could not at any time have foreseen the error which had occurred.

6.34. In any case, when the Vienna Convention focuses on error, it is concerned with consent. Therefore, the rule in Article 48 specifies: a) a defect in its consent to be bound by the treaty and b) it constituted an essential basis of its consent to be bound by the treaty. In short, the error must arise from an essential assumption, where there is a misconception about a matter that was believed to be true, for example, negotiations, declarations, documents, traditions, conduct or actions. In the case of the 1897 Washington Treaty, the consent formally given by Venezuela is a necessary consequence of deception, deceit or artifice (creation of a dispute and covert conversations to facilitate fraud) which were the means used to deceive, as well as a forced situation orchestrated by the chief negotiator of the treaty, the U.S. official, Mr. Olney. Grotius said that the right of the parties must always be protected to give free and voluntary consent, which did not happen.

6.35. Thus, fraud in treaty law is centred on ill intent or malice, just as it is a rule of law in general to qualify the intention or will directed towards an unlawful end and which criminal law qualifies with greater unlawfulness when that end serves conduct that in the abstract, is criminally reprehensible. Specifically, when one of the parties directs its action in two concrete situations, a) deceit or fraudulence and b) implicit or explicit (extortive) violence (fraudulent fraud and extortive fraud), which can be understood either as an influence of the action itself or out of just fear of being exposed to a greater evil. Both situations have to do with consent to be bound. The first is the most common, as it involves fraudulent actions, such fraudulence may be constitutive in that one party believes that the other party is negotiating in good faith, which is the sensible thing to do, when in fact it is not, and thus seeking to make the injured party fall into an error which is also entirely excusable. The Convention in Article 49 states: “[i]f 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.” It would seem that the defect referred to in the Convention, in the first instance, would be fraud or deception, which produces in the other state a conduct prejudicial to its interests which, being essential, there is no doubt about the invocation of nullity.

6.36. The Convention adds other fraudulent cases in relation to representation when it is subject to two illegal situations, such as: corruption of the negotiating official and coercion that may be exercised on the official. Article 50 of the Convention states: “[i] 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.” It is striking that both the American (Olney) and Anglo-Saxon (Salisbury and others) representatives were involved in a way that deviated from their functional duties as officials, which resulted in an act of fraudulent corruption to the detriment of Venezuela.

6.37. The other situation that can be invoked for the purposes of nullity is coercion or violence (extortive fraud). As mentioned above, violence can be direct and can seek to obtain consent by affecting the subject's willingness to give consent. For this reason, Article 51 of the Convention establishes: “[t]he expression of a State’s consent to be bound by a

treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.” It is obvious that no previous fraudulent conduct affecting consent can be valid and affects the universality of the whole treaty. For this reason, Article 52 of the Convention states: “[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.”

6.38. In the specific case of the Venezuelan situation in 1899 with regard to the Treaty of Washington of 1897, the arbitration award, as a consequence of it, and the subsequent execution, were affected by openly fraudulent activities, as has already been sufficiently stated; not only with regard to fraud in the creation of the Treaty and its contents (the British authorities at the time, together with certain American officials, especially the diplomatic representation of the State Department, made it appear that they were acting in good faith), but also with regard to the issues dealt with and the corruption of the arbitrators, as well as the subsequent enforcement of the Award, which was marked by coercion, despite the special circumstance that the 1897 Treaty constituted a violation of essential rules of domestic law. Therefore, the situation experienced by Venezuela at the time of the 1899 Arbitral Award was that of a victim of fraudulent (criminal) actions by all the members of the Arbitral Tribunal or Commission, the American officials and British Foreign Department and its authorities who, taking advantage of their warlike power as the world's leading power, sought to harm the fundamental and territorial interests of the Venezuelan nation.

6.39. The ILC pointed out in its report that in attempting to answer the question of violent coercion, it is defined as the threat or use of armed force or whether it involves or encompasses all forms of coercion. Finally, says the Commission, the Conference adopted, as an annex to its Final Act, a *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*, in which it pronounced a solemn condemnation of the resort to the threat or use of pressure in any form, whether military, political or economic, by a State in order to coerce another State to perform an act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and the freedom of consent.

6.40. Moreover, the fraudulent conduct of the two negotiating States is confirmed by their subsequent conduct. Despite all the confidentiality surrounding the correspondence between the parties, Britain - without encountering any real opposition from the United States - did not hesitate to openly refer to its existence and content during the proceedings before the arbitral tribunal. Once Venezuela ratified the Treaty, all reasons for strict confidentiality suddenly disappeared.

6.41. In sum under the foregoing analysis, it can be affirmed that the conditions were and are present to consider the 1897 Treaty invalid for fraud. First, the fraud came from one negotiating party, Great Britain, with the complicity of the chief representative of the United States (Richard Olney) who acted as the representative of the United States. Secondly, the fraud was a determining factor in inducing Venezuela to accept the Treaty, since the fraudulent conduct affected the crucial issue concerning key aspects of the dispute which, properly analysed, constituted an inexcusable prejudice to Venezuelan interests. Third, Venezuela was not and could not have been aware of the fraudulent conduct of Britain and the United States (good faith prevailed). For all these reasons, the 1897 Treaty is invalid and has no effect, as well as the consequent result of the arbitration, namely the void award of 3 October 1899.

6.42. It is imperative to emphasise what the International Law Commission has said: "fraud, when it occurs, strikes at the root of an agreement" because it "destroys the whole basis of mutual confidence between the parties". It is difficult to see what mutual trust can exist when negotiating states resort to confidential correspondence in the way that the United States and Britain did.

**a) Error in substance applicable to the 1897 Washington Treaty in its content:
Substantive error in the rules**

6.43. Article 48 (1) of the Vienna Convention provides as follows: "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".

6.44. In the present case, the error by concealment in question related to the calculation of the period of prescription provided under Article IV of the 1897 Treaty. During the negotiation of the Treaty, the United States and Great Britain agreed upon the interpretation to be given to this key provision of the Treaty, without informing Venezuela of this fact. The effect of such conduct was a misrepresentation of the real meaning of the provision, which clearly affected “the reality of the consent supposed to have been given” by Venezuela.⁵⁶⁴

6.45. Thus, Venezuela gave its consent to the Treaty on the erroneous assumption that the period for the computation of the statute of limitations was different and that any occupation after 1850 would constitute a usurpation without legal value.⁵⁶⁵

6.46. The position of Venezuela on this issue was clearly articulated by its Minister of Foreign Affairs in 1965. The Treaty of Washington is invalid because “the correspondence exchanged between the 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”.⁵⁶⁶

6.47. As widely demonstrated in Chapter 5, while the Treaty does not clarify when the period of prescription was meant to start, Great Britain and the United States had confidentially agreed that factual occupation was able to generate a valid title even if it had taken place in the period after 1814. They also agreed that the 1850 Agreement concluded between Venezuela and Great Britain did not necessarily represent an impediment for taking into account situations of factual occupation which occurred after 1850.

⁵⁶⁴ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961, I.C. J. Reports 1961*, p. 30.

⁵⁶⁵ See the Vol. 11 of the proceedings, pp. 3096-3097, where Harrison stated that : “now comes into play the 1850 Agreement by which, as we stated, there was a mutual occupation of the territory, a joint jurisdiction in which neither had an adverse position any longer, but had it with the consent of the other and which, of course, according to the rules of international law cut off the statute of limitations and this discussion of the period [...]” (available at the Peace Palace Library).

⁵⁶⁶ Dr. I. Irabarren Borges, *Statement made by Dr. Ignacio Irabarren Borges, Venezuelan Foreign Minister, to the Ministerial Conference Held in London (9 December 1965)*, GM, Vol. IV, Annex 76.

6.48. The two States never informed Venezuela of these decisions. Venezuela therefore gave its consent to the Treaty on the mistaken assumption that the period for the calculation of prescription was a different one. This is demonstrated by the fact that, when presenting its arguments before the Arbitral Tribunal, Venezuela argued, in the first place, that Article IV (a) of the 1897 Treaty had no application to the period subsequent to 1814 and, secondly, that in any case the 1850 Agreement precluded Great Britain to claim that the period of time after 1850 could be taken into account for the purposes of determining prescription. It was only during the oral phase of the proceeding before the Arbitral Tribunal that Great Britain made use of the confidential correspondence between the United States Secretary of State, Olney, and the English Ambassador, Pauncefote, to argue that, on both issues, the position of Venezuela was erroneous since it did not conform to what the United States and Great Britain had agreed upon about the relevant period for the calculation of the prescription.

6.49. There is little doubt that the conditions set forth in Article 48 of the Vienna Convention are met. Firstly, Article 48 requires that the error relates to a “situation which was assumed by [the consenting] State to exist at the time when the treaty was concluded”. As just shown, when Venezuela concluded the 1897 Treaty, its consent was clearly based on a mistaken assumption about the relevant period for the calculation of the prescription under Articles III and IV, as well as on the binding nature of the 1850 agreement.

6.50. Secondly, Article 48 requires that the mistaken situation “formed an essential basis of [the State’s] consent to be bound by the treaty”. As established in Chapter 7, the question of whether prescription was to be regarded as a valid title for claiming the contested territory was crucial for settling the territorial dispute. On several occasions, Venezuela had made clear its opposition to recognise *de facto* occupation as a valid title. The determination of the relevant period for the calculation of the prescription constituted therefore an essential issue for Venezuela, as it represented the only guarantee for limiting territorial claims, such as those advanced by the United Kingdom, which were based exclusively on the *de facto* occupation of the territory. From the beginning of the negotiations, the UK stated that it would not cede territory where there were British subjects. In this sense, for the British, rule (a) and (c) meant that occupied territories would

not be part of the arbitration. Both rules were proposed by the U.S. It is clear that the Venezuelans had a different interpretation from that of the negotiators – yet, this was not out of naivety but because they took Olney's word for it, who in turn had made a commitment to the contrary to the British.⁵⁶⁷

6.51. Thirdly, and lastly, under Article 48, error cannot be invoked by a State “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”. Venezuela did not contribute to the error nor could have avoided it. As observed by the International Law Commission, in ordinary circumstances, “treaty making processes are such as to reduce to a minimum the risk of errors on material points of substance”.⁵⁶⁸ The treaty-making process leading to the conclusion of the 1897 Treaty was by no means an ordinary process. Venezuela was intentionally left outside of the negotiation process. It was not consulted nor informed of the development of the negotiation. Given these circumstances, it was simply impossible for Venezuela to be on notice of a possible error or to contribute to it.

b) Fraud: Invalidity for lack of factual and legal basis (reasons)

6.52. In addition to error, another basis for holding the Treaty invalid is fraud. It has been observed that it may sometimes be difficult to distinguish between error and fraud, since in fact “fraud (ie error induced by the actions of another party) constitutes a species of the genus error”.⁵⁶⁹ While error provides a sufficient ground for invalidating the 1897 Treaty, it is submitted that the conditions for considering it invalid because of fraud are also met.

6.53. Article 49 of the Vienna Convention provides as follows: “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”.

6.54. The United States and Great Britain did not limit themselves to excluding Venezuela from the negotiation process. They kept some crucial decisions strictly

⁵⁶⁷ The Venezuelan Question, London Time, Tuesday, November 10, p. 1896.

⁵⁶⁸ *Yearbook of the International Law Commission*, 1966, vol. II, p. 243.

⁵⁶⁹ See E. Wyler, R. Samson, ‘Article 48’, in O. Corte, P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford : Oxford University Press, 2011, p. 1130.

confidential. The level of confidentiality was attested by the fact that the relevant documents were not even allowed “to go on to the files of the State Department”.⁵⁷⁰

6.55. It is difficult to explain why the parties followed this course of conduct if not for the reason that they wanted to leave Venezuela in the dark about the content of their decisions. They were aware of the importance attached by Venezuela to the issue of prescription and feared the resistance that Venezuela might have opposed to further concessions aimed at facilitating the recognition of *de facto* control as a valid title for claiming sovereignty over the territory in dispute. In order to induce Venezuela to accept the treaty, they chose not to address these controversial issues directly in the text of treaty, preferring instead to conclude informal and confidential arrangements.

6.56. The fraudulent conduct of the two negotiating States is confirmed by their subsequent conduct. Despite all the confidentiality surrounding the correspondence between the parties, Great Britain – without meeting real opposition from the United States – did not hesitate to openly refer to its existence and content during the proceedings before the arbitral tribunal. Once Venezuela had ratified the Treaty, all the reasons for the strict confidentiality suddenly disappeared.

6.57. According to the International Law Commission, “fraud, when it occurs, strikes at the root of an agreement” because “it destroys the whole basis of mutual confidence between the parties”.⁵⁷¹ It is hard to see what mutual confidence can exist when negotiating States have recourse to confidential correspondence in the way in which the United States and Great Britain did.

6.58. The conditions for considering the 1897 Treaty invalid because of fraud are met. First, the fraud emanated from a negotiating party, Great Britain, with the complicity of the United States. Secondly, the fraud was a determining factor in inducing Venezuela to accept the Treaty, as the fraudulent conduct affected the crucial issue concerning the determination of the relevant period for the calculation of the prescription. Third,

⁵⁷⁰ Letter from Richard Olney to Sir Pauncefote (24 May 1899), in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, p. 25.

⁵⁷¹ *Yearbook of the International Law Commission*, 1966, vol. II, p. 244.

Venezuela was not aware, and could not be aware, of the fraudulent conduct of Great Britain and the United States. For all these reasons, the 1897 Treaty is to be regarded as null and void.

(ii) INVALIDITY FOR ABSENCE OF REASONS

6.59. The Award rendered on 3 October 1899 did not state the reasons on which the Tribunal had based its decision. This circumstance is sufficient for concluding that the Award is null and void. As stated in the Report prepared by the Experts nominated by the Venezuelan Government, “the Arbitral Tribunal which dictated the verdict in the British-Venezuelan border conflict did not comply with its duty, and therefore, giving a decision without the corresponding statement of reasons, did not proceed in accordance with the norms of international law. Therefore, the decision of the Arbitral Tribunal lacks any validity in international law”.⁵⁷²

6.60. The duty to state the reasons for an award is universally recognised. The existence of such a duty was also widely acknowledged when the 1899 Arbitral Award was rendered. Article 23 of the 1875 *Draft Regulations* provided that “[t]he arbitral award must be reduced to writing, and contain a statement of reasons, unless that is dispensed with under the stipulations of the compromis”.⁵⁷³ The duty of arbitrators to reason their awards was

⁵⁷² Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 14, para. 17 (**Annex 150**). See further P. Ojer, *Sumario histórico de la Guayana Esequiba*, Colección Sumario (1982), p. 50; C. Sosa Rodríguez, “El Acta de Washington y El Laudo de París”, in T. Carrillo Batalla (ed.), *La reclamación venezolana sobre la Guayana Esequiba*, Biblioteca de la Academia Venezolana de Ciencias Políticas y Sociales (1983), p. 159-160; H. González Oropeza and M. Donis, *Historia de las Fronteras de Venezuela*, Cuadernos Lagoven (1989), p. 164; J. Sucre Reyes, *El despojo del siglo: la Guayana Esequiba*, Publicaciones Seleven (1981), p. 56; A. Brewer-Carías, *Derechos de Venezuela sobre el territorio Esequibo: la nulidad del laudo arbitral de 1899 y las falsedades en la memoria de Guyana ante la Corte Internacional de Justicia* (Academia de Ciencias Políticas y Sociales 2023), pp. 139-142; R. Badell Madrid, *La reclamación de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), pp. 166-171; Sucre Reyes, *El despojo del siglo: la Guayana Esequiba*, Publicaciones Seleven (1981), p. 56.

⁵⁷³ Institut de droit international, *Draft Regulations for International Arbitral Procedure*, available at <https://www.idi-iil.org/en/publications/i-projet-de-reglement-pour-la-procedure-arbitrale-internationale/>.

“définitivement consacrée par le droit international positif”⁵⁷⁴ at the 1899 Hague Conference. According to Article 52 of the Convention for the Pacific Settlement of International Disputes, “[t]he Award, given by a majority of votes, is accompanied by a statement of reasons”.⁵⁷⁵ As observed by Pierantoni in 1898, “[l]es motifs en fait et en droit, s’ils sont une garantie exigée par la loi de procédure, sont un besoin de la société internationale”.⁵⁷⁶

6.61. If stating the reasons for the award is a duty, failure to state such reasons is a ground for nullity of the award. Article 35 of the 1958 *Model Rules* is clear in this respect: the award is a nullity if “there has been a failure to state the reasons for the award”.⁵⁷⁷

6.62. This Court has recognised that failure to state the reasons is a ground for nullity of an award. It has also admitted that the existence of such ground of invalidity was generally recognised at the time when the 1899 Award was rendered. In the case concerning the *Arbitral Award made by the King of Spain*, Nicaragua claimed the nullity of an award rendered in 1906 on the ground of the lack and inadequacy of reasons in support of the conclusions arrived at by the arbitrator. While the Court arrived at the conclusion that Nicaragua’s claim was without foundation,⁵⁷⁸ its reasoning relied on the assumption that this ground of nullity applied to an award rendered in 1906. The Court’s judgment thus stands in clear opposition to Guyana’s argument that failure to state the reasons was not a ground of invalidity when the 1899 was rendered.⁵⁷⁹

6.63. Nothing in the 1897 Treaty could be interpreted as dispensing the Tribunal with the obligation to state the reasons. To the contrary, the fact that the arbitral tribunal was

⁵⁷⁴ Castberg, ‘L’excès de pouvoir dans la justice internationale’, (1931) 35 *Recueil des cours*, p. 389.

⁵⁷⁵ See the text at: <https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf>.

⁵⁷⁶ Pierantoni, ‘La nullité d’un arbitrage international’ (1898) 30 *Revue de Droit International et de Législation Comparée*, p. 459.

⁵⁷⁷ *Yearbook of the International Law Commission 1958*, vol. II, p. 83.

⁵⁷⁸ *Arbitral Award made by the King of Spain on 23 December 1906*, Judgment, I.C.J. Reports 1960, p. 216.

⁵⁷⁹ GM, para. 8.33.

under a duty to state the reasons can be inferred from a number of features characterising the 1897 Arbitration Treaty.

6.64. The first feature concerns the composition of the Tribunal. Indeed, the choice of the individuals who acts as arbitrators provides an indication about the intention of the parties with regard to the requirement of stating the reasons for the award. In the early practice of international arbitration, the rare cases of awards without motivation were generally justified by the fact that the arbitrator was a sovereign or the president of a State. In such cases, the failure to state the reasons might be expected by the parties, being a means for protecting the dignity and the political authority of the individual they had chosen as arbitrator.⁵⁸⁰

6.65. The composition of the Tribunal which rendered the 1897 leaves no doubt about the intention of the parties. Article II of the 1897 Treaty provided that “The Tribunal shall consist of five jurists”. The importance attached to the legal expertise and background of the five selected arbitrators shows that the parties expected a decision explaining in legal terms the reasons behind the territorial delimitation. There is no need for highly qualified jurists if the objective is to have an award in the form of an oracle.

6.66. Another factor to be taken into account relates to the criteria chosen by the parties for deciding the dispute. When the *compromis* gives a wide margin of discretion to the arbitrator about the rules to be applied for deciding upon the dispute or when it authorises the arbitrator to decide *ex aequo et bono*, the trust placed in the authority of the arbitrator makes it less evident the need to provide the reasons at the basis of the decision. In such cases, the tribunal may be regarded as having being dispensed by the parties with the obligation to state the reason. As Paul Reuter put it, “on pouvait comprendre que pour un

⁵⁸⁰ See Balasko, *Causes de nullité de la sentence arbitrale en Droit international public*, Pedone, 1938, p. 127 (“lorsque des souverains rendaient les sentences, ils s’abstenaient d’exposer les motifs de leur décision par crainte que leur propre raisonnement ne pût être invoqué contre eux-mêmes, pour échapper aux critiques”).

arbitre, appelé par les parties à statuer *ex aequo et bono* soit réservé le droit de ne pas motiver sa sentence”.⁵⁸¹

6.67. The 1897 Treaty did not fall into that category of arbitration agreement. The Treaty furnished detailed instructions as to the rules to be applied by the tribunal for delimiting the territory in dispute. Article III required the Tribunal to investigate “the extent of the territories belonging to, or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain” in 1814. Article IV provided a precise list of the rules “which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case”. Having set these strict conditions governing the work of the tribunal, it cannot reasonably be expected that the parties did not intend to require the Tribunal to give reasons for its decision. This conclusion is further supported by Article X of the Treaty, which provides that “[t]he decision of the Tribunal shall, *if possible*, be made within three months from the close of the argument on both sides” (emphasis added). It would make little sense to give to the arbitrators a deadline of three months, with the possibility of extending it if necessary, if the Tribunal was only required to formulate an award without any reasoning.

6.68. The motivation of the awards is a fundamental means for controlling whether the award was rendered in full conformity of the *compromis*. The motivation allows the parties to appreciate and control what are the rules of law applied the arbitrator, what the facts on which it relied and what the evidence establishing these facts, or what the weight assigned to the arguments of each party. The fact that an award is accompanied by an adequate motivation is the best guarantee that the Award has been rendered in accordance with the instructions provided by the parties in the *compromis*.

6.69. In sum, when the arbitrators are selected by the parties because of their reputation as legal scholars, the *compromis* provides rigid instructions as to the rules of law to be applied by them, and the tribunal is given several months for rendering its decision, failure to state the reasons is hard to justify. In this respect, by no means can it be inferred from

⁵⁸¹ P. Reuter, *La motivation et la révision des sentences arbitrales à la Conférence de la paix de la Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Venezuela*, in *Mélanges Offerts À Juraj Andrassy*, Springer, Dordrecht, p. 240.

the text of the 1897 Treaty that the parties intended to dispense the tribunal with its obligation to state the reasons for the Award. On the contrary, the content of the Treaty confirms that the Tribunal was under such obligation.

6.70. Finally, at the time when the Arbitral Award was rendered, the practice widely supported the existence of an obligation of stating the reasons. Absence of reasons was a rare exception. To prove the contrary, Guyana refers to four unmotivated awards rendered in the period between 1893 and 1904.⁵⁸² It is sufficient to rapidly examine these four cases, and to compare them to the case between Venezuela and Great Britain, to realise that they confirm, rather than contradict, what has been just said. In two cases – the *Cerruti Case* and the *Argentine-Chile Case*, the award was rendered by, respectively, the United States President Cleveland and by King Edward VII, and in both cases the *compromis* gave wide discretion to the arbiter about the determination of the grounds for decision. In the *Cerruti Case*, for instance, President Cleveland based its unmotivated decision on the fact that the *compromis* had vested in him “full power, authority and jurisdiction to do [...] all things without any limitations whatsoever which, in [his] judgment, might be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes the agreement is intended to secure”.⁵⁸³ In the *Bering Sea Fisheries Case* and in the *San Domingo Improvement Company Claims Case*, both of which, to be said incidentally, in fact contain a succinct statement of reasons,⁵⁸⁴ no clear indications was given to the arbitral tribunal about the legal principles to be applied for deciding the dispute. Article II of the 1892 Treaty between Great Britain and the United States on the arbitration respecting the seal fisheries in Behring’s Sea simply required that the arbitrators “shall proceed impartially and carefully to examine and decide the questions that have been or shall be

⁵⁸² GM, para. 8.31.

⁵⁸³ See UNRIAA, vol. XI, p. 394.

⁵⁸⁴ Significantly, this fact did not escape the attention of Martens, who, acting as delegate of Russia at the 1899 Hague Peace Conference, referred to the arbitration in the *Bering Sea Fisheries Case* for supporting his opposition to the obligation to state the reasons for an award (“he [De Martens] cites cases of arbitration such as those of the *Alabama* and the Bering Sea Fisheries in which certain members of the tribunal refused to affix their signatures to the award because it stated the reason thereof”). *The Proceedings of the Hague Peace Conferences*, New York, Oxford University Press, 1920, p. 748.

laid before them”.⁵⁸⁵ Finally, it is significant that, in commenting these awards, some scholars raised the question of their invalidity because of the absence of reasons.⁵⁸⁶

6.71. For all these reasons, it can be safely concluded that, by not stating the reasons on which its decision was based, the Tribunal not only breached an obligation which could be inferred from the terms of the 1897 Treaty. It also breached an obligation which existed under general international law. This circumstance alone is sufficient to render the Arbitral Award of 3 October 1899 null and void.

6.72. Before moving to the next section, it is important to emphasise that failure to state the reasons, beside being an autonomous ground of nullity, may also be revealing of an attempt to conceal other defects of the award. In particular, it may conceal an excess of power. In fact, by leaving the award unmotivated, the arbitrator creates the conditions for circumventing the difficulty of explaining the decision on the basis of a rigorous application of the rules imposed by the *compromis*.

6.73. At the time when the Award was rendered, the risk of using the lack of motivation as a means for escaping the limits of the *compromis* had already been denounced by several scholars. Commenting the unmotivated decision in the *Cerruti* case, rendered in 1894, Pierantoni criticised the arbitrator who, “se rendant compte de la difficulté d’expliquer sa décision sur la base du droit, [...] s’en est volontairement abstenu en s’appuyant sur les pleins pouvoirs”.⁵⁸⁷ As suggested by Pierantoni, absence of reasons, seen in context, may reveal that decision was not taken on the basis of the law. In this sense, absence of reasons may become an evidence proving the excess of power vitiating an award.

6.74. Remarkably, it was the President of the Arbitral Tribunal, Friedrich De Martens, who, in very clear terms, recognised that the obligation to motivate an award limited, if not excluded, the possibility of an arbitrator departing from the strict respect of the conditions

⁵⁸⁵ See UNRIIAA, vol. XXVIII, p. 267.

⁵⁸⁶ See, for example, with regard to the award in the *Cerruti* case, Pierantoni, “La nullité d’un arbitrage international”, 1898, 30, *Revue de Droit International et de Législation Comparée*, pp. 458-459.

⁵⁸⁷ Pierantoni, ‘La nullité d’un arbitrage international’, p. 189, para. 30; *Revue de Droit International et de Législation Comparée*, p. 459.

imposed by the *compromis*. Even more remarkable, however, is the fact that it was precisely for that reason that De Martens strongly opposed any attempt to recognise the existence, under general international law, of an obligation of motivation. Acting as a delegate of Russia at the 1899 Hague Peace Conference, De Martens voted against the provision which later became Article 52 of the Convention for the Pacific Settlement of International Disputes. In a meeting which took place on 26 June 1899, he explained his opposition as follows:

“in an international conflict arbitrators are not only judges; they are also representatives of their Governments. To require them to state the reasons for their decisions would be to impose upon them one of the most delicate of obligations, and perhaps even to embarrass them seriously, if their judicial consciences do not find themselves in accord with the requirements of their Governments or the sensibilities of public opinion in their countries. It is indeed going too far to require an impartial arbitrator to condemn his own government. Must we also require him to justify himself expressly and thereby aggravate this condemnation? If the arbitral decision contains only a few sentences all of the arbitrators without regard to their nationality may sign it”.⁵⁸⁸

6.75. At the meeting of 30 June 1899, De Martens expressed again its opposition against the obligation of motivation. He stated: “While this obligation to state the reasons for the award would no doubt be an advantage from a legal view-point, it would be a hindrance from a practical view-point”.⁵⁸⁹

6.76. These statements are shocking for the message they convey and for when they were made. De Martens openly defended the idea that an arbitrator also acts as a representative of his State of nationality; that his loyalty to the mandate conferred to him by the parties in dispute may not be easy to reconcile with the loyalty he had to provide to the interests of his State; that, as a consequence, compromises are inevitable; and that the more practical way for having an award which, by concealing the compromises, could be accepted by all

⁵⁸⁸ See, *The Proceedings of the Hague Peace Conferences*, New York, Oxford University Press, 1920, p. 740.

⁵⁸⁹ *Ibid.*, p. 748.

the arbitrators is to exclude any obligation to motivate the award, even though – as he admits – such solution would not be “an advantage from a legal view-point”. De Martens made this declaration when oral hearings before the Arbitral Tribunal were still ongoing and only a few weeks before the Tribunal rendered its final award.⁵⁹⁰

6.77. Moreover, Mr. Martens in his personal diary acknowledges:

“Finally, in French, I expressed my thanks to the French government for the hospitality extended to the tribunal and explained the special significance of the decision which was adopted unanimously (which had never happened before!) and which applied for the first time the rules of procedure adopted by the Hague Convention.”⁵⁹¹

6.78. It referred specifically to the Hague Convention of July 1899, unknown, by the way, to a majority of countries which did not participate and, for that matter, especially Venezuela less so, and which then, in 1907, was present at the Conference held in The Hague. However, although this Convention did not establish the nullity of the arbitration award due to defects, it did establish the necessary motivation of the award in its Article 52, Martens erred and what we see in his (unanimous) award is a compromise on the "Anglo-American" issue, as he himself called it.

6.79. It should be added that so necessary and important was the motivation that Mr Martens dares to point out with evident disregard for the rights of other countries and for what belonged to Venezuela that: "I [Mr. Martens] stated my views on all the main questions, denied the monstrous right of discovery and occupation of Spaniards and Americans (probably referring to Venezuela) demonstrated the lack of definition of the

⁵⁹⁰ It has been rightly observed that, precisely for the views he expressed and for the different roles he simultaneously played, “Martens was not the right person to act as an impartial third party in his role as an arbitrator of law”. See H. Faúndez Ledezma, “La Controversia del Esequibo y el fantasma de Federico de Martens”, in *Revista de Derecho Público de Venezuela* (2022), p. 18 (“Martens no resultaba ser la persona idónea para actuar como un tercero imparcial, en su función de árbitro de Derecho”). See further R. Badell Madrid, *La reclamación de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), pp. 172-175; M. Falcón Briceño, *Orígenes de la actual reclamación de la Guayana Esequiba*, Boletín de la Academia de Ciencias Políticas y Sociales, número 91, Caracas, 1983, pp. 67-68.

⁵⁹¹ (**Annex 149**).

frontier in the Treaty of Wesfalia⁵⁹² and said that [...] the Essequibo and the Orinoco could probably be recognised as a condominium of Spaniards and Dutchmen”. This assertion deserves to be analysed in detail.

6.80. The strong note sent by Olney (American Secretary of State) to Bayard, for Bayard to read out to Salisbury (Prime Minister) on 20 July 1895, is in the following terms:

“[t]he dispute [says Olney], is of ancient date and began at least as early as the time when Great Britain acquired by the treaty with the Netherlands of 1914 “ the establishments of Demerara, Essequibo, and Berbice” From that time to the present the dividing line between these “establishments” (now called British Guiana) and Venezuela has never ceased to be a subject of contention. The claims of both parties, it must ve conceded, are of a somewhat indefinite nature. On the one hand Venezuela, in every constitution of government since she became an independent State, has declared her territorial limits to be those of the Captaincy General of Venezuela in 1810. Yet, out of “moderation and prudence,” it is said, she has contented herself with claiming the Essequibo line – the line of the Essequibo River, that is – to be the true boundary between Venezuela and British Guiana. On the other hand, at least an equal degree of indefiniteness distinguishes the claim of Great Britain”.⁵⁹³

6.81. Olney says there is no basis for considering British aspirations just. Britain remained indifferent until 1840, when it commissioned Schomburgk to fix the line.

“If it was expected that Venezuela would acquiesce in this line, the expectation was doomed to speedy disappointment. Venezuela at once protested and with such vigour and to such purpose that the line was explained to be only tentative – port of a general boundary scheme concerning Brazil and the Netherlands as well as Venezuela

⁵⁹² Of highly unusual relevance was the British counter-argument given before the Paris tribunal, according to the Venezuelan memoir submitted in 1898: “Great Britain has the right to retain any territory which she has possessed, or which has been subject to her exclusive political domination, for a period of 50 years, even if the result would be to give to Great Britain territory which had never been Dutch and might even have been Spanish for some time”. In *Colección Frontera 9, Arbitramiento*, p. 22. This reflects that Martens was following this line, and was ultimately what happened without saying so in the corpus of the arbitration award.

⁵⁹³ (**Annex 152**).

– and the monuments of the line set up by Schomburgk were removed by the express order of Lord Aberdeen.”⁵⁹⁴

6.82. The paradoxical nature of Olney’s comment fades away later in the construction of the Washington treaty of 1897 and the Arbitral Award of 1899. As rightly recalled at the 348th session of the Special Political Committee on 12 November 1962 by H.E., Dr. Marcos Falcón, then Minister of Foreign Relations of Venezuela:

“In private letters to friends, Harrison declared [...]: I shall tell you but not in writing exactly what happened. They did not wish to disclose the true mystery which, for various reasons, surrounded this arbitral award.

6.83. When Mallet-Prevost returned to New York in 1899, that is shortly after the handing down of the award in Paris, he met in that city with the former United States Secretary of State, Mr. Olney, who referred to this interview in a letter addressed to Cleveland. He said:

(Continued in English)

“I have not seen you since the award in the Venezuela Boundary case. Upon his return to New York, Mr. Mallet-Prevost, Venezuela’s junior counsel, was anxious to tell me how the thing went and why it went as it did. On one of my New York visits I asked him to dine --- with the result that he consumed less food than time and that the feast was not so much a flow of solid or liquid refreshment as of intense wrath and bitterness of soul at the course and decision of the arbitral tribunal. I refrain from going into particulars because no doubt you have already heard them from some other source. The worst result to be feared apparently is not the loss of territory to Venezuela, but the general discrediting of the cause of arbitration. According to my informant, both the Chief Justice and Brewer are down on arbitration as a mode of settling international disputes unless some safeguarding of the rights of parties can be provided. Ex-Secretary John W. Foster,

⁵⁹⁴ *Ibid.*

with whom I dined here the other day, said Fuller and Brewer had come home pretty sick of arbitration.”⁵⁹⁵

6.84. Everything reveals that rather than a question of law it was a compromise concerning the Paris arbitration.

6.85. De Martens’ statement is highly revealing of the way in which the Tribunal he presided operated. Indeed, as will be shown in the next section, the 1899 Arbitral Award provides a clear illustration of how the failure to state the reasons was instrumental in allowing the Tribunal to render a decision without respecting the clear terms of the 1897 Treaty. As observed by an eminent author, “the lack of legal motivation of the 1899 Award was the way Martens found to impose a solution that was not strictly legal”.⁵⁹⁶

(iii) NULLITY DUE TO FUNCTIONAL EXCESS OR EXCESS OF POWER OF THE ARBITRATORS

6.86. The Award of 3 October 1899 is invalid. It is invalid because the Tribunal, in rendering it, manifestly exceeded its power.⁵⁹⁷ The account of pertinent facts given in Chapter 7 makes abundantly clear that it did so in manifold ways. More specifically, in rendering the 1899 Award, the arbitral Tribunal:

- failed to respond to one of the questions put to it in Article III;
- failed to apply the Rules it was tasked to apply under Article IV, or ignored the meaning of the rule without giving any reasoning whatsoever;
- acted inconsistently with Article V, which required the tribunal to act impartially;

⁵⁹⁵ (Annex 143, pp. 19-20).

⁵⁹⁶ H. Gros Espiell, “Federico Martens, John Westlake y el laudo de 1899”, in *Boletín de la Academia Nacional de Historia* 1983, p. 1017.

⁵⁹⁷ On this see further R. Badell Madrid, *La reclamación de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), pp. 157-166; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, pp. 343-350; P. Ojer, *Sumario histórico de la Guayana Esequiba*, Colección Sumario (1982), pp. 50-51.

- acted inconsistently with the scope of its powers, as defined in Articles I and III, by deciding matters falling outside of the Washington Treaty; and ultimately,
- acted inconsistently with its duty to render an award based on international law.

6.87. Nullity on the grounds of excess of powers or excess of authority (functional excess or misuse) is “the oldest and most universally recognized ground for nullity”.⁵⁹⁸ It is universally recognized because, under a cardinal rule of international law, the authority of international courts and tribunals depends on the consent of parties: nullity is the remedy for a tribunal overstepping the limits of its authority, as set out expressly or implicitly in the *compromis*. The Court has described this in the following terms:

“[W]hen States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal ‘must conform to the terms by which the Parties have defined this task’”⁵⁹⁹

6.88. In light of the evidence mentioned above, there can be no doubt that – to the extent that the matter should be considered relevant - international law at the turn of the 20th century recognised the possibility of annulling awards for excess of power. The *Orinoco Steamship* case⁶⁰⁰ is an example in point. It is also worth noting that, as early as in 1910, Fiore had noted that ‘[l]a *communis opinio* des juristes est donc que la sentence arbitrale n’a aucune valeur quand l’arbitre n’a pas observé les prescriptions du compromis ou quand il s’est arrogé une juridiction qui n’y était pas stipulée.’⁶⁰¹

⁵⁹⁸ See Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, UN doc A/CN.4/92, p. 107.

⁵⁹⁹ *Arbitral Award of 31 July 1989*, ICJ Reports 1991, 53, para. 49 (citing *Delimitation of the Maritime Boundary in the Gulf of Maine, Judgment*, I.C.J. Reports 1984, p. 266, para. 23).

⁶⁰⁰ *Orinoco Steamship Company Case (Annulment)*, 1910, RIAA, p. 238.

⁶⁰¹ Fiore, *La sentence arbitrale*, p. 248.

6.89. As observed by Judge Weeramantry, insisting that tribunals act within the bounds of their authority is central to the administration of international justice: “proper respect for international arbitration involves not only respect for the award but also respect for the *compromis* which provides the foundation on which the award stands”.⁶⁰²

6.90. Whether a tribunal rendering an award has acted within the limits of its power, is (in the words of the ILC), “in essence, a question of treaty interpretation [...], which is to be answered by a careful comparison of the award [...] with the relevant provision of the *compromis*.”⁶⁰³ In assessing what the tribunal is required to do under the *compromis*, much will turn, as the Court’s decision *Arbitral Award of 31 July 1989* indicates, on what a tribunal could plausibly consider its task to be, having regard to general principles governing the interpretation of treaties. These general principles require “arbitrators [to] examine [...] with the utmost care, the substance of their mandate and the limits of their authority” so as to ensure that “their interpretation must be anchored to the realities of the context”.⁶⁰⁴

6.91. Excess of power may manifest itself in different forms. In principle, it covers any breach of rules contained in the *compromis*, as well as any breach of the limits inherent in the arbitral function performed by the arbitrators. Balasko’s summary is instructive. He refers to:

“toute violation, toute méconnaissance, tout dépassement ou toute omission des dispositions de l’accord d’arbitrage, toute violation de la limite de la fonction juridictionnelle par le tribunal arbitral compétent ... que cette limite soit tracée explicitement par les parties litigantes, ou implicitement acceptées ou admises par elles, comme

⁶⁰² *Arbitral Award of 31 July 1989*, Dissenting opinion of Judge Weeramantry, I.C.J. Reports 1991, p. 152.

⁶⁰³ ILC, Draft Convention with Commentaries, p. 108.

⁶⁰⁴ *Arbitral Award of 31 July 1989*, Diss. Op. Weeramantry, p. 134.

inhérentes essentiellement à la nature et au but de la fonction juridictionnelle”.⁶⁰⁵

6.92. International practice and jurisprudence have distilled different manifestations of excess of power, reflecting the different “terms agreed by the parties” and their way of defining “the jurisdiction of the tribunal and determin[ing] its limits”.⁶⁰⁶ Noting that “excess of jurisdiction may, of course, assume a variety of forms”, Hersch Lauterpacht identifies the two such manifestations, namely instances in which the arbitrator “adjudged on a matter not submitted to him, or [...] disregarded the sources of law which he was instructed to apply.”⁶⁰⁷ In the same vein, a tribunal’s failure to pronounce on issues submitted to it is generally seen as a particular category of disregarding the sources of law which it is instructed to apply: a tribunal failing to carry out its duties under a *compromis* falls “short of performing that which it should have performed and in this way act[s] as it was not entitled to act”, failing to “respect for the *compromis* which provides the foundation on which the award stands”.⁶⁰⁸

6.93. As will be discussed in the following, the Tribunal established under the Washington Treaty committed excesses of power falling into each of these categories: it ‘adjudged on matters not submitted to [it]’, failed to pronounce on issues that were submitted to it, and it ‘disregarded the sources of law which [it] was instructed to apply’.

6.94. These excesses are all the more glaring because the Treaty of Washington, as discussed more fully below, defined the mandate of the Tribunal with precision.

⁶⁰⁵ Balasko, *Causes de nullité de la sentence arbitrale en Droit international public* (Pedone, 1938), p. 153. For similar pronouncements see Guggenheim, ‘La validité et la nullité des actes juridiques internationaux, Recueil des cours, 1949, p. 218 (l’excès de pouvoir résulte du fait que “le Tribunal a appliqué une règle non conforme aux dispositions du compromis”).

⁶⁰⁶ *Arbitral Award of 31 July 1989*, ICJ Reports 1991, p. 53, para. 49.

⁶⁰⁷ Lauterpacht, ‘The Legal Remedy in Case of Excess of Jurisdiction’ (1928) 9 BYIL, pp. 117-118.

⁶⁰⁸ *Arbitral Award of 31 July 1989*, Diss. Op. Weeramantry, at 158 and 152; and see the majority judgment, at paras. 50-51. In line with this, as noted by Judge Anzilotti, for a tribunal to “confine itself to answering a part of” the questions posed to it, would be an “abuse of its powers”: *Customs Regime between Germany and Austria, Advisory Opinion* (1931) PCIJ Ser A/B, No 41, p 37, Anzilotti individual opinion, at p. 69.

First, Article III of the Treaty defined the scope of the Tribunal's task: and determined the questions to be decided the arbitrators. The Tribunal thus had to decide these questions: *all* of these questions, and *only* these questions.

Second, by means of Article IV, the Washington Treaty specified rules for the performance of the Tribunal's task: that is, the Treaty determined the applicable law to the dispute. It was not open to the Tribunal to decide on any other basis, than on the Rules stipulated in the Treaty.

Third, by Article V, the arbitrators were required to perform their task, and apply the applicable law, impartially: that is, by avoiding any bias towards one of the parties, nor indeed engage in any behaviour that may affect the perception of their neutrality towards the parties and its task.

Finally, the Washington Treaty, as confirmed by the negotiations and in the oral proceedings, required the Tribunal to decide on the basis of law. It was not open to the Tribunal to reach a decision on *any* other basis, not equity, not compromise, not political expediency.

6.95. The brevity of the Award evidences the Tribunal's deliberate disregard for these prescriptions. Its text, and the credible evidence that has come to light since the Award was rendered, demonstrates that the Tribunal did not evaluate "the substance of [its] mandate", let alone do so "with the utmost care".⁶⁰⁹ Rather, it went rogue, seeking to somehow resolve the matter submitted to it, delivering what it considered to be a convenient and expedient decision that was reached without respect for the terms of reference prescribed by the parties. As a result, the Award is invalid on the basis of excess of powers.

⁶⁰⁹ *Arbitral Award of 31 July 1989*, Diss. Op. Weeramantry, p. 134.

a) The Tribunal failed to perform the task entrusted to it by Article III of the Washington Treaty

6.96. To begin with, the Tribunal failed to perform its task under Article III of the Washington Treaty, thus failing to discharge a duty imposed on it by the compromis.⁶¹⁰

1. The Tribunal's task as defined in Article III

6.97. Article III defined the task of the Tribunal in the following terms:

“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.”

6.98. As stated above, although this rule was detrimental to Venezuelan rights over the territory, a proper interpretation and application of the treaty would have provided a more objectively balanced solution. For, in the absence of any legal basis and in a clear exercise of excessive power, the imbalance was made present to favour the position of one of the parties (the United Kingdom).

6.99. In this provision the parties clearly specified two questions the Tribunal was required to answer, separated by a comma and the beginning of a new clause. First, the Tribunal was required to determine the extent of the territories belonging, or lawfully claimed by, either the Netherlands or Spain at the time of Britain's acquisition of Guyana in 1814. Second, the tribunal was to identify the boundary-line between British Guiana and Venezuela.

6.100. These were connected, but separate, questions. The first required the Tribunal to decide whether of Spain or the Netherlands possessed title to (and thus ‘could lawfully claim’) the territory of the Essequibo, and the extent of that title, as of 1814. The answer to

⁶¹⁰ See further J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, pp. 344-345.

this question was a crucial step in performing the task assigned to the Tribunal, for it was well established at the time that States could not cede territory over which they had no title. The second question required it to delimit the boundary between Venezuela and the United Kingdom. Crucially, the Tribunal was required to do *both* things. Article III was clear that the Tribunal “*shall* ascertain” the title and its extent *and* also “*shall* determine” the boundary.

6.101. Other provisions of the Washington Treaty confirm that the Tribunal was expected to reply to these two questions, rather than to one. Thus, Article V required the Tribunal to “proceed impartially and carefully to examine and decide the *questions* that have been, or shall be, laid before them”, and later states that “all *questions* considered by the Tribunal” shall be decided by majority.

6.102. This is further corroborated by the proceedings before the Tribunal. As has already been noted, the parties spent significant time on the proper understanding of Article III, and on the Tribunal’s task in this respect. The gist of President Harrison’s argument is worth restating in this context, as it illustrates the importance accorded to Article III in the proceedings:

“[T]hat clause [Article III] introduces the Netherlands and Spain. It does not declare simply that they shall find the boundary between the existing claimants, but they are to ascertain the extent of the territories belonging to or that might lawfully be claimed by the Netherlands or the Kingdom of Spain by the time of this acquisition [in 1814]. Now, Mr. President, there is a duty laid upon this Commission to do that; a duty that the Tribunal cannot put off, manifestly. The duty was not laid upon the Tribunal for nothing. It was not intended that when you 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, a period when the titles had each a new representative, and then when you had gone through all that, to throw it to the winds. A large part of the evidence that has been accumulated here looks to that question. The 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 of 1648 and 1814.”⁶¹¹

6.103. Lord Russell also summarized the significance of Article III in the following terms:

“the fundamental question was - had Spain acquired the right to Guiana by discovery followed by possession of such a kind and extent to give her complete title. If this were established the result would be that Great Britain could only succeed as to such territory as the Dutch and Great Britain actually possessed - acquired by conquest or by adverse possession from Spain”.⁶¹²

6.104. That the duty to ascertain the respective titles of the Netherlands and Spain as at 1814, was not ‘laid upon the Tribunal for nothing’, but had a distinct relevance, also followed from the nature of the questions asked by Article III. The first concerned the question of title over the territory. The second concerned the question of delimitation of the boundary between Venezuela and Great Britain. In Daniel Bardonnnet’s explanation, in disputes as to title:

“la contestation porte sur un territoire tout entier; elle porte sur l’attribution en souveraineté d’une entité ou d’une masse territoriale donnée. [...] [U]n tel conflit, envisagé à l’état pur, c’est- à-dire en l’absence de tout problème spécifique de délimitation, «met pleinement en jeu le statut général de l’entité ou de la masse territoriale en question”.⁶¹³

6.105. These are different from delimitation disputes. In these cases:

“Il ne s’agit plus, dans les différends de cette sorte, de définir et de fixer le statut d’une entité ou d’une masse territoriale donnée, il s’agit, comme l’a relevé Charles De Visscher, «de procéder à un choix entre des lignes susceptibles de la diviser, en d’autres termes,

⁶¹¹ Verbatim Record, p. 3087 (available at the Peace Palace Library).

⁶¹² Lord Russell, letter to Salisbury, 7 Oct 1899, in J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, p. 126.

⁶¹³ Bardonnnet, “Les frontières terrestres et la relativité de leur tracé (Problèmes juridiques choisis)” (1976) 153 *Recueil des cours*, p. 13, para. 48.

d'opter entre deux interprétations différentes d'une même frontière»; le problème se ramène à la détermination de la ligne divisoire.”⁶¹⁴

6.106. Each of the two questions posed to the Tribunal, on title and on delimitation, required different assessments and, indeed, separate decision, for the rules and principles, as well as the evidence, applicable to each may be distinct. In the explanation furnished by Sir Robert Jennings and Sir Arthur Watts, disputes about title concern “the fact and mode of acquisition of territorial title”, whereas boundary disputes concern “the proper interpretation of some instrument, award or adjudication, or course of historical development, that is claimed to have established the boundary of the territory in question”.⁶¹⁵

6.107. Finally, the Tribunal was expected to answer *both* questions. Nothing in the language of Article III allowed the Tribunal scope to choose whether to answer all questions and, if so, which question to answer. To use an expression from the Court’s judgment in *Arbitral Award of 31 July 1989*, these were “successive questions which were not made conditional on each other”⁶¹⁶ both of which the Tribunal needed to respond to. In these circumstances, for the Tribunal to “confine itself to answering a part of” the questions posed to it, would be an “abuse of its powers”, to paraphrase Judge Anzilotti.⁶¹⁷

6.108. In sum, the parties had asked the Tribunal to answer two successive questions, which were not made conditional on each other. The first question concerned title to the territory as of 1814, the second question concerned the delimitation of the territory. These two questions were, moreover, to be answered in accordance with Articles IV and V of the Washington Treaty. Article IV stipulated the applicable law, and Article V required the Tribunal “to proceed impartially and carefully to examine and decide” the questions asked of it.

⁶¹⁴ *Ibid.* p. 13, paras. 48-49.

⁶¹⁵ Jennings & Watts, *Oppenheim’s International Law*, 9th éd., OUP 1996, pp. 668-669.

⁶¹⁶ *Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal), para 50.

⁶¹⁷ *Customs Regime between Germany and Austria, Advisory Opinion* (1931) PCIJ Ser A/B, No 41, p. 37, Anzilotti individual opinion, at p. 69.

2. The Tribunal's failure to respect the terms of Article III

6.109. The Tribunal failed to discharge its duty with respect to the question of title over the Esequibo region by either the Netherlands or Spain at the time Great Britain acquired British Guyana in 1814. As noted above, this question was explicitly set out in Article III of the Washington Treaty, which mentioned it as a dedicated – in fact the first – step to be taken by the Tribunal.

6.110. The Tribunal addressed this question in a short sentence. It asserted that it had:

“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”.

6.111. This is not an answer to the first question: it is a mere restatement of the text in Article III. It is simply astonishing that, despite the importance placed by the parties on this first question, as the extracts from the proceedings just quoted show, the Tribunal completely omitted to consider it. There is no explanation of the decision, and certainly no engagement with the evidence put forward by the parties. Indeed, there is no *decision* on the question of title as at 1814. The Tribunal was asked to decide, on the basis of the law and the evidence, which of the two States possessed title over the territory: it was required, under Article V, to reach a *conclusion* after a “careful consideration and examination” of the law and the facts. Nothing in the Award reflects an engagement with the applicable law, with the law in general, or the evidence put forward by the parties: there is no evidence whatsoever of ‘careful consideration and examination’. The Tribunal did not so much answer the question: it merely restated it. The Award reads as if (adapting President Harrison’s words) the first question mentioned in Article III had been “laid upon the Tribunal for nothing”.⁶¹⁸

6.112. The Tribunal, in other words, asserted a power to choose which of the two questions from the Treaty it would answer, in clear violation of Article III. In this sense,

⁶¹⁸ Harrison, Verbatim Record, p. 3087 (available at the Peace Palace Library).

the Award of 3 October 1899 reflects an approach that is different from that before the Court in the *Case Concerning the Arbitral Award of 31 July 1989*, rendered by the tribunal established by Guinea-Bissau and Senegal, whose validity was challenged before the Court. Article 2 of the 1985 Arbitration Agreement between the Guinea-Bissau and Senegal had asked the tribunal to:

“decide in accordance with the norms of international law on the following questions

1. Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?
2. *In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?*”⁶¹⁹

6.113. In the case of the *Arbitral Award of 31 July 1989*, the tribunal had reached the view that, having responded positively to the first question, it did not need respond to the second question. In its judgment in the *Arbitral Award of 31 July 1989* case, the Court found that, in light of the text of Article 2 of the agreement, it was within the tribunal’s power to determine that the conditions for it to respond to the second question were not met. Omitting to answer the second question, contrary to Guinea-Bissau’s contention, was not a failure to comply with the *compromis*.⁶²⁰

6.114. The present case is strikingly different in at least three respects. First, Article III of the Washington Treaty required the Tribunal to answer two separate questions, and it did so without conditions. By contrast, Article 2 of the Agreement between Guinea-Bissau and Senegal subordinated the second question to the first one. As explained by the Court:

“Article 2 of the Arbitration Agreement presented a first question concerning the 1960 Agreement, and then a second question relating

⁶¹⁹ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, p. 58, para. 14 (Emphasis added).

⁶²⁰ *Ibid.*, p. 71-70, paras. 52 and 50.

to delimitation. A reply had to be given to the second question “in the event of a negative answer to the first questions”. The Court notes that those last words, which were originally proposed by Guinea-Bissau itself, are categorical.”⁶²¹

6.115. In assessing the validity of the arbitral award of 31 July 1989, the Court contrasted this wording with cases where the *compromis* tasked a tribunal to answer “successive questions which were not made conditional on each other”.⁶²² The Washington Treaty belongs to this second set of cases: it asked the Tribunal to address two successive questions, and these questions were not made conditional on each other. Article III specified the Tribunal’s task as the ascertainment of title *and* to the delimitation of the boundary: in the terms of Article III the Tribunal “shall” do both of these things. The Tribunal established by the Treaty of Washington – unlike that established by Guinea Bissau and Senegal – enjoyed no discretion in determining whether to answer the questions put to it.

6.116. Third, while the approach of the tribunal established by Senegal and Guinea-Bissau may have been controversial, the tribunal made clear that it had exercised its powers. It stated expressly that, in view of its response to the first question, it need not respond to the second.⁶²³ The Court noted in its judgment that it seemed difficult to criticise the tribunal for having failed to discharge its duty under the *compromis*. After all, the tribunal in that case *considered and decided* not to address the second question and explained the reasons for this omission. It had, in other words, made plain its approach and in the award of 31 July 1989, set out its response – a response that may not have convinced both parties (and was accordingly scrutinised), but that embodied the tribunal’s decision in accordance with the task as specified in the *compromis*.

⁶²¹ *Ibid*, p. 70, para. 50.

⁶²² *Ibid*.

⁶²³ Para. 87 of the *Arbitral Award of 31 July 1989*: “Bearing in mind the above conclusions reached by the Tribunal and the wording of Article 2 of the Arbitration Agreement, in the opinion of the Tribunal it is not called upon to reply to the second question. [...] Furthermore, in view of its decision, the Tribunal considered that there was no need to append a map showing the course of the boundary line.”

6.117. The Tribunal established under the Washington Treaty, by contrast, gave *no* decision. At no point did the Tribunal indicate how the boundary, as drawn in the Award, would relate to the title over the “territories belonging to or that might lawfully be claimed by the Netherlands or the Kingdom of Spain” in 1814. Nothing in the Award indicates how the Tribunal had viewed the task of ascertaining title, and its relationship to the requirement to draw a boundary: there is no evidence that the tribunal had “addressed its mind”⁶²⁴ to the question. This is not just an omission: it is a complete failure to perform the first task entrusted to by Article III. It is a “serious dereliction of [the Tribunal’s] duties ... and no doubt ... a valid ground for a nullity claim”.⁶²⁵

b) The Tribunal failed to comply with the requirements of Article IV of the Washington Treaty on the applicable law

6.118. In addition to failing to perform (part of) its mandate, the Tribunal failed to comply with the requirements of Article IV of the Washington Treaty, which had defined the applicable law.

6.119. It is well established that a tribunal’s failure to apply the rules stipulated in the *compromis* – the “disregar[d] [for] the sources of law which [a tribunal] was instructed to apply” in Lauterpacht’s phrase⁶²⁶ - amounts to an excess of powers. In the decision in the *Orinoco Steamship case*, rendered a decade after the 1899 Award, the tribunal held that:

“excessive exercise of power may consist, not only in deciding a question not submitted to the Arbitrators, but also in misinterpreting the express provisions of the Agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied”.⁶²⁷

6.120. In Balasko’s leading treatise, the point is made with abundant clarity:

⁶²⁴ Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), Weeramantry dissenting opinion, p. 162.

⁶²⁵ J. Gillis Wetter, *The International Arbitral Process: Public and Private*, 1979, p. 345.

⁶²⁶ Lauterpacht, ‘The Legal Remedy in Case of Excess of Jurisdiction’ (1928) 9 BYIL, pp. 117-118.

⁶²⁷ *Orinoco Steamship Company Case (Annulment)* (1910) RIAA, pp. 238-239.

“Lorsque le compromis d’arbitrage formule les principes ou les règles de fond à appliquer par le tribunal arbitral pour résoudre le litige qui lui est soumis, ces règles forment des limites explicites, tracés par la volonté commune des parties, qui s’imposent au tribunal [...]”⁶²⁸

6.121. A review of the relevant jurisprudence and commentary yields three preliminary points that are relevant for present purposes.

First, in assessing whether a tribunal had “disregarded the sources of law which [it] was instructed to apply”, a reviewing body is not engaging in an appeals process addressing the outcome of the award. The central question is not whether the tribunal reached the *right* decision, but whether in reaching that decision the tribunal respected the mandate given to it by the *compromis*. What is reviewed, in short, is *how* the Tribunal reached its decision.

Second, whether a tribunal had failed to discharge its duty turns on an interpretation of the *compromis*, and what it requires the arbitral tribunal to do. In this respect, it is clear that the parties can provide the tribunal with ‘terms’ of different levels of detail: some define the task of tribunals in a highly prescriptive manner, others leave discretion to the arbitrators.

Third, in considering whether a tribunal had “conformed to the terms by which the Parties have defined [its] task”,⁶²⁹ the reasoning of a decision is crucial, as it is meant to reflect a tribunal’s decision-making process and to identify the factual and legal premises of a decision and communicate those to the parties. As has been noted in the context of ICSID annulment decisions, tribunals must give meaningful effect to the rules defining their task: the reasoning of an award cannot be “limited to *postulating* [...] the existence of a principle”, but must actually “demonstrate” that it the tribunal had been guided by it.⁶³⁰ For this reason, the question whether a tribunal had discharged its duty (or failed to do so) has usually been addressed through a close scrutiny of the reasoning of decisions. Conversely, where this is not possible (with respect to un-reasoned awards), a tribunal’s failure to set

⁶²⁸ Balasko, *Causes de nullité*, p. 157.

⁶²⁹ *Gulf of Maine, I.C.J. Reports 1984*, p. 266, para. 23.

⁶³⁰ *Klöckner v Cameroon*, Decision on Annulment, 3 May 1985, para. 79.

out the reasons for its decision has in and of itself been considered indicative of a failure to comply with the requirement to apply the rules as stipulated by the *compromis*. A lack of reasoning conceals the *method* through which the tribunal approached its task, a method which the parties sought to regulate expressly and specifically, mandating the tribunal to decide in a particular manner, namely on the basis of international law.

1. The Tribunal's task as defined in Article IV

6.122. Article IV identified the Rules that the Tribunal was to apply in performing the tasks identified in Article III:

“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 holding 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 and claims resting on any other ground whatever valid according to international law, and on any principles 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 territory of one Party 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.”

6.123. In this provision, the parties formulated clear and express terms that were to guide the Tribunal “[i]n the performance of the task entrusted to it”.⁶³¹ As has been noted in Chapter 7, the United States and Great Britain, behind Venezuela’s back, had reached a secret understanding on the understanding of Rule (a), concerning the ‘cut-off point’ for extinctive prescription. But notwithstanding this improper *fait accompli*, Article IV had specified *how* the Tribunal was to make its decision and prescribed the method by which it was to reach a conclusion.

6.124. The text of Article IV specified the approach of the Tribunal in four ways:

- The chapeau tasked the Tribunal to apply the rules specified in Article IV, which were to be “taken as applicable to the case”, as well as principles of international law “not inconsistent therewith”;
- Rule (a) clarified that prescription or adverse holding for more than 50 years was to make ‘good title’.
- Under Rule (b), the Tribunal could give effect to any rights or claims resting on other valid legal grounds under international law, “not in contravention with” Rule (a).
- Rule (c) empowered the Tribunal to give effect to occupation, to adjust the boundary as much as “reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require”.

6.125. Article IV also stipulated a priority among these rules. Rule (a) was to be applied with priority to Rule (b). Rule (c) was then to be applied to adjust the boundary found by application of Rules (a) and (b), but only in particular circumstances: where citizens of one of the two parties found themselves on the ‘wrong side of the line’. In these cases, an adjustment to the line found by application of Rules (a) and (b) could be made on the basis of “reason, justice, the principle of international law, and the equities of the case”. By default, the Tribunal was mandated by the chapeau of Article IV to apply other rules of

⁶³¹ *Gulf of Maine, I.C.J. Reports 1984*, p. 266, para. 23.

international law, insofar as they were not inconsistent with the three Rules specified in that provision.

6.126. Article IV of the Washington Treaty shows that that the parties kept the Tribunal on a ‘short leash’, providing them with “des règles fort précises” with regards to both the law to be applied and the method to be followed.⁶³² This understanding is reflected in Balasko’s assessment which views the Washington Treaty as an example of treaty giving express directives and contrasts it to “less precise” provisions.⁶³³

6.127. As is clear from the account given in Chapter 7, these rules were central to the parties’ arguments. These discussions made plain how seriously the parties took the Washington Treaty’s provisions on applicable law; and how much depended on their proper construction – from Venezuela’s detailed argument on the relationship between Articles III and IV to the British lead counsel’s firm statement that “I do not want prescription”.⁶³⁴

2. The Tribunal’s failure to apply the Rules stipulated in Article IV

6.128. The Tribunal, in a short passage, asserted the following:

“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”.

6.129. As is apparent from the text of the Award, the Tribunal completely ignored the Rules stipulated in Article IV, it completely ignored the parties’ extensive arguments and

⁶³² P. Reuter, p. 238.

⁶³³ Balasko, *Causes de nullité*, p. 157.

⁶³⁴ Verbatim Record, p. 2964 (available at the Peace Palace Library).

exchanges on the proper interpretation and application of these rules, and of the applicable law more generally. Adapting the above-quoted passage of an ICSID Annulment Committee, the Arbitral Tribunal “limited [itself] to *postulating*” adherence to the applicable law clause, but did not make any attempt to “demonstrate” that it had been guided by it.⁶³⁵

6.130. The short paragraph does not reveal what the Tribunal understood its task to be under the *compromis*, or how it interpreted the applicable rules. There is no information or explanation as to *how* the tribunal reached its decision, nor what provisions of the Washington Treaty were ostensibly to serve as a basis for it. Was the decision based purely on prescription? What was the role of other relevant – and not inconsistent – international law rules underwriting potential other claims or rights to the territory? Did the tribunal consider possession and, if so, did it adjust the boundary in light of reason, equity, justice, or principles of international law, or a combination thereof? What sorts of considerations did it take into account in performing this task? What other rules of international law – if any – did the Tribunal apply to determining the extent of the territory of the Netherlands or Spain it stood in 1814? This paragraph does not address, or even mention, the specific provisions of Article IV. Indeed, the Award as a whole does not mention the words ‘prescription’, ‘possession’, ‘international law’, or even the words ‘law’ or ‘rules’. It does not show any ‘careful consideration and examination’ of the rules applicable to the dispute, nor of their application to the facts of the case.

6.131. This failure to state the reasons for its decision in the Award – in addition to being an independent ground for annulment – also evidences the Tribunal’s failure to discharge its duty under the *compromis* to apply the law stipulated by the parties. In fact, it is impossible to avoid the conclusion that the Tribunal rendered an un-reasoned award precisely to obscure the grounds on which it had reached a decision. Pierantoni’s critique of the *Cerruti case*, is apposite: “se rendant compte de la difficulté d’expliquer sa décision sur la base du droit, [le tribunal] s’en est volontairement abstenu en s’appuyant sur les pleins pouvoirs”. As suggested by Pierantoni and Balasko, absence of reasons, in this

⁶³⁵ *Klöckner v Cameroon*, Decision on Annulment, 3 May 1985, para. 79.

context may amount to excess of power ‘by omission’. Assessed against the standards formulated by the Court, the published Award of 1899 does not reflect any awareness on the part of the Tribunal that it would have to investigate the “substance of [its] mandate”⁶³⁶ or that it would have to “conform to the terms by which the Parties have defined this task”.⁶³⁷

c) The Tribunal acted inconsistently with the scope of its powers, as defined in Articles I and III, by deciding matters falling outside of the Washington Treaty

6.132. The Tribunal not only failed to discharge duties imposed upon it by the Washington Treaty. Despite rendering an extremely brief award, the Tribunal managed to clearly exceed its powers by deciding matters that it had no competence to decide under the Washington Treaty.⁶³⁸

6.133. That this form of excess of power renders an award null and void is universally admitted. The ILC notes succinctly that “The Roman Law maxim *arbiter nihil extra compromissum facere potest* has been adopted in international law”.⁶³⁹ International practice provides many examples of this basic proposition, including in relation to disputes that predated the 1899 Award: the fate of the 19th century decisions in the *Isla de Aves*⁶⁴⁰

⁶³⁶ *Arbitral Award of 31 July 1989*, Diss. Op. Weeramantry, at p. 134.

⁶³⁷ *Gulf of Maine, I.C.J. Reports 1984*, p. 266, para. 23.

⁶³⁸ See further C. Sosa Rodríguez, “El Acta de Washington y El Laudo de París”, in T. Carrillo Batalla (ed.), *La reclamación venezolana sobre la Guayana Esequiba*, Biblioteca de la Academia Venezolana de Ciencias Políticas y Sociales (1983), p. 155; R. Badell Madrid, *La reclamación de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), pp. 162-166; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, pp. 345-346; Ojer, *Sumario histórico de la Guayana Esequiba*, Colección Sumario (1982), pp. 52-53.

⁶³⁹ ILC, *Draft Convention with Commentaries*, p. 107.

⁶⁴⁰ In their *compromis* in the *Isla de Aves* case, Venezuela and the Netherlands tasked the arbitrator to resolve “[l]a question du droit de domination [*dominio*] et de souveraineté [*soberanía*] de l’île Aves”. In her award of 30 June 1865, Queen Elizabeth II of Spain, having discharged this task, but also decided to award compensation to Dutch citizens for the loss of fishing rights around the island. This was considered to be an excess of power (De Lapradelle and Politis and viewed it as a “grave violation”: *Recueil des arbitrages internationaux* (Pedone 1905) vol 2, 420). Significantly, the Dutch and Venezuelan governments subsequently resolved their dispute through an exchange of letters, which recognised Venezuela’s sovereignty but maintained fishing rights of Dutch nationals: see 5 *Moore’s Arbitrations*, p. 5040.

and *Cerruti*⁶⁴¹ cases are illustrative; in both instances, the parties agreed to re-open dispute settlement procedures because the arbitrators had gone beyond the *compromis*. The underlying proposition – that an arbitrator commits an excess of power when “adjudg[ing] on a matter not submitted to him”⁶⁴² – cannot seriously be doubted.

1. The Tribunal’s competence as defined in Articles I and III

6.134. The Washington Treaty clearly defined the Tribunal’s competence in its 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.”

6.135. Article III, as cited already, required the Tribunal to “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 *second*, to “determine the boundary-line between the Colony of British Guiana and the United States of Venezuela.”

6.136. These provisions empowered the Tribunal, just as much as they limited its competence. As regards the latter aspect, Article I clarified that the Tribunal had no power to decide matters involving third States, not parties to the Washington Treaty. What is

⁶⁴¹ In the *Cerruti case*, U.S. President Cleveland, as arbitrator, was asked to identify claims of Mr. Cerruti that were properly to be adjudicated by an international tribunal, and to decide upon these claims. In the award of 2 March 1897, President Cleveland awarded compensation to Cerruti, and *also* decided that Colombia was bound to guarantee and protect Cerruti from all liability arising from all debts of the Cerruti firm, of which he was director as well as partner. Commentators like Pierantoni, Borel and Ralston criticised the excess of power (stating that “la décision sur ce point sort complètement des limites de l’action arbitrale”: see Pierantoni, ‘La Nullité d’un Arbitrage International’ (1898) 30 *RDILC* 445, 459-460; and further Borel, ‘Les voies de recours contre les sentences arbitrales’ (1935) 52 *Recueil des cours* 1, 60; Ralston, ‘International Awards’ (1928) 15 *Virginia Law Review* 1, 9 (as an example of the tribunal ‘having exceeded the terms of the *compromis*’)). Subjected to Italian threats of force, Colombia agreed to another round of arbitration, designed to whitewash the initially excessive decision, and eventually was forced to honour the debts of Cerruti’s company.

⁶⁴² Lauterpacht, “The Legal Remedy in Case of Excess of Jurisdiction”, 1928, *BYIL*, Vol. 117, No. 9, p. 118.

more, Article III not only required the Tribunal to answer to questions (which, as noted above, it did not do), but also precluded it from addressing other questions.

6.137. The Tribunal professed faith to this mandate in the very title of the Award, which describes the decision as one concerning “the Boundary between the Colony of British Guiana and the United States of Venezuela”. But this faith was only apparent, for the Tribunal made two determinations that did *not* concern the boundary between British Guiana and Venezuela: it determined the boundary with third States, and it imposed a regime of navigation on the rivers Amakura and Barima. Both determinations clearly went beyond the Tribunal’s powers as set out in Articles I and III of the Washington Treaty.

2. The Tribunal’s failure to respect the limits of its competence defined by Articles I and III

6.138. More specifically, the Tribunal went beyond the limits of its competence in two ways.

6.139. First, the Award allocated territories to British Guiana that, at the time, were disputed between the United Kingdom and Brazil. The Award’s relevant passage is this:

“[T]he boundary-line between the Colony of British Guiana and the United States of Venezuela is as follows: — [...]

from Mount Roraima to the source of the Cotinga, and along the mid-stream of this River to its junction with the Takutú, and along the mid-stream of the Takutú to its source, and thence in a straight line to the westernmost point of the Akarai Mountains.”

6.140. This ‘overreach’ clearly could not be based on the *compromis*. Aware of this obvious problem, the Tribunal included a clause that sought to preserve the possibility of a future boundary determination between the Venezuela and Brazil, and the United Kingdom and Brazil, noting that “the line of delimitation fixed by this Award shall be subject and without prejudice to any questions [...] 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”. These attempts were insufficient, and did

not placate the third country immediately affected, viz. Brazil, which firmly protested against the effects of the Award. It is telling that, in a later British-Brazilian arbitration, the arbitrator took for granted that the 1899 Award “deciding the boundary between Great Britain and Venezuela, *adjudged* to the former the territory which constitutes the subject of the [British-Brazilian] dispute”.⁶⁴³

6.141. That the Award had interfered with Brazil’s territorial interests was a standard feature of early discussions of the decision. Early commentary noted that the Tribunal “a certainement étendu sa mission, puisque le Brésil n’était pas partie à la convention d’arbitrage [...], qu’il n’était représenté dans le tribunal et ne lui avait pas donné mandat de statuer sur une question qui l’intéressait.”⁶⁴⁴ Pointing to the above-quoted saving clause included in the Award, certain observers sought to ‘explain away’ the Tribunal’s extension of its mandate by suggesting that, as regards Brazil, the Award “n’a donc que la valeur d’une indication”.⁶⁴⁵ But it was undeniable that the tribunal had gone beyond its mandate. These same observers had to concede the Tribunal had “a dépassé son mandat”, but sought to excuse it nonetheless: the Tribunal had done so “dans une intention louable”.⁶⁴⁶ But this was hardly convincing: leading commentators like Ernest Nys remained highly critical of the Award, describing the transgression of Brazil’s interests as “une grossière erreur”.⁶⁴⁷

6.142. The Brazilian government agreed. Not only had it asserted its interests in the disputed territories prior to the beginning of the arbitral proceedings. Once the 1899 Award had been rendered, it protested against the Tribunal’s transgressions in a circular note of 7 December 1899, which gave expression to its profound “surprise” at the fact that “le Brésil était éliminé de la carte de la région de l’Amazone sur une étendue indéfinie”.⁶⁴⁸

⁶⁴³ *Guiana Boundary Case* (Brazil/Great Britain) (1904) XI RIAA 11, p. 22 (emphasis added).

⁶⁴⁴ ‘Chronique des faits internationaux : Sentence arbitrale du 3 octobre 1899’, 1901, *RGDIP*, Vol. 9, No. 71, p. 79.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Ibid.*, pp. 79-80.

⁶⁴⁷ Nys, ‘La revision de la sentence arbitrale’, 1910, *RDILC*, Vol. 12, No. 596, p. 614.

⁶⁴⁸ Ministry of Foreign Affairs, Circular of 7 December 1899 (cited in Wetter III, p. 171).

6.143. Quite apart from pronouncing on rights of third States, the Tribunal went beyond its powers in another, *second*, respect: as the Tribunal also prescribed how the parties were to conduct themselves within their territories, and limiting their right of territorial sovereignty. The central passage is contained in the last substantive paragraph of the 1899 Award:

“[T]he Arbitrators consider and decide that in times of peace the Rivers Amakuru and Barima shall be open to navigation by the merchant-ships of all nations, subject to all just regulations and to the payment of light or other like dues: Provided that the dues charged by the Republic of Venezuela and the Government of the Colony of British Guiana in respect of the passage of vessels along the portions of such rivers respectively owned by them shall be charged at the same rates upon the vessels of Venezuela and Great Britain, such rates being no higher than those charged to any other nation: Provided also that no customs duties shall be chargeable either by the Republic of Venezuela or by the Colony of British Guiana in respect of goods carried on board ships, vessels, or boats passing along the said rivers; but customs duties shall only be chargeable in respect of goods landed in the territory of Venezuela or Great Britain respectively.”

6.144. As is clear from the wording of this passage, the Tribunal saw fit to impose upon the parties a regime for the governance of the Amakuru (Amacuro) and Barima (Barimi) rivers, both of them tributaries of the Orinoco. This regime, like those established for other rivers, ‘internationalised’ and opened the two rivers to navigation by all nations. As standard river regimes, it limited the rights of sovereigns to impose duties on ships navigating the rivers, in effect requiring equal treatment of ships of the other side. The language of the Award clearly reflected the arbitrators’ familiarity with standard concepts of 19th century river governance.

6.145. By setting out a regime for the Amakura and Barima rivers, the Tribunal clearly went beyond the task entrusted to it by the *compromis*. As Guyana notes, “the [Washington] 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”.⁶⁴⁹ Contrary to Guyana’s argument, the imposition of an internationalised river regime was not “directly related to the delimitation of that boundary”, or “a necessary and integral aspect of the boundary delimitation”.⁶⁵⁰ Three points can be made:

First, nothing precluded the Tribunal from drawing the boundary line and then leaving each party to administer the territory allocated to it without limitations concerning the management of rivers. Guyana’s assertion of a ‘necessary link’ is plainly wrong, and nor can it plausibly claim that the river regime was ‘integral’ to the boundary determination, i.e. a “necessary and important as part of a whole”.⁶⁵¹

Second, Guyana’s attempt to bring the excessive decision within the remit of the *compromis* is contradicted by the approach adopted by the parties during the proceedings. Neither of them addressed the question in their pleadings, nor made submissions on it: the final paragraph of the Award was added at the Tribunal’s own initiative.

Third, the Tribunal’s approach (and Guyana’s attempt to gloss over the excess of power) cannot be reconciled with the jurisprudence of the Court based on special agreements.⁶⁵² The Court is regularly entrusted by parties to determine title to territory or to delimit territorial boundaries. But, unlike the Tribunal established under the Washington Treaty, it takes great care not to overstep the limits of its jurisdiction conferred by the parties. To illustrate, when Malaysia and Singapore requested the Court to determine sovereignty over the islands of Pedra Branca, Middle Rocks and South Ledge,⁶⁵³ the Court took great care to clarify that on the basis of the *compromis*, it had no power to delimit the maritime spaces of the two parties:

⁶⁴⁹ GM, paras. 8.50.

⁶⁵⁰ GM, paras. 8.50-8.51.

⁶⁵¹ See <https://dictionary.cambridge.org/dictionary/english/integral>.

⁶⁵² Guyana relies on the Court’s judgment in the *Construction of A Road case* (Nicaragua v Costa Rica) in support of the opposite proposition. But since the Court’s jurisdiction in that case was based on a broad compromissory clause, viz. Art XXXI of the Pact of Bogota, it is hardly instructive for a discussion of the scope of jurisdiction under a *compromis*.

⁶⁵³ Article 2 of the Special Agreement, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment (2008) ICJ Rep, pp. 12, 1, para 2.

“The Court recalls that in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.”⁶⁵⁴

6.146. Similarly, when exceptionally the Court has pronounced on navigation rights in the context of territorial disputes, it has been extremely careful to explain its exercise of jurisdiction on the basis of the wording of the *compromis* and the parties’ understanding. This is notably borne out by the judgment in the *Kasikili/Sedudu case*, in which, having determined the course of the boundary, the Court went on to hold that the nationals of both States would enjoy free navigation along the Chobe river.⁶⁵⁵ This approach was justified by reference to the terms of the *compromis*, which not only referred (like the Washington Treaty) to the delimitation of a boundary, but asked the Court to decide on the “legal status” of the *Kasikili/Sedudu* island – which (as noted by Judge Fleischauer) could be understood to “comprise[] the determination of the legal status of the waters around” the island.⁶⁵⁶ Moreover, unlike in the case between Venezuela and Great Britain, Botswana and Namibia when agreeing to settle their dispute had specifically mentioned the freedom of navigation on the Chobe river:⁶⁵⁷ As the Court and individual judges noted, the parties’ agreement and positions taken during the proceedings informed the interpretation of the *compromis* and justified a pronouncement on freedom of navigation.⁶⁵⁸

6.147. In light of these considerations, the Tribunal’s imposition of a river regime was indeed, as noted by a commentator, a “blind, unauthorised excursion into an area wholly outside the conception of the draftsmen of the Treaty, the parties and their counsel”.⁶⁵⁹ It

⁶⁵⁴ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment (2008), I.C.J., 12, p. 101, para. 298.

⁶⁵⁵ *Kasikili/Sedudu Island (1999) ICJ Report*, pp. 1045, 1108, para 104.

⁶⁵⁶ *Ibid.*, Judge Fleischauer dissenting opinion, p. 1205.

⁶⁵⁷ *Ibid.*, I.C.J Report, pp. 1045, 1106.

⁶⁵⁸ *Kasikili/Sedudu Island (1999) ICJ Rep 1045*, pp. 1106-1108, paras 102-103; and further *Kasikili/Sedudu Island (1999) ICJ Rep 1045*, Judge Kooijmans, p. 1148, para. 22.

⁶⁵⁹ Wetter III, pp. 345-346.

did serve a useful purpose, though, at least for one party.⁶⁶⁰ In his letter to Lord Salisbury of 7 October 1899, penned four days after the Award, the British-appointed arbitrator, Lord Russell, emphasised the importance of the Tribunal's 'excursion' into the field of navigational rights: the Award, he noted, had put the United Kingdom in a better position than it would have been under any of the prior British offers for a negotiated boundary. "Venezuela gets much less", he went on to write, than under the offers that had been made by Lord Aberdeen and Lord Roseberry, and

"about the same territory as Lord Granville's offer would have given her in '80 [1880]. But Lord Granville's offer did not stipulate for that which is, by the Award, secured by Great Britain – viz. the free navigation of the Barima and Amakura as approaches to and exits from the Orinoco".⁶⁶¹

6.148. Whatever motivation may have guided the Tribunal, is clear that its "excursion" was "unauthorised" – unauthorised by the *compromis* and not covered by the parties' consent, amounting to a plain excess of power.

d) The Tribunal failed to act impartially, as required by Article V of the Washington Treaty

6.149. In addition to its failure to exercise jurisdiction (only) where required, and its failure to apply the applicable law determined by the parties, the Tribunal also violated its duty to act impartially. Impartiality is one of the most fundamental duties of arbitrators. This duty is implicit in the arbitral function and was, moreover, expressly stipulated in Article V of the Washington Treaty.

⁶⁶⁰ Indeed, as observed by I. B. Römer, "La reclamación sobre el territorio Esequibo y la plataforma Deltana", in J. A. Albornoz Oliver, P. Apolinar Rojas, F. Eudes Mujica B. (eds.), *El derecho internacional en tiempos de globalización. Libro homenaje a Carlos Febres Pobeda*, Publicaciones Vicerrectorado Académico (2006), p. 434, "a more reasonable explanation as to what led the arbitrators to violate the terms of the arbitration and the most elementary legal principles in such a manner" was "the geopolitical importance of the Orinoco for England and the United States" ("una explicación más razonable sobre qué llevó a los árbitros a violentar de tal manera los términos del arbitraje y los más elementales principios jurídicos .. la importancia geopolítica misma del Orinoco, para Inglaterra y Estados Unidos").

⁶⁶¹ See letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

6.150. The requirement that arbitrators must act impartially has been recognised for a long time. Already in the 19th century, it was understood that impartiality was a cardinal feature of the arbitral function.⁶⁶² Failure to act impartially, as Pradier-Fodéré noted, constituted a ground of nullity.⁶⁶³ These implicit duties could, and often were, expressly included in the parties' arbitration agreements (as it was in the 1897 Treaty of Washington). Where this was the case, the arbitrators' failure to act with their duty of impartiality constituted *also* a violation of, or a deviation from, the *compromis* and, as such, amounted to an excess of powers. This is made clear in Goldschmidt's report of 1875 to the *Institut de Droit International*, which stated that an award could be annulled "si les règles de procédure ... expressément prescrits à l'observation du tribunal arbitral dans le compromis [...] ont été manifestement négligés ou violés".⁶⁶⁴

6.151. Establishing a violation of the condition of impartiality does not require showing that the arbitrator was *actually* not impartial. It is instead sufficient for that there is a "justifiable doubt" of impartiality of the arbitrator(s) in question. This is the standard referred to in the UNCITRAL Arbitration Rules,⁶⁶⁵ as well as the SCC Arbitration Rules,⁶⁶⁶ and has been applied in ICSID annulment proceedings,⁶⁶⁷ whether as a ground of annulment or to justify arbitrator challenges. Doubts as to impartiality are justifiable when (as noted in a recent challenge decision):

"they give rise to an apprehension of bias that is, to the objective observer, reasonable. Actual bias or partiality need not be established. [...] [I]t is the reasonableness of the fear or apprehension

⁶⁶² See for example Calvo, *Le droit international théorique et pratique* (5th edn, 1896), vol III, p. 485 para. 1774.

⁶⁶³ Pradier-Fodéré, *Traité de droit international public* (1894), vol 6, p. 433.

⁶⁶⁴ Goldschmidt, 'Projet de règlement pour tribunaux internationaux (1874)' 6 RDILC pp. 441, 446-447.

⁶⁶⁵ Art 11, UNCITRAL Arbitration Rules (with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021).

⁶⁶⁶ Art 18, SCC Arbitration Rules (2023).

⁶⁶⁷ EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic (ICSID Case No. ARB/03/23), Decision on Annulment, 5 February 2016, paras 107-116, and 134; Eiser Infrastructure Limited and Energía Solar Luxembourg Sarl. v Kingdom of Spain (ICSID Case No. ARB/13/36), Decision on Annulment, 11 June 2020, para. 45.

of bias on the part of the claimant - its justifiable character - that is required to be established".⁶⁶⁸

6.152. A comparable standard was applied in 19th century practice. The treatment of possibly tainted decisions rendered by the *Venezuela-US Claims Commission* of 1866 is instructive. Venezuela protested seven of the 24 awards rendered by the Commission, on the grounds that, in these seven case, there had been collusion between counsel and one of the arbitrators.⁶⁶⁹ The U.S. accepted that the allegations against a sub-set of the awards had cast doubt on the propriety of the arbitrators' conduct throughout the proceedings, and the parties eventually agreed to set aside all of the awards made by the Commission (even those ones in respect of which no specific allegations of fraud had been made) and re-submit them for decision to a new tribunal.⁶⁷⁰

1. Article V of the Washington Treaty required the Tribunal to act impartially

6.153. Against this background, it is significant that Article V of the Washington Treaty required the Tribunal to "proceed impartially and carefully to examine" the two questions posed to it in Article III, in light of the rules stipulated by the parties in Article IV.

6.154. These were not empty words, but reflected the parties' desire (and Venezuela's hope) for an unbiased decision that would uphold standards of international law and justice – particularly important to Venezuela that was opposed to an expansionist imperial power.

⁶⁶⁸ Challenge Decision of 11 January 1995, (1997) XXII Yearbook of Commercial Arbitration 227, 234. See also: *Gallo v Canada*, Decision on the Challenge to Mr J Christopher Thomas QC, 14 October 2009, PCA, para. 19.

⁶⁶⁹ For details see 2 *Moore's Arbitrations*, 1662-1664: In a unanimous resolution of both the U.S. Congress and Senate, the Houses found that there had been "serious charges impeaching the validity of and integrity of the proceedings" of the 1866 Commission, and that the evidence taken by the House of Congress had "tend[ed] to show that such charges [were] not without foundation" (see *ibid.*, 1664). The Committee of Foreign Affairs of the U.S. Congress considered 'the alleged Commission [to be] a conspiracy; its proceedings were tainted with fraud. That fraud affects its entire proceedings.' As a result, the proceedings were 'diseased throughout, and there [was] no method known to the committee by which to separate the fraudulent part from the honest part and establish any portion in soundness and integrity' (*ibid.*, 1663).

⁶⁷⁰ Stowell and Munro, *International cases*, vol 1, p. 73.

General Harrison emphasised the importance of the arbitrators' impartiality during the proceedings:

"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."⁶⁷¹

2. The evidence shows the Tribunal's impartiality was compromised

6.155. The evidence discussed in Chapter 7 shows that the Tribunal's members did not adhere to the parties' demand for impartiality. As has been indicated, contemporary documents suggest that counsel for the UK viewed the British ('our') arbitrators not as impartial, but as part of the British side. Sir Richard Webster's candid admission that he would not hesitate to have private meetings with 'our own arbitrators' to inform them of British legal positions, is worth restating. This is clear from the above-quoted letter sent by the British lead counsel to Joseph Chamberlain, Secretary of State for the Colonies, in which Sir Richard noted that:

"If I find it necessary to take any independent action I shall do so privately through our own Arbitrators and only when I am satisfied that having regard to expressions of opinion of the part of some member of the Tribunal it is desirable that our arbitrators should appreciate our views."⁶⁷²

6.156. Similarly, in a letter to Lord Salisbury, dated 19 July 1899, Sir Richard indicated that

⁶⁷¹ Boundary between the Colony of British Guiana and the United States of Venezuela, Fiftieth Day's Proceedings (19 Sept. 1899), p. 2982, GM, Vol. IV, Annex 111.

⁶⁷² Letter from Sir Richard Webster to Joseph Chamberlain, 19 July 1899 (**Annex 64**).

“If I have reason to believe the Tribunal is against me on this part of the case, I shall endeavor to let the British Arbitrators know our view of the position”.⁶⁷³

6.157. As regards the U.S. Arbitrators, suffice it to mention again the fact that, on the eve of a potential ‘disastrous’ award, they reached out to Venezuelan counsel and met with them: as detailed in chapter 7, in the course of a meeting, the U.S. Arbitrators not only gave the Venezuelan side a detailed account of the Tribunal’s potential outcomes and *modus operandi*, but also sought advice on how they should deal with the dilemma presented to them – advice eventually received from the counsel team led by General Harrison.

6.158. As discussed below, these facts reflect a failure of the Tribunal to comply with its central obligation, namely to reach a decision based in law. For present purposes, they are sufficient to raise justifiable doubts as to the impartiality of the arbitrators. Any reasonable observer would readily apprehend a risk of bias in circumstances in which there existed communications between one of the parties to the arbitration and their party-appointed arbitrators, covering substantive matters placed before the tribunal.

e) The Tribunal failed to comply with its duty to render a decision based on law

6.159. The Tribunal exceeded its powers in a further respect, namely by failing to render an Award based on law as required by the *compromis*. This is the most fundamental defect affecting the Tribunal’s decision, supported by accounts of individuals directly involved in the decision-making process and reflected in objective features of the Award. It is fundamental because it reflects many of the more particular defects identified in the preceding sections, and yet goes beyond them.⁶⁷⁴

6.160. It goes beyond them because the duty of tribunals to render decisions based on law is an essential aspect of the function of binding dispute settlement. By 1899, it was beyond

⁶⁷³ Letter from Sir Richard Webster to Lord Salisbury, 19 July 1899 (**Annex 63**).

⁶⁷⁴ See further A. R. Brewer-Carías, *Derechos de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), p. 123-132; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, pp. 347-350; M. Falcón Briceño, *Orígenes de la actual reclamación de la Guayana Esequiba*, Boletín de la Academia de Ciencias Políticas y Sociales, número 91, Caracas, 1983, p. 68.

dispute that, unless parties to an arbitration expressly authorised a tribunal to base its decision on other considerations, the tribunal's decision was to be reached on the basis of law: "[L]e principe est que le tribunal arbitral chargé de fonction juridictionnelle doit appliquer la règle de droit".⁶⁷⁵ The leading authorities of the late 19th century thus insisted on the distinction between arbitration and diplomatic means of dispute resolution, clarifying that "Les arbitres ne sont pas des médiateurs".⁶⁷⁶

6.161. The duty to render decisions based on law did not reduce arbitrators to the mechanic application of predetermined rules of law. Of course, they retained judicial discretion that could be exercised in their decisions. However, such judicial discretion (as Lauterpacht would note) was "circumscribed by the duty to apply the existing law",⁶⁷⁷ and thus "governed by law".⁶⁷⁸ A tribunal's balancing of conflicting principles, its weighing of the evidence, and the potential choice they may make between conflicting principles, must still be made "only after conscientious and exhaustive scrutiny", and it must be accompanied by "a consciousness of duty performed".⁶⁷⁹

1. The Washington Treaty required the Tribunal to render an Award based on law

6.162. The Washington Treaty reflected the Parties' insistence that the dispute be resolved on the basis of law – a point that the parties stressed during the proceedings. Four aspects of the Washington Treaty are worth recalling:

First, as discussed above, the parties presented the Tribunal, in Article III, with two questions that it was expected to respond to.

Second, as discussed above, in Article IV(a)-(c), the parties defined, with significant detail, which rules the Tribunal should apply to reach its decision: this included concrete

⁶⁷⁵ Balasko, *Causes de nullité*, p. 172.

⁶⁷⁶ Bonfils, p. 253.

⁶⁷⁷ Lauterpacht, *The Development of International Law by the International Court of Justice* (Praeger, 1958), p. 399.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.*, p. 396.

references to particular rules (eg prescription), as well as directions concerning the priority among the different Rules.

Third, the parties, in Rule IV(c), empowered the Tribunal to resort to considerations of “reason, justice, [...] and the equities of the case”, but circumscribed this narrowly – identifying a particular context and conditions, so that considerations of equity, reason and justice, in effect would serve to mitigate consequences of a particular drawing of the boundary. By implication, outside this setting, the Tribunal was required to be guided by rules of international law.

Fourth, in the chapeau to Article IV, the parties envisaged a decision based on “principles of international law” that the Tribunal deemed applicable, but limited this by stating that these could only be applied if they were “not inconsistent” with the particular Rules stipulated in IV(a)-(c).

6.163. The overall conclusion derived from these provisions is that the parties defined the Tribunal’s “terms of reference”⁶⁸⁰ carefully and with precision, insisting on the need for a decision based in law.

6.164. As noted above, this understanding was reinforced firmly during the oral proceedings. As regards Great Britain, Sir Richard Webster was emphatic that he was addressing a “judicial Tribunal” that was “not here to draw compromise lines”. In his phrase, “it would be a death blow to arbitration if it is to be imagined that by making a claim to territory to which they have no legal title, a nation can get a slice of it”.⁶⁸¹

6.165. As for Venezuela, the focus on a decision based in law was if anything more pronounced, not the least because Venezuela was afraid of a compromise that would merely favour the stronger power in the dispute. General Harrison’s warning against decisions based on political expediency and give-and-take is worth recalling. As noted above, General Harrison distinguished two different modes of settling international controversies, noting that “if th[e] process of settling international difficulties is to commend itself to the

⁶⁸⁰ *Gulf of Maine, ICJ Reports 1984*, p. 266, para. 23.

⁶⁸¹ Verbatim Records, p. 731 and 865 (available at the Peace Palace Library).

nations, it can only be by setting up for the trial of such questions an absolutely impartial, judicial Tribunal. If conventions, if accommodations, and if the rule of give-and-take are to be used, then let the diplomatists settle the questions. But when these have failed in their work, [...] it seems to me necessarily to imply the introduction of a judicial element into the Tribunal.” These were not abstract notions, but – he continued – guided the settlement of the boundary question opposing Great Britain and Venezuela, as “these nations have adopted that [judicial] basis in the constitution of this Tribunal”⁶⁸²:

“[T]he purpose of this Treaty Arbitration was to bring in just this judicial element, and to exclude the representative element which has appeared in many former arbitrations [...] There is no Venezuelan here. This latter provision distinctly excludes the idea of representation, for when that idea is allowed, the representation is direct and equal. Venezuela, then, Mr. President, comes to this tribunal as to a great court. She gives to each member of it her fullest confidence, and submits her case to be judged upon the principles of international law and the rules of the treaty, and not to be compounded or compromised upon suggestions of political expediency”.⁶⁸³

6.166. The record leaves no doubt that the parties expected a decision which, while making allowance for some discretion and compromise, was “governed by law” and was accompanied by “conscientious and exhaustive scrutiny”.⁶⁸⁴

2. The Tribunal failed to render an Award based on law

6.167. From the text of the Award, as well as the documentary record, it is clear that the Tribunal failed to render a decision based in law. This is the necessary implication of the evidence discussed in Chapter 7 and in the preceding sections of the present Chapter. Two key points can be made.

⁶⁸² *Ibid.*, p. 2983 (available at the Peace Palace Library).

⁶⁸³ *Ibid.*, p. 2984 (available at the Peace Palace Library).

⁶⁸⁴ Lauterpacht, *The Development of International Law by the International Court of Justice* (Praeger, 1958), p. 399.

6.168. To begin with, the Award contains not a trace of legal reasoning.

6.169. The Tribunal asserted that it had:

“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”.

6.170. But this assertion is just that: an assertion, and it does not bear out Guyana’s claim that the Tribunal “applied the legal standard advocated by Venezuela”.⁶⁸⁵ Guyana relies on the parties’ pleadings to show the ample legal arguments brought before the Tribunal. But this merely accentuates how obviously the Tribunal fell short of its duty to render a decision ‘governed by law’.

6.171. In fact, contrary to Guyana’s claim, there is no evidence, no trace whatsoever, in the text of the Award that legal rules and principles, or that their weighing and balancing, played any role in the decision-making of the Tribunal. Nowhere does the Award refer to Article IV of the Washington Treaty, and the words ‘law’, ‘rule’, ‘international law’, or any similar terms do not appear in the decision. There is no mention of prescription, or occupation, or critical date, or any of the legal concepts and doctrines of the law on acquisition of territory, extensively debated by the parties.

6.172. The breadth and complexity of the legal materials, as well as the evidence, put to the Tribunal was emphasised by both parties. U.S. President Harrison, on behalf of Venezuela, explained that Venezuela had “present[ed] a full and complete discussion of every question of law and fact that we thought was in the case”.⁶⁸⁶ Sir Richard Webster, on

⁶⁸⁵ GM, p. 73, para. 3.54.

⁶⁸⁶ Boundary between the Colony of British Guiana and the United States of Venezuela, Fiftieth Day’s Proceedings (19 Sept. 1899), pp. 2984-2985 (Harrison). GM, Vol. IV, Annex 111. (cited in GM, at 70.)

behalf of Great Britain, also acknowledged observed that there was a “very vast mass of matter [...] discussed and [...] presented to the Tribunal”.⁶⁸⁷ Lauterpacht would later aptly describe the proceedings before the Tribunal as ‘a lengthy legal contest on such questions as acquisition of title by occupation, discovery, and prescription, and on such procedural technicalities as the function of estoppel in relations between States’.⁶⁸⁸

6.173. None of this ‘lengthy legal contest’ is reflected in the Award – rushed out within less than a week, and on the basis of meetings that (as noted above) were not necessarily attended by all members of the Tribunal. The text of the Award reveals nothing approaching a legal process: not the length of pleadings, not the breadth or complexity of the legal principles and evidence involved. The Tribunal did not place on record which legal considerations, or indeed any of the *other* considerations referred to in Article IV(c), if any, guided it in reaching its decision.⁶⁸⁹ Adapting terms used by the Court, the Award does *not* “make it possible to determine [...] the reasons why the Tribunal decided [the way it did]”.⁶⁹⁰ On its face, nothing in this Award gives the reader the impression that the decision was based on legal considerations.

6.174. The documentary record elucidating the Tribunal’s decision-making process corroborates this assessment.

6.175. Writing about the Award in the 1950s, Arthur Nussbaum reported that “[t]o the surprise of everyone, the tribunal did not give any reason for the decision which aroused much resentment in Venezuela”.⁶⁹¹ While this may have been surprising at the time, evidence that has come to light since the Award was issued reveals that the absence of any legal reasoning, of any mention of law, at all, in the Award, should not have been so surprising after all. For the Tribunal’s decision was *not* based on law. The decision, as

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Lauterpacht, *The Function of Law in the International Community* (Clarendon 1933), p. 157.

⁶⁸⁹ Indeed, Lauterpacht refers exclusively to the pleadings and materials of the arbitration to make his point, not to the award.

⁶⁹⁰ Arbitral Award of 31 July 1989, pp. 53, 68, para. 43.

⁶⁹¹ Nussbaum, ‘Frederic de Martens Representative Tsarist Writer on International Law’ (1952) 22 *Nordic Journal of International Law*, pp. 51, 58.

Guyana admits, was the product of compromise.⁶⁹² Crucially, it was the product of compromise *only*, and of one that was not ‘governed by law,’ but by political expediency – precisely the criterion decried by the parties, and one that would lead the Tribunal to favour the more powerful litigant, rendering a dramatically unbalanced decision.

6.176. The Tribunal’s decision-making process out in some detail in Chapter 5⁶⁹³ reveals a clear picture of the key factors that led the Tribunal to reach its decision. Three points are worth reiterating:

6.177. First, the evidence makes abundantly clear that during the deliberations, the Tribunal’s President had separate discussions with the party-appointed arbitrators, indicating to them that unless they accepted a boundary line put forward by him, he would side with the other party’s position. This is clear from the memorandum of Mallet-Prevost, the letter of Lord Russell and the diary of De Martens himself. The central sections, which are as candid as they are damning, are as follows:

6.178. Recalling the events of a few days earlier, Lord Russell stated that de Martens “intimated to LJ 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 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.”⁶⁹⁴

6.179. Mallet-Prevost’s memorandum recounts Arbitrator Brewer’s statement to the fact that: “‘Martens has been to see us. He informs us that Russell and Collins are ready to decide in favor of the Schomburgk Line, which starting from Point Barima on the coast

⁶⁹² GM, pp. 255-259.

⁶⁹³ See chapter 7, paras. 119-143. See further A. R. Brewer-Carías, *Derechos de Venezuela sobre el territorio Esequibo*, Academia de Ciencias Políticas y Sociales (2023), p. 123-132; J. Gillis Wetter, *The International Arbitral Process: Public and Private*, vol. III, Oceana Publications: New York, 1979, pp. 347-350; M. Falcón Briceño, *Orígenes de la actual reclamación de la Guayana Esequiba*, Boletín de la Academia de Ciencias Políticas y Sociales, número 91, Caracas, 1983, p. 68.

⁶⁹⁴ See letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

would give Great Britain the control of the main mouth of the Orinoco; and that if we insist on starting the line on the coast at the Moruca River he will side with the British and approve the Schomburgk Line as the true boundary.’ ... However [...] Martens is anxious to have a unanimous decision; and if we [the two U.S. Arbitrators] will agree to accept the line which he proposes he will secure the acquiescence of Lord Russell and Lord Collins and so make the decision unanimous.’”⁶⁹⁵

6.180. Dr. Martens’ private diary affirm the essentials recounted by Lord Russell and Mr. Mallet-Prevost/Arbitrator Brewer. Having failed to persuade the British and American arbitrators to agree, the President “decided to get down to this issue in a diplomatic way”:

“I went to Chief Justice Fuller and persistently urged him to make one more small concession. The old man was very fond of me and promised to speak to his colleague Brewer. I then went to Lord Collins and explained to him that the British also had to make another concession. But Collins, with whom I had hitherto been on better terms, flatly refused and said he preferred a simple majority (considering me on his side) to unanimity for further concessions. The next day, early on Monday morning, I went again to see Brewer and persuaded him. I learned from him that dearest Fuller had been with him the night before for two hours, and after much deliberation they agreed to make a new concession. I was very glad and considered that the basis for an agreement had been found. I went again to Lord Collins but found him even less accommodating than the day before. But then I explained to him that England was not interested in forcing me over to the American side. This made him think. I told Fuller and Brewer that if they did not make a concession, then I would be forced *à contre coeur* to side with the English, because I could not wish and allow a scandal, i.e. a situation where the tribunal could not decide the case because the 4 arbitrators cannot agree among themselves, and the super-arbitrator refuses to cast his vote!

I did not speak to Lord Russell on Sunday because he was not in Paris. But Lord Collins, at my request, told him all about these

⁶⁹⁵ Mallet-Prevost Memorandum, in Schoenrich, ‘The Venezuela-British Guiana Boundary Dispute’ (1949) 43 AJIL, pp. 523, 530.

negotiations. These conversations, and in particular the fear that Lord Collins communicated to him that I would go over to the American side, simply pissed him off.”⁶⁹⁶

6.181. Second, it is clear from these statements that, in his attempt to procure a unanimous award ‘at all costs’, the Tribunal’s President was not guided by considerations of law. In his diary, de Martens describes his approach as ‘a diplomatic way’; in his perceived need to obtain ‘concessions’, there is not a hint of legal argument. As noted by Lord Russell, the President seemed to be guided, not by legal considerations of law, but “seemed [...] to think that it was his duty, above all else, to secure, if he could, a unanimous award”.⁶⁹⁷ The three first hand accounts indeed bear out a commentator’s verdict: “It is [...] inherently evident that that Professor de Martens did not arrive at his compromise line by a process of legal reasoning which he was prepared to expound, or of which he was convinced, for if that were so, he could not have threatened to join one extreme award line or the other”.⁶⁹⁸

6.182. Third, it is equally clear that, while the pressure exercised by the Tribunal’s President did ostensibly produce the desired result (i.e. a unanimous decision), the Award could not reflect the legal reasoning of the Tribunal members. Both Lord Russell and Lord Collins, and Arbitrators Fuller and Brewer, felt required to accept an Award that set a line they did not consider to be justifiable as a matter of law. In fact, Arbitrators Fuller and Brewer made their vote in favour dependent on the approval by counsel: in effect, two American arbitrators, without consulting the Venezuelan government, decided to vote for an Award as directed by another American, General Harrison – who saw no alternative to accepting an ‘iniquitous’ result.

6.183. The verdict of close observers confirms this: as noted above, even British officials (who would have been content with the outcome) did not hesitate to describe the approach as ‘trickery’ and a ‘farce’; subsequently, commentators would speak of the ‘unjudicial’⁶⁹⁹

⁶⁹⁶ See Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, AVPR, opis 787, delo 9, ed.k hr. 1-7 , p. 11 (**Annex 149**).

⁶⁹⁷ See letter from Lord Russell to Lord Salisbury, 7 October 1899 (**Annex 67**).

⁶⁹⁸ Wetter III, p. 348.

⁶⁹⁹ Dennis, p. 722.

manner of reaching the decision and described it as a “marchandage purement politique” (Paul Reuter).⁷⁰⁰

6.184. To summarise, the evidence clearly bears out the correctness of Reuter’s assessment. This assessment is supported by the Award as drafted – from which legal reasoning is absent. It is also supported by the positive documentary evidence of how the Award was drafted: given the time that has lapsed since 3 October 1899, one cannot fail to be astonished at how clearly the tribunal’s decision-making process was driven by exactly the consideration that the parties sought to exclude – political expediency, crude give-and-take, diplomacy and pressure – replacing legal considerations as the benchmark of decision-making.

f) Interim conclusion: manifold excesses of power

6.185. The preceding sections reveal manifold, and at times astonishing, excesses of power committed by the Tribunal. To recall, under the Washington Treaty, the Tribunal was required to settle the dispute between Venezuela and the United Kingdom, in respect of the Esequibo region. Its task was clearly defined by Articles I and III: to delimit the boundary between the two countries, and to do this in two steps, first ascertaining title over the territory as at 1814, and second to determine the boundary line. The parties specified the rules to be applied by the Tribunal in Article IV, as well as the order of priority among them, clearly intending that the Tribunal would approach its task as a *legal* one: that the Tribunal, on other words, issue a decision governed by law. The parties anticipated that some adjustments to the boundary would be necessary, and made specific provision for this in Rule (c) of Article IV: giving the Tribunal some legally-bounded discretion in this respect. The parties expected the Tribunal carefully to assess the questions posed to it, and to proceed impartially as made clear in Article V.

6.186. The Tribunal failed in each of these respects. It ignored one of the two questions Article III expressly asked it to address, but then went on to decide matters that the parties

⁷⁰⁰ Reuter (1968), 238. Falcón Briceño speaks of ‘blackmail’ (‘chantaje’): M. Falcón Briceño, *Orígenes de la actual reclamación de la Guayana Esequiba*, Boletín de la Academia de Ciencias Políticas y Sociales, número 91, Caracas, 1983, p. 68.

had not only not posed to it – but that had not been in their contemplation at all: navigation of the rivers Amakura and Barima. What is more, straying from the limits imposed by the consent of the parties in Article I, the Tribunal pronounced on the legal position of a third State: Brazil. In reaching its decision, the Tribunal completely disregarded the carefully drafted and extensively debated Rules in Article IV. Indeed, it disregarded the parties’ wishes to obtain a decision based on law: unanimity in the Award was, at least for the President of the Tribunal, the paramount consideration which must take priority ‘above all else’ including the clearly expressed will of the parties. Finally, members of the Tribunal seemed indifferent to the duty of impartiality, entertaining communications with the parties that had appointed them on substantive matters concerning the dispute.

6.187. The law on excess of powers is clear and well-established, with a long-standing history. It was clear and well-established at the time of the Award. Arbitral tribunals exist exclusively because of and entirely within the consent of the parties as expressed in their arbitration agreements and with its full guarantee. “Les arbitres”, according to Méringnac’s account given in 1895, “doivent rester strictement dans les limites de leurs attributions et, en dehors d’elles, ils n’ont aucune qualité.”⁷⁰¹ Any violation or non-observance of, deviation from, or failure to abide by the explicit requirements included in the parties’ agreement amounts to an excessive exercise of its powers: because outside of the bounds of their agreement, the arbitrators ‘n’ont aucune qualité’.

6.188. The Tribunal’s excesses of power are plain to see, and could be identified “with certainty and immediacy, without it being necessary to engage in elaborate analyses”.⁷⁰² The evidence that exists concerning the conduct of those involved in the proceedings, and deliberations, corroborate these excesses which are plain from the text of the Award. From not deciding questions expressly asked of it, to deciding questions *not* asked of it, to deciding on matters affecting States not parties to the *compromis*. From ignoring the expressly stipulated applicable rules mandated by the parties, to ignoring the law entirely, to settling on a compromise line ‘above all else’. From failing to observe the duty of

⁷⁰¹ Méringnac, *Traité théorique et pratique de l’arbitrage international*, Larose, 1895, pp. 284-285.

⁷⁰² *Dogan v Turkmenistan*, Decision on Annulment, 15 January 2016, para. 103 (internal citations omitted); *Mitchell v. DR Congo*, Decision on Annulment, 1 November 2006, para. 20.

impartiality, to the well-documented undue pressures from the President of the Tribunal to achieve a unanimous decision.

6.189. While bearing on different aspects of the Tribunal's mandate, these excesses are interconnected manifestations of the same underlying failure of the Tribunal: its attitude of disregard for the clear boundaries and limitations imposed on its powers by the parties. The precise manifestation of each of the Tribunal's failures is formally and substantively unimportant. What matters, adapting arguments by U.S. counsel in the *Orinoco Steamship case*, is 'the fact that the arbitrators have been guilty of "a plain departure from the terms of the reference" (Twiss), or of "a palpable disregard of the terms of the submission" (United States Case)', which is important, and which invalidates the award, not the precise character of the departure.'⁷⁰³

6.190. It would be difficult to imagine *any* arbitral decision that had so spectacularly failed in its compliance with the parties' agreement. An Award tainted so obviously would not be allowed to stand today: it should be unthinkable that it should be allowed to stand merely because of the date when it was issued. The law at the time recognised invalidity for excess of powers, and the practice showed that awards *were* set aside on this basis. For these reasons, the award, as Venezuela has maintained for many decades, the 1899 Award is null.

⁷⁰³ Oral argument, *Orinoco Steamship*, p. 66.

CHAPTER 7: THE PATH TOWARD THE AMICABLE RESOLUTION OF THE CONTROVERSY UNDER THE GENEVA AGREEMENT OF 1966

I. INTRODUCTION

7.1. Guyana devotes a considerable number of pages trying to convince the Court that the 1899 Award has been seen as a “victory” by Venezuela from 1899 up to the 1950’s. This is probably because Guyana is aware that, in the case of the *Arbitral Award by the King of Spain*, the Court had seemed to pay attention to some expression of satisfaction regarding the award at stake in that case.⁷⁰⁴ Yet, in the present case, it is simply historically erroneous to assert that Venezuela asserted “satisfaction” after the 1899 Award had rejected nearly all its legitimate and legally-grounded sovereignty claims. As a matter of fact, this Arbitral Award has always created bitterness and a sense of complete injustice (II).

7.2. For a long time, Venezuela could not challenge the Award, although it was deeply unjust, fraudulent and without legal basis. Some features of this Award were surely alarming since, on its face, the 1899 Award appeared as an arbitrary and purely political ratification of the British unfounded claims. Yet, the evidence of fraud was not available to Venezuela. Moreover, faced with a situation of structural coercion from outside, as evidenced by the naval blockade of the Republic by several powers in 1902 and the ill-fated gunboat policy, Venezuela was not in a position to challenge the 1899 Arbitral Award.

7.3. Since 1949, with the release of the Mallet-Prevost Memorandum,⁷⁰⁵ the anomalies, manipulations and falsifications that led to the Award came to light. All the pieces of the puzzle assembled perfectly and pointed to the complete nullity of what came to be confirmed as a sham arbitral award. On this basis, Venezuela presented its claim of territorial dispossession arising from the Award before international institutions from the early 1950’s, and before the United Nations from the early 1960’s. This claim by Venezuela

⁷⁰⁴ *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C. J. Reports 1960*, pp. 206-208, 210-212.

⁷⁰⁵ O. Schoenrich, “The Severo Mallet-Prevost Memorandum”, *The American Journal of International Law*, Vol. 43, No. 3, July 1949 in *Claim to Guayana Esequiba – Documents 1962-1981*, Caracas, 1981, pp. 141-142 (available at Peace Palace Library)

opened the way to the conclusion of the Geneva Agreement of 1966, by which Venezuela and Guyana started to tread towards an amicable and practical settlement of the territorial controversy (III).

7.4. In the Geneva Agreement, Guyana acknowledged the existence of Venezuela's contention that the 1899 Award is null and void and accepted as legitimate the maintenance of this contention in consenting to engage into a process aiming at resolving the controversy through a practicable solution acceptable to both Parties. Guyana now cynically and surprisingly argues in its Memorial that Venezuela cannot maintain its argument because there is an alleged "prolonged acceptance" of the 1899 Award on its part, or that such alleged conduct had the effect of "curing" the nullity of the Award. Both allegations are far-fetched and without legal merit.

7.5. There is no acquiescence upon which Guyana can rely to advance its claim before the Court. This is because:

- *First*, such an argument was never invoked until Guyana's Memorial (IV, A).
- *Secondly*, the alleged prolonged acceptance invoked by Guyana has never existed (IV, B).

II. THE RECEPTION OF THE 1899 ARBITRAL AWARD

7.6. It is wholly inaccurate to state, as Guyana does cynically on the basis of quotations made out of context,⁷⁰⁶ that Venezuela welcomed the Arbitral Award of 1899 with satisfaction, or that "there was no indication of any dissatisfaction with the Award by Venezuela or its ally".⁷⁰⁷

⁷⁰⁶ GM, Annex 3. See also GM, paras. 1.29, 4.2, 4.4, 4.5, 4.6, 9.8.

⁷⁰⁷ GM, para. 4.9.

7.7. To the contrary, Venezuela has never been “satisfied” to be deprived by way of an unjust and fraudulent arbitral award of what it perfectly knew, as brilliantly argued by its lawyers, was *its* territory.⁷⁰⁸

7.8. In a letter sent to the Minister of Foreign Affairs the day after the decision was rendered, Venezuela’s agent, José María de Rojas, characterised the decision as “derisory and a manifest injustice”.⁷⁰⁹ Ambassador Andrade, the representative of Venezuela in London, concluded bitterly about the Award that:

“the right of Venezuela to a great part of the territory which has been left under the dominion of Great Britain was absolutely clear”,

and that:

“the Award does not appear to be based on reason and justice, as Mr. de Martens affirmed in his closing speech, and the Venezuelan arbiters only gave their adhesion in order to avoid an even greater contempt of the essential attributes of any faultless judgment”.⁷¹⁰

7.9. On 27 December 1899, former U.S. Secretary of State Richard Olney wrote to U.S. President Cleveland the following about what was immediately seen as a disastrous award:

“The worst result to be feared, apparently, is not the loss of territory to Venezuela but the general discrediting of the arbitration case. According to my informant, both the Chief Justice and Brewer are against arbitration as a mode of settling international disputes unless some new safeguarding of the rights of the parties can be provided.

⁷⁰⁸ *Ibid.* For an extensive analysis of the attitude of Venezuela in the months immediately following the Award see in particular F. M. De Vegamian, *El Esequivo, frontera de Venezuela: documentos históricos y experiencias personales*, Raycar, SA Impresiones, 1968, pp. 200-208.

⁷⁰⁹ Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 20, para. 24 (**Annex 150**).

⁷¹⁰ GM, Annex 3, Vol. II (Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs, 7 October 1899).

Ex-Secretary John W. Foster, with whom I dined here the other day, said Fuller and Brewer had come home pretty sick of arbitration.”⁷¹¹

7.10. To recall, Brewer and Fuller were the two arbitrators appointed by the United States. As such, they were the direct witnesses of what this award truly was. And as said by Olney to Cleveland, they were “pretty sick of arbitration”, precisely after what they had witnessed during the deliberation of the 1899 Award.

7.11. *This is the way* the Award was received, far from what Guyana depicts as a claimed “victory”. The President of Venezuela, quoted by Guyana (without providing the source),⁷¹² considered that the Award had amounted to a restitution to Venezuela of only “a part of its territory that had been usurped” by Great Britain, obviously considering that justice had not been properly done.⁷¹³

7.12. Guyana quotes Venezuela’s American counsel just after the Award was rendered.⁷¹⁴ But it does so in a biased and manipulated manner. In fact, a review of the reference as a whole shows that the Venezuelan representative criticised the arbitral tribunal for being a tribunal of political and diplomatic compromise rather than a tribunal of law. In his own terms:

“The president of the tribunal, the Venezuelan representative added, had commented in his closing speech today on the unanimity of the present award, and referred to it as a proof of the success of the arbitration. However, it did not require much intelligence to penetrate behind this superficial statement and see that the line drawn was a line of compromise, and not a line of law. If the British argument had been correct, the line should have been drawn much further west. If it had been wrong, it should have been drawn much further east. There was nothing in the history of the dispute or, indeed, in the legal principle involved that could adequately explain

⁷¹¹ Library of Congress, Richard Olney Papers, Vol. 12. pp. 455-457; quoted in Statement of His Excellency, Dr. Marcos Falcon Briceno, Minister for External Relations of Venezuela, at the 348th Meeting of the Special Political Committee on 12 November 1962, p. 20 (**Annex 143**).

⁷¹² GM, para. 4.7.

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*, para. 4.8.

why the line should be drawn as it now stood. As long as the arbitration is conducted based on such principles, it cannot be considered a success, at least by those who believe that arbitration should result in an admission of legal rights, and not in compromises of a truly diplomatic character. Venezuela has gained much, but it was entitled to much more, and if the arbitrators were unanimous, it must have been because their failure to agree would have confirmed Britain in the possession of still more territory.”

7.13. Guyana tries to undermine in advance these remarks by contending that “[t]he 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”.⁷¹⁵ But this is, once again, a complete misleading presentation of the historical facts.

7.14. The United States intervened in the controversy for its own benefit, committing a grave and inexcusable wrong by subrogating the interests of its “defendant” to its own, and also because it was outraged by the “continuous growth of the undefined British claim”. As evidence of this, for example, “Lord Aberdeen himself in 1844 proposed a line beginning at the River Moroco, a distinct abandonment of the Schomburgk line”.⁷¹⁶

7.15. President Cleveland did not "side with Venezuela" in the controversy, contrary to Guyana's contention. As Olney explained, the United States was accepting the idea that Britain could obtain recognition of its manifestly unfounded claim, to the extent that British gain would not be seen as the result of a forceful invasion and conquest.

7.16. In fact, any objective observer would have concluded that Great Britain had no title at all to the territory west of the Essequibo River, and that its policy was to “annex cartographically” an always larger territory in order to reach the Orinoco. A look at the successive maps manipulated by Great Britain perfectly illustrates this policy.

⁷¹⁵ GM, para. 1.8.

⁷¹⁶ Letter from Richard Olney to Thomas Bayard, 20 July 1895 (**Annex 152**).

7.17. One element to note is that Britain was still a major power on the international scene at the time and resisting its unfounded claim exposed Venezuela to the use of force, as it had done in the recent past.

7.18. Moreover, as President Cleveland recalled, during the negotiations leading to the Washington Treaty, for a long time Great Britain refused arbitration because it feared that an award rendered according to international law might be made in favour of Venezuela, which would have been unacceptable for the British Crown.⁷¹⁷ As recalled by Marcus Baker in 1900: “It came to be seen that a finding adverse to Great Britain would produce an awkward situation”.⁷¹⁸ Ultimately, Great Britain accepted an arbitration process only when it was certain that it would end up in its favour. It is in this context that Secretary of State Richard Olney, in the name of U.S. President Cleveland, described the British claim and how it could be accommodated by the United States:

“Great Britain, however, has always and continuously refused to arbitrate, except upon the condition of a renunciation of a large part of the Venezuelan claim and of a concession to herself of a large share of the disputed territory. [...] the British demand that her right to a portion of the disputed territory shall be acknowledged before she will consent to an arbitration as to the rest seems to stand upon nothing but her own *ipse dixit*. She says to Venezuela, in substance: ‘You can get none of the debatable land by force, because you are not strong enough; you can get nothing by treaty, because I will not agree; and you can take your chance of getting a portion as I may designate.’ It is not perceived how such an attitude can be defended nor how it is reconcilable with that love of justice and fair play so eminently characteristic of the English race. It in effect deprives Venezuela of her free will and puts her under virtual duress. The territory acquired by reason of it will be as much wrested from her by the strong hand as if occupied by British troops or sieged by British fleets. It seems therefore quite impossible that this position of Great Britain should be assented to by the United States, or that, if such position be adhered to with the result of enlarging the bounds

⁷¹⁷ *Ibid.*

⁷¹⁸ M. Baker, *The Anglo-Venezuelan boundary dispute 1849-1903*, Washington, Judd & Detweiler, 1990 (available at: <https://archive.org/details/cu31924021109529>).

of British Guiana, it should not be regarded as amounting, in substance, to an invasion and conquest of Venezuelan territory”.⁷¹⁹

7.19. Indeed, this was, as Venezuela later found, the sole object of the U.S.-sponsored arbitration process that culminated in the 1899 Award: to grant Britain, but not by the use of force (as this would have been contrary to the Monroe Doctrine), most of the Venezuelan territory that Britain coveted but to which it never had legal title.

7.20. On the other hand, Venezuela’s claims against the nullity and invalidity of the arbitral award were also frustrated in an imperialist period in which the Republic of Venezuela was immersed in a situation of structural coercion.

7.21. Indeed, the meaning of a State’s conduct depends on the circumstances and conditions in which it occurs. Venezuela argues, supported by legal principles and the jurisprudence of the International Court of Justice, that the existence of conditions is necessary to ensure the possibility of exercising the free expression of its will⁷²⁰ and that those conditions were in no way present for Venezuela in the period immediately preceding the Award, at the time the 1899 Award was rendered, nor in the years immediately following, since throughout that period the Republic of Venezuela was systematically threatened from the outside by the then powerful and bullying British Empire.

7.22. Threats to Venezuela by Britain, and also by other empires and powers of the time, are very numerous and prove the situation of structural coercion. By way of illustration, of particular note is the infamous and detestable “gun-boat diplomacy”, which was characterised by the threat or use of military force to try to impose the interests of foreign powers on Venezuela. This term, in other words, defines military interventions and the imposition of conditions unfavourable to Venezuela, which affected its autonomy. This was the case, for example, with the coercion exercised through the naval blockade for the collection of certain claims against Venezuela in 1902.

⁷¹⁹ *Ibid.*, p. 345. See also, Letter from Richard Olney to Thomas Bayard, 20 July 1895 (**Annex 152**).

⁷²⁰ *Frontier Dispute, (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 554, para. 80* (“the idea of acquiescence, which presupposes freedom of will [...]”).

7.23. But coercion can be explained more broadly, as has been demonstrated in this Counter-Memorial, in relation to the British strategy of usurpation of Venezuelan territory, the culmination of which is verified in the signing of the Treaty of Washington of 2 February 1897, which Venezuela was forced to ratify under threat of “dangerous consequences”, and in the fraudulent Award of 3 October 1899. Mr. Olney himself put it very clearly: the British Crown “actually deprives Venezuela of its free will and places it under virtual duress. The territory acquired by reason of it will be wrested from her as much by the strong hand as if it were occupied by British troops or sieged by British fleets”.⁷²¹

7.24. Such structural coercion must also be considered a legitimate basis for rejecting the force and validity of Guyana’s arguments on acceptance and acquiescence, falsely attributed to the Bolivarian Republic of Venezuela.

III. THE PATH TOWARD THE 1966 GENEVA AGREEMENT

7.25. The Mallet-Prevost Memorandum of July 1949, in disclosing a “fait nouveau”, changed everything. Before the Mallet-Prevost Memorandum, Venezuela had been unaware of the Award’s “inner history”, as Foreign Minister Falcon Briceño called it in a Statement of 12 November 1962, during a meeting of the Special Political Committee of the UN General Assembly.⁷²² But, from that moment, Venezuela knew that, on the basis of a defective arbitral award, it had been the victim of the outrageous theft of a territory on which it had an undisputable title.

7.26. Venezuela first brought its claim before the OAS in 1951 and 1954, very shortly after the Mallet-Prevost Memorandum had come to light.

7.27. In 1951, during the Fourth Meeting of Consultation of the Ministers of Foreign Affairs of the American Countries, Venezuela’s representative stated that:

⁷²¹ *Ibid.*, p. 345. See also Richard Olney to Thomas Bayard, 20 July 1895 (**Annex 152**).

⁷²² Question of Boundaries between Venezuela and the Territory of British Guiana: Statement of His Excellency, Dr. Marcos Falcon Briceño, Minister for External Relations of Venezuela, at the 348th Meeting of the Special Political Committee on 12 November 1962 (**Annex 143**).

“In the opinion of the Government of Venezuela, no changes of status which may occur in British Guiana as a consequence of the international situation or of the measures that may be adopted in the future, or as a result of the progress of the inhabitants of said territory towards the determination of their own destinies, will be an obstacle for Venezuela, in view of the peculiar circumstances that prevailed when its boundary line with the aforementioned colony was marked, to assert its just aspirations that the damages suffered by the Nation at that time be repaired in accordance with an equitable rectification”.⁷²³

7.28. At the Tenth Inter-American Conference, in 1954, the legal consultant to the Venezuelan Ministry of Foreign Affairs, stated that:

“In the particular case of 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 harm sustained by the Nation when its border 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 waiver of those rights”.⁷²⁴

7.29. In March 1960, a member of the Venezuelan Congress submitted to a parliamentary delegation of the United Kingdom the Venezuelan plea that:

“A change of status in English Guiana cannot invalidate the fair aspirations of our people to be redressed, in an equitable manner and by amicable understanding, the major harm that the nation sustained under the unjust award of 1899”.⁷²⁵

⁷²³ Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations, 14 February 1962 (**Annex 140**).

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*, p. 25.

7.30. Guyana cynically maintains that these claims were not based on the rejection of the validity of the Award of 1899, but merely affirmed Venezuela's aspiration for an equitable rectification.⁷²⁶ Guyana then contends that Venezuela raised its claim "for the first time" in 1962.⁷²⁷ It also contends that, until then, Venezuela had acknowledged the "legality of the Arbitral Award".⁷²⁸

7.31. Yet, these contentions are backed by no official Venezuelan statement from the 1950's recognising the validity of the 1899 Award. Rather, Guyana relies on an unsigned "Memorandum of Conversation" from the U.S. Department of State, reporting that a minister counsellor of the Venezuelan Embassy in Washington "explained that Venezuela did not question the validity of the Arbitral award".⁷²⁹ It goes without saying that, given his rank a minister counsellor of the Embassy of Venezuela in Washington D.C., he has no authority to define Venezuela's official international position in relation to an issue affecting the territorial integrity. Guyana also refers to a Policy Statement prepared by the United States Department of State in 1951, in which there is nothing resembling Venezuela's acknowledgement of the validity of the Award, contrary to what Guyana asserts.⁷³⁰

7.32. Secondly, it is untenable to contend, as Guyana does, that Venezuela somehow ratified the legal validity of the Award during the 1950's. The fact that, from 1951 onward, Venezuela officially claimed that there was a need for an "equitable rectification", that "harm" was sustained, that this harm should be "redressed", and that Venezuela had all the rights to claim so, was nothing else than the outcome of the nullity of the Award. Venezuela would have had no basis to assert those claims if the Arbitral Award of 1899 was not considered null and void and if Great Britain had not noted this.

⁷²⁶ GM, paras. 4.54-4.57; 9.9.

⁷²⁷ GM, paras. 5.11, 9.13.

⁷²⁸ GM, para. 9.10.

⁷²⁹ Memorial of Guyana on jurisdiction and admissibility, Vol. II, Annex 16.

⁷³⁰ GM, para. 9.11.

7.33. In the context of the process of decolonization of British Guiana, Venezuela raised its claim before the United Nations, the body of competent jurisdiction to hear it. To this effect, the Permanent Representative of Venezuela addressed a letter to the Secretary-General of the United Nations on 14 February 1962, in which he stated:

“Inasmuch as there is a dispute between my country and the United Kingdom concerning the demarcation of the frontier between Venezuela and British Guiana and since, for that reason, my Government feels obliged to reserve its position on the matter and to explain the situation to the United Nations, I should be grateful if you would circulate this letter and the memorandum annexed thereto to the Members of the United Nations for their information.”⁷³¹

7.34. The memorandum attached to this letter did present Venezuela’s position in detail.⁷³²

7.35. The United Kingdom’s initial position was laid out on 13 February 1962 by Ambassador Colin Crowe, in the context of the United Nations’ 349th Meeting of the Special Political Committee.⁷³³ This position was, patently, poorly argued and relied on manifestly wrong assertions. For example, Ambassador Crowe affirmed that the Schomburgk line represented “the precise limits of the former Dutch possessions where all trace of Spanish influence was absent”,⁷³⁴ which was pure invention. The three Dutch possessions were tiny and had nothing to do with the vast territory of Guayana Esequiba west of the Essequibo River. In fact, the three Dutch settlements of Berbice, Essequibo and Demerara are precisely defined by the western boundary of each of these rivers, that is, the Berbice River, the Demerara River and the Essequibo River, with any Dutch acquisitions ending there, as thousands of maps of the time show. Such settlements are the origin of the territory of Guyana and nothing more.

⁷³¹ Memorial of Guyana on jurisdiction and admissibility, Vol. II, Annex 17, p. 1, para. 2.

⁷³² *Ibid.*

⁷³³ Agenda Item 88: Question of Boundaries between Venezuela and the Territory of British Guiana (continued), 13 November 1962 (**Annex 145**).

⁷³⁴ Memorial of Guyana on jurisdiction and admissibility, Vol. II, annex 24, p. 3.

7.36. From there, the Parties agreed that their experts should look for evidence substantiating further Venezuela's claim.⁷³⁵ They found such evidence.

7.37. Venezuela's position on the nullity of the award came to be further confirmed by the additional solid evidence found between 1963 and 1965 by Venezuelan experts, the Jesuits Hermann González Oropeza and Pablo Ojer. This evidence, freshly found and compiled, provided conclusive proof of the fraud sustained by Venezuela, which had been deceived and deprived of its legitimate territory by the 1899 Arbitral Award.

7.38. Guyana has provided the Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana (18 Mar. 1965) in annex 74 of Vol. IV of its Memorial on the merits. But it is only an extract. Indeed, it does not provide the most interesting evidence upon which the Report is based.

7.39. The evidence shows that the British Foreign Office was perfectly aware that the Schomburgk line was not representing anything close to "the undoubted" right of the British Crown. In the document titled "minutes by Lord Stanley, Colonial Office Secretary, London", dated 7 September 1841, the British side clearly admitted that:

"Mr. Schomburgk does not provide any data upon which he assumes the limits claimed by him, to be, as he designates then more than ever, the 'undoubted' right of the British Crown".⁷³⁶

7.40. In the same vein, in a Confidential Memorandum from the British Foreign Office, dated 24 November 1857, the British side admitted that:

⁷³⁵ On the role and meetings of experts, see Memorandum of Venezuela, pp. 8-12.

⁷³⁶ Minutes by Lord Stanley, Colonial Office Secretary, London, 7 September 1841, Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 34 (**Annex 150**).

“it certainly appears to be doubtful whether our rights are so free from doubts as to make it advisable to claim the boundary as laid down by Sir R. Schomburgk”.⁷³⁷

7.41. The Venezuelan experts also brought first hand evidence that the British did tamper the maps they used before the Arbitral Tribunal.

7.42. They found and provided the very frank testimony of Hertslet, from the Foreign Office, who perfectly knew that the British territorial claim was based on noting something close to a legal claim, and admitted that the British case:

“is a poor one”.⁷³⁸

7.43. He also admitted that the British side:

“could not submit the case to arbitration with the slightest hope of success given the contradictory claims which have been put forward in the English published maps”.⁷³⁹

7.44. Hertslet also frankly admitted that:

“the argument based on the grounds of strict right would be hopeless [...]”.⁷⁴⁰

7.45. Any honest reading of the entire expert report would admit without any doubt the reality of the British territorial swindle, quite eloquently illustrated on a sketch map prepared by the experts, showing the successive British claims based upon tampered British maps.⁷⁴¹

⁷³⁷ Confidential Memorandum from the British Foreign Office, dated November 24, 1857, Bodleian Library (Oxford). Mss. Clarendon Deposit C/275, Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 34 (**Annex 150**).

⁷³⁸ Letter from Sir Hertslet to Mr. Jervoise, 14 June 1886, Public Record Office (London) F.O. 80/309, Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 35 (**Annex 150**).

⁷³⁹ Extract of the Memorandum by Sir E. Hertslet, Foreign Office, 5/VIII/1886 (**Annex 27**).

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

7.46. At this point, the British Government became manifestly less sure of its case, and prudently sought to set aside the question of the invalidity of the 1899 Award, changing course in favour of a negotiated and practical solution to the territorial controversy that would be acceptable to both Parties, which became a source of embarrassment for the British Crown.

IV. GUYANA’S CONTENTION REGARDING VENEZUELA’S ALLEGED “PROLONGED ACCEPTANCE” OF THE 1899 AWARD CONTRADICTS THE GENEVA AGREEMENT’S OBJECT AND PURPOSE, AND IS OF NO AVAIL TO GUYANA

7.47. Guyana argues in Chapter 4 of its Memorial, that, for decades after 1899, Venezuela had accepted the award and adhered to the line described by the arbitrators. Guyana further lists a series of acts and statements that it qualifies as acceptance of the 1899 Award and the natural implementation of its demarcation, improperly called the “1905 Boundary Agreement”,⁷⁴² later drawing the “legal consequences” from Venezuela’s alleged acceptance of the Award before 1962. Guyana notably insists on “Venezuela’s knowing and prolonged acceptance of the Award”,⁷⁴³ and concludes that Venezuela allegedly lost its right to claim that the Award is invalid, or that Venezuela’s prolonged acceptance would somehow “cure any defect” that would invalidate the 1899 Award.

7.48. This contention is unsustainable because it is in direct contradiction with the object and purpose of the Geneva Agreement, under which the Parties have an obligation to settle the dispute “that has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the border between British Guiana and Venezuela is null and void” (Art. I of the Geneva Agreement). It follows that the Geneva Agreement fully validates – indeed, as premise and as its very *raison d’être* – the confirmation and Venezuela’s right to contend that the Award of 1899 is null and void and proceed to demand the consequences that its text specifically mandated as to the practical and mutually acceptable settlement on

⁷⁴² GM, paras. 4.59 and 9.17.

⁷⁴³ GM, para. 9.17.

the territorial dispute. Therefore, Guyana cannot succeed in depriving Venezuela of its right to maintain its contention.

**(i) THE PRECLUSIVE EFFECT DERIVING FROM GUYANA AND ITS
PREDECESSOR'S PROLONGED CONSENT TO DEAL WITH VENEZUELA'S
CONTENTION THAT THE 1899 AWARD IS NULL AND VOID**

7.49. Before this case was unilaterally filed, neither the United Kingdom nor Guyana had ever suggested that Venezuela's alleged acquiescence or prolonged acceptance of the 1899 Award boundary line could deprive Venezuela of its right to substantiate the material justice enshrined in the mandate to reach a mutually acceptable solution or that this alleged prolonged acceptance had the legal effect of "curing" the Award's nullity. Even less has it been suggested that this effect "emerged" in disregard of the Geneva Agreement and the various decades of it being applied. The Geneva Agreement commits Guyana to the contrary: in concluding it, Guyana plainly recognised Venezuela's rejection of the 1899 Arbitral Award and of the boundary line deriving from it and gave effect to this rejection by committing itself to search for a practicable solution acceptable by both Parties.

7.50. This is confirmed by the fact that, in the context of the Geneva Agreement, acquiescence was never discussed, not when the Parties negotiated the Geneva Agreement or when they enforced it. Venezuela's alleged acquiescence was never a matter at issue, not in the Port of Spain Protocol, nor in the bilateral negotiations or in the Good Offices process undertaken by the United Nations Secretary-General. It was first raised by Guyana before the International Court of Justice, after decades of silence, in a desperate and legally baseless attempt to advance its untenable position.

7.51. Indeed, neither the United Kingdom nor Guyana have put forward or alleged the supposed acquiescence as a defence or opposition to the claim filed before the United Nations in 1962 by Venezuela. No document, without exception, shows any allegations whatsoever by the United Kingdom or British Guiana of Venezuela's acquiescence. On the contrary, what is clear is that the UK and Guyana would never have signed the Geneva

Agreement if they had not ascertained the validity of the Venezuelan claim, let alone committed themselves to a mutually acceptable settlement.

7.52. Furthermore, in December 1965 there was a meeting of ministers in London between Venezuela, the United Kingdom and British Guiana, now Guyana, and the minutes of the meeting shows no evidence of acceptance by Venezuela of the subject matter of the Arbitral Award or the resulting boundary.⁷⁴⁴ To the contrary, in a joint communiqué dated December 14th, 1965, the United Kingdom committed, *inter alia*, to seek practical, satisfactory and acceptable solutions to the Venezuelan claim.

7.53. Moreover, during the 53 years following the beginning of the talks on the issue of the invalidity of the 1899 Arbitral Award and the boundary question, and the 49 years following the entry into force of the Geneva Agreement, Guyana and the United Kingdom have never tried to oppose to Venezuela its alleged acquiescence of the 1899 Award or of the resulting boundary. There is not a single word referring to that subject matter prior to the case submitted by Guyana, and more precisely prior to its Memorial of 2022. Therefore, Guyana may not raise these allegations by reason of its long-standing acceptance.

7.54. Venezuela contends that this prolonged silence regarding any alleged Venezuela's acquiescence, together with the clear commitment enshrined in the Geneva Agreement to pursue a practicable solution acceptable to both Parties, has the legal effect of confirming Guyana's consent to find such a solution, and of precluding Guyana from now rejecting the mere idea of finding such a solution by claiming that the Court must refuse to give legal effect to the nullity of the 1899 Award, because this nullity would have been "cured" by the alleged Venezuela's acceptance.

7.55. For the same reason, the rule of estoppel clearly precludes Guyana from trying to oppose to Venezuela an alleged prolonged acceptance. According to the Court:

“the ‘essential elements required by estoppel’ are ‘a statement or representation made by one party to another and reliance upon it by

⁷⁴⁴ See Minutes of London Preliminaries to the Geneva Agreement, 9 December 1965 (**Annex 85**).

that other party to his detriment or to the advantage of the party making it””.⁷⁴⁵

7.56. When examining whether the conditions laid down in the Court’s jurisprudence for an estoppel to exist were present with regard to the boundary dispute between Cameroon and Nigeria, the Court stated:

“An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice””.⁷⁴⁶

7.57. In the present context, the United Kingdom before Guyana’s independence, and then Guyana since its independence, have consistently made it fully clear that Venezuela’s alleged prolonged compliance with the 1899 Award and the resulting boundary would not be opposed to Venezuela. It is on this basis that Venezuela has supported and recognised Guyana’s independence. It is on this basis that Venezuela signed the Geneva Agreement. And it is on this basis that Venezuela has for decades engaged in a long process aiming at finding a practicable solution to the controversy acceptable to both Parties.

(ii) THERE HAS BEEN NO SUCH PROLONGED ACCEPTANCE

7.58. Again, Venezuela could not have challenged the Award, even though it was profoundly unjust, fraudulent and without legal basis. Some features of this Award were, of course, alarming since, on the face of it, the 1899 Award appeared to be an arbitrary and purely political ratification of unfounded British claims. However, the evidence of fraud was not available to Venezuela. Moreover, amidst foreign structural coercion, as evidenced by the naval blockade of the Republic by several powers in 1902 and the ill-fated gunboat

⁷⁴⁵ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63.

⁷⁴⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, Preliminary Objections, 11 June 1998, para. 57.

policy, Venezuela was not in a position to challenge the 1899 Arbitral Award. Therefore, prolonged acceptance cannot be claimed or argued.

7.59. This conclusion about the absence of any relevant acquiescence applies both with respect to the 1905 demarcation and to the boundaries negotiated with Brazil, as will be explained in Sub-Section (a), and to the conduct attributable to Venezuela from 1899 to 1962, as further developed in Sub-Section (b).

a) Guyana's failed theories about a demarcation agreement in 1905 and about the land boundaries with Brazil

7.60. Guyana asserts that, shortly after the release of the 1899 arbitral Award, the Parties entered into a process of demarcation that resulted in the 1905 Boundary Agreement, and that this 1905 Agreement stands independently from the 1899 Award. Therefore, even if the 1899 Award were indeed null and void, the boundary established under the 1905 Agreement would stand,⁷⁴⁷ as if the 1905 Agreement were a treaty establishing such a boundary.

7.61. Nevertheless, as the International Court of Justice rightly observed in *Libya v Chad*, the:

“[u]se of the term ‘demarcation’ creates a presumption that the parties considered the definition of the frontiers as already effected”.⁷⁴⁸

7.62. In the same vein, the Court recalled in *Cameroon v. Nigeria* that it:

“had occasion to state in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (I.C.J. Reports 1994, p. 28, para. 56), the delimitation of a boundary consists in its ‘definition’, whereas the demarcation of a boundary, which

⁷⁴⁷ GM, para. 9.5.

⁷⁴⁸ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, para. 56.

presupposes its prior delimitation, consists of operations marking it out on the ground.”⁷⁴⁹

7.63. In this case, the demarcation process was based on the fact that the demarcation had already been affected by the 1899 Award. There was therefore no need to “agree” on anything else than on what this Award was supposed to mean on the ground. And as is clearly stated in all relevant documents, and as repeatedly acknowledged by Guyana,⁷⁵⁰ the 1905 Demarcation Agreement is merely a technical exercise of construction of the Arbitral Award of 1899 for materialising in as much as possible its findings on the ground.

7.64. Thus, Guyana’s contention that even if the 1899 Award is null and void, the 1905 Demarcation Agreement would still provide the legal definition of the boundary is clearly erroneous. Again, since the demarcation of a boundary “presupposes its prior delimitation”, it follows that no demarcation can survive the nullity of the prior delimitation. Therefore, from the moment the 1899 Award was deemed null and void, the demarcation agreement was of no avail.

7.65. The same holds true concerning Guyana’s contention regarding “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”.⁷⁵¹ With this contention, Guyana seems to suggest that the relations between the Parties and Brazil, when it comes to their boundaries, were respectful of the 1899 Award.

7.66. But, first, there is reference neither to the 1899 Award nor to the 1905 demarcation in the Agreement between Venezuela and Brazil, contrary to what Guyana suggests.⁷⁵²

7.67. Second, the Brazil’s boundary issue clearly illustrates that the arbitrators who signed the 1899 Award were only prepared to satisfy Great Britain’s most baseless claims,

⁷⁴⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, para. 84.

⁷⁵⁰ GM, paras. 4.10, 4.14, 4.18, 4.20, 4.22.

⁷⁵¹ *Ibid.*, pp. 103-110.

⁷⁵² *Ibid.*, para. 4.35.

and, as a consequence, that their Award was alien to any sound legal consideration. Indeed, the Award provides that the southernmost part of the boundary runs 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”.⁷⁵³

7.68. However, Venezuela had simply no territorial claim over most of the territory west of the line running south of Mount Roraima. Indeed, Venezuela had signed a boundary Treaty with Brazil in 1859 adopting a line based upon the water divide of the Amazon and Orinoco rivers, therefore leaving to Brazil most of the territory west of the line drawn south of Mount Roraima by the 1899 Award.

7.69. Thus, in relation to Brazil, the 1899 Award was simply erroneous and lacked any sort of international legal grounds. This was confirmed by the “Award of his Majesty the King of Italy with regard to the boundary between the colony of British Guiana and the United States of Brazil” of 6 June 1904.⁷⁵⁴ This Award regarding Great Britain and Brazil stated:

“the arbitral Judgment of the 3rd October, 1899, delivered by the Anglo-American Tribunal, which, when deciding the boundary between Great Britain and Venezuela, adjudged to the former the territory which constitutes the subject of the present dispute, cannot be cited against Brazil, which was unaffected by that Judgment”.⁷⁵⁵

7.70. It is worth noting that this 1904 Award highlighted that the 1899 Award regarding the boundary between Great Britain and Venezuela had been rendered by an “Anglo-American Tribunal” —no doubt an anomaly.

⁷⁵³ Arbitral Award of 3 October 1899 (Guyana v. Venezuela).

⁷⁵⁴ The Guiana Boundary Case (Brazil, Great Britain), 6 June 1904, RIAA, Vol. XI, pp. 11-23.

⁷⁵⁵ *Ibid.*

7.71. Furthermore, the 1904 Award found, contrary to the 1899 Award, that there was nothing of such a nature as to grant under international law legal title to Great Britain in the territory south-west of Mount Roraima adjudged to it by the 1899 Award. To wit:

“That it does not appear from the documents produced to Us, which have been weighed and duly considered, that there are historical and legal claims on which to found thoroughly determined and well-defined rights of sovereignty in favour of either of the contending Powers over the whole territory in dispute, but only over certain portions of the same”.⁷⁵⁶

7.72. Thus, while Guyana contends that the border affairs with Brazil somehow reinforce its claim, they rather confirm the nullity of the 1899 Award.

b) There is no Venezuelan acquiescence

7.73. Guyana cannot seriously argue that Venezuela’s stance prior to 1949 precludes it from claiming that the Award is null and void. Indeed, Guyana contends that a State’s acceptance of an Arbitral Award only “cure[s] any alleged defect that should have been apparent to any outside observer already in 1899”.⁷⁵⁷ And, of course, what Mallet-Prevost, and the evidence found in London by Venezuelan experts during the four years of intense negotiation with the United Kingdom revealed decades later, was not “apparent to any outside observer”.

7.74. Thus, Guyana’s comparison of Venezuela’s claim with Nicaragua’s claim in the case of the *Arbitral Award by the King of Spain* is of no avail. Nicaragua challenged the award in this case shortly after its pronouncement and, in contrast with this case, did not articulate its claim upon finding new facts. And of course, such finding can justify a new claim, including a claim that an award that had been considered valid by then is null and void. Guyana’s theory of acceptance based on Venezuela’s stance before 1949 is therefore of no avail in this case.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ GM, para. 9.7.

7.75. Likewise, Guyana's persisting contention that "Venezuela's conduct for more than 60 years" should be regarded as "prolonged acceptance" makes no sense.⁷⁵⁸ As a matter of fact, until the 1950's, Venezuela was not cognisant of the circumstances under which the 1899 Award was granted. Notwithstanding, Guyana may not oppose Venezuela's right to contend that the 1899 Award is defective.

7.76. As for the period following 1949, as shown above, Guyana wrongly contends that Venezuela somehow kept silent, or even conducted itself until 1962 "as if the Award was perfectly valid".⁷⁵⁹ Even if Venezuela had waited until the 1960's for formulating its claim before the United Nations, it would not be tantamount to an acquiescence of the Award despite its nullity.

7.77. Obviously, even if not expressly speaking of nullity of the 1899 Award, Venezuela's claims from 1951 onward can certainly not "presuppose clear and consistent acceptance" of the 1899 Award, and they could certainly not be construed, in good faith, as acceptance of the Award, no matter the nullity thereof.

7.78. Moreover, Venezuela's position over time has been consistent on this subject matter as it has continuously sought to highlight the injustices of the 1899 Award, namely as: the composition of the tribunal, which included no Venezuelan arbitrators;⁷⁶⁰ the fact that the Award granted almost all of the British claims;⁷⁶¹ the disregard of the arbitration rules contained in the 1897 Treaty of Washington;⁷⁶² the inexistence of any rationale behind the arbitrators' decision⁷⁶³—a rule fundamental to any award or judgment, to the extent of being included in the ultimate peaceful settlement instrument at that time, i.e., the Hague Convention of 1899, which states that an award must be "accompanied by a statement of reasons,"⁷⁶⁴ and a requirement of the essence for the Court's procedure in the

⁷⁵⁸ *Ibid.*, para. 9.17.

⁷⁵⁹ GM, para. 9.7.

⁷⁶⁰ Memorial of Guyana on jurisdiction and admissibility, Annex 19, para. 24, p. 5.

⁷⁶¹ *Ibid.*, para. 25, p. 5.

⁷⁶² *Ibid.*, paras. 26-33, pp 5-7 and paras. 49-50, p. 11.

⁷⁶³ *Ibid.*, para. 50, p. 11.

⁷⁶⁴ 1899 Convention for the Pacific Settlement of International Disputes, Art. 52.

sense that any judgment “shall state the reasons on which it is based”;⁷⁶⁵ and of course, the deals inside the Tribunal, as disclosed by Mr. Severo Mallet-Prevost in the *American Journal of International Law* in July 1949.⁷⁶⁶ Nonetheless, Venezuela has always strived for a “friendly solution to the problem”.⁷⁶⁷

7.79. Last but not least, by signing the Geneva Agreement, the Parties created a new legal situation governed by the Agreement, which recognises the existence of a territorial dispute, as confirmed by the ICJ’s decision of 18 December 2020, which is required to be amicably resolved in a manner acceptable to both Parties. In view of the binding obligations of the Parties to find a mutually satisfactory solution to a territorial dispute, no question of prolonged acquiescence or acceptance may be opposed to Venezuela.

⁷⁶⁵ Statute of the Court, Art. 56, para. 1.

⁷⁶⁶ Memorial of Guyana on jurisdiction and admissibility, Annex 19, paras. 34-49, pp. 7-11.

⁷⁶⁷ Memorandum of Venezuela, p. 8; Question of Boundaries between Venezuela and the Territory of British Guiana: Statement of His Excellency, Dr. Marcos Falcon Briceno, Minister for External Relations of Venezuela, at the 348th Meeting of the Special Political Committee on 12 November 1962, p. 25 (**Annex 143**).

CONCLUSIONS

1. As shown, there is no basis for the Court to hear the claim unilaterally instigated by Guyana. Venezuela is one of the 119 States that do not recognize the obligatory jurisdiction of the Court. True to its historical position. Nor has Venezuela given express consent to submit the territorial controversy over Guayana Esequiba to the jurisdiction of the Court. Article IV of the Geneva Agreement does not in any way constitute a commitment clause.
2. In proceeding with this process, the Court has erroneously attributed jurisdiction to itself in violation of the Geneva Agreement and international law. The falsification of an alleged consent of Venezuela artificially extracted by the Court in its 2020 judgment, attempts to strip Venezuela of its sovereignty and illegally violates its jurisdictional immunity, its right to due process and its rights as a Nation. The submission of this document implies neither recognition of the jurisdiction and competence of the Court to hear the territorial dispute over Guayana Esequiba, nor of the decision it may adopt on this matter.
3. Similarly, there is no doubt that the territorial dispute over Guayana Esequiba can and must be resolved only under the Geneva Agreement, that is, through a practical, acceptable, and satisfactory settlement for the parties. This Agreement is in force and is the normative framework that must be complied with in good faith by the parties, as a mechanism for peaceful, political and diplomatic negotiation. The discussion on the validity or invalidity of the Arbitral Award was buried with the signing of the Geneva Agreement and the subsequent practice of the parties in execution of that international treaty.
4. In this sense, it is clear that Guyana's unilateral request is a desperate action that responds to the interests of the energy transnationals to seize the great wealth of the disputed area, with the support of the government of the United States of America. It is also the latest proof of a repeated breach of the commitments made upon the signing of the Geneva Agreement. They seek to use the Court as a tool to obtain the title of sovereignty that Guyana has never had and will never have.
5. In view of the above, the Court has no role to play in the resolution of the territorial dispute. It is bound by law to respect the in-force status and validity of the Geneva Agreement,

under which the parties must reach a practical and mutually acceptable settlement. Its involvement in the substance of the matter could disturb peace and stability in the region, thus affecting the most laudable objectives of the United Nations system and of the International Court of Justice itself.

6. Also, with this Counter-Memorial, it has been demonstrated that Guyana has lied to the Court and to the world. Venezuela has incontrovertible historical title to the territory of Guayana Esequiba. Moreover, Guyana is simply heir to a historical colonial dispossession carried out by the United Kingdom, only to satisfy its expansionist vocation and seize the immense wealth of Venezuela.
7. The content of this document shows that the United Kingdom artificially constructed a territorial controversy with Venezuela and then stripped it of 15% of its territory through a fraudulent arbitration process. This objective could only be achieved with the complicity of the United States of America, within the framework of an agreement on the distribution of zones of influence between colonialist powers. 125 years later, Guyana is trying to replicate history by simulating a legal dispute through its unilateral request to turn a fraudulent, irrational, criminal and outdated award into the title it has never had and has never been able to justify or sustain.
8. The foundational basis of the arbitral process, namely the Washington Treaty of 1897, is clearly fraudulent. This treaty was built behind Venezuela's back and was imposed on it through the veiled threat of the use of force. The result was an unequal treaty, profoundly unjust, and the original source of the invalidity of the criminal award of 1899.
9. Against this background, there is no doubt that the arbitral award of 1899 is null and void. Its legal source, the composition of the tribunal, its lack of motivation and the excess of power that has been clearly demonstrated, make this award one of the most scandalous outrages against a Latin American Republic in two centuries and the worst expression of territorial plunder committed by the British Empire in its history.
10. Finally, Guyana's claims to prevent Venezuela from upholding the nullity of the 1899 award are unfounded. The structural coercion exercised by the United Kingdom initially

prevented Venezuela from speaking up against an arbitration fraud in the midst of opprobrious aggressions against the country, victim of gunboat diplomacy, the flag of colonialist barbarism characterized by the sowing of unequal treaties in its expansionist impulse throughout the planet. In addition, both the negotiation process and the signing and subsequent implementation of the Geneva Agreement render Guyana's desperate thesis in favour of territorial dispossession inadmissible.

11. The 1899 Award was buried and cured by the virtuous Geneva Agreement, a legal instrument used to finally heal the wounds caused by the imperial territorial dispossession committed by the United Kingdom. Guyana must observe and comply with this legal instrument. There is no other way or shortcut.

SUBMISSIONS

For the above-mentioned reasons, notwithstanding its historical stance of not recognition of the jurisdiction of the International Court of Justice and reserving the right to complete, expand or amend the following submissions,

The Bolivarian Republic of Venezuela hereby requests the Court to:

(1) Abstain from intervening in the territorial controversy between Venezuela and Guyana on Guayana Esequiba and from interfering with the obligations arising from the 1966 Geneva Agreement regarding the settlement of said dispute in an amicable, satisfactory and acceptable manner to the Parties, by means of peaceful, political and diplomatic negotiations.

(2) In consequence, refuse to hear and dismiss the Co-operative Republic of Guyana's claims.

Samuel Reinaldo Moncada Acosta
Agent of the Bolivarian Republic of Venezuela

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VOLUME IV MAPS

APPENDIX: THE TERRITORY OF GUAYANA ESEQUIBA AND ITS CURRENT STATE

I. INTRODUCTION

1. The territory subject to the controversy is the Venezuelan State of Guayana Esequiba, which measures approximately 159,500 square kilometres and accounts for almost 15% of the surface area of the Bolivarian Republic of Venezuela. It is situated west of the Essequibo River, delimited to the south-west by the border with Brazil, to the north by the Atlantic Ocean and to the north-west by the southern limit of the Venezuelan states of Bolívar and Delta Amacuro.

2. The territory of Guayana Esequiba is currently administered by the Co-operative Republic of Guyana (Guyana), which exercises control over it. This current *de facto administration and control* by Guyana in no way amounts to a lawful exercise of sovereignty and is without prejudice to Venezuela's legitimate claim to the territory. Pursuant to Article V of the Geneva Agreement, none of the acts taken by Guyana as an administrator constitutes a basis for asserting or supporting Guyana's claim to territorial sovereignty or create sovereign rights over this territory; nor can they constitute a basis for denying Venezuela's historic territorial claim. Venezuela expressly referred to this provision on the day of Guyana's independence, when it "recognize[d] as territory of the new State [of Guyana] that which is located east of the right bank of the Essequibo River, and reiterate[d] before the new country, and before the international community, that it expressly reserve[d] its rights of territorial sovereignty over the entire zone to the left margin of the aforementioned river", namely "the territory of the Guayana Esequiba".¹ In the following months, Venezuela expressly reserved its sovereign rights to the territory of Guayana Esequiba before the Security Council² and the General Assembly of the United Nations.³ Venezuela also opposed the unilateral granting of logging and mining

¹ Memorandum of Venezuela, Annex, pp. 38-39.

² *Ibid.*, p. 39.

³ *Ibid.*

concessions by Guyana on the territory of Guayana Esequiba⁴ from its inception, making clear that the Geneva Agreement preserved its rights to the territory of Guayana Esequiba.⁵ Its position has never changed since.

3. It is crucial to recognise that Guayana Esequiba belongs to Venezuela, which, as its true sovereign, has made every effort to secure the preservation of its ecosystems and every element that makes up the environment, as well as the well-being of its people. By contrast, after nearly six decades of administration by Guyana there is no doubt left as to Guyana's willingness to exploit and exhaust the territory's natural elements at any cost, with absolute disregard for the destructive consequences of its actions on the environment, in blatant violation of the rights of the local indigenous populations and of its international obligations.

II. THE TERRITORY OF GUAYANA ESEQUIBA

4. The territory of Guayana Esequiba forms part of a much wider natural region known as the Guiana Shield or Guiana Highlands. Shields are very stable sections of the Earth, with a geological composition which has changed little over time and with little seismic activity. The Guiana Shield is irregularly shaped and covers an area of 1,100,000 square kilometres. As can be seen on Figures 2.1.a. and 2.1.b., it encompasses the southeast of Venezuela, including Guayana Esequiba, together with the territories of Guyana, Surinam and French Guiana, as well as the north of Brazil and a small portion of Colombia. The Venezuelan States of Amazonas and Bolívar as well as the southern part of Delta Amacuro, adjacent to Guayana Esequiba, also form part of the Guiana Shield. The shield

⁴ See e.g. P. Torrealba, *A un siglo del despojo. Esequibo, la historia de una reclamación*, Caracas, Editorial Arte, 2004.

⁵ See e.g. the press release of the Ministry of Foreign Affairs in which it is stated that Venezuela does not recognise purported concessions in Guayana Esequiba, 15 May 1968 (**Annex 99**). See also R. Sureda Delgado, *La Guayana Esequiba: dos etapas en la aplicación del Acuerdo de Ginebra*, UCV y Academia Nacional de Historia, Caracas, 1990, pp. 67-68.

is an ecological and geographical continuum, the major part of which is covered by jungle or primary tropical rainforest.⁶

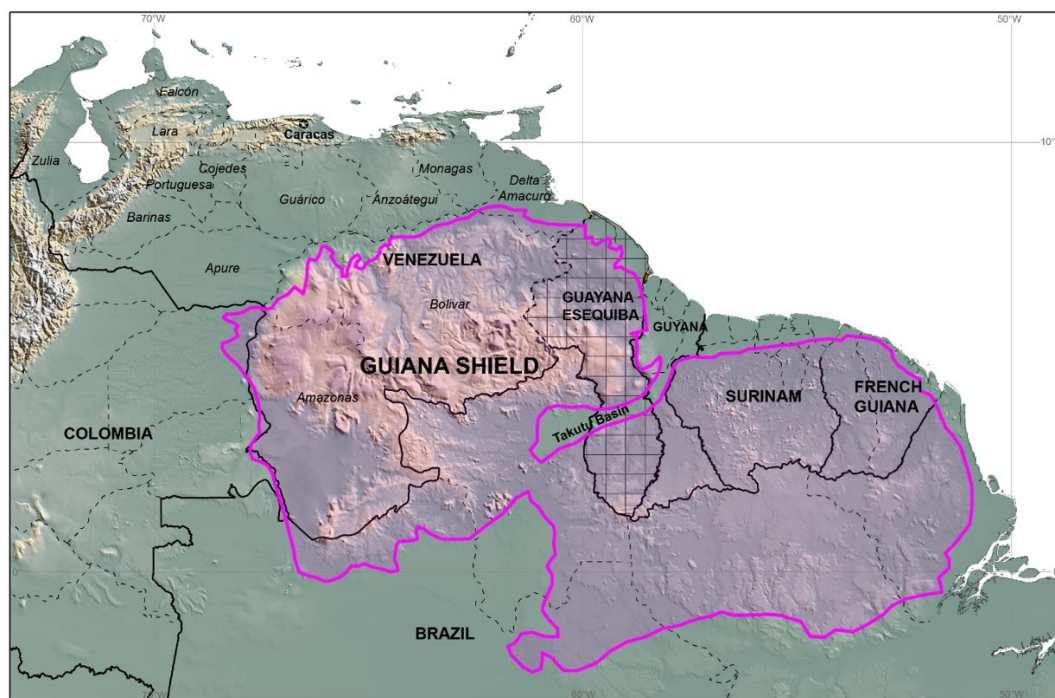


Figure 2.1a. The Guiana Shield
(topography from GTOPO30)

⁶ See D. de Barandiarán, “La Guayana Esequiba, su tierra y su gente (breve síntesis)”, in *Boletín de la Academia Nacional de la Historia*, Vol. LXXXIV, January, February, March 2001, N°333, pp. 156-158; S. Molina Duarte, “Venezuela y la cuenca del gran Caribe”, 2008 (available at https://bibliofep.fundacionempresaspolarg.org/media/1076/gv_t9_c78_p298_341_lres_single_previ_ew.pdf). On the states Bolívar, Amazonas and Delta Amacuro, see also R. Pérez-Hernández, D. Lew, “Las clasificaciones e hipótesis biogeográficas para la Guayana venezolana”, *Interciencia*, Vol. 26, N° 9, 2001 (available at <https://www.redalyc.org/pdf/339/33906002.pdf>).

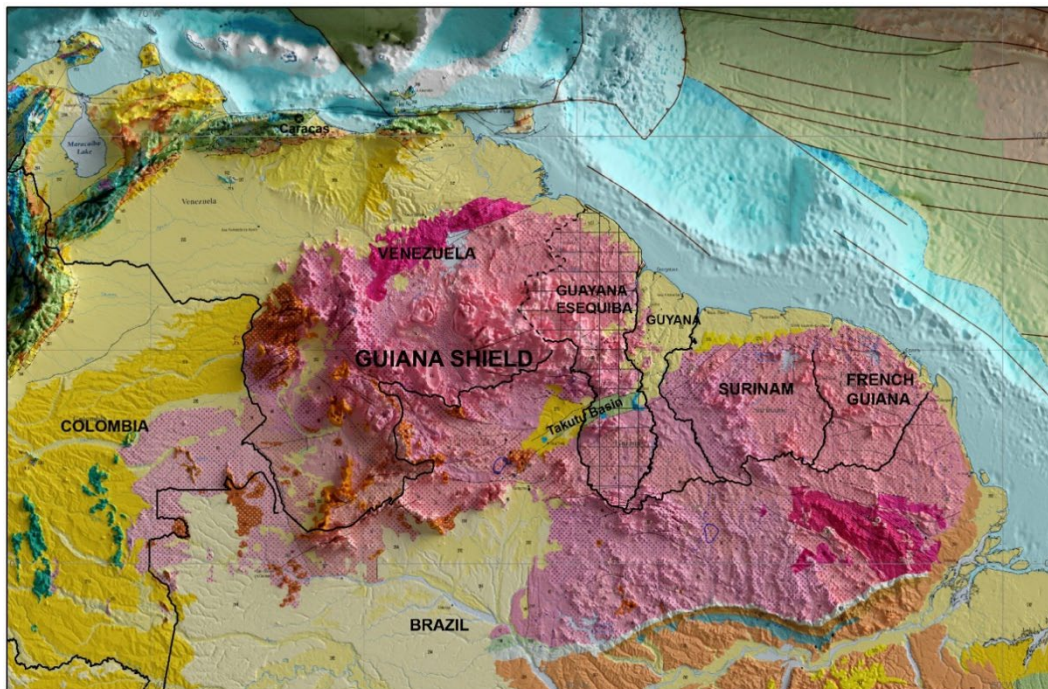


Figure 2.1b. Geological relief Map of northern South America showing the Guiana Shield in pink⁷

5. Guayana Esequiba rests on the remnants of the bare shield of the ancient supercontinent of “Gondwana”, one of the oldest and most primitive continental blocks on Earth, which dates back to when South America, Africa, Australia, Antarctica, the Arabian Peninsula, India and Madagascar were united. It is formed of crystalline granites and gneisses, forming an area of highlands, slightly interrupted at the latitude of 4°N, in a rift zone known as the Takutu basin. The rocks of the Guiana Shield host the diamonds, gold and other semi-precious metals that make up most of the mineral resources of Guayana Esequiba.
6. To the west, between the 4°N and 6°N, bordering the state of Bolívar, are the mountains of Pakaraima, equivalent to the Roraima Formation in the Venezuelan State of

⁷ Gómez, J., Schobbenhaus, C. & Montes, N.E., compilers. 2022. Geological Relief Map of South America 2022. Scale 1:5 000 000. Commission for the Geological Map of the World (CGMW), Colombian Geological Survey, and Geological Survey of Brazil, Paris (available at <https://doi.org/10.14682/2022GRMSA>).

Bolívar (see Figure 2.2). Mount Roraima, which rises to 2,850 metres above sea level, goes from west to east in descending steps until arriving in the vicinity of the Essequibo, at 100 metres above sea level. To the south, at the border with Brazil, are the mountains of Kamaoa, which reach a maximum of 558 metres above sea level. To the north, the extension of the Imataca mountain range continues until Guayana Esequiba, forming the Kauramembu Range constituted of small hills of 200 to 300 metres above sea level. In the north of the territory is a zone of younger sediments derived from marine and deltaic processes.

7. The territory of Guayana Esequiba is divided into five natural regions:⁸

- The region of Tepuyes and Gran Sabana, which constitutes 20.4% of the territory and forms part of one continuous natural region, the rest of which is situated in the south-western part of Venezuela's state of Bolívar (and occupies 30,000 km² thereof). This region is mountainous with tabular reliefs of different levels of erosion, with heights ranging from 600 to 2,810 metres above sea-level, and valleys created by numerous rivers.
- The peneplain of the south of Rupununi (Penillanura del Sur de Rupununi), which constitutes approximately 25% of the territory and is situated between the Takutu Basin in the north and the Brazilian border in the south. This area is characterised by lower reliefs – ranging from 100 to 1,500 metres above sea level – and is home to the Kanuku mountains, which are carved and split in

⁸ F. Morales, "Geografía física del territorio en reclamación: Guayana Esequiba", *Fondo Editorial Humanidades*, 1999, pp. 57 ff. See also O.J. Marquez, *La Venezolanidad del Esequibo. Reclamación, desarrollo unilateral, nacionalidad de los Esequibanos*, Caracas, 2002, pp. 61-62, which refers to four natural regions: the coastal zone (zona costera), the intermediate zone (zona intermedia), the Cordillera Pacaraima, and the southern zone made of the Rupununi Savannahs, crossed over by the Kanuku mountains. See also D. de Barandiarán, "La Guayana Esequiba, su tierra y su gente (breve síntesis)", in *Boletín de la Academia Nacional de la Historia*, Vol. LXXXIV, Januray, February, March 2001, N° 333, pp. 145-154. For a full geographical sketch of the disputed territory, see *Venezuela-British Guiana Boundary Arbitration, The Case of the United States of Venezuela before the Tribunal of Arbitration To Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2, 1897*, Vol. I, New York, 1898, pp. 13-34 (available at <https://archive.org/details/venezuelabritis01venegoog/page/n6/mode/2up>).

two by the rivers Rupununi and Ireng, tributaries of the river Branco, which in turn is a tributary to the river Negro sub-basin.

- The peneplain of the north (Penillanura del Norte), which corresponds to around 40% of the territory and is at low altitude, almost entirely below 150 metres above sea-level. It is delimited by the coastal plains in the north, the Takutu Basin Rift in the south and the region of Tepuyes and Gran Sabana in the west. Like the region of Tepuyes and Gran Sabana, the Penillanura del Norte forms part of a greater natural region, a large part of which is situated in uncontested Venezuelan territory, namely in the states Bolivar and Delta Amacuro.
- The Takutu Depression occupies 5.7 % of the territory subject to the controversy and separates the peneplains of the north and of the south of Rupununi. The river Ireng flows westwards along its northern edge in part, towards the River Negro Basin. It is an area of flat to gently undulating relief forming a slightly depressed area between the Kanuku and Pakaraima Mountains. In the rainy season due to its flat-lying nature it is prone to flooding. Rivers in the west flow westwards towards the Amazon Basin, those in the east towards the Essequibo.
- The Coastal Plain corresponds to around 8.9% of the territory in controversy. It is a low-lying area extending 30-70 km inland from the coast and composed of sands, clays, and continental and marine debris with a warm and rainy climate. It is on these fertile soils that the vast majority of the population of Guayana Esequiba is living.

8. The low elevation of the territory means that 87.6% of the land is characterised by a humid tropical climate. The higher elevations and northwest-southeast orientation of the Tepuyes and Gran Sabana region favour the interception of northeasterly winds approximately between November and March, which leads to increased rainfall in a large

part of this region and in the peneplain of the north. During the same period, the Takutu Depression is prone to droughts.⁹

⁹ F. Morales, “Geografía física del territorio en reclamación: Guayana Esequiba”, *Fondo Editorial Humanidades*, 1999.

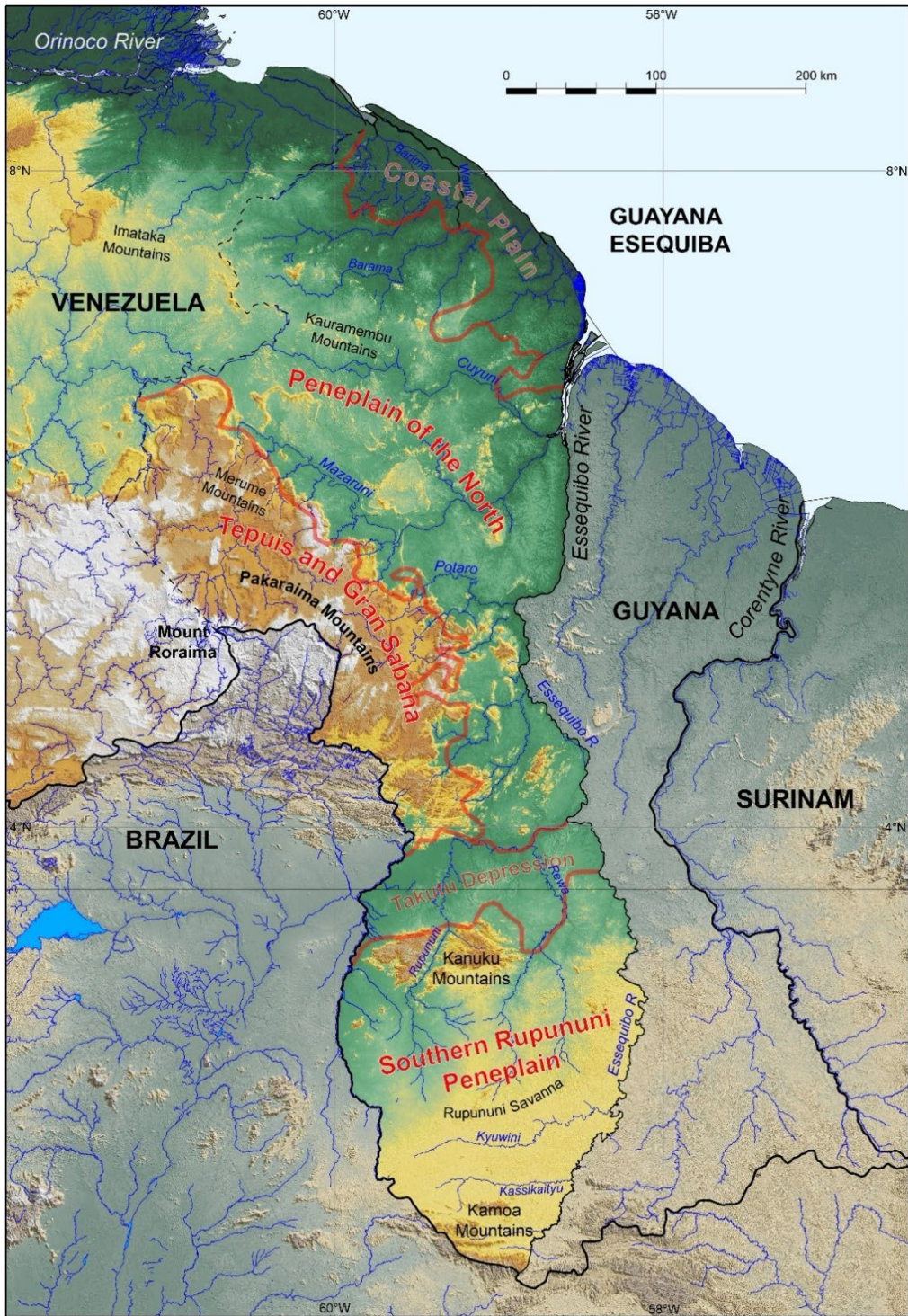


Figure 2.2. Major topographic features of Guayana Esequiba (topography from SRTM30 data, available from NASA/USGS)

9. 96.3% of the territory of Guayana Esequiba is made of natural vegetation (Figure 2.3), with 14% of the territory being savannahs and 72% covered by primary rainforest, montane forest, seasonal forest, dry evergreen forest, marsh forest and swamp forest,¹⁰ crossed by a number of rivers up to 1000 kilometres long, presenting characteristics specific to the region including a vast quantity of rapids, waterfalls, river islands and natural river channels.¹¹

10. The exact extent of the natural wealth of Guayana Esequiba is difficult to assess.¹² It is one of the regions of highest biodiversity in the world,¹³ and it is estimated to host between 7,000 and 10,000 plant species, including 1,700 types of trees, but also nearly 1,500 species of vertebrates, 730 species of birds and more than 400,000 species of

¹⁰ F. Morales, “Geografía física del territorio en reclamación: Guayana Esequiba”, *Fondo Editorial Humanidades*, 1999, pp. 164 ff. See also O.J. Marquez, “La Venezolanidad del Esequibo. Reclamación, desarrollo unilateral, nacionalidad de los Esequibanos”, Caracas, 2002, pp. 62-63, which describes the diverse forest cover of Guayana Esequiba.

¹¹ G. Melun, M. Le Bihan, “Histoire et impacts environnementaux de l’orpillage en Guyane. Clefs de compréhension des tensions actuelles”, *Office français de la biodiversité*, 2020, p. 6 (available at https://oai-gem.ofb.fr/exl-php/document-affiche/ofb_recherche_oai/OUVRE_DOC/60505?vue=ofb_recherche_oai&action=OUVRE_DOC&cid=60505&fic=PUBLI%2FR21%2F45.pdf). On the characteristics of the rivers and watercourses of Guayana Esequiba, see also: D. de Barandiarán, “La Guayana Esequiba, su tierra y su gente (breve síntesis)”, in *Boletín de la Academia Nacional de la Historia*, Vol. LXXXIV, January, February, March 2001, N°333, pp. 158-161; Ing. For. Inocencio Soto, “Los ríos de la Guayana Esequiba venezolana y su potencial”, 26 February 2023 (available at <https://fr.scribd.com/document/677341597/Los-Rios-de-La-Guayana-Esequiba-Venezolana-y-Su-Potencial>).

¹² On the topic and more generally on the geography and physical characteristics of Guayana Esequiba, see e.g., I. Sequera de Segnini et al., “Venezuela y su espacio fronterizo, El problema del Esequibo”, *La Universidad*, Facultad de Humanidades y Educación, Instituto de Geografía y Desarrollo Regional, Caracas, 1985.

¹³ On the importance of the Guiana Shield as an “ecoregion”, see e.g. P. Haden, “Forestry Issues in the Guiana Shield Region: a Perspective on Guyana and Surinam”, in *European Union Tropical Forestry Paper 3*, Overseas Development Institute, London, European Commission, Brussels, 1999, p. 10 (available at <https://odi.org/en/publications/forestry-issues-in-the-guiana-shield-region-a-perspective-on-guyana-and-suriname/>), stating that “the size and pristine nature of [the Guiana Shield’s] tropical forest is unique: it is an area of opportunity for conservation and sustainable development”.

insects.¹⁴ Specialists consider that one hectare of forest in the Guiana Highlands could host as many different tree species as the whole of Europe.

¹⁴ G. Melun, M. Le Bihan, “Histoire et impacts environnementaux de l’orpaillage en Guyane. Clefs de compréhension des tensions actuelles”, *Office français de la biodiversité*, 2020, p. 6 (available at https://oai-gem.ofb.fr/exl-php/document-affiche/ofb_recherche_oai/OUVRE_DOC/60505?fic=PUBLI/R21/45.pdf).

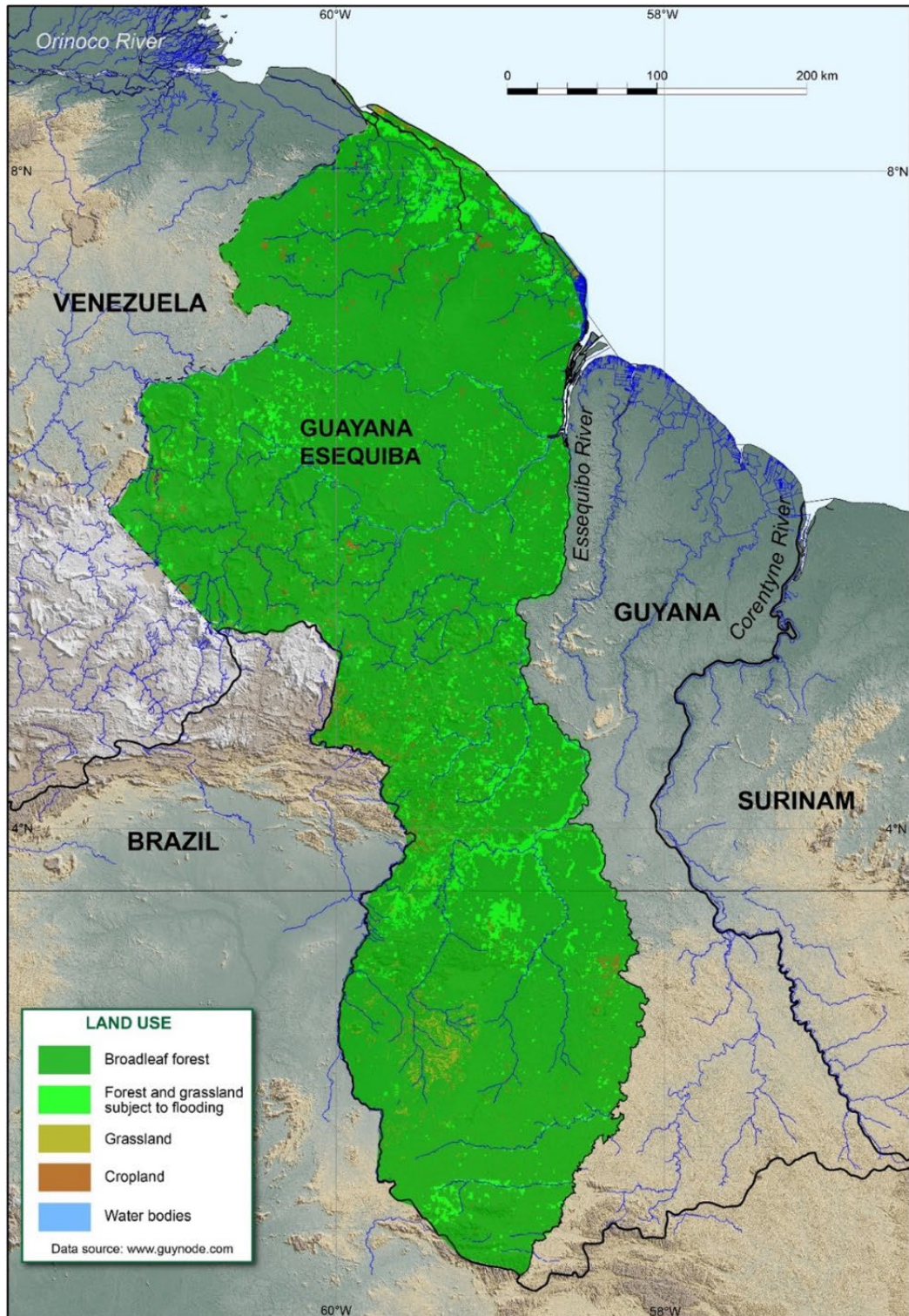


Figure 2.3. Land use of Guayana Esequiba

11. The Prologue to Bellin's "Geographic Description of Guyana" describes the territory as follows:

"Gold, silver, copper, quicksilver, iron, antimony, sulphur, nitro, lead, magnet, and marbles of all kinds and colours abound in this country: there are diamonds, rubies, emeralds, amethysts, garnets, alabaster, rock crystal, and all other precious stones and minerals, besides the fishing of precious pearls, which is done in various parts. In the countryside all kinds of grains, fruits, legumes, herbs, plants and flowers of Europe are produced; such as cocoa, cinnamon, pepper, sarsaparilla, vanilla, grana, tobacco, a thousand species of balsams, palo from Brazil, from Campeche..., very fragrant incense, gums, barks, resins and medicinal herbs. The number of cattle is incredible, and the race or caste of horses and mules of Europe deserves singular estimation. In its forests, tigers, leopards and bears abound; in the rivers there are lizards or caimans, and a thousand species of fish; and in the fields there are many vipers and snakes, of so many sizes, qualities, shapes and colours, that it is unspeakable, as well as other poisonous insects and animals."¹⁵

12. In addition to the incredible fauna and flora and to the vast reserves of gold present in Guayana Esequiba,¹⁶ bauxite, manganese,¹⁷ coltan, silver and uranium¹⁸ have also been

¹⁵ S. Bellin, Descripción geográfica de la Guayana, Prologo por Caupolicán Ovalles, Ediciones de la Presidencia de la República, Caracas, 1986.

¹⁶ See e.g.: WTO Trade Policy Review Guyana 2007; Joint Meeting Venezuela-Guyana for Economic and Oil Cooperation, 3-4 April 1986, p. 2, 4 (**Annex 128**).

¹⁷ I. Vargas-Arenas, "Guayana: la historia del Nuevo Dorado", en A. Mejías Guiza, C. Teresa García (eds.), *Antropologías hechas en Venezuela*, Vol. I, Asociación Latinoamericana de Antropología, Red de Antropologías del Sur, 2020, p. 296.

¹⁸ Véase, por ejemplo, "Company finds some five million pounds of uranium in Guyana", *Kaieteur News*, 23 de enero de 2009 (disponible en: <https://www.kaieteurnews.com/2009/01/23/company-finds-some-five-million-pounds-of-uranium-in-guyana/>); "El hallazgo de uranio podría ser un nuevo punto de partida para Guyana", *Guyana Chronicle*, 14 de abril de 2010 (disponible en: <https://guyanachronicle.com/2010/04/14/uranium-find-could-be-new-breaking-ground-for-guyana/>). Véase también: "Guyana's Extractive Industry Sector (EIS), A Synopsis of Issues and Recommendations for the mining sector as a Sustainable Element of Guyana's Low Carbon Development Strategy (LCDS)", julio de 2013, pp. 11-13 (disponible en: http://awsassets.panda.org/downloads/extractive_industries_sector_final_report_1.pdf).

discovered in the area.¹⁹ The presence of significant reserves of oil and natural gas is also suspected in the Takutu Basin, some of which are already subject to exploration and/or exploitation plans by transnational corporations.²⁰

13. It is because of these exceptional environmental features, and more particularly because of the territory's incredible wealth in natural resources, that the then British colonisers first started to covet it.²¹ Today, it is still this wealth that has attracted illegal mining activities and mining corporations operating in the region, under licences granted by the Guyanese Government.²² Unfortunately, even though Guyana recently established

¹⁹ O.J. Marquez, "La Venezolanidad del Esequibo. Reclamación, desarrollo unilateral, nacionalidad de los Esequibanos", Caracas, 2002, p. 64.

²⁰ See e.g. "Venezuela pudiera perder gran riqueza natural de la Guayana Esequiba", *Vitalis* (accessible at <https://vitalis.net/actualidad-ambiental/venezuela-riqueza-natural-guayana-essequiba/>); "Investors eyeing Takutu Basin for oil exploration", *Guyana Chronicle*, 17 February 2022 (accessible at <https://guyanachronicle.com/2022/02/17/investors-eyeing-takutu-basin-for-oil-exploration/>); "Growing interest by oil companies in re-exploring Takutu Basin", *News Guyana*, 17 February 2022 (accessible at https://www.inewsguyana.com/growing-interest-by-oil-companies-in-re-exploring-takutu-basin/#:~:text=There%20has%20been%20growing%20interest,under%20discussion%20by%20the%20Government.)).

²¹ See, e.g. The Case of the United States of Venezuela before the Tribunal of Arbitration To Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2, 1897, Vol. III, New York, 1898 (available at <https://archive.org/details/venezuelabritis03venegoo/page/n154/mode/2up>), Annex N° 668: "Extract from the Official Report, dated July 25, 1895, on the Gold Mining Industry in British Guiana". See also: H. González Oropeza, *Una historia de nuestra frontera oriental: las colonias holandesas en Guayana "cambian de dueño" 1975-1814*, Caracas, Academia Nacional de Historia, 2014, p. 19; M. Martínez, "Visión geográfica e histórica de las fronteras de Venezuela y Guyana", *Revista Geopolítica Natal*, Vol. 7, 2016, pp. 117-120; P. Ojer, *Sumario histórico de la Guayana Esequiba*, Maracaibo, San Cristóbal, Colección Sumario, 1982, pp. 19-20, 25; A. Rojas, *Los límites de Venezuela con la Guayana Británica*, Ministerio de Relaciones Exteriores, Caracas, 1962, pp. 15-16; C. Rondón, *Desde el Orinoco hasta el Esequibo*, Caracas, Congreso de la República, 1973, pp. 24 ff and 46, observing that "British Guyana, like other British colonies, was reduced to the primitive role of source of raw materials and market for goods and other industrial products"; I. Thurn, F. Everard, *The boundary between British Guiana and Venezuela*, Venezuela, 1879 (available at <https://archive.org/details/boundarybetweenb00imth>); V. Zambrano, *The Essequibo: our historic claim*, Caracas, 1982, p. 7. On further considerations explaining the importance of the territory in the eyes of the British colonisers, see e.g.: J. Aguilera, *Las fronteras de Venezuela*, Venezuela Ediciones Minci 2015 Nuestro Esequibo, Ministerio del Poder Popular para la Comunicación y la Información, 1976, pp. 64-65.

²² On the continuous role played by the constant search for appropriation of the natural wealth of Guayana Esequiba, see e.g.: D. Alvarez, "El Esequibo es territorio Venezolano", *Enlace Científico*, 16, No. 13, 2015, pp. 87-100. See also M. Martínez, "Visión geográfica e histórica de las fronteras

purportedly protected areas (Figure 2.4), these areas are totally inadequate to protect the environment of Guayana Esequiba from these activities, resulting in excessive resource extraction activities that have irreparably damaged the environment of the area.²³

de Venezuela y Guyana”, *Revista Geopolítica Natal*, Vol. 7, 2016, which highlights Venezuela’s protests against the granting of mining and logging concessions in Guayana Esequiba in the XXth and XXIst centuries (available at https://issuu.com/publicacionesuptaeb/docs/enlace_cient_fico_volumen_13_uptaeb_ebfa4744f68839).

²³ GIS Datasets and maps of Guyana (available at www.guynode.com). To compare with the extent to which Venezuela has declared protected zones, see Embassy of Venezuela, Protected zones in Venezuela (available at <https://www.embajadadevenezuela.org/generalidades/areas-protegidas/>).

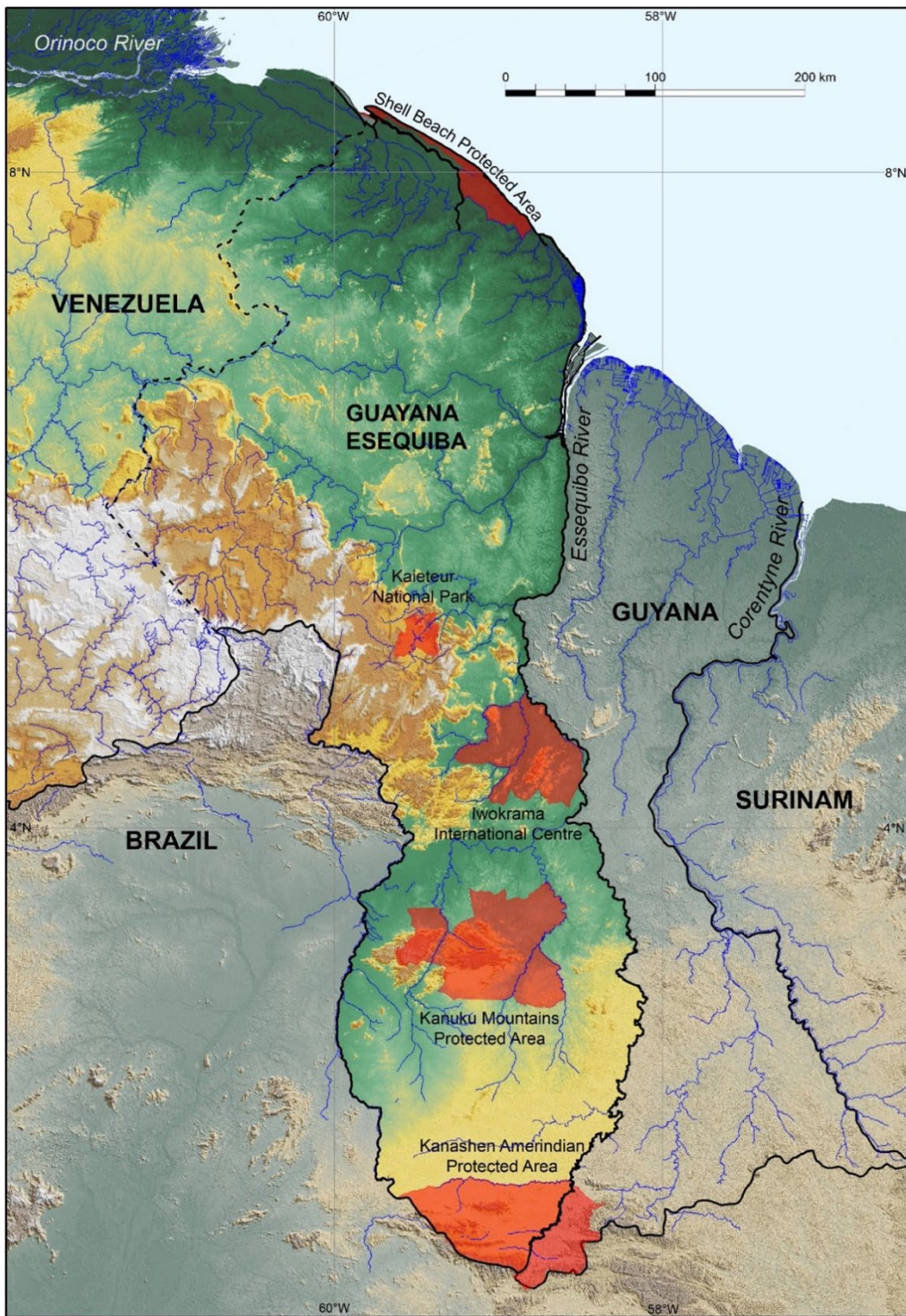


Figure 2.4. Recently declared protected areas in Guayana Esequiba.
(data source: www.guynode.com)

14. The Protected Areas Commission established by Guyana's Protected Areas Act 2011²⁴ has not addressed these deficiencies. In fact, only one protected area was declared since the Commission became operational in 2012.²⁵ On 28 March 2024, the Human Rights Committee expressed its concern at the environmental damage caused by mining activities under Guyana's watch; it highlighted the lack of enforcement of environmental regulations by Guyana and the inefficiency of Guyana's Environmental Protection Agency.²⁶

III. THE POPULATION OF GUAYANA ESEQUIBA

15. The total population of Guayana Esequiba is around 125,000 inhabitants. This number takes into account the last census published by Guyana, and conducted in 2012,²⁷ which showed a negative birth rate resulting from a population drop as compared to the earlier census of 2002.²⁸ This estimation is in line with the World Bank's note, according to which 90% lives in the narrow coastal plain,²⁹ and it is confirmed by various sources.³⁰

²⁴ Guyana's Protected Areas Commission is supposedly in charge of establishing, promoting and expanding Guyana's national protected areas system. See Protected Areas Commission, "About Us", at <https://www.pac.gov.gy/about-us-2/#:~:text=In%202011%20the%20PA%20Act,global%20importance%20including%20climate%20regulation>. However, its action falls far below what is required to protect the environment of Guayana Esequiba.

²⁵ Out of the five protected areas recognised by Guyana in Guayana Esequiba, one was declared prior to Guyana's independence, one was declared in 1996, two in 2011 and one in 2017. Information specific to these protected areas can be found on the Protected Areas Commission's website at <https://www.pac.gov.gy>

²⁶ Human Rights Committee, Concluding observations on the third periodic report of Guyana, UN Doc. CCPR/C/GUY/CO/3, 28 March 2024, para. 26.

²⁷ Guyana conducted another census in 2022. Venezuela is not in a position to comment on the results as the census has not been published.

²⁸ The results of both censuses are available at <https://statisticsguyana.gov.gy/census/>.

²⁹ See World Bank, 'The World Bank in Guyana', Overview (available at <https://www.worldbank.org/en/country/guyana/overview#1>)

³⁰ See e.g.: Orinoco Tribune, 'Venezuela Deploys Identification Personnel in Tumeremo to Grant IDs to Essequibo Residents', 12 December 2023, available at <https://orinocotribune.com/venezuela-deploys-identification-personnel-in-tumeremo-to-grant-ids-to-essequibo-residents/>; Le Monde avec AFP, 'Essequibo: le Guyana et le Venezuela s'accordent « pour ne pas utiliser la force », mais campent sur leurs positions', 15 December 2023, available at <https://www.lemonde.fr/international/article/2023/12/15/essequibo-le-guyana-et-le-venezuela-s->

The number of 235,928 claimed by Guyana in its Memorial³¹ and allegedly based on the census conducted under Guyana's administration in 2012 is clearly erroneous and grossly misleading, as it corresponds to the sum of the alleged population of six purported Guyanese regions, three of which are not entirely located within the disputed territory. In particular, the inclusion in the account of the whole of the more densely populated region of Essequibo Islands – West Demerara (unilaterally proclaimed by Guyana) is manifestly erroneous.³² Claiming that the population of “the Essequibo region” – which is the name given by Guyana to the disputed territory³³ – is “235,928, or nearly one third of Guyana's entire population”³⁴ is yet another misrepresentation of the facts by Guyana.

16. As indicated above, the most significant part of the territory's diverse population is concentrated in the northern coastal area,³⁵ with a smaller proportion of the population, constituted essentially of indigenous communities, living further in the interior, near the Pacaraima mountains and in the south of the territory.³⁶ The density of population in all the areas of the interior is less than 1 person per square kilometre (see Figure 2.5).

17. Nevertheless, the interior of Guayana Esequiba is home to numerous indigenous peoples and communities which have lived there since way before colonial times, conserving and promoting their customs, and passing them on from generation to

accordent-pour-ne-pas-utiliser-la-force-mais-campent-sur-leurs-positions_6205961_3210.html; BBC News Mundo, ‘3 claves para entender la escalada de tensión entre Venezuela y Guyana por el disputado territorio del Esequibo (y cual es la respuesta internacional)’, 8 December 2023, available at

<https://www.bbc.com/mundo/articles/cxx18pjld55o#:~:text=El%2520Esequibo%2520concentra%2520seis%2520de,los%2520800.000%2520habitantes%2520del%2520país>

³¹ Guyana's Memorial on the Merits, Vol. I, para. 2.23.

³² The final results of the 2012 census conducted by Guyana are available at https://statisticsguyana.gov.gy/wp-content/uploads/2019/10/Final_2012_Census_Count-1.pdf

³³ Guyana's Memorial on the Merits, Vol. I, para. 2.2.

³⁴ Guyana's Memorial on the Merits, Vol. I, para. 2.23.

³⁵ World Bank, ‘The World Bank in Guyana’, Overview (available at <https://www.worldbank.org/en/country/guyana/overview#1>)

³⁶ According to the Committee on Economic, Social and Cultural Rights, Amerindian people constituted 73.5% of the population of the hinterlands areas in 2015. See Economic and Social Council, Committee on Economic, Social and Cultural Rights, “Concluding observations on the combined second to fourth periodic reports of Guyana”, UN Doc. E/C.12/GUY/CO/2-4, 28 October 2015, para. 42.

generation.³⁷ Most of these indigenous peoples speak a language Caribe: this is the case of the Pemón, Akawaio, Kariña, Patamona, Macuxi, Wai Wai y Yekuana people. Others, such as the Lokono (arawako), the Wapishina and the Warao people, speak Arawak or have a linguistically independent language.

³⁷ The Ministry of Amerindian Affairs of Guyana has registered 112 indigenous communities, 102 of which live in Guayana Esequiba. See Instituto Geográfico de Venezuela Simón Bolívar, 2024, “Breve descripción de la Geografía Humana de la Guayana Esequiba”, Caracas, Dirección de Proyectos Especiales, 2024.

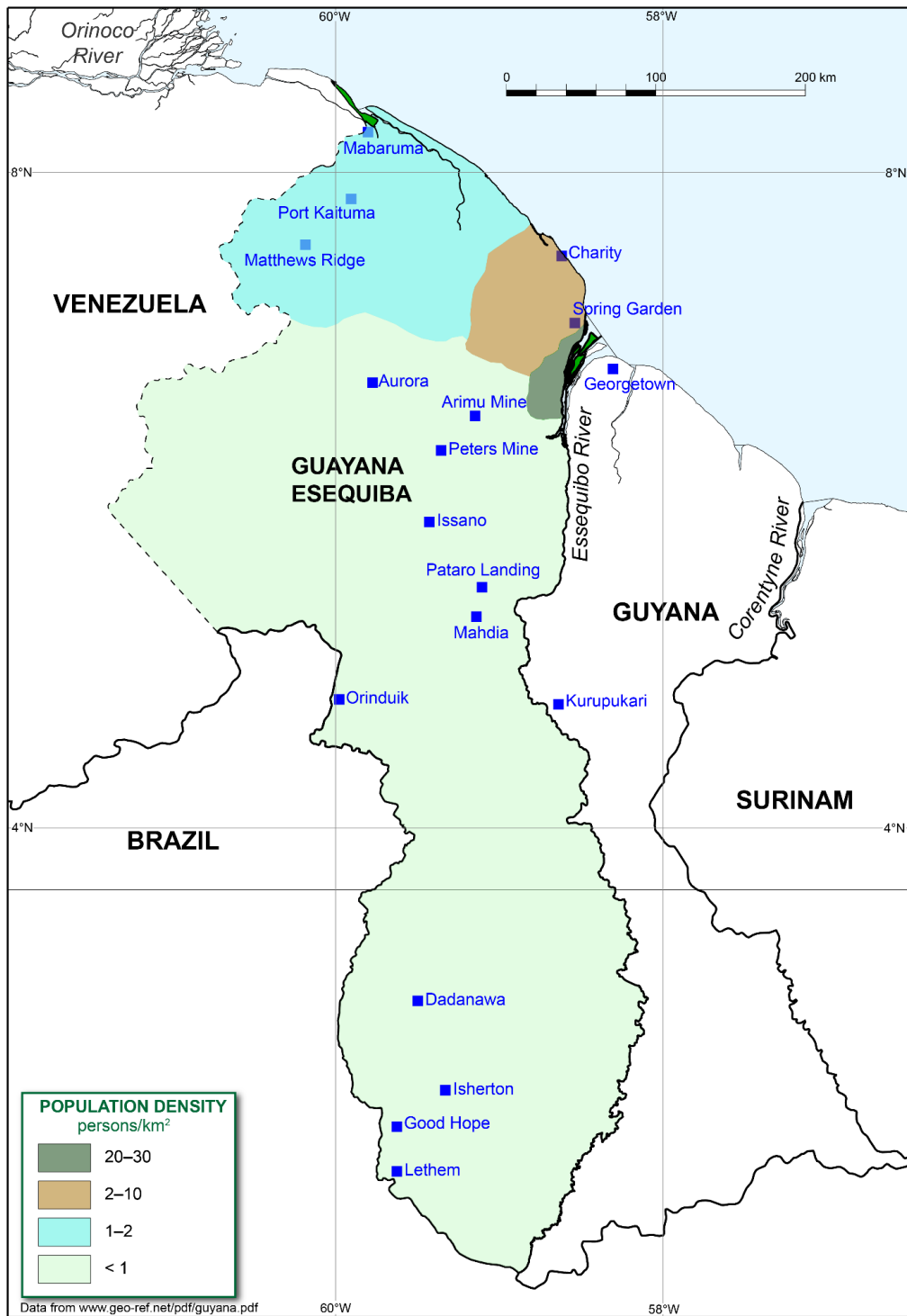


Figure 2.5. Population density in Guayana Esequiba
(after www.geo-ref.net/pdf/guyana.pdf)

18. The documentation presented by Venezuela before the Paris arbitral tribunal in 1899 attests in particular to the fact that the indigenous people living on the territory are the original inhabitants and owners of Guayana Esequiba.³⁸ In 1883, the population of the northwestern part of the territory, situated between the Pomeroon river and the Orinoco, was described in the following terms:³⁹

“The population of the whole district is very scanty, and is very scattered. Most of the inhabitants are Red men – True Caribs chiefly on the Barama and upper Barima, Ackawoi on the Morooka and upper Waini, Arawaks on the Morooka, and many Warraus everywhere at the mouths of the rivers”.⁴⁰

19. Traditionally and historically, indigenous communities have lived peacefully in the broader area constituted of Guayana Esequiba and of the southern Venezuelan States of Delta Amacuro, Bolívar and Amazonas.⁴¹ In particular, the indigenous people from the Akawaio, Arawak (Lokono), Pemón, Arekuna, Kariña, Warao, Macuxi, Patamona,

³⁸ On this point, see also: I. Thurn, F. Everard, *The boundary between British Guiana and Venezuela*, Venezuela, 1879 (available at <https://archive.org/details/boundarybetweenb00imth>). See, further, G. Salas, “Las controversias limítrofes pendientes en América del Sur. La cuestión del Esequibo”, *Revista de la Facultad de Derecho*, 2(2), 2011, p. 68 (available at <https://revistas.unc.edu.ar/index.php/refade/article/view/6280>). The author highlights that achieving the peaceful and mutually acceptable settlement of the territorial controversy through negotiations is of the highest importance for the essential interests of the population (see p. 77). See also P. F. Cayetano de Carrocera, “Las Misiones en Venezuela. Síntesis histórica”, in *Boletín de la Academia Nacional de la Historia*, N° 197, January-March 1967, which addresses the links between the first missionaries in Venezuela and the indigenous communities. On the treatment of the indigenous communities by the United Kingdom in the 19th century, see M. Menezes, *British policy towards the Amerindians in British Guiana 1803-1873*, Guyana, The Caribbean Press, 1977.

³⁹ The Case of the United States of Venezuela before the Tribunal of Arbitration To Convene at Paris under the Provisions of the Treaty between the United States of Venezuela and Her Britannic Majesty Signed at Washington February 2, 1897, Vol. III, New York, 1898 (available at <https://archive.org/details/venezuelabritis03venegoog/page/n154/mode/2up>), Annex N° 628: E.F. im Thurn, “The Northwest District in 1883”. See also Annex N° 664 and 665 of the same volume.

⁴⁰ *Ibid.*

⁴¹ On the link between geographical factors and the administration of the territory, and the presence of indigenous communities in Guayana Esequiba, see e.g.: M. Bello, “Formación de los límites terrestres de Venezuela”, *Aldea Mundo, Revista sobre Fronteras e Integración*. Año 13, N° 26 (2), 2008 (available at <https://www.redalyc.org/pdf/543/54315493002.pdf>). On the links between Venezuela and Guayana Esequiba, see e.g.: P. Torrealba, *A un siglo del despojo. Esequibo, la historia de una reclamación*, Caracas, Editorial Arte, 2004.

Wapishama and WaiWai communities are sister communities which share cultural ties and live on both sides of the *de facto line*.

20. Indigenous people represent the majority of the population living inland; as the original owners of the territory they must fully participate in the decision-making impacting their ancestral lands. However, because of Guyana's illegal and environmentally destructive activities in the area, it is common for the people of Guayana Esequiba to cross the *de facto line* to reach the state of Bolivar, whether it is to work, to go to school, or to access public services.

21. Guyana has turned a blind eye to the catastrophic destruction of the environment of Guayana Esequiba, including the pollution of the territory's watercourses, as a consequence of the excessive exploitation of the territory's natural resources. Logging and mining concessions have been granted to large corporations on land pertaining to indigenous communities, and the people opposing mining activities carried out in their lands have faced threats, harassments and acts of violence. It must also be emphasised that the people of Guayana Esequiba have not received economic or social benefits from the activities taking place on their territory, and have instead suffered from poverty and social exclusion. Moreover, Guyana should tell the world the truth about how, despite the dozens of years in which it has allowed or participated in the depredation of Guayana Esequiba, none of the profit obtained by transnational mining has been reverted, not even to the human and social development of the Guyanese people themselves, whose birth rate was the only one in America that was reversed for almost the entire twentieth century, and whose human development index has been one of the lowest, if not the lowest of the whole of South America.

22. Since the conclusion of the Geneva Agreement in 1966 and the increasingly unfavourable policies adopted by Guyana, Venezuela has consistently opposed the destruction of the territory's environment and multiplied its initiatives to support the population of Guayana Esequiba, which it considers to be Venezuelan for reasons of historical sovereignty. Venezuela's best efforts to cooperate and promote the development

of its territory have not stopped in the past six decades, in stark contrast with the focus adopted by Guyana. Guyana's narrative, according to which Venezuela has suddenly been reviving an old territorial claim because of the discovery of oil fields off the coast of Guayana Esequiba in 2015, is pure propaganda.

