INTERNATIONAL COURT OF JUSTICE

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**CASE CONCERNING**

**ARBITRAL AWARD OF 3 OCTOBER 1899**

**CO-OPERATIVE REPUBLIC OF GUYANA**

**v.**

**BOLIVARIAN REPUBLIC OF VENEZUELA**

# GUYANA'S REPLY ON THE MERITS

Volume I

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9 December 2024

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# CHAPTER 1

# INTRODUCTION

1.1. This Reply responds to the arguments made by Venezuela in its Counter-Memorial. Those arguments are short on substance and long on rhetoric, confusion and contradiction. To the extent that it actually addresses Guyana's case contained in its Memorial on the Merits, nothing in Venezuela's Counter-Memorial undermines the correctness and cogency of that case. On the contrary, the Counter-Memorial — and the evidence filed with it — confirm that Venezuela's repudiation of the 1899 Arbitral Award, and the boundary which it established, is manifestly lacking in legal and factual merit.

## I. The Jurisdiction of the Court and Venezuela's Ongoing Challenge to It

1.2. Guyana welcomes Venezuela's decision to file a Counter-Memorial. It is striking, however, that its principal focus is not the merits of Guyana's case on the validity of the 1899 Arbitral Award and the boundary which it established, but rather an attempt to re-argue and re-litigate the Court's jurisdiction over these matters.

1.3. The Court's jurisdiction was finally confirmed by its Judgment of 18 December 2020, in which the Court unequivocally found:

> "that *it has jurisdiction* to entertain the Application filed by the Co-operative Republic of Guyana on 29 March 2018 *in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary*

> *dispute* between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela".[1]

1.4. In its Judgment of 6 April 2023 — in which the Court rejected Venezuela's objections to the admissibility of Guyana's claims — the Court confirmed that "it can adjudicate upon the merits of the claims of the Co-operative Republic of Guyana" insofar as they fall within the scope of the paragraph of its 2020 Judgment quoted above[2].

1.5. Venezuela, nevertheless, persists in its effort to avoid an adjudication by the Court, devoting many pages of its Counter-Memorial to its contention that "there is no basis on which to establish, even *prima facie*, the jurisdiction of the Court to hear Guyana's unilateral claim"[3], and asserting that the Court "erroneously attributed jurisdiction to itself in violation of the Geneva Agreement and international law"[4]. It describes the Court's 2020 Judgment as "questionable"[5] and refers to "[t]he falsification of an alleged consent of Venezuela artificially extracted by the Court"[6]. It criticizes the Court for having "violated" Venezuela's "right not to be subjected to a trial without a legal or legally rational basis"[7] and of "strip[ping] Venezuela of its sovereignty"[8].

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[1] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 493, para. 138 (1) (emphasis added).

[2] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 2023*, p. 292, para. 108 (3).

[3] VCM, p. 3, para. 11.

[4] *Ibid.,* p. 334, para. 2.

[5] *Ibid.,* p. 3, para. 12.

[6] *Ibid.,* p. 334, para. 2.

[7] *Ibid.,* p. 3, para. 13.

[8] *Ibid.,* p. 334, para. 2.

1.6. These unjustified attacks on the validity of the Court's Judgments are without merit, and do not call for a detailed response from Guyana. The same is true of Venezuela's related contention that the Geneva Agreement, from which the Court's jurisdiction derives, "was never related to the validity or invalidity of the Award"[9] and "does not, at any point, provide that answering the question of the validity of the Award is a pre-condition for"[10] the resolution of the controversy between the Parties.

1.7. This argument is indeed pure fantasy. It is obvious that resolving the controversy over the validity of the 1899 Award is the very purpose of the Geneva Agreement. As the Court explained in its 2020 Judgment, "the 'controversy' that the parties agreed to settle through the mechanism established under the Geneva Agreement *concerns the question of the validity of the 1899 Award*, as well as its legal implications for the boundary line between Guyana and Venezuela"[11] and "it would not be possible to resolve definitively the boundary dispute between the Parties without first deciding on the validity of the 1899 Award about the frontier between British Guiana and Venezuela"[12]. Indeed, at the time of the Agreement's conclusion, Venezuela had expressly "confirm[ed] that the parties to the Geneva Agreement understood that *the question of the validity of the 1899 Award was central to the controversy that needed to be resolved* under … the Geneva Agreement in order to reach a definitive settlement of the land boundary between Guyana and Venezuela"[13].

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[9] VCM, para. 3.3.

[10] *Ibid.*, para. 2.9 (first bullet-point).

[11] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 474, para. 66 (emphasis added).

[12] *Ibid.*, p. 490, para. 130.

[13] *Ibid.*, p. 492, para. 134 (emphasis added).

## II. Venezuela's Lack of Credible Arguments Against the Validity of the 1899 Award

1.8. Venezuela's resort to arguments such as these reveals its lack of a credible answer to the substance of Guyana's claims regarding the validity of the 1899 Award and the location of the Parties' land boundary. Rather than focusing on the merits of Guyana's claims, Venezuela engages in a pointless attempt to override (or simply ignore) the Court's *res judicata* determination that it has jurisdiction over — and shall proceed to determine the merits of — those claims. Venezuela's recycling of failed arguments on jurisdiction and admissibility makes clear that it has no case on the merits.

1.9. Indeed, as Guyana demonstrated in its Memorial on the Merits (and further shows in this Reply), Venezuela's attacks on the validity of the 1899 Award are entirely groundless and have no credible basis in fact or law. Contrary to the portrayal in its Counter-Memorial, Venezuela had long urged Great Britain to submit the dispute regarding the boundary between Venezuela and British Guiana to binding arbitration. Great Britain, however, refused to do so. At Venezuela's urging, the United States interceded and, through a combination of diplomatic pressure, the creation of a Presidential Commission to assess the territorial entitlements of both States, and the threat of military force ultimately persuaded the British to accede to Venezuela's demand for arbitration. The terms of the Washington Treaty were then negotiated with Venezuela's active involvement, knowledge, authority and approval. In February 1897, Venezuela signed and ratified the Treaty — which formally gave effect to its long-held desire for the boundary dispute to be resolved through arbitration — in full knowledge of its terms, which were neither concealed from nor prejudicial to Venezuela. Venezuela's contention that the 1899 Award is the product of a fraudulent and invalid Treaty is entirely without merit.

1.10. Venezuela's attacks on the validity of the Award are similarly devoid of legal or factual substance. Its criticisms based on the absence of reasons in the Award are unsustainable in the light of the terms of the Washington Treaty, which did not require a statement of reasons, and the absence of any contemporaneous requirement for such a statement under international law. Its criticisms of the conduct of the Arbitrators, and the process by which the outcome of the Award was determined, are without evidentiary support and legally untenable. Venezuela's allegations of fraud and corruption are equally unsupported by credible evidence. So too are its complaints based on alleged excess of jurisdiction or failures to apply the rules contained in the Washington Treaty. Venezuela's own evidence, submitted with its Counter-Memorial, confirms that its attacks on the validity of the Award are factually and legally groundless.

1.11. The hollowness of Venezuela's case is confirmed by the fact that for more than six decades following the issuance of the 1899 Award, Venezuela repeatedly, consistently and overtly affirmed the validity of the Award and the boundary which it established. It was only in 1962 — some 63 years after the Award was delivered — that Venezuela repudiated an Award which it had long welcomed, recognised, affirmed and implemented. Venezuela's Counter-Memorial ignores its decades-long recognition and endorsement of the validity of the Award, and the implications of that conduct for the merits of Guyana's case before the Court.

## III. Venezuela's Disregard of the Court's Order on Provisional Measures

1.12. Regrettably, Venezuela has shown as little deference to the Court's Judgments and Orders as it has shown to the 1899 Arbitral Award in the years since its repudiation of that Award in 1962. In addition to disputing the Court's Judgments of 18 December 2020 and 6 April 2023 establishing its jurisdiction in

this case, Venezuela has defied the Order on Provisional Measures of 1 December 2023. In manifest violation of the Court's provisional measures requiring Venezuela to refrain from taking any action to modify the current situation whereby Guyana administers and exercises control over the disputed territory, Venezuela has done exactly that.

1.13. On 3 April 2024, for example, Venezuela promulgated an "Organic Law for the Defense of Guayana Esequiba", which created the new Venezuelan state of "Guayana Esequiba" comprised entirely of the disputed territory[14]; ordered that every map of Venezuela must depict the territory of the new "Guayana Esequiba" state as an integral part of Venezuela[15]; vested Venezuela with executive, legislative and judicial prerogatives over the new state, and its population[16]; and authorised the exploitation of the territory's natural resources by Venezuela's state-owned oil and mining companies[17].

1.14. In enacting these measures, and subsequently, Venezuela has conducted military activities, including construction of new military facilities and infrastructure, in close proximity to the disputed territory and in direct threat to Guyana's peace and security[18]. These and other measures violate the Court's Order

[14] Organic Law for the Defense of Guayana Esequiba (3 April 2024) (Vol. III, Annex 1) ("Organic Law"), Article 9 ("The state of Guayana Esequiba is hereby created within the territorial and political organization of the Bolivarian Republic of Venezuela. The state of Guyana Esequiba is a politically autonomous entity, with legal personality full and own and independent assets."; translation of the Spanish original: "*Se crea el estado Guayana Esequiba dentro de la organización político territorial de la República Bolivariana de Venezuela. El estado Guayana Esequiba es una entidad autónoma en lo político, con personalidad jurídica plena y patrimonio propio e independiente*.").

[15] *Ibid.*, Article 23.

[16] *Ibid.*, Articles 11-13, First and Second Transitory Articles.

[17] *Ibid.*, Article 29.

[18] Video embedded in "Sixth Corp of Engineers of the Bolivarian Army Building the Homeland", @6TOCING_EJB, *X* (19 January 2024), available at https://x.com/6TOCING_EJB/status/

that both Parties refrain from aggravating or extending the dispute or making it more difficult to resolve.

1.15. Venezuela's disregard for its obligations underscores the importance and urgency of a comprehensive, authoritative and conclusive determination by the Court of the validity of the 1899 Award and the boundary which it established.

## IV. Procedural History

1.16. On 29 March 2018, Guyana submitted its Application in this case. This followed the decision of the Secretary-General of the United Nations on 30 January 2018, pursuant to his authority under Article IV of the Geneva Agreement, that the controversy between Guyana and Venezuela over the validity of the 1899 Arbitral Award should be resolved by the Court. Guyana filed its Memorial addressing the jurisdiction of the Court on 19 November 2018. On

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1748465769992630783 (last accessed on 27 November 2024) (Venezuela's military informing the construction of a tank park in Ankoko and a bridge to that island. The video shows construction materials, APCs, and heavy river ferry along with this tweet: "The @6TOCING_EJB Complying with instructions from the @CEOFANBVE from Isla de Ankoko, edo Bolívar; continue engineering works on the banks of the Cuyuní river, where the Mabey Compact 200 bridge is being built along with the construction of the tank farm in the jungle."[Added]) (Guyana's translation of the Spanish original: "El @6TOCING_EJB Cumpliendo instrucciones del @CEOFANBVE desde la Isla de Ankoko, edo Bolívar; continúan los trabajos de Ingeniería a orillas del río Cuyuní, donde se construye el puente Mabey Compact 200 y la construcción del tancodromo en selva."); Video embedded in "Bolivarian Army", @somos_ejército, #Enterate || GJ Domingo Hernández Lárez, Strategic Operational Commander of the FANB, reviewed the Ankoko Island in #Bolívar state in order to inspect the construction of the tankodrome (tank farm), promoted by the 11 Armoured Brigade together with the @6TOCING_EJB, improving the FANB's response system in this important border area with the state of Guayana Esequiba and repelling any eventuality that attempts against the Republic" (Guyana's translation), *X* (25 January 2024), available at https://x.com/somos_ejercito/status/1750548445130019157 (last accessed on 27 November 2024); Pictures and video embedded in GJ. Domingo Hernández Lárez, @dhernandezlarez, *X* (25 January 2024), available at https://x.com/dhernandezlarez/status/1750501357075706075 (last accessed on 27 November 2024) (posting three pictures and one video of Venezuela's military activities in Ankoko island, and asserting that the army "is firm and willing to comply with its mission to defend the national sovereignty and support with the effort of the development of the country" (Guyana's translation)).

28 November 2019 (more than seven months after the deadline specified in the Court's Order of 19 June 2018), Venezuela submitted a "Memorandum" in response to Guyana's submissions.

1.17. On 30 June 2020, the Court held an oral hearing on the question of its jurisdiction over Guyana's Application. By Judgment dated 18 December 2020, the Court determined that it has jurisdiction to hear Guyana's Application "in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela"[19].

1.18. In accordance with the Court's Order dated 8 March 2021, on 8 March 2022 Guyana filed its Memorial on the Merits.

1.19. Venezuela then submitted Preliminary Objections on the admissibility of the case on 7 June 2022. Guyana submitted Written Observations in response on 15 July 2022. The Court duly held oral hearings on Venezuela's Preliminary Objections between 17 and 22 November 2022. By Judgment dated 6 April 2023, the Court rejected Venezuela's Preliminary Objections in their entirety[20].

1.20. On 30 October 2023, Guyana filed a request for the indication of provisional measures by the Court. Guyana's request was prompted by Venezuela's announcement of its intention to hold a national referendum, which posed questions that sought to obtain a popular mandate to reject the 1899 Arbitral Award and the

[19] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 493, para. 138 (1).

[20] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 2023*, p. 292.

boundary with Guyana that it established; to reject the Court's jurisdiction over these proceedings; and to unlawfully seize and annex "Guayana Esequiba" (i.e. the territory awarded to Guyana (then British Guiana) by the 1899 Award) by formally incorporating it into Venezuela as a new Venezuelan State[21].

1.21. Following oral hearings on Guyana's request on 14 and 15 November 2023, the Court issued an Order on 1 December 2023. The Court's Order on Provisional Measures unanimously ordered that:

> "Pending a final decision in the case, the Bolivarian Republic of Venezuela shall refrain from taking any action which would modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area;
>
> .....
>
> Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[22]

1.22. As described above, Venezuela has acted in defiance of that Order.

1.23. On 8 April 2024, Venezuela submitted its Counter-Memorial. On 14 June 2024, the Court authorised a second round of written pleadings and specified deadlines for the submission of those pleadings, fixing 9 December 2024 for Guyana's Reply. Guyana submits this Reply in accordance with that Order.

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[21] Guyana's Request for Provisional Measures, 27 October 2023, paras. 2-5.

[22] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Provisional Measures*, Order of 1 December 2023, para. 45.

## V. Structure of the Reply

1.24. This Reply comprises three volumes. Volume I sets out the main text of the Reply. Volume II contains Maps and Figures for illustrative purposes and Volume III, Guyana's Annexes, all of which are cited in Volume I.

1.25. Volume I comprises five chapters, followed by Guyana's Submissions and a short Appendix. Following this Introduction, **Chapter 2** addresses the validity of the 1897 Treaty of Washington. It rebuts Venezuela's attempts to impugn the validity of 1899 Award by challenging the validity of the Treaty containing the arbitral *compromis*. The Chapter begins by demonstrating how the contemporaneous evidence — including the evidence put forward by Venezuela in its Counter-Memorial — comprehensively defeats Venezuela's claim that its consent to the Treaty was vitiated by error or fraud either in the negotiation of the Treaty or in its terms. Contrary to Venezuela's allegations, nothing was included in the Treaty without Venezuela's knowledge or contrary to its interests. The chapter then explains how the contemporaneous evidence — including that relied on by Venezuela — provides no support for Venezuela's claim that it was forced to enter the Treaty against its will. The evidence shows that Venezuela freely entered the Treaty, which was and is valid and binding upon the parties.

1.26. **Chapter 3** addresses the validity of the 1899 Award. It addresses each of the grounds (in addition to the alleged invalidity of the Washington Treaty) on which Venezuela argues that the 1899 Award is invalid. The chapter begins by demonstrating that neither the Washington Treaty nor international law more generally contained any requirement for the Award to include a statement of reasons. The absence of any such duty under international law at the time of the 1899 Award is put beyond question by the **Appendix** at the end of Volume I of this

Reply, which collates numerous examples of arbitral awards rendered by jurists in the nineteenth and early twentieth centuries which contained no statement of reasons. Accordingly, Venezuela's attempt to assail the validity of the Award by reference to the lack of reasons is entirely without merit. The chapter then addresses and refutes Venezuela's contentions that the Award is invalid because the Tribunal failed to comply with the rules contained in Article IV of the Treaty, exceeded its powers under the Treaty, and reached a decision based on a compromise rather than law. Finally, it shows that Venezuela's claim that the Award was vitiated by fraud and corruption during the arbitration is also entirely without merit.

1.27. In **Chapter 4**, Guyana addresses the legal consequences that arise from Venezuela's decades-long recognition, acceptance, affirmation and implementation of the 1899 Award. It demonstrates that all the matters which form the basis for Venezuela's contention of nullity were known to Venezuela at the time the Award was delivered in October 1899. Despite that knowledge, Venezuela positively recognised and affirmed the validity of the Award, and the boundary which it established, over a period of more than six decades. The chapter refutes Venezuela's claim that "structural coercion" prevented it from challenging the validity of the Award until many years after it was issued and its equally spurious contention that the publication of the Mallet-Prevost Memorandum in 1949 "changed everything"[23]. The chapter concludes by showing that Venezuela's claim that Guyana is barred from relying on Venezuela's decades-long affirmation, acceptance and acquiescence in the 1899 Award is legally and factually baseless.

1.28. **Chapter 5** addresses Venezuela's defiance of the Court's Order on Provisional Measures and the legal consequences thereof. It explains that by adopting measures to *de facto* and *de jure* annex, administer and control the

[23] VCM, para. 7.25.

disputed territory, Venezuela has violated both its obligation to refrain from taking any action to modify the situation that currently prevails in the disputed territory and its obligation to refrain from doing anything which might aggravate or extend the dispute or render it more difficult to resolve. The chapter concludes by setting out the legal consequences which arise from those breaches of the Court's Order.

1.29. Volume I concludes with Guyana's Submissions, and the Appendix described in paragraph 1.26 above.

## CHAPTER 2

## THE VALIDITY OF THE 1897 WASHINGTON TREATY

2.1. In its Memorial on the Merits, Guyana described at length the situation which led to the conclusion of the Treaty between Great Britain and the United States of Venezuela Respecting the Boundary between the Colony of British Guiana and the United States of Venezuela, signed in Washington on 2 February 1897 (the Washington Treaty)[24]. Guyana demonstrated that the Treaty — the special agreement for the resolution of the border dispute between what was then British Guiana and Venezuela — had been validly concluded[25].

2.2. Deliberately ignoring the points made by Guyana in its Memorial, Venezuela addresses in its Counter-Memorial various factual aspects of the negotiations and the conclusion of the Washington Treaty. It argues that the Treaty was invalid due to alleged error by concealment, fraud and coercion.

2.3. Although Venezuela mixes up the various grounds for nullity provided by the 1969 Vienna Convention on the Law of Treaties (VCLT), its arguments may be summarised in two points:

(a) First, Venezuela alleges that its consent to the Washington Treaty is invalid based on VCLT Article 48 because it was procured through "error *by concealment*" of "the calculation of the period of prescription provided under Article IV of the 1897 Treaty"[26], and based on VCLT Article 49 because its alleged exclusion from the negotiation of the Washington Treaty

[24] See MMG, paras. 7.1-7.80.

[25] *Ibid.*

[26] VCM, para. 6.44 (emphasis added).

and non-access to confidential communications between the United States and the British negotiators constitutes fraud[27]; and

(b) Second, Venezuela contends that it was *coerced* by the United States and Great Britain to sign the Washington Treaty in contradiction of VCLT Article 52[28].

2.4. To support its arguments of error by concealment and fraud, Venezuela alleges that it played no role in the negotiation of the Washington Treaty, that it was not informed of the content of the negotiations — especially concerning the period of prescription for the vesting of title to the disputed territory by occupation — and that, as a result, the Treaty "was a text that was patently prejudicial to the interests and dignity of Venezuela in respect to crucial issues"[29]. As for the alleged coercion, Venezuela argues that because of "the threat it was confronting [in 1897], Venezuela had no other option but to accept a treaty which was clearly prejudicial to its rights"[30].

2.5. In the present Chapter, Guyana shows that neither the negotiations which led to the conclusion of the Washington Treaty (**I**), nor the consent given by Venezuela to the Treaty (**II**), were tainted by any concealment, fraud or coercion, and there is therefore no basis for impugning the validity of the Treaty.

[27] VCM, paras. 6.52-6.58.

[28] *Ibid.*, para. 5.76.

[29] *Ibid.*, para. 5.7.

[30] *Ibid.*, para. 5.76.

## I. There Was No Error by Concealment or Fraud in the Negotiations that Led to the Conclusion of the Washington Treaty

2.6. In its Counter-Memorial, Venezuela claims that due to an error by concealment and/or fraud, the consent it gave in signing and ratifying the Washington Treaty is invalid[31]. It alleges that "the fraud was a determining factor in coercing Venezuela to accept the Treaty (causing the error)"[32]. On this basis, it argues that the Treaty is invalid because its consent was given in violation of conditions detailed in Articles 48 and 49 of the VCLT[33].

2.7. Guyana accepts that Articles 48 and 49 of the 1969 Convention reflect, in large part, the rules applicable at the time the Washington Treaty was signed and ratified (**A**). However, Venezuela's claims of error and fraud are contradicted and defeated by the evidence of record in this case, including in particular the evidence put forward by Venezuela in its Counter-Memorial and the Annexes thereto. As shown below, this evidence fully refutes Venezuela's arguments that its consent to the Treaty was marred by error or fraud in the negotiation of the Treaty (**B**) or in its content (**C**).

### A. The Applicable Rules: Error and Fraud as Grounds for the Invalidity of Consent to a Treaty at the End of the 19th Century

2.8. According to Venezuela, "[a]s recognised by Guyana, the conditions for determining the invalidity of a treaty as a consequence of error or fraud are set forth

[31] VCM, para. 6.26.

[32] *Ibid.*, p. 95, para. 46.

[33] *Ibid.*, paras. 6.43-6.58.

in, respectively, Articles 48 and 49 the 1969 Vienna Convention on the Law of Treaties"[34].

2.9. The Parties are not significantly divided on this point, although Venezuela's characterization of Guyana's position is imprecise. To clarify, Guyana does not dispute that, at the end of the 19th century, error and fraud were recognised as grounds justifying the invalidity of a treaty[35]. Its Memorial on the Merits states:

> "Articles 48, 49 and 50 of the 1969 Vienna Convention on the Law of Treaties are respectively devoted to error, fraud and corruption as defects in the consent of a State, which may result in the invalidity of a treaty to which the State is a party. It is appropriate to take those provisions of the VCLT as a *starting point*, even if the customary rules pertaining to the invalidity of treaties more than a century and a half ago were assuredly *less developed than today*."[36]

2.10. In regard to error as a ground for invalidating consent, Venezuela explains that the error must concern the assessment of a given factual situation and be significant enough to have influenced its consent when it signed and ratified the Treaty[37]. Relying on Article 48 of the VCLT, Venezuela acknowledges that error will not invalidate a treaty "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"[38]. This is consistent with Guyana's understanding of error as a ground for invalidating consent, as reflected in its Memorial on the Merits. However, Venezuela fails to point out that the error must de demonstrated by

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[34] VCM, para. 6.26, citing to note 563 ("GM, p. 175, para. 7.5").

[35] MMG, paras. 7.6-7.16.

[36] *Ibid.*, para. 7.5 (emphasis added).

[37] VCM, para. 6.49.

[38] *Ibid.*, para. 6.51.

"*convincing* evidence"[39] and that the ILC has noted that the cases in which "errors of substance have been invoked … have not been frequent"[40].

2.11. In respect to fraud, Venezuela considers this a ground for the invalidity of consent when: (i) it emanates from a party to the treaty; (ii) it constitutes a decisive element in obtaining the consent of the State; and (iii) the State victim of the fraud is unaware of it[41]. Venezuela acknowledges that proving fraud requires proof of the *fraudulent intent* of the person who committed it[42]. Guyana agrees with this definition of fraud as it existed at the end of the 19th century[43].

2.12. With these clarifications, it may be said that the Parties are in substantial agreement on the rules for determining whether consent to a treaty at the end of the 19th century can be invalidated on the basis of error or fraud. Where the Parties fundamentally disagree is on the facts and the evidence. In Guyana's view, the facts of this case — as supplied by Venezuela itself — fail to support its contention that its consent to the Washington Treaty resulted from error or fraud, or that as a result of these alleged infirmities, it accepted a Treaty whose contents were prejudicial to it. Rather, they show the opposite: that there was no error or fraud, and nothing prejudicial to Venezuela in the Treaty to which it freely consented.

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[39] *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, *Judgment*, *I.C.J. Reports 1959*, p. 222 (emphasis added); MMG, para. 7.12.

[40] Draft Articles on the Law of Treaties with commentaries, *ILC Yearbook*, 1966, vol. II, (hereinafter "Draft Articles on the Law of Treaties with commentaries"), Article 45, p. 243, para. 1 of the commentary; MMG, para. 7.12.

[41] VCM, para. 6.58.

[42] *Ibid.*, p. 81, para. 13 (emphasis added).

[43] MMG, paras. 7.13-7.16.

## B. THE FACTS: NOTHING WAS CONCEALED FROM VENEZUELA, NOR WAS IT DEFRAUDED BY THE UNITED STATES, IN THE NEGOTIATION OF THE WASHINGTON TREATY

2.13. Venezuela asserts without any factual basis that the Treaty "stemmed from a criminal fraud in which even United States government officials of the time participated, namely, the collusion between Mr. Olney (United States Secretary of State in 1897), Mr. Salisbury (United Kingdom Foreign Secretary) and the United Kingdom's Ambassador of the time, Julian Pauncefote, as well as the active cooperation of Joseph Chamberlain, former Minister of the Colonial Office"[44].

2.14. Venezuela fails to offer proof of fraud, and its own evidence supports the opposite contention to that which it argues. Its Annexes show that: (**1**) Venezuela repeatedly, and over more than a decade between 1883 and 1896, beseeched the United States to intercede with the British to persuade them to agree to arbitration of the territorial dispute; and the United States responded positively and pressed Great Britain to accept arbitration with Venezuela — even threatening to go to war if the British refused — and ultimately succeeded in compelling them to accede to the arbitration that Venezuela had long desired but had been unable to procure on its own; and (**2**) in negotiating the arbitration agreement itself, the United States consulted closely with Venezuela, kept it fully informed of the proposals and counter-proposals, and succeeded in obtaining terms which Venezuela found agreeable and worthy of acceptance.

[44] VCM, p. 79, para. 7.

*1. Venezuela Directly Appealed to the United States to Help It Obtain an Arbitration Agreement to Settle Its Territorial Dispute with Great Britain*

2.15. Venezuela acknowledges that "recourse to arbitration was a long-standing aspiration," that it "had repeatedly proposed to Great Britain to settle the territorial dispute by arbitration," and that "Great Britain had systematically refused such solution, or had subjected recourse to arbitration to unacceptable conditions"[45]. In frustration, Venezuela eventually turned to the United States, urging it to intercede with the British on its behalf to obtain their agreement to arbitrate the territorial dispute. As Venezuela admits:

> "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."[46]

2.16. The evidence shows that Venezuela first approached the United States in 1883, when Venezuela's Foreign Minister, Simón Camacho, wrote to his United States counterpart, Secretary of State Frederick Frelinghuysen, to request that the United States intercede with the British to persuade them to accept arbitration of the territorial dispute:

> "To carry this controversy to a practical ground and possible termination, there is, in the opinion of the President of Venezuela, only one and at the same time very simple way – arbitration.

[45] VCM, para. 5.9, note 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).").

[46] *Ibid.*, para. 5.10.

> And for arbitration, there is only one Government who could propose it with real effect and decide the question of boundaries to the satisfaction of Venezuela – the United States of America."[47]

2.17. Mr. Frelinghuysen sent his response through the United States Minister in Caracas:

> "This Government has already expressed its view that arbitration of such disputes is a convenient resort in the case of failure to come to a mutual understanding, and intimated its willingness, if Venezuela should so desire, to propose to Great Britain such a mode of settlement."[48]

2.18. This exchange occurred after the British had repeatedly rebuffed Venezuela's own proposals for submission of the dispute to arbitration, even as they continued to expand their presence in and control over the disputed territory[49]. Feeling vulnerable in the face of Great Britain's superior military power and diplomatic stalemate, Venezuela urged the United States to apply the "Monroe Doctrine" by which the United States had pledged to prevent the expansion of European colonial settlement in the Americas[50].

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[47] Letter from the Venezuelan Foreign Minister, Mr. Simón Camacho, to United States Secretary of State, Mr. Frederic Frelinghuysen (15 January 1883) (Vol. III, Annex 2).

[48] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

[49] See, e.g., VCM, p. 84, para. 20; *ibid.*, paras. 4.142 and 4.151-4.152.

[50] See *White Paper of the Venezuelan Council on Foreign Relations (COVRI) regarding the Pending Case* Arbitral Award of 3 October 1899 (Guyana *v.* Venezuela) (9 December 2020), p. 30, para. 52, available at https://covri.com.ve/wp-content/uploads/2020/12/White-Paper-COVRI-3.pdf (last accessed on 27 November 2024) ("Relying on the *Monroe Doctrine*, Venezuela called on the United States of America for its good offices").

2.19. In December 1886, in response to Venezuela's further overtures, the United States approached the British directly to obtain their agreement to arbitrate the territorial dispute, even offering itself as an impartial arbitrator. Secretary of State Thomas Bayard instructed the United States Minister in London to deliver the following message to the British:

> "[T]he records abundantly testify our friendly concern in the adjustment of the dispute; and the intelligence now received warrants me in tendering through you to Her Majesty's Government the good offices of the United States to promote an amicable settlement of the respective claims of Great Britain and Venezuela in the premises.
>
> As proof of the impartiality with which we view the question, we offer our arbitration, if acceptable to both countries."[51]

2.20. The offer received the same negative reaction from the British as had Venezuela's own proposals. In February 1887, Venezuela, alarmed by the ongoing westward expansion of British settlement into what it claimed was its own territory, broke relations with Great Britain. A year later, in February 1888, the United States, again responding to Venezuela's request, complained to the British about their ongoing expansion into the disputed territory and renewed its demand for arbitration of the dispute. United States Secretary of State Bayard instructed the United States Minister in London to advise the British:

> "The claim now stated to have been put forth by the authorities of British Guiana necessarily gives rise to grave disquietude, and

[51] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

> creates an apprehension that the territorial claim does not follow historical traditions or evidence, but is apparently indefinite.
>
> .....
>
> It may be well for you to express anew to Lord Salisbury [the British Foreign Minister] the great gratification it would afford this Government to see the Venezuelan dispute amicably and honorably settled by arbitration or otherwise and our readiness to do anything we properly can to assist to that end."[52]

2.21. Venezuela expressed its gratitude to the United States, and especially to President Grover Cleveland, for its support. In September 1888, the Venezuelan chargé d'affaires in Washington, Father Antonio Silva wrote:

> "To the President of the United States, Grover Cleveland, my country is largely indebted for his sympathy and the notion taken by him toward the Government of Great Britain, in showing that Government that the United States was not indifferent to the unwarranted acts of encroachment by Great Britain on the territory of the Republic of Venezuela.
>
> The timely interference on the part of President Cleveland has for the present stopped the English Government in her attempted acts of spoliation, encroachment, and appropriation to herself of very nearly one-third of our whole republic … My Government and people feel that in President Cleveland they have a friend and protector."[53]

2.22. The British remained opposed to arbitration. At Venezuela's urging, the United States made another overture. In February 1890, the Venezuelan Minister in Washington, Bolet Peraza wrote to United States Secretary of State James Blaine

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[52] *Ibid.*

[53] Letter from Venezuelan Chargé d'Affaires in the United States of America, Fr. Antonio Silva, to Diplomatic Agent of Venezuela in New York, Col. George Gibbons (18 September 1888), available at http://www.guyananews.org/Western/1888-1891.pdf (last accessed on 27 November 2024), p. 910.

"once more" requesting "the United States Government to use its good offices (which will be strengthened by its powerful influence) in order to bring about a settlement of the dispute between Venezuela and Great Britain and by the means which international law and the spirit of modern civilization have provided for such cases"[54]. In response, Secretary Blaine sent instructions to the United States Minister in London:

> "to use his good offices with Lord Salisbury to bring about the resumption of diplomatic intercourse between Great Britain and Venezuela as a preliminary step towards the settlement of the boundary dispute by arbitration."[55]

2.23. Between 1890 and 1893, Venezuela attempted, through its agent in London and with United States' support, to reach agreement with the British to arbitrate the territorial dispute and reestablish diplomatic relations[56]. As before, its attempts were rebuffed. In response, Venezuela again turned to the United States, urging it to use its influence to pressure the British to accept arbitration. This is reflected in correspondence dated 19 December 1894 from José Andrade, Venezuela's Minister in Washington, to W. Q. Gresham, Secretary of State of the United States:

> "As Your Excellency will understand, the dispute already has a phase that we could call threatening, given that the Colonial Authorities are preparing to expand their jurisdiction even further … and to thus enter into regions where the Republic has established

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[54] Letter from Mr. Peraza to Mr. Blaine (17 February 1890), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Address of the President, December 1, 1890* (1891), Document 496, available at https://history.state.gov/historicaldocuments/frus1890/d496. See also, reiterating the same request, Letter from Mr. Peraza to Mr. Blaine (24 April 1890), in *ibid.*, Document 497, available at https://history.state.gov/historicaldocuments/frus1890/d497.

[55] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

[56] *Ibid*.

> regular centers. In view of this, and as the Venezuelan Government always endeavors to exhaust all lawful means to reach an amicable settlement, it wishes to inform the Embassy of the new danger posed by this matter, and thus reiterate to the United States Government its request for effective and direct intervention, which our Minister Plenipotentiary presented to the Department of State in Washington some time ago and has continually ratified."[57]

2.24. Once again, the United States responded favourably to Venezuela's request. As described by United States Secretary of State Richard Olney:

> "Since the close of the negotiations initiated by Señor Michelena [Venezuela's agent in London] in 1893, Venezuela has repeatedly brought the controversy to the notice of the United States, has insisted upon its importance to the United States as well as to Venezuela, has represented it to have reached an acute stage — making definite action by the United States imperative — and has not ceased to solicit the services and support of the United States in aid of its final adjustment. These appeals have not been received with indifference and our Ambassador to Great Britain has been uniformly instructed to exert all his influence in the direction of the re-establishment of diplomatic relations between Great Britain and Venezuela and in favor of arbitration of the boundary controversy."[58]

2.25. The United States' concern about British colonial expansion and support for Venezuela continued to grow. By the end of 1894, Venezuela's cause was fully embraced at the highest level of the United States Government. President Cleveland, in his address to the United States Congress in December 1894, pledged:

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[57] Letter from Mr. Andrade to Mr. Gresham (19 December 1894) (MMG, Vol. III, Annex 29).

[58] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

> "I shall renew the efforts heretofore made to bring about a restoration of diplomatic relations between the disputants and to induce a reference to arbitration, a resort which Great Britain so conspicuously favors in principle and respects in practice and which is earnestly sought by her weaker adversary."[59]

2.26. The United States Congress responded in February 1895 with a Joint Resolution endorsing the President's determination "that Great Britain and Venezuela refer their dispute as to boundaries to friendly arbitration"[60].

2.27. Thereafter, the United States increased its pressure on the British. In July 1895, Secretary of State Olney instructed the United States Minister in London to deliver a strong message to Lord Salisbury, accusing Great Britain of "aggression upon Venezuelan territory" which impacts the United States in such a manner that the United States "can not regard with indifference":

> "By the frequent interposition of its good offices at the instance of Venezuela, by constantly urging and promoting the restoration of diplomatic relations between the two countries, by pressing for arbitration of the disputed boundary, by offering to act as arbitrator, by expressing its grave concern whenever new alleged instances of British aggression upon Venezuelan territory have been brought to its notice, the Government of the United States has made it clear to Great Britain and to the world that the controversy is one in which

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[59] Speech of President Grover Cleveland of 3 December 1894, available at https://millercenter.org/the-presidency/presidential-speeches/december-3-1894-second-annual-message-second-term (last accessed on 27 November 2024); see also Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527 (quoting the same statement).

[60] United States Congress, 53rd Session, *Joint Resolution*, H. Res. 252 (10 January 1895) (MMG, Vol. IV, Annex 81). See also Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527 (quoting the same resolution of the United States Congress).

> both its honor and its interests are involved and the continuance of which it can not regard with indifference."[61]

2.28. Venezuela admits in its Counter-Memorial that it is "a fact that [it] 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 also recognises that "[i]t was clear that the possibility of submitting the dispute to arbitration could have materialised only with the support of the United States … when, in 1895, the United States intervened in the dispute, Venezuela accepted, and even encouraged, its mediation"[62].

2.29. Venezuela's contrary assertion that the United States somehow colluded with Great Britain against Venezuela's interests runs contrary to its own admissions, and the clear evidence of consistent United States' support for Venezuela in its struggle with Great Britain — support which reached its zenith in 1895 and 1896. The United States Secretary of State's July 1895 message to the British fully embraced Venezuela's position, employing what was, at the time, especially pointed diplomatic language:

> "[T]he 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 [by arbitration, only if you first agree to abandon to me such other portion] as I may designate.' It is not perceived how such an attitude can be defended nor how it is

[61] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

[62] VCM, para. 5.10.

> 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 of British Guiana, it should not be regarded as amounting, in substance, to an invasion and conquest of Venezuelan territory."[63]

2.30. The United States thus made it perfectly clear to the British that it saw its own interests as aligned with those of Venezuela. Throughout the 19th century, pursuant to its so-called "Monroe Doctrine", the United States had vociferously opposed any expansion of European colonialism in the Western Hemisphere, including that of Great Britain, and it viewed British territorial claims against Venezuela through this prism. It was in these circumstances that United States Secretary Olney warned Britain that its attitude not only "deprives Venezuela of her free agency and puts her under duress," but also offends "the interests of the people of the United States" on a matter "with which the honor and welfare of this country are closely involved":

> "[T]he duty of the President appears to him unmistakable and imperative. Great Britain's assertion of title to the disputed territory combined with her refusal to have that title investigated being a substantial appropriation of the territory to her own use, not to protest and give warning that the transaction will be regarded as injurious to the interests of the people of the United States as well as oppressive in itself would be to ignore an established policy with which the honor and welfare of this country are closely identified."[64]

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[63] VCM, para. 7.18, quoting "M. Baker, *The Anglo-Venezuelan Boundary Dispute 1849-1903*, Washington, 1990 (available at https://archive.org/details/cu31924021109529)".

[64] Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the*

2.31. This warning was followed by President Cleveland's message to the United States Congress in December 1895. Expressly invoking the Monroe Doctrine against Great Britain, the President declared that: "its enforcement is important to our peace and safety as a nation and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government"[65].

2.32. The British interpreted the speech as a threat to go to war on behalf of Venezuela. As expressed by the Secretary of State for the Colonies, Joseph Chamberlain, in a letter to his Under-Secretary, Lord Selbourne:

> "I regard the situation created by the President's Message with grave concern. I do not think it is due entirely to electioneering motives; but I am sorry to say that I am afraid that a large number, and probably a majority, of Americans would look forward without horror to a war with this country. … They are jealous of this country, and suspect us always of an assumption of superiority of which we are not conscious ourselves, but they are convinced nevertheless that we look down upon them, [and] they would not be sorry to prove that they are bigger & stronger & better than we are. …
>
> Cleveland is a coarse-grained man, with, I think, a good deal of the bully in his composition. He has yielded to the Jingoes, but not altogether without sympathy for their views."[66]

2.33. Far from any "collusion" or "conspiracy" against Venezuela by the United States and Great Britain — as falsely alleged in its Counter-Memorial — the contemporaneous documentary evidence shows that the two States were close to

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*President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527.

[65] Speech of Grover Cleveland, "Message Regarding Venezuelan-British Dispute" (17 December 1895), available at https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed on 27 November 2024).

[66] Letter of Mr. Joseph Chamberlain to Mr. Selborne (20 December 1895) (Vol. III, Annex 3).

war over the territorial dispute between Britain and Venezuela, with the United States unequivocally committed to the Venezuelan side.

2.34. To further this commitment, President Cleveland announced his intention to create a "commission" to investigate and determine the "true" boundary between Venezuela and British Guiana:

> "[T]he dispute has reached such a stage as to make it now incumbent upon the United States to take measures to determine with sufficient certainty for its justification what is the true divisional line between the Republic of Venezuela and British Guiana. …
>
> When [the commission's] report is made and accepted it will, in my opinion, be the duty of the United States to resist by every means in its power, as a willful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela."[67]

2.35. In February 1896, the United States Congress appropriated the funds and President Cleveland's commission was established as the "United States Venezuela Border Commission". As Chairman, President Cleveland appointed Supreme Court Justice David Brewer (who would later be appointed as an arbitrator under the Washington Treaty). Venezuela applauded the commission. Its Foreign Minister, Pedro Ezequiel Rojas, communicated his government's approval to Secretary of State Olney, promising to cooperate with the commission and transmit all pertinent archival records[68].

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[67] Speech of Grover Cleveland, "Message Regarding Venezuelan-British Dispute" (17 December 1895), available at https://millercenter.org/the-presidency/presidential-speeches/december-17-1895-message-regarding-venezuelan-british-dispute (last accessed on 27 November 2024).

[68] Letter from P. Ezequiel Rojas to Richard Olney (28 March 1896) (MMG, Vol. IV, Annex 64).

2.36. The establishment of President Cleveland's commission proved to be the decisive element in compelling the British, finally, to reverse course and agree to Venezuela's demand for arbitration. Venezuela itself acknowledges this in its Counter-Memorial:

> "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."[69]

> "Great Britain accepted arbitration only because of the pressure put on it by the United States."[70]

2.37. Venezuela's *Libro Amarillo* (Yellow Book) of 1896, the official annual report of the Ministry of Foreign Affairs presented to the National Congress, stated that:

> "The good offices thus exercised by the Government of Washington were entirely aligned with Venezuela's request. Venezuela turned to the Great Republic in search of a dignified resolution to its conflict with Great Britain, and its request was heeded. Although at the time the British Cabinet insisted upon an exclusion that had long been openly rejected by the Republic, the path outlined by the United States was the most appropriate to achieving without further delay a positive harmony of opinions on the issue of arbitration.
>
> .....
>
> The manner in which the Legislative and Executive Branches of the United States began to undertake it could *could not have corresponded better to our wishes*. The means subsequently employed by the Department of State, as evidenced in the

[69] VCM, para. 5.1.

[70] *Ibid.*, para. 5.12.

> correspondence published in July, were no less consonant with our purpose. *The creation of an arbitral tribunal to settle the controversy from its inception would fulfil all of Venezuela's hopes*."[71]

2.38. Venezuela thus expressly acknowledges that, in compelling the British to accede to its demands for arbitration, the United States obtained for Venezuela that which it had long desired but was unable to obtain for itself. The contemporaneous documentation confirms that the United States did, in fact, take sides in this controversy, but the side it took was that of Venezuela, not that of Great Britain, even to the extent of threatening military intervention against Great Britain on Venezuela's behalf.

2.39. For decades this has been acknowledged by Venezuela. It is only very recently, in the context of these proceedings before the Court, that it first accused the United States of collusion with the British, conspiracy and fraud. The evidence shows that this is simply not the case. Whatever may be the relations between the United States and Venezuela in the 21st century, they were allies in the struggle against British imperialism in the late 19th and early 20th centuries. There is no evidence before the Court to support Venezuela's assertion that the United States acted against its interests in obtaining British agreement to its longstanding demand

[71] *El Libro Amarillo de los Estados Unidos de Venezuela*, 1896, pp. xxvii and xxix (emphasis added) (Vol. III, Annex 4) (translation of the Spanish original: "*Los buenos oficios así ejercidos por el Gobierno de Washington* se conformaban del todo a la solicitud de Venezuela*. Ella acudió a la Gran República en pos de una solución decorosa de su conflicto con la Gran Bretaña, y su petición fue atendida. Aun cuando por el momento el Gabinete inglés insistiera en una exclusión abiertamente rechazada de antiguo por la República,* el camino trazado por los Estados Unidos era el más apropiado *para llegar sin mayor tardanza a una positiva armonía de opiniones en punto de arbitramento. ... El modo como empezaron a prestarla los Poderes Legislativo y Ejecutivo de los Estados Unidos,* no podía corresponder mejor a nuestros deseos*. El medio de que siguió valiéndose para ello el Departamento de Estado, según aparece de la correspondencia publicada en julio, no era menos cónsono con nuestro propósito.* La creación de un tribunal arbitral que dirimiese la controversia desde su principio, venía a dejar realizadas todas las esperanzas de Venezuela").

for arbitration of the territorial dispute. Venezuela's claim that it was the victim of fraud has no support.

### *2. The United States Negotiated the Arbitration in Close Collaboration with Venezuela*

2.40. Venezuela now claims that it "was left out of the treaty negotiations"[72] and that the United States negotiated the terms of the Treaty "behind Venezuela's back"[73] in a manner "designed to harm Venezuela"[74].

2.41. The evidence undermines that claim. Notably, Venezuela has not submitted any contemporaneous evidence — not a single document — reflecting any dissatisfaction on its part with the way in which the United States conducted the negotiations with Great Britain over the terms of arbitration agreement. There were no complaints that Venezuela was "left out" of these negotiations, or that they were conducted in a manner likely "to harm Venezuela".

2.42. Rather, the documentary evidence shows a close collaboration between the United States and Venezuela throughout the negotiations. The chief points of contact were Secretary of State Olney for the United States and, for Venezuela, José Andrade and James Storrow — respectively Venezuela's Minister in Washington and its United States counsel, who served as legal advisor to Venezuela during the negotiations and previously acted as Venezuela's counsel before the United States Venezuela Boundary Commission.

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[72] VCM, p. 90, para. 27.

[73] *Ibid.*, para. 5.13.

[74] *Ibid.*, para. 2.18.

2.43. In November 1896, the United States Secretary of State wrote to Justice Brewer (in his capacity as Chairman of United States Venezuela Boundary Commission) that:

> "The treaty is so eminently just and fair as respects both parties – so thoroughly protects the rights and claims of Venezuela – that I cannot conceive of its not being approved by Venezuelan President and Congress. It is thoroughly approved by the counsel of Venezuela here and by the Venezuelan Minister at this capital."[75]

2.44. Minister Andrade reported to his Foreign Minister on 20 July 1896 on the "decision, firmness and cleverness with which he [Olney] is defending the rights of Venezuela. I do not believe she could have her cause in more apt, resolute and disinterested hands"[76].

2.45. To be sure, the negotiations had not yet concluded and there was hard bargaining ahead on certain issues. The documentary record during this period shows that the United States kept Venezuela fully informed of the progress of the negotiations, exchanged views with Venezuela on the various proposals and counterproposals, sought to have Venezuela's views reflected in the treaty text, and succeeded in doing so to the best of its ability.

2.46. Two issues proved to be difficult for the United States and Great Britain to resolve: the extent of the territory claimed both by the British and Venezuela that would be subject to arbitration, and the number of years of effective occupation that

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[75] Letter from Mr. Olney to Mr. Brewer (10 November 1896) (Vol. III, Annex 5). See also United States, 55th Congress, 1st Session, *Report from the Secretary of State regarding the Work of the Special Commission Appointed to Reexamine and Report upon the True Line between Venezuela and British Guiana*, Transmitted to the United States Senate Committee on Foreign Relations, Document 106 (25 May 1897), p. 13 (MMG, Vol. IV, Annex 65).

[76] Reproduced in Sir Geoffrey Meade, *Report on the Exposition presented by the Venezuelan Experts* (3 August 1965), para. 9 (MMG, Vol. IV, Annex 75).

would be sufficient to bestow title. The evidentiary record shows that the United States consulted closely with Venezuela on both issues, bargained hard on Venezuela's behalf, and obtained results that Venezuela welcomed and considered to be acceptable.

2.47. On the former issue, the British insisted that title to only part of the disputed territory be subject to arbitration, specifically, the territory west — that is, on the Venezuelan side — of the Schomburgk line with all territory east of the line accepted as British[77]. Venezuela and the United States vigorously opposed this, insisting that the arbitration cover all the disputed territory on both sides of Schomburgk line. As United States Secretary of State Olney wrote in June 1896: "[W]hatever this Government might be willing to agree in the way of a general arbitration plane, no arbitral convention for the settlement of the Venezuelan boundary could be entered into which did not make the award a finality as respect *the entire controversy*"[78]. Venezuela's counsel, Mr. Storrow, corresponded with Secretary Olney about this issue, expressing astonishment at Great Britain's audacity: "Does England simply want to secure to itself, free from the risks of arbitration, the territory which comes within Lord Salisbury's description of Jan. 10, 1880 (Blue b.295)?"[79] Ultimately the United States and Venezuela

[77] VCM, para. 4.132; Letter from Chamberlain to Olney (9 September 1896) (VCM, Vol. III, Annex 167).

[78] Letter from Mr. Olney to Mr. White (30 June 1896) (emphasis added) (Vol. III, Annex 6). See also Letter from Mr. Olney to Mr. Bayard (20 July 1895), in United States Department of State, *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895*, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527 ("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 of British Guiana, it should not be regarded as amounting, in substance, to an invasion and conquest of Venezuelan territory").

[79] Letter from Mr. Storrow to Mr. Olney (29 August 1896) (Vol. III, Annex 7).

prevailed; the Treaty provided for arbitration in respect of all disputed territory, on both sides of Schomburgk line, exactly as Venezuela wanted[80].

2.48. The other major disagreement between the British on one side, and the United States and Venezuela on the other, concerned the length of time required for effective occupation of any disputed territory to vest into title. In their discussions, the Parties referred to this as the period of "prescription". The British, who were expanding the area under their control, wanted a shorter period of prescription, proposing that title would vest after 30 years of continuous occupation[81]. Assuming ratification of the Treaty in 1897 (which is what occurred), this would have resulted in British title to any disputed territory first occupied by British settlers at any time up to 1867. Venezuela opposed this proposal on the ground that it would have nullified an agreement it had reached with Great Britain prohibiting any new occupation after 1850[82]. Accordingly, the United States insisted (with Venezuela's concurrence) that the period of prescription should be no less than 50 years prior to the Washington Treaty[83]. This prevented Great Britain from claiming title to any

[80] See, e.g., Washington Treaty, Article III (confirming that the Tribunal's jurisdiction is not restricted to a limited area of the disputed territory and covered 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"). See also Speech of President Grover Cleveland of 7 December 1896, available at https://millercenter.org/the-presidency/presidential-speeches/december-7-1896-fourth-annual-message-second-term (last accessed on 27 November 2024) (informing that "[t]he Venezuelan boundary question has ceased to be a matter of difference between Great Britain and the United States, their respective Governments having agreed upon the substantial provisions of a treaty between Great Britain and Venezuela submitting the *whole controversy to arbitration*"; emphasis added).

[81] See Letter from Chamberlain to Olney (9 September 1896) (VCM, Vol. III, Annex 167) ("All territory which has been in the actual use and occupation of British subjects or citizens of Venezuela respectively, or over which the Governments of the Colony of British Guiana or of Venezuela have exercised unrestricted political control for a continuous period of the last 30 years prior to the date of this Convention should be held to be and to form part of British Guiana or Venezuela respectively as the case may be.").

[82] Letter from Pauncefote to Salisbury (29 October 1896) (VCM, Vol. III, Annex 169).

[83] *Ibid.*

territory first occupied after 1847, preserving the effectiveness of the 1850 agreement. On this issue, too, the United States prevailed, and a 50-year period of prescription was incorporated into the treaty.

2.49. The evidence before the Court is reflected in contemporary correspondence on this key issue. It demonstrates the close coordination that took place between the United States and Venezuela during the treaty negotiations and contradicts Venezuela's new contention that the United States negotiated with Great Britain "behind Venezuela's back"[84]. For example, on 12 September 1896, Secretary Olney sent Venezuela's counsel (Mr. Storrow) a letter enclosing a British "draft of the proposed clause for the projected arbitration agreement respecting the Venezuela boundary", with a 40-year prescription period[85]. Mr. Storrow responded on 17 September:

> "Our views agreed the other day so that I thought it enough to answer to your telegram 'no change.'
>
> Settlements by British subjects, living under British rule, in territory administered solely by British rule, if long continued will certainly (I think) give title. Sixty years is the classic period; I would agree to less as a rule rather than lose an arbitration.
>
> Political occupation & administration, continuous & exclusive will give, I think political title. I would agree to the same period."[86]

2.50. On 26 October 1896, Mr. Storrow sent Secretary Olney a handwritten note continuing their discussion, and further illustrating their close collaboration on the

[84] VCM, para. 5.13.

[85] Letter from Mr. Olney to Mr. Storrow (12 September 1896) (Vol. III, Annex 8).

[86] Letter from Mr. Storrow to Mr. Olney (17 September 1896) (Vol. III, Annex 9) (emphasis in original).

prescription period during the negotiations, which had then reached a climactic stage:

> "Filling the blanks with 60 [years], I see no objection to the actual occupation part.
>
> I don't now see any actual objection to the second part. But I think it is unnecessary as applied to the facts. I will try to write a couple of sentences more [illegible word] explaining what I think is needed & send them to your home this afternoon."[87]

2.51. Two days later, on 28 October 1896, Mr. Storrow sent Secretary Olney another handwritten note, further evidencing Venezuela's intimate collaboration with the Secretary during the final stage of the negotiations:

> "Mr. Andrade [Venezuela Minister in Washington] and I will come to your house at 8:15 tonight unless we hear to the contrary"[88].

2.52. The timing is significant because, as noted below, Secretary Olney was at that time considering the latest text proposed by the British and preparing his response, which he sent the next day, following his meeting with Merrsr. Storrow and Andrade the night before[89]. In that response, the Secretary refused to agree to a prescription period of less than fifty years, precisely in order to preserve the 1850 agreement that was so important to Venezuela: "If a shorter term be stipulated it is certain to be urged, and with great force, that the Agreement of 1850 is thereby waived at least pro tanto."[90] Faced with Secretary Olney's adamance on this point, the British agreed to a 50-year prescription period, the effect of which was that no

[87] Letter from Mr. Storrow to Mr. Olney (26 October 1896) (Vol. III, Annex 10).

[88] Letter from Mr. Storrow to Mr. Olney (28 October 1896) (Vol. III, Annex 11).

[89] Letter from Mr. Olney to Sir Julian Pauncefote (29 October 1896) (Vol. III, Annex 12).

[90] *Ibid*.

occupation commenced after 1847 would be recognized and the Agreement of 1850 was preserved.

2.53. Venezuela apparently reviewed Secretary Olney's collected papers — stored at the Library of Congress in Washington — during the preparation of its Counter-Memorial. This is evident from its submission of some of those papers as Annexes 55, 56, 58, 60, 167, 169 and 176. However, it failed to annex or cite any of the Olney papers quoted above, even though they are included in the same collection. The reason is obvious: it did not wish to put evidence before the Court that contradicted its claim that the United States failed to consult Venezuela, or failed to faithfully represent its interests, on this or any other issues during the treaty negotiations.

2.54. Venezuela's selective use of the Olney papers is regrettable. It is accompanied by its selective quotation from the documents it has chosen to submit, in particular the speech of its then President, Joaquín Sinforio de Jesús Crespo, to the Venezuelan Congress on 20 February 1897, upon submitting the Washington Treaty for ratification. In respect of the role played by the United States in negotiating the treaty, President Crespo declared (in the part excised by Venezuela):

> "It is eminently just to acknowledge that the Great Republic endeavoured persistently to direct the matter by the most favourable route, and that the outcome achieved represents an effort of intelligence and will, worthy of praise and gratitude from those of us who are familiar with the intricate details of this very complicated matter."[91]

[91] *Presidencia de la República*, *Mensajes Presidenciales*, Tomo III, 1971, pp. 188-189 (Vol. III, Annex 13) (translation of the Spanich original: "Es de alta justicia reconocer que la Gran República ha procurado empeñadamente encaminar el asunto por la vía más favorable, y que el resultado obtenido representa un esfuerzo de inteligencia y de voluntad, digno de loa y agradecimiento por los que estamos al cabo de las íntimas peripecias de este complicadísimo asunto. »

2.55. As the Venezuelan President's words demonstrate, Venezuela expressed its gratitude for the role played by the United States in compelling the British to agree to arbitration, and in negotiating the terms of the arbitration agreement. To accuse the United States now, 127 years after the fact, of collusion and conspiracy to defraud Venezuela is entirely unsupported by the evidence. Venezuela has offered no evidence of concealment by the United States, much less evidence of an intent on the part of the United States to defraud Venezuela. Thus, Venezuela's argument that its consent to the Washington Treaty was tainted by error and fraud is baseless.

### C. The Facts: Nothing Was Included in the Treaty Without Venezuela's Knowledge or Contrary to its Interests

2.56. In its Counter-Memorial, Venezuela complains that it was "fraudulent and unjust … to … include, among rules applicable by the Tribunal, the recognition that fifty years' occupation constituted a valid title"[92]. Venezuela also says that "[t]his rule was clearly prejudicial to … Venezuela [which] had persistently opposed to recognize effective occupation, of whatever antiquity, as a valid title to the disputed territory"[93]. Notably, Venezuela cites no sources or evidence for either of these assertions.

2.57. Venezuela also complains that it was prejudiced by the agreement the United States reached with Great Britain in Article II of the Treaty, on the appointment of arbitrators, which did not provide for the appointment of any arbitrators of Venezuelan nationality. The Counter-Memorial asserts — again without reference to any evidence — that "it was already a given that Olney had agreed with the British, that Venezuela would not be given any chance to benefit

[92] VCM, para. 5.33.

[93] *Ibid.*, para. 5.34.

from the treaty, let alone to appoint arbitrators, which in itself should suffice to invalidate the treaty and the arbitration"[94].

2.58. The evidence before the Court, however, shows beyond any doubt that Venezuela obtained exactly what it wanted in the 50-year prescription rule, and that the United States bargained hard to get it (**1**); and that, although it initially desired Venezuelan arbitrators, when faced with the fact that the British refused to agree, Venezuela came to accept and eventually applaud the appointment of two United States Supreme Court Justices (**2**). Neither the prescription rule nor the appointment of arbitrators was prejudicial to Venezuela; nor did either provision constitute grounds for invalidating the Washington Treaty.

### *1. The 50-Year Prescription Rule Was Not Fraudulent and Did Not Prejudice Venezuela*

2.59. As indicated, the Counter-Memorial does not cite any evidence in support of Venezuela's assertion that it was "fraudulent and unjust" to include the 50-year prescription rule in the Washington Treaty[95]. There is a good reason for this: the contemporaneous documents show that this was *not* Venezuela's position during negotiation of the Treaty. In fact, the evidence confirms the *opposite*: that Venezuela *favoured* inclusion of a rule providing that effective occupation for a prescribed period would constitute valid title to the disputed territory, and that it was aware of, and endorsed, the proposal made by the United States that occupation for a prescription period of fifty years would be sufficient to establish title.

[94] VCM, p. 91, para. 31.

[95] *Ibid.*, para. 5.33.

2.60. As described above, this was a subject about which Venezuela's representatives and Secretary of State Olney consulted closely during the critical stage of the treaty negotiations in September and October 1896; and Mr. Storrow, on behalf of Venezuela, advised the Secretary of State that Venezuela favoured inclusion of a provision that title would result from effective occupation for a prescribed period. It bears repeating that Mr. Storrow made this clear in his letter to the Secretary of 17 September 1896, suggesting that a 60-year prescription period would be appropriate, while stating that he "would agree to less":

> "Settlements by British subjects, living under British rule, in territory administered solely by British rule, if long continued will certainly (I think) give title. Sixty years is the classic period; I would agree to less as a rule rather than lose an arbitration."[96]

2.61. There is no evidence that Venezuela ever communicated a different view to Secretary Olney, or to any other representative of the United States associated with the treaty negotiations, on acquisition of title by effective occupation. The British, too, favoured acquisition of title by effective occupation, but proposed a shorter prescription period of thirty years, as reflected in the handwritten letter of 9 September 1896 from Joseph Chamberlain, Minister for the Colonies, to Secretary Olney[97].

2.62. Reflecting Venezuela's views, Secretary Olney wrote to Sir Julian Pauncefote, the British Secretary of State in Washington, on 29 October 1896 — after meeting with Mr. Storrow and Minister Andrade the prior evening — insisting

[96] Letter from Mr. Storrow to Mr. Olney (17 September 1896) (Vol. III, Annex 9) (emphasis in original).

[97] Letter from Mr. Chamberlain to Mr. Olney (9 September 1896) (VCM, Vol. III, Annex 167), p. 546.

that he would not agree to a prescription period less than 50 years[98]. This would preclude the British from claiming title based on their occupation of any part of the disputed territory that commenced after 1847. As noted above at paragraph 2.52, Secretary Olney explained in his letter to Pauncefote that any prescription period less than 50 years would effectively "waive" the Agreement of 1850 between Venezuela and Great Britain, which Venezuela would not accept, and the United States would not endorse. The British acceded, and the 50-year prescription period was included in the proposed treaty that the Secretary sent to Venezuela for its consideration in November 1896[99].

2.63. In Caracas, this provision was carefully scrutinised and debated before it was ultimately approved. This is described in the letter from Mr. Storrow to Secretary Olney of 29 November 1896[100]. As reported by Mr. Storrow, he was greeted in Caracas by President Crespo, to whom he delivered a letter from President Cleveland along with the draft treaty commending it and urging its acceptance by Venezuela:

> "Mr. Andrade [Venezuela's Minister in Washington] afterwards had a long talk with him [President Crespo], and afterward with the Minister of Foreign Affairs and Dr. Bruynal Arra … Minister of the Treasury, the strongest man in the Cabinet. They were all satisfied with the Treaty and said that there should not be a moment's hesitation about adopting it. I have myself seen Dr. Bruynal and Dr. Rojas (Minister of Foreign Relations), the latter quite frequently, and they are entirely clear on the subject."[101]

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[98] Letter from Sir Julian Pauncefote to Mr. Salisbury (29 October 1896) (VCM, Vol. III, Annex 169); Letter from Mr. Olney to Sir Julian Pauncefote (29 October 1896) (Vol. III, Annex 12).

[99] Letter from Mr. Olney to Mr. Storrow (18 November 1896) (Vol. III, Annex 14) (informing that Olney is enclosing a "type-written copy of the proposed treaty between Great Britain and Venezuela" for Storrow to take to President Crespo in Caracas).

[100] Letter from Mr. Storrow to Mr. Olney (29 November 1896) (Vol. III, Annex 15).

[101] *Ibid.,* p. 2.

2.64. The draft treaty was then submitted to a commission of experts, with whom Mr. Storrow and Minister Andrade met and discussed, *inter alia*, the provision on acquisition of title by effective occupation. The discussion on this subject, which lasted "for several hours," is described in detail in Mr. Storrow's letter to Secretary Olney[102]. Mr. Storrow and Minister Andrade explained that they thought the provision was favourable to Venezuela:

> "[W]e said, it was not a concession. Prescription was, I thought, our strongest ground, and I wanted G.B. [Great Britain] to agree to it; and of all possible terms, 50 years was the best for us. To get England to assent to a rule we wanted was not giving away our case."[103]

2.65. One member of the commission, Dr. Raphael Seijas, a former Foreign Minister, argued against the provision, explaining that for Venezuela to agree to the principle of acquisition of title by effective occupation might violate the Venezuelan Constitution. However, he ultimately agreed "that he had no doubt prescription applied, and that the arbitrators would apply it …"[104].

2.66. Venezuela responds to this documentary evidence by impugning Mr. Storrow's loyalty to his client. According to the Counter-Memorial, "he was appointed as Venezuela's representative because of his strong connection to Olney," but "acted constantly under the instructions of the U.S. Secretary of State, [Olney] and not that of the Government of Venezuela"[105]. Again, this is pure assertion: there is no evidence to support this disparaging characterisation of Mr. Storrow, which was not Venezuela's view of him at the relevant time. He had served

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[102] Letter from Mr. Storrow to Mr. Olney (29 November 1896) (Vol. III, Annex 15), pp. 3-5.

[103] *Ibid.*, p. 4 (emphasis in original).

[104] *Ibid*., p. 4.

[105] VCM, para. 5.24.

Venezuela with distinction as its co-counsel before the United States Venezuela Boundary Commission[106], before accepting the role of Venezuela's liaison with Secretary Olney during the treaty negotiations. Venezuela's sudden disassociation from him is a recent invention to explain away his contemporaneous correspondence with Secretary Olney, which completely eviscerates the contention that the United States negotiated the treaty with Great Britain without consulting Venezuela's representatives or accommodating their concerns.

2.67. Mr. Storrow was not the only Venezuelan counsel who favoured the 50-year prescription rule. Former United States President Benjamin Harrison, Venezuela's lead counsel in the arbitration, regarded the rule as an important part of Venezuela's case against British claims to the disputed territory based on occupation by British settlers: "In view of the fifty years rule … adopted by the present treaty, the expansion of British occupation subsequent to 1847 can have no effect upon the determination of the boundary line."[107]

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[106] See, e.g., *El Libro Amarillo de los Estados Unidos de Venezuela*, 1898, p. x (Vol. III, Annex 16) (Venezuela praising Mr. Storrow on the occasion of his sudden death in 1897: "In April [1897], Mr. James J. Storrow, lead counsel for the Republic before the Investigative Commission in Washington, passed away suddenly and unexpectedly. We would have counted on him for the work required to present our titles and even to support our right before the Tribunal itself. *His death caused, in addition to the natural sentiment, a very great annoyance to the Executive Branch. The work written by him for the purpose of demonstrating the validity of our demand to the Commission appointed on 1 January 1896, by President Cleveland to ascertain the true dividing line of Guayana was an advanced guarantee of his skill and competence.* [The Governement was] *[d]eprived in an unexpected and painful way of that skillful collaboration* …". (emphasis added). Translation of the Spanish original: "En abril [de 1897] se había visto fallecer, casi súbitamente, al señor Doctor James J. Storrow, abogado principal de la República ante la Comisión Investigadora de Washington. Con él se hubiera contado para el trabajo que requería la exposición de nuestros títulos y aun para apoyar nuestro derecho ante el propio Tribunal. Su muerte causó, además del natural sentimiento, una contrariedad muy gran al Poder Ejecutivo. De su habilidad y competencia era prenda anticipada la obra por él escrita con el objeto de demostrar la validez de nuestra demanda al Cuerpo nombra el 1ro de enero de 1896 por el Presidente Cleveland para averiguar la verdadera línea divisoria de la Guayana. [E]l Gobierno [fue privado] de modo … imprevisto y doloroso de esa hábil colaboración …").

[107] *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*, New York, 1898, p. 179 (Vol. III, Annex 17).

2.68. The issue now raised by Venezuela is not whether the provision on "Adverse holding or prescription" — in Article IV (A) of the treaty — was opposed by Venezuela (it was not, as the contemporaneous statements of Mr. Storrow and President Harrison make clear). Rather, it is whether Venezuela can reasonably claim to have been defrauded by its inclusion, either because the United States concealed it from Venezuela during the negotiations, or acted in bad faith in agreeing to it, or misled Venezuela as to its meaning. There is no proof of any of these alleged deceptions. The evidence all points the other way. It shows that the United States consulted closely with Venezuela's representatives during its negotiations with the British, including about this very provision, and that those representatives understood and endorsed it. The evidence further shows that, when the draft treaty was sent to Caracas in November 1896, the Venezuelan government carefully considered and debated the merits of the provision — as well as all others — before approving, signing and ratifying the Treaty. There is no support whatsoever for Venezuela's argument that the Treaty should be invalidated because of its inclusion.

2.69. The Venezuelan Foreign Ministry's *Libro Amarillo* for 1896 flatly contradicts the Counter-Memorial's reinterpretation of historical events. Far from criticizing the United States for concealing things from Venezuela or negotiating against its interests with the British, the contemporaneous official report stated: "when the work regarding the definition of our rights had reached the level of importance noted at the outset of the present address, the Department of State in Washington consulted the Government, through the Venezuelan Legation, concerning a matter closely tied to the arbitration agreement, which was still being negotiated to bring an end to the dispute"[108].

[108] Pedro Ezequiel Rojas, Minister of Foreign Affairs, Informs the Venezuelan Legislature (Senators and Deputies) in its annual address, *El Libro Amarillo de los Estados Unidos de Venezuela*, 1896, pp. xxviii-xxxi (Vol. III, Annex 4).

2.70. In the same year (1896), President Crespo made the following statement about the role played by the United States in the negotiation of the Treaty:

> "[H]aving been considered by the President of the Republic in the Council of Ministers, the nature of this publication — *expertly and wisely defended by the Department of State in Washington, and setting out the principles and doctrines to which Venezuela adheres in order to uphold its rights and dignity in one of the gravest issues recorded in its political annals* — has led to the decision to produce a special edition in Spanish of all the notes comprising the above-mentioned correspondence. This edition is to be circulated not only within the country but also throughout all sister Republics, as both *a pledge of recognition to the Government of the United States* and a welcome contribution to the promotion of principles so gallantly supported by the Great People of the North in support of common security and international peace."[109]

2.71. Venezuela's argument that the treaty is invalid because of the absence of a provision expressly mentioning the 1850 agreement is equally without merit. According to the Counter-Memorial: "Venezuela insisted that the arbitration Treaty should include an explicit reference to that agreement."[110] There is no evidence that

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[109] *Correspondencia entre los Estados Unidos y la Gran Bretaña*, Caracas, 1896, pp. 3-4 (Vol. III, Annex 18) (emphasis added) (translation of the Spanish original: "*Simultáneamente acaba de salir a luz en Washington y en Londres la correspondencia diplomática cruzada entre el Gobierno de los Estados Unidos y el de la Gran Bretaña con motivo de un proyecto de Arbitraje Internacional aplicable a la cuestión de límites pendiente entre Venezuela y la Colonia de Demerara; correspondencia que pone una vez más de manifiesto la acción saludable de la Gran República del Norte ... Y, considerada por el Señor Presidente de la República en Consejo de Ministros la naturaleza de esa publicación, donde aparecen* defendidos experta y sabiamente, por parte del Departamento de Estado de Washington, principios y doctrinas á que viene acogiéndose Venezuela para sacar ilesos sus derechos y su dignidad *en la más grave de las cuestiones que registran sus anales políticos, ha dispuesto que se lleve á cabo una edición especial en idioma castellano de todas las notas que constituyen la mencionada correspondencia, y hacerla circular no sólo en el País sino en todas las demás Repúblicas hermanas,* como prenda de reconocimiento al Gobierno de los Estados Unidos, al par que como grata contribución a la propaganda de ideas tan gallardamente sustentadas por el Gran Pueblo del Norte en pro de la seguridad común y en favor de la paz internacional." (emphasis added)).

[110] VCM, para. 5.64.

this alleged "insistence" was ever communicated to the United States during the treaty negotiations. The only source that the Counter-Memorial cites is a letter from Foreign Minister Rojas to Minister Andrade, that is, from one Venezuelan to another[111]. Moreover, it is dated 9 December 1896, a month after the negotiations between the United States and Great Britain ended and the draft treaty was sent to Caracas. Two days earlier, on 7 December 1896, Minister Andrade had telegrammed Secretary Olney that the draft treaty had been accepted by Venezuela:

> "Memorandum accepted. Will be published here Monday afternoon. Extra session of Congress will be called as soon as possible. Am authorized to sign the treaty with small corrections such as provision filling vacancies in case of death or disability …"[112]

2.72. Venezuela did communicate its views on the 1850 agreement to Secretary Olney during the negotiations, but it did not ask for a reference to it in the Treaty. In his letter to the Secretary of 17 September 1896, Mr. Storrow wrote only: "I do not think that the truce of 1850 could be waived or impaired or that it ought to be."[113] As indicated above, at paragraph 2.52 above, Secretary Olney took pains to ensure that the 1850 agreement was not "waived or impaired". He explained in his letter to Sir Julian Pauncefote that his refusal to accept a prescription period less than 50 years was precisely to avoid having that agreement "waived pro tanto"[114].

2.73. Subsequently, in a letter to former United States President Harrison at the time he was serving as Venezuela's lead counsel in the arbitration, Secretary Olney wrote:

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[111] *Ibid*. See also Letter from Ezequiel Rojas to José Andrade (9 December 1896) (VCM, Vol. II, Annex 59).

[112] Telegram of Minister Andrade to Mr. Olney (7 December 1896) (Vol. III, Annex 19).

[113] Letter of Mr. Storrow to Mr. Olney (17 September 1896) (Vol. III, Annex 9).

[114] Letter of Mr. Olney to Sir Julian Pauncefote (29 October 1896) (Vol. III, Annex 12) (emphasis added).

> "I may add that both Mr. Storrow and myself considered it legally impossible that there could be any adverse holding or prescription as against the agreement of 1850 – a position to which we deemed the British Government to have committed itself in the most public and emphatic manner."[115]

2.74. Secretary Olney did not consider it necessary or advisable to refer expressly to the 1850 agreement in the Treaty, provided its force was preserved. As he explained to Sir Julian Pauncefote:

> "[A]n attempt to define its scope and meaning … will involve us in protracted debate and indefinitely postpone the attainment of the object we now have in view. The Agreement will come, and should come, before the arbitral Tribunal in the natural course of things and will be interpreted by the Tribunal with the aid of facts, documents and considerations of which we cannot know now anything."[116]

2.75. This was not a betrayal of Venezuela by Secretary Olney, as Venezuela now argues. It was entirely consistent with Venezuela's contemporaneous position, as conveyed to him by Mr. Storrow. It was also sensible in light of the agreement's manifest ambiguity. Attention was called to this by William Lindsay Scruggs, the other attorney who, alongside Mr. Storrow, represented Venezuela before the United States Venezuela Boundary Commission. In his treatise supporting Venezuela's territorial claims, Mr. Scruggs described the 1850 agreement as follows:

> "[By the terms of that Agreement], each party was obligated 'not to occupy any part of the unoccupied territory in dispute' till the question of boundaries should be finally settled."[117]

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[115] Letter from Mr. Olney to Mr. Harrison (29 July 1898) (Vol. III, Annex 20).

[116] Letter from Mr. Olney to Sir Julian Pauncefote (29 October 1896) (Vol. III, Annex 12).

[117] W. L. Scruggs, *British Aggression in Venezuela, or the Monroe Doctrine on Trial*, Atlanta, 1895, p. 18.

Unfortunately, however, this "unoccupied territory in dispute" was not explicitly described; and "some years later, under change of government, each party accused the other of trespass, and of thus violating the Agreement of 1850"[118].

2.76. The Counter-Memorial accuses Secretary Olney of keeping "some crucial decisions strictly confidential" and not sharing them with Venezuela[119]. There is no evidence of any "decisions" by the United States, or in which it participated, that were withheld from Venezuela. Venezuela cites a letter from Secretary Olney advising his British counterparts that certain of their correspondence would be considered private, and therefore excluded from the Department of State's official files[120]. The only such "confidential correspondence"[121] (Venezuela's words) in the record appears to be the Secretary's letter to Sir Julian Pauncefote of 29 October 1896, described and quoted above at paragraphs 2.52 and 2.62[122]. However, it is most unlikely that the contents were not known by Venezuela's representatives — Mr. Storrow and Minister Andrade — who met with the Secretary at his home the previous evening to discuss the subject matter. In any event, this is the letter, supplied by Venezuela in Annex 150 to its Counter-Memorial, in which the Secretary insisted on a prescription period of no less than 50 years in order to preserve the force of the 1850 agreement, precisely as Venezuela wished. There is thus no evidence of any "confidential decisions" or "secret correspondence" by the United States, let alone any that were contrary to Venezuela's interests.

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[118] *Ibid.*

[119] VCM, para. 6.31.

[120] *Ibid.*, paras. 5.44-5.47.

[121] *Ibid*.

[122] See, e.g., *ibid.*, paras. 5.55 and 5.65.

2.77. That the "secret correspondence" was not prejudicial to Venezuela is confirmed by the fact that Venezuela's own counsel introduced it along with other "confidential" documents in the arbitral proceedings:

> "General Harrison. – [C]ertain notes were submitted for our consideration not before known to us. When they were presented we at once said to the Counsel for Great Britain 'Let them be put in evidence without objection because they bear on this question.'
>
> They were marked, one of them 'strictly personal' and others 'confidential'. Perhaps Venezuela might have raised some question as to whether they could be used in construing the Treaty, but we have raised no such question, and while Venezuela does not now, in view of these personal and confidential notes *which we have admitted into the case*, expect to pursue or to renew the argument she has made, she does not withdraw it, but submits it to the Tribunal for its consideration upon these notes …"[123]

2.78. Thus, even if, *quod non,* Venezuela had suffered injury by virtue of the so-called "secret correspondence" or "confidential" documents, it could not on this basis challenge the validity of the Treaty because (i) it cannot invoke an alleged error in which it participated; (ii) it could have avoided the error (if it was an error) by not introducing these items into evidence before the arbitral tribunal; and (iii) the circumstances were such as to bring the alleged error to the attention of the party (Venezuela) invoking it[124].

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[123] *British Guiana-Venezuelan Boundary: arbitration between the governments of her Britannic Majesty and the United States of Venezuela: proceedings*, Vol. VII, 28-35 days, Paris, 1899, p. 1753 (emphasis added).

[124] See VCLT, Article 48 (2). See also MMG, para. 7.9, note 385, citing to *Temple of Preah Vihear (Cambodia* v. *Thailand)*, *Judgment*, *I.C.J. Reports 1962,* pp. 26-27; *Korea - Measures affecting Government Procurement*, Report of the Panel, WT/DS163/R (1 May 2000), paras. 7.120-7.126; *Legal Status of Eastern Greenland*, *Judgment*, *1933*, *P.C.I.J.*, *Series A/B*, *No. 53*, p. 71 and *Legal Status of Eastern Greenland*, *Judgment*, *Dissenting Opinion of Judge Anzilotti*, *1933*, *P.C.I.J.*, *Series A/B*, *No. 53*, pp. 92-93.

*2. The Treaty Provision on Appointment of Arbitrators Was Not Fraudulent and Did Not Prejudice Venezuela*

2.79. The contemporaneous evidence shows that the British were firmly opposed to the appointment of Venezuelan nationals to the arbitral tribunal. Sir Julian Pauncefote's private letter to Lord Salisbury, the Foreign Minister, stated (as quoted by Venezuela):

> "[W]e 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."[125]

2.80. This was not, however, the position of the United States. In fact, the very letter quoted above, which was dated 8 December 1896, expresses this concern on Pauncefote's part: "I am a little uneasy as to whether the U.S. judges may not be urged by him [Secretary of State Olney] to appoint a Venezuelan as Arbitrator."[126] At the time, Venezuela was pressing for a modification to the draft treaty negotiated by the United States and Great Britain to allow it a role in the appointment of arbitrators. Article II of the *draft* treaty provided no such role:

> "The tribunal shall consist of two members nominated by the judges of the Supreme Court of the United States and two members nominated by the judges of the British supreme court of justice and of a fifth juror selected by the four persons so nominated … ."[127]

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[125] 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 (VCM, Vol. III, Annex 150).

[126] *Ibid.*

[127] Heads of proposed treaty between Venezuela and Great Britain for settlement of Venezuela boundary question as agreed upon between Great Britain and the United States dated 12 November 1896, Article II, reproduced in H. La Fontaine, *Pasicrisie Internationale 1794-1900, Histoire documentaire des arbitrages internationaux*, 1902, p. 557-558.

2.81. Venezuela engaged directly with Secretary Olney and Pauncefote to seek a modification of this provision. Its efforts were described in Minister Andrade's communication to Foreign Minister Rojas of 9 January 1897:

> "On the 28th [of December] in the morning I had my first conversation with Mr. Olney, and in the afternoon with Sir Julian Pauncefote, concerning the proposed modification of the basic article II of the Arbitration Treaty on the question of Guiana.
>
> The same day, the British Ambassador [Pauncefote] transmitted the Venezuelan proposal to Lord Salisbury [the Foreign Minister] by telegram."[128]

2.82. After several weeks of negotiation, Venezuela succeeded in persuading the British to agree that the draft treaty would be modified to empower Venezuela to appoint as one of the arbitrators a Justice of the United States Supreme Court. As described by Minister Andrade, the agreement he reached with the British would:

> "attribut[e] to Venezuela the appointment of only one of the arbiters on her side, and the other to the United States, it being noted that the Venezuelan appointee would be a judge from the Supreme Court of this country"[129].

2.83. Mr. Andrade explained that having two United States Supreme Court Justices on the arbitral tribunal, rather than one, would be advantageous to Venezuela:

> "The more I think of it, the more I think that Venezuela, far from wishing to restrict the participation of the United States in the composition of the Tribunal, should seek to augment it so that she (the U.S.A.) may have greater moral responsibility with regard to

[128] Letter from Minister Andrade to Minister Ezequiel Rojas (9 January 1897) (Vol. III, Annex 21).
[129] *Ibid*.

> the result of the arbitration, and that more effective her concern during the judgment."[130]

2.84. Prior to its acceptance by the British, the Venezuelan proposal was sent in a letter from President Crespo to President Cleveland, which was delivered to the latter (as well as Secretary Olney) by Mr. Storrow (Venezuela's counsel). Mr. Storrow described the favourable United States reaction, and Great Britain's ultimate acceptance, to Foreign Minister Rojas in a letter dated 27 January 1897:

> "Both the President and Mr. Olney declared that the desire of Venezuela about the appointment was entirely reasonable, and said that they would gladly do what they properly could to further it. In fact, the Secretary of State had already, in consequence of my cable messages, spoken to the British Ambassador on the subject and at once saw him again, pointing out to him that a change of the nature desired would be a graceful act of courtesy between nations now friendly. Sir Julian Pauncefote received the suggestion in the same spirit, and you know the result which Mr. Andrade and Sir Julian reached in their subsequent conferences.
>
> We knew the desire of the Government of Venezuela that the tribunal should be composed not only of Jurists, but of Jurists holding the highest judicial stations. The duties, and the very heavy press of work on the Justices of the Supreme Court of the United States, together with the serious illness of some of their number, made it difficult for them to spare two members. But they finally concluded that if on the part of England, two high judicial officers should be appointed, two Justices of the court here would also serve, and the Chief Justice would accept the appointment from General Crespo."[131]

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[130] *Ibid*.

[131] Letter from James J. Storrow to Dr P. Ezequiel Rojas, Venezuelan Minister of Foreign Relation (26 January 1897) (MMG, Vol. III, Annex 31).

2.85. Mr. Storrow reminded Foreign Minister Rojas that this was consistent with Venezuela's expressed desires:

> "Thus, I think you have got what you desired – a clear and formal recognition of the appointing power of Venezuela on the face of the treaty; precisely the same two Jurists [Chief Justice Fuller and Justice Brewer] whom, at Caracas, you told me you preferred; and in addition to that, you will have (if the plan is carried out) two of the highest judicial officers, on the part of Great Britain. This you owe to the tact of Mr. Andrade, to the kindly help of President Cleveland and Mr. Olney, and in considerable part to the disposition of England to make the arrangements agreeable to Venezuela."[132]

2.86. The Counter-Memorial has misconstrued the facts. The contemporaneous documents, which Venezuela now completely ignores, show that: (i) Venezuela sought to modify the draft treaty negotiated by the United States and Great Britain to ensure that two United States Supreme Court Justices, including the Chief Justice, would be appointed and to empower the President of Venezuela to make at least one of those appointments directly; (ii) the United States supported Venezuela's proposal and interceded with the British to obtain their acceptance of it; (iii) the British agreed to the proposal; and (iv) Article II of the treaty was modified to incorporate Venezuela's proposal. The final version of Article II thus provided (in relevant part):

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[132] Letter from James J. Storrow to Dr P. Ezequiel Rojas, Venezuelan Minister of Foreign Relation (26 January 1897) (MMG, Vol. III, Annex 31). Venezuela's gratification at the appointment of the two United States Supreme Court Justices was reflected in the letter sent by the President of Venezuela to Chief Justice Fuller on 17 February 1897: "The designation that I had the honor to make, in your person, to constitute with the Magistrate chosen by the Court over which you preside, a part of the Tribunal of five Jurists who are to take cognizance of the matter of the boundary between Venezuela and the British Colony of Guyana, satisfies most fully my own desire, and was received in the country with signal marks of approval. … Your participation in the delicate tasks of this respected Arbitral Tribunal … is of special importance for Venezuela, because, besides the title to our respect and esteem with which your personal qualifications inspire us, your aptitude for the duties which belong to the highest administration of justice, and which you have shown in the conspicuous office of Chief Justice, constitute one assurance more that the Arbitral Tribunal will reach a correct result in its delicate deliberations." (Vol. III, Annex 22).

> "The Tribunal shall consist of five jurists … *two on the part of Venezuela*, nominated, one *by the President of the United States of Venezuela*, namely, the Honourable Melville Weston Fuller, Chief Justice of the United States of America, and one nominated by the Justices of the Supreme Court of the United States of America, namely, the Honourable David Josiah Brewer, a Justice of the Supreme Court of the United States of America … ."[133]

2.87. The modification of Article II to Venezuela's satisfaction led to its acceptance of the Treaty. This was clearly stated by President Crespo himself, in his address to the Venezuelan Congress, on 20 February 1897:

> "The Government of course deemed it indispensable to introduce into the Treaty a modification aimed at ensuring the appointment of the arbitral tribunal with the effective participation of the Venezuelan Authorities. This proposal was promptly submitted, and the alteration was accepted. The involvement of the United States had produced a result whose subsequent effects were unavoidably tied, from a moral standpoint to the effective and authoritative prestige of that great mediating nation."[134]

2.88. It is therefore apparent that Venezuela ratified the Treaty of Washington on 2 February 1897 in full knowledge of the composition of the Tribunal. As summarized by the Venezuelan *Libro Amarillo* of 1897, published by the Venezuelan Foreign Ministry:

> "The proposed articles provided for the creation of the Arbitral Body with two members appointed by the judges of the Supreme Court of the United States and two appointed by the judges of the British Supreme Court, in addition to a fifth jurist chosen by the other four, or by His Majesty the King of Sweden and Norway, in the event of

[133] Treaty Between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary Between the Colony of British Guiana and the United States of Venezuela (2 February 1897), Article II (Application, Annex 1) (emphasis added).

[134] *Presidencia de la República*, *Mensajes Presidenciales*, Tomo III, 1971, pp. 188-189 (Vol. III, Annex 13).

> a failure to agree on such a choice. *The honourable impartiality of such a constituted Tribunal was sufficiently guaranteed*."[135]

2.89. Had Venezuela still wanted to challenge the composition of the Tribunal, it could and should have done so when the hearings opened[136]. However, at the beginning of the hearings, Venezuela expressed again its satisfaction, affirming that it was composed of "[a]rbitrators whose distinguished records and whose high reputation give us the assurance that the questions involved will be decided in justice and equity"[137].

2.90. The evidence thus fully refutes Venezuela's contention that it was defrauded, deceived or betrayed by the United States or Great Britain in regard to the Treaty provision concerning appointment of arbitrators. On the contrary, it demonstrates that Venezuela "got what [it] desired"[138], in the words of its then legal counsel, and that neither the manner in which this provision was negotiated nor the final outcome provide any basis for alleging that the Treaty is invalid.

2.91. In conclusion, there is no evidence that Venezuela's consent to the Washington Treaty was either tainted by error or secured by fraud. Furthermore, Venezuela was not forced to conclude this Treaty, as shown below.

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[135] *El libro amarillo de los Estados Unidos de Venezuela*, 1897, pp. xxxiii-xxxiv (Vol. III, Annex 23). Translation of the original in Spanish: "*Los artículos propuestos harían formar el Cuerpo Arbitral con dos miembros nombrados por los jueces de la Suprema Corte de los Estados Unidos y dos nombrados por los jueces de la Suprema Corte Británica de Justicia, además de un quinto jurista elegido por los cuatro, o por Su Majestad el Rey de Suecia y Noruega en caso de no haber acuerdo para tal elección.* La honrada imparcialidad de un Tribunal así compuesto estaba suficientemente garantizada." (emphasis added).

[136] MMG, paras. 7.51-7.52.

[137] *Ibid.*, para. 7.49; Boundary between the Colony of British Guiana and the United States of Venezuela, First Day's Proceedings (25 January 1899), p. 4 (MMG, Vol. IV, Annex 96).

[138] *Ibid.*, para. 3.32; Letter from James J. Storrow to Dr P. Ezequiel Rojas, Venezuelan Minister of Foreign Relation (26 January 1897) (MMG, Vol. III, Annex 31).

## II. Venezuela Freely Signed the Washington Treaty

2.92. Venezuela asserts that "[it] 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"[139]. Venezuela alleges that "[i]t would therefore be justified to consider the 1897 Treaty to be invalid because of coercion"[140].

2.93. Venezuela's claim ignores both the facts and the law. As to the facts, Venezuela's characterisation is contradicted by the evidence on record, which shows that Venezuela was free to accept or reject the ratification of the Washington Treaty and that it entered the Treaty of its own free will (**A**). As to the law, Venezuela's argument in any event ignores international law as it existed at the end of the 19th century, when coercion was not considered a factor capable of vitiating a State's consent to a treaty (**B**). Venezuela's attempts to impugn the validity of the Treaty on the basis of "coercion" are therefore without merit.

### A. The Evidence Refutes Venezuela's Argument that it Signed and Ratified the Washington Treaty under Coercion

2.94. In support of its argument that it was coerced into signing and ratifying the Treaty, Venezuela relies on a letter dated 9 December 1896 in which the Venezuelan Minister of Foreign Affairs, Pedro Ezequiel Rojas, informed the Venezuelan Minister in Washington, José Andrade, of his Government's decision to accept the draft treaty. In this letter, Minister Rojas stated that "the Government, taking into consideration, on the one hand, what it owes to the United States of

[139] VCM, para. 5.68.

[140] *Ibid.*, para. 5.76.

America, and on the other, the dangerous consequences of the abandonment in which the refusal would place Venezuela, has decided to accept" the Treaty[141].

2.95. Venezuela thus seeks to equate the prospects of unspecified "dangerous consequences" with coercion by another State, which could only have been Great Britain or the United States. It states in its Counter-Memorial: "In case of refusal [of the Treaty], 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."[142] On this basis, Venezuela argues: "It would therefore be justified to consider the 1897 Treaty to be invalid because of coercion."[143]

2.96. Venezuela offers no evidence to support its argument. There is no evidence that any Venezuelan official contemporaneously indicated, suggested or even inferred that the Government was forced to sign or ratify the Treaty. By its new claim that it was subject to coercion 127 years ago, Venezuela has turned history on its head, reversing cause and effect. It is undisputed that the threat of military action by Great Britain is what caused Venezuela to seek arbitration of the territorial dispute, and to press the United States to use its influence with the British to get them to agree to arbitrate[144]. If anyone was forced to accept arbitration, it was the British, who were threatened with war by the United States[145]. In the words of Secretary of State Olney: "[I]f this matter were allowed to run on till open rupture came between England and Venezuela, [the United States] should be involved in the war. … Should war have begun … the American people would become aroused

[141] VCM, para. 5.72, quoting "Letter from Ezequiel Rojas to José Andrade, 9 December 1896 (Annex 59)."

[142] *Ibid.*, para. 5.68.

[143] *Ibid.*, para. 5.76.

[144] See paras. 2.15-2.18 above.

[145] See paras. 2.31-2.33 above.

and force our Government to side with Venezuela."[146] Venezuela itself admits: "If the British finally accepted to enter into an arbitration process, it was under the U.S. pressure."[147]

2.97. By agreeing to the Washington Treaty, Venezuela accomplished its objective of removing the threat of British military activity that caused it to seek arbitration in the first place. How can it credibly claim to have been coerced into accepting an arbitration agreement with Great Britain that it had been aggressively, even desperately, seeking, as a means of relieving the pressure it was facing, for more a dozen years between 1883 and 1897?

2.98. Venezuela accuses the United States, as well as Great Britain, of coercing it to accept the Washington Treaty, both by direct pressure from Secretary of State Olney, who allegedly "persevered in forcing Venezuela to sign the Treaty"[148]. This allegation is thoroughly refuted by the contemporaneous documents which, as indicated above[149], show that Venezuela favourably received the draft treaty in November 1896. Mr. Storrow reported, in his letter to Secretary Olney of 29 November, that he had met in Caracas with President Crespo, Foreign Minister Rojas and the Minister of Finance who "were all satisfied with the Treaty and said that there should not be a moment's hesitation about adopting it"[150].

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[146] H. James, *Richard Olney and his public service*, Boston/New York, 1923, p. 138, mentioning Speeches in Stirring Times, R. H. Dana (Houghton Mifflin Company, 1910), p. 138 (Vol. III, Annex 24).

[147] VCM, para. 5.1. See also *ibid.*., para. 5.12.

[148] *Ibid.*, p. 94, para. 42.

[149] See paras. 2.43, 2.62-2.63 above.

[150] Letter from Mr. Storrow to Mr. Olney (29 November 1896) (Vol. III, Annex 15). Storrow's letter also reported that: "A newspaper this morning had a very neat little article. The U.S., it said, had been asked by Venezuela to help. It had negotiated a settlement, which most people thought a good one. But Venezuela was at liberty to accept or reject it. It was, however, the best that the U.S. could do." (*ibid.*, p. 7).

2.99. Venezuela's decision to sign the Treaty, in November 1896, preceded its successful efforts to make the terms even more favourable by modifying the provision on appointment of arbitrators, as described above[151]. To be sure, the Treaty, even as modified, was not perfect from Venezuela's point of view. It was, after all, the product of negotiation with Venezuela's then-adversary, Great Britain. However, as President Crespo explained, the Treaty was the "most favourable" that could be obtained in the circumstances[152]. The alternative for Venezuela was to forego arbitration of the territorial dispute, which had long been its central objective, and once again expose itself to conflict with Great Britain. If these were the "dangerous consequences" referred to by Foreign Minister Rojas, they were a reflection of the geopolitical reality, not evidence of "coercion" by Great Britain or the United States.

2.100. Venezuela clearly understood this at the relevant time. Far from accusing anyone of forcing Venezuela to sign an unjust treaty, President Crespo declared that:

> "The settlement plan was presented to Venezuela for its consideration, with no coercive intent and in full respect of the sovereignty and independence of the Republic …"[153]

2.101. The evidence thus entirely refutes the Counter-Memorial's unsupported assertion that Venezuela signed the Washington Treaty under coercion, just as it refutes the equally unsupported assertion that Venezuela signed it as a result of concealment or fraud.

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[151] See paras. 2.79-2.88 above.

[152] *Presidencia de la República*, *Mensajes Presidenciales*, Tomo III, 1971, pp. 188-189 (Vol. III, Annex 13).

[153] *Ibid.*, p. 188.

## B. INTERNATIONAL LAW DID NOT INVALIDATE CONSENT GIVEN UNDER COERCION AT THE END OF THE 19TH CENTURY

2.102. In any event, even if — *quod non* — Venezuela had signed the Treaty under coercion, this would not invalidate its consent to the Treaty under international law as it existed at the time of that act.

2.103. In support of its claim that its consent to the Treaty was invalid, Venezuela invokes Article 52 of the VCLT of 1969, which entered into force on 27 January 1980 and provides that: "[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."[154]

2.104. This argument leads to two observations: (i) The 1969 Vienna Convention was adopted 72 years after the 1897 Washington Treaty was ratified by Venezuela; and (ii) the Convention formally refers to the principles embodied in the Charter of the United Nations, adopted 48 years after the ratification of the 1897 Washington Treaty.

2.105. In its Memorial, Guyana demonstrated that Article 52 VCLT does not apply retroactively and cannot render invalid the Washington Treaty of 1897[155]. The commentary on Article 52 could not be clearer:

> "The question of the time element in the application of the article was raised in the comments of Governments from two points of view: (a) the undesirability of allowing the rule contained in the article to operate retroactively upon treaties concluded prior to the establishment of the modern law regarding recourse to the threat or

[154] VCM, para. 5.76.

[155] *Ibid.*, paras. 7.57-7.63.

> use of force; and (b) the date from which that law should be considered as having been in operation. The Commission considered that there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law. … 'A juridical fact must be appreciated in the light of the law contemporary with it.' … The present article concerns the conditions for the valid conclusion of a treaty – the conditions, that is, for the creation of a legal relation by treaty. An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force. The rule codified in the present article cannot therefore be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force."[156]

2.106. The Court itself, when Article 52 was invoked before it, was careful to stress that it reflected "contemporary international law" as international law existed in 1973[157].

2.107. Nevertheless, Venezuela states that "[i]t would … 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"[158].

2.108. In its Memorial, Guyana cited various authors who, contemporaneously with the ratification of the Washington Treaty, wrote that coercion of a State in

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[156] MMG, para. 7.58, note 440: "Draft Articles on the Law of Treaties with commentaries, Art. 49, p. 247, para. 7".

[157] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 1973*, p. 14, para. 24; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 1973*, p. 59, para. 24.

[158] VCM, para. 5.76.

order to obtain its consent would not lead to the invalidity of the consent given[159]. Furthermore, the same source cited by Venezuela in support of its argument[160], P.B. Potter, wrote in 1930 that:

> "the objection to treaties …, based on the argument that such treaties are often imposed by force, is swept away by … decisive considerations. International law has not hitherto prohibited, either in practice or in principle, the use of coercion against a nation as a means of obtaining concessions by treaty"[161].

2.109. Similarly, as late as 1917, the Cuban author Sánchez de Bustamante y Sirvén also observed, albeit disapprovingly, that international law was also "not immune to principles or institutions that prioritize the supreme effectiveness of force"[162]. And with good reason: it was not until 1919, with the adoption of the Covenant of the League of Nations, that, save in very exceptional circumstances[163] — not relevant in the present case — conventional limitations on the use of armed force gradually acquired customary status, culminating in Article 2, paragraph 4, of the United Nations Charter prohibiting much more generally "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

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[159] MMG, paras. 7.59-7.60.

[160] VCM, note 477 citing "Collected Courses of the Hague Academy of International Law, Vol. 32, 1930-II".

[161] P. B. Potter, "L'intervention en droit international moderne", in *Collected Courses of the Hague Academy of International Law*, Vol. 32, 1930-II, p. 660 (Guyana's translation of the French original: "*l'objection faite aux traités ... fondée sur l'argument que ces traités sont souvent imposés par la force est balayée par [des] considérations décisives .... Le droit international n'a pas interdit, jusqu'ici, en pratique ni en principe, l'emploi de la contrainte exercée contre une nation en tant que nation comme moyen d'obtenir des concessions par voie de traité.*")

[162] A. Sanchez de Bustamante y Sirvén, *Los conflictos internacionales y el panamericanismo: conferencia escrita en 1916 y leída en la velada de honor de la Universidad de la paz*, 4 August 1917, p. 15, available at https://gallica.bnf.fr/ark:/12148/bpt6k95772t/f20.item (Guyana's translation of the Spanish original: "*El Derecho Internacional tampoco está al cubierto de principios o instituciones que entrenan la suprema eficacia de la fuerza*").

[163] See The Hague Convention II of 18 October 1907, Convention respecting the limitation of the employment of force for the recovery of contract debts ("Drago-Porter Convention").

2.110. Consequently, even if Venezuela had been coerced into entering the 1897 Treaty — which it plainly was not — this would not invalidate its consent. On any view, therefore, Venezuela's consent to the Treaty was and remains valid.

# CHAPTER 3

# THE VALIDITY OF THE 1899 ARBITRAL AWARD

3.1. The Counter-Memorial puts forward six grounds on which the 1899 Arbitral Award is alleged to be invalid. According to Venezuela:

(a) There was no agreement to arbitrate because the Washington Treaty was invalid;

(b) The Award did not provide the reasons on which it was based;

(c) The Award was based on compromise rather than law;

(d) The Tribunal failed to follow the rules governing the arbitration, as set out in Article IV of the Treaty;

(e) The Tribunal exceeded its powers under the Treaty; and

(f) The arbitration was fraudulent and corrupt.

3.2. Guyana anticipated and refuted every one of these arguments in Chapter 8 of its Memorial on the Merits. They are, in fact, the same empty complaints Venezuela started to make in 1962, some 63 years following the issuance of the Award (in which period Venezuela accepted and repeatedly confirmed its validity). In the Counter-Memorial, Venezuela attempts to put a new gloss on them. Guyana has already addressed Venezuela's refashioning of the first argument, on the validity of the Washington Treaty, in the previous Chapter of this Reply. In this Chapter, it responds to the Counter-Memorial's efforts to breathe life into the other five moribund arguments; in so doing, Guyana refers to its Memorial on the Merits, as appropriate, to avoid burdening the Court with excessive repetition.

## I. The Absence of Reasons in the Award

3.3. The Award of 1899 states that the Arbitrators:

> "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".

3.4. It was on this basis that the Arbitrators answered "the questions submitted to us by the said Treaty of Arbitration" and determined "the boundary-line between the Colony of British Guiana and the United States of Venezuela …". The Award provides no further explanation as to how the "boundary-line" was determined.

3.5. As shown later in this Chapter at paragraphs 3.12 to 3.16[164], international law did not require arbitrators to include a statement of reasons in their awards at the time this Award was issued. Nor did the Washington Treaty include such a requirement. The detailed rules for the conduct of this arbitration, set forth in Articles III, IV, V, VI, IX, XI, and especially Article X of the Treaty, notably did not require that the Tribunal provide a statement of reasons. Hence, the absence of such a statement cannot invalidate the Award.

3.6. The Counter-Memorial helpfully explains why, in this arbitration, the Tribunal considered it neither necessary nor helpful to provide a detailed statement of the reasons upon which the Award was based. At paragraph 6.74, Venezuela quotes the submission made by the Tribunal's President, Professor Martens, to the 1899 Hague Peace Conference, during the time period when he was presiding over

[164] See also MMG, paras. 8.27-8.35.

the arbitration between Great Britain and Venezuela, some three months before the Award was delivered:

> "[A]rbitrators are not only judges; they are also representatives of their Governments. To require them to state their 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 …"

3.7. Professor Martens' views might not reflect the norm today. But 125 years ago — before any rule requiring tribunals to explain the bases for their awards had emerged — they reflected an honest desire to ensure that the arbitrators would decide matters according to their "judicial consciences," free of concerns about possible reactions in their home States that might otherwise influence them. Venezuela has offered no evidence that any of the other arbitrators disagreed with Professor Martens or contended that the Award should have included a statement of reasons. Nor, significantly, is there any evidence that, following issuance of the Award, Venezuela itself complained that no such statement was included. To the contrary, in the only contemporaneous Venezuelan statement on the subject that has been produced thus far in these proceedings, the Legal Advisor to the Foreign Ministry (himself a former Foreign Minister) expressly rejected the argument that Venezuela advances now:

> "As the treaty which set up the arbitral tribunal did not stipulate any requirement to give reasons for its decision, omission of the grounds for it does not permit any complaint on this score."[165]

[165] Report of Counsellor Dr. Rafael Seijas (4 May 1900), p. 189 (MMG, Vol. IV, Annex 66), quoted also in MMG, para. 8.30.

3.8. This remained Venezuela's position for at least the next six decades, even when it raised its claim of nullity for the first time, Venezuela did not explicitly impugn the Award for its lack of reasons, but stated more generally that "[t]he frontier was demarcated arbitrarily"[166]. Indeed, Dr. Marcos Falcón Briceño, Venezuela's Minister of Foreign Affairs, who first presented the claim of nullity of the Award before the United Nations in 1962[167], acknowledged that, in 1899, there was no duty to state reasons, and that the Washington Treaty did not change that, because it did not require the Award to provide reasons. Referring to the 1900 report of the Legal Advisor to Venezuela's Foreign Ministry quoted above, Dr. Falcón Briceño stated:

> "*At that time* [in 1899], *there was no obligation to provide statement of reasons for an arbitral decision unless it had been explicitly agreed upon in the arbitral treaty* — in other words, in the document establishing the bases that the judges were to follow. *That was not done in this case*. To the best of my recollection, I have read in the Foreign Ministry's files the report by Mr. Rafael Seijas, an eminent Venezuelan jurist, in which he made this observation."[168]

In its Memorial on the Merits, Guyana presented the opinion of Dr. Seijas referenced by Dr. Briceño[169]. Venezuela did not respond in its Counter-Memorial.

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[166] See Statement made on 14 February 1962 to the Secretary General by Venezuela's Permanent Representative (VCM, Vol. III, Annex 140, p. 288).

[167] See, e.g., VCM, Vol. III, Annex 143.

[168] Dr. Marcos Falcón Briceño, "Orígenes de la Actual Reclamación de la Guyana Esequiba" (1981), p. 56 (Vol. III, Annex 25) (Translation of the original Spanish: "*En esa época no habla la obligatoriedad de la motivación de la sentencia, salvo que se la hubiera pactado en el tratado arbitral, es decir, en el documento en el cual se establecían las bases por las cuales se iban a seguir los jueces. Eso no se hizo, de manera que yo recuerdo hater leído en los papeles de la Cancillería el Informe del Dr. Rafael Seijas, eminente jurista venezolano, en el cual hace esta observación. Menciono este particular porque se ha hablado de la falta de motivación del Laudo*").

[169] MMG, para. 8.30, citing to Report of Counsellor Dr. Rafael Seijas (4 May 1900), p. 189 (MMG, Vol. IV, Annex 66).

3.9. Venezuela does not dispute that the text of the Washington Treaty did not require the Tribunal to state reasons for its Award. However, it contends that by failing to state reasons, "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."[170] Venezuela is wrong on both counts.

3.10. *First*, no obligation to state reasons can be inferred from the terms of the Washington Treaty as it is entirely silent in that regard. Guyana showed in its Memorial on the Merits why the terms of the Treaty do not lend themselves to the inference that Venezuela strains to draw from them[171]. Guyana will not burden the Court with a repetition of what is already stated in its Memorial; it notes only that none of Venezuela's brief arguments about Articles III, IV and X of the Washington Treaty[172] properly respond to Guyana's straightforward reading of these terms. Instead of reading these provisions for what they are, and contrasting them with the Treaty's silence on reasons, Venezuela purports to derive an alleged intention of the parties to the Treaty to require reasons from these totally different requirements. Venezuela's "inferred obligation" to state reasons is nothing more than a *petitio principii*.

3.11. Venezuela also contends that an alleged obligation to state reasons can be inferred from the composition of the Tribunal, i.e., the fact that it was made up of five jurists: "[t]here is no need for highly qualified jurists if the objective is to have an award in the form of an oracle"[173]. As explained below, throughout lengthy hearings, the arbitrators duly engaged in legal analysis of the facts in light of the

[170] VCM, para. 6.71.

[171] MMG, para. 8.28.

[172] VCM, para. 6.67.

[173] *Ibid.*, para. 6.65.

applicable rules, so that the Award, far from being an "oracle" as Venezuela disparagingly describes it, was properly based on law[174]. Venezuela is of course correct to recall that the Tribunal was composed of five highly qualified jurists. However, it is — to say the least — quite telling that *none* of these seasoned judges read in the Washington Treaty any inferred obligation to state reasons that Venezuela finds today. Thus, instead of supporting Venezuela's contention, the highly qualified character of the jurists comprising the Tribunal entirely undermines it. Referring to the then-ongoing proceedings of the Tribunal, Professor Martens stated at the Hague Conference that it "has not admitted the obligation"[175] to provide reasons for its eventual Award. This suggests that the highly qualified jurists making up the Tribunal discussed the matter and decided that the Tribunal was not required to state reasons.

3.12. *Second*, Venezuela is also wrong in arguing that the requirement to state reasons existed in 1899 as a matter of general international law. Venezuela contends that that validity of the Arbitral Award must be determined according to the law existing on "the date on which such invalidity is invoked"[176], meaning the law as it existed in 1962, not 1899. Guyana demonstrated in its Memorial on the Merits that this is obviously incorrect: it is an undisputed principle of intertemporal law that the validity of a legal act must be appreciated in the light of the law contemporary with it[177]. This means that Venezuela bears the burden of proving the invalidity of

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[174] See Section II below.

[175] J. B. Scott, *The Proceedings of the Hague Peace Conference*, 1920, p. 615.

[176] See Hermann González Oropeza, S.J. & Pablo Ojer, *Informe que los expertos venezolanos parala cuestión de límites con Guayana Británica presentan al Gobierno Nacional [Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana]* (18 March 1965), para. 17 (MMG, Vol. IV, Annex 74). See also Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Co-Operative Republic of Guyana on March 29th, 2019 (28 November 2019), para. 17.

[177] MMG, paras. 6.43-6.45. See also Chapter 2, para. 2.105 above, and the development concerning the non-retroactivity of the principle enshrined in Article 52 VCLT.

the Award in light of the law as it stood in 1899. References to instruments adopted in the second half of the 20th century are thus entirely inapposite. Writing in 1981, Professor Verhoeven stressed that it is only "*aujourd'hui*" ("today") that the lack of reasons is a ground for invalidating arbitral awards[178].

3.13. Indeed, as also explained by Guyana, the law contemporary with the 1899 Award did not mandate the statement of reasons[179]. Not only was it contested that arbitral award had to be reasoned, but even when an obligation to state reasons was advocated, the violation of such obligation was not considered as a ground of nullity. The 1875 Resolution adopted by the *Institut de droit international* is particularly illuminating in that regard and it is telling that Venezuela relies on its Article 23 (duty to state reasons)[180] while ignoring its Article 27 (grounds of invalidity, among which the lack of reasons was not listed). Likewise, as Professor Martens' statement during the 1899 Hague Peace Conference indicates[181], there was no positive duty to state the reasons for an award under international law at that time[182]. Moreover, while the 1899 Hague Convention finally included a requirement according to which "[l]*a sentence arbitrale … est motivée*"[183] it did not include grounds for nullity and did not identify the failure to state reasons as such a ground. The same resulted from the 1907 Hague Convention, following the Second Hague Peace Conference, despite calls to regulate the validity of awards[184].

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178 J. Verhoeven, *Les nullités du droit des gens*, Paris, 1981, p. 36.

179 MMG, paras. 6.46-6.49 and 8.31-8.34.

180 VCM, para. 6.60.

181 See para. 3.6 above.

182 See the declaration of Mr. Holls commenting on Article 54: "as I have already said, our duty in this Conference is … to uphold an ideal, to declare to the world that which the representatives of all the civilized nations consider desirable and practically attainable." (J. B. Scott, *The Proceedings of the Hague Peace Conference*, 1920, p. 622).

183 Hague Convention for the pacific settlement of international disputes (1899), Article 52.

184 See MMG, paras. 6.47-6.48.

3.14. Venezuela contends that it is only when arbitral awards were delivered by heads of state that the duty to state reasons did not apply in the early interstate arbitration practice[185]. Venezuela is wrong to draw such a distinction. Indeed, amongst the numerous unreasoned awards delivered during the same era by arbitral tribunals composed of qualified jurists, there is the 1895 Award of the Venezuela-United States Commission[186]. One of the Venezuelans who signed the 1897 Washington Treaty, Minister José Andrade, was Venezuela's Commissioner in that case. Thus, Venezuela was familiar with the practice of arbitral tribunals not issuing reasoned awards at the time it signed the 1897 Treaty. Had it desired a reasoned award in this matter, it could have advocated for one during negotiation of the Treaty. There is no evidence that it did, and the Counter-Memorial makes no such assertion.

3.15. Guyana has carefully surveyed the arbitration practice of the 19th and early 20th centuries and found numerous unreasoned awards delivered by tribunals composed of qualified jurists as arbitrators[187]. In order not to burden the Court, that research is included as an Appendix to this Reply, at the end of this Volume. It is worth noting that the leading compendium and commentary of arbitral case law of

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[185] VCM, para. 6.64.

[186] H. La Fontaine, *Pasicrisie Internationale 1794-1900, Histoire documentaire des arbitrages internationaux*, 1902, p. 422.

[187] See Appendix, pp. 177-191 below, describing the awards rendered by jurists, containing no statement of reasons, in the following nine cases; *River Saint Croix (UK/US)* (25 October 1798); *Decision under Article IV of the Treaty of Ghent (US/UK)* (24 November 1817); *Halifax Fisheries Commission (US/UK)* (23 November 1877); *Award of Chief Justice Melius de Villiers, as to the boundary question between Great Britain and the South African Republic (Transvaal) in the Cape Colony* (5 August 1885); *Bering Sea Fisheries (US/UK)* (15 August 1893); *Award by the Venezuela-US Mixed Commission at Washington* (26 March 1895); *Award relating to the demarcation of the Puna de Atacama boundary between Argentine Republic and Chile (Chile v. Argentina)* (24 March 1899); *The Alaska Boundary Case (UK/US)* (20 October 1903); *San Domingo Improvement Company Claim (US v. Dominican Republic)* (14 July 1904).

the 19th Century[188], authored by Belgian Professor Henri La Fontaine (Nobel Peace Prize winner in 1913), noted that *both* the 1897 Washington Treaty *and* the 1899 Award were "absolutely normal" and did not "call for any commentary." In his own words, the Award concerned:

> "*[u]ne des contestations multiples auxquelles donnèrent lieu les frontières incertaines des diverses Guyanes. Bien que la question souleva de vives discussions dans la presse, le compromis qui institua l'arbitrage et la sentence intervenue ont un caractère* absolument normal *et* n'appellent aucun commentaire*.*"[189]

3.16. The 1960 judgment of the Court in the *King of Spain Award of 1906* is of no assistance to Venezuela. The lack of reasons was not an issue in that case. Rather, Nicaragua asserted that the Award's reasons were insufficient or incoherent. As Honduras invited it to do[190], the Court responded to Nicaragua's allegation from a purely factual point of view. It found that the Award "deal[t] in logical order and in some detail with all relevant considerations and that it contain[ed] ample reasoning and explanations in support of the conclusions arrived at by the arbitrator"[191]. On that basis, the Court concluded that "this ground [of invalidity] is without foundation"[192]. Thus, the Court was not called upon to decide whether there was a

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[188] *UNRIAA*, Vol. I, p. 4 (considering La Fontaine's treatise as the first "collection" of a "truly … general character"); H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire documentaire des arbitrages internationaux*, 1902, p. xx ("*l'ouvrage que nous offrons à nos contemporains … le premier … recueil d'une Jurisprudence Internationale*.").

[189] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire documentaire des arbitrages internationaux*, 1902, p. 554 (emphasis added). Another proof that reasonings were rare at the time is that Professor La Fontaine would highlight reasoned awards. See, e.g., *ibid.*, pp. 301 and 385 (commenting on the *Award of the referee in the matter of the claim of Charles Adrian Van Bokkelen, given in Washington, December 4, 1888* (US/Haiti) and *the Award of 1881 rendered by the Emperor of Austro-Hungarian Empire, in a dispute between UK and Nicaragua*).

[190] *I.C.J. Pleadings*, *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, p. 501 (see also https://www.icj-cij.org/sites/default/files/case-related/39/9176.pdf).

[191] *Arbitral Award made by the King of Spain on 23 December 1906*, *Judgment*, *I.C.J. Reports 1960*, p. 216.

[192] *Ibid*.

requirement to state reasons as a ground of invalidity in 1906. Contrary to Venezuela's assertion, no legal "assumption"[193] can be drawn from that case about the lack of reasons as a ground of nullity at the beginning of the 20th century.

## II. An Award Allegedly Not Based on Law

3.17. Venezuela complains that the Arbitral Award was based on "political expediency, crude give-and-take, diplomacy and pressure — replacing legal considerations as the benchmark of decision-making"[194], and that this was its "most fundamental defect".[195] In Guyana's view, it is Venezuela's argument rather than the 1899 Award that is fundamentally defective. This is demonstrated *inter alia* by Venezuela's own evidence.

3.18. That evidence shows that the five arbitrators arrived at their respective conclusions on where to draw the boundary between British Guiana and Venezuela by dutiful application of the prevailing legal rules, including the rules specified in Article IV of the Washington Treaty[196]. The initial result, as reflected in the arbitrators' own contemporary correspondence and public statements, was five different boundary lines[197]. A 3-2 majority then coalesced around a line that was more favourable to the British than the one that was ultimately adopted[198]. To obtain

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[193] VCM, para. 6.62.

[194] *Ibid.*, para. 6.184.

[195] *Ibid.*, para. 6.159.

[196] See MMG, paras. 8.36-8.45.

[197] "Judge Brewer's Opinion, Venezuela's Arbitrator Tells How the Verdict Was Reached", *The New York Times* (5 October 1899) ("Until the last moment I believed a decision would be quite impossible, and it was *by the greatest conciliation and mutual concessions that a compromise was arrived at.* If any of us had been asked to give an award, each would have given one differing in extent and character. The consequence of this was that *we had to adjust our different views, and finally draw a line running between what each thought right.*" (emphasis added)).

[198] On the opinion held by the majority, see MMG, para. 8.64 (explaining that Professor Martens initially shared the opinion of Lord Russell and Lord Justice Collins that the Treaties of Münster

unanimity — which Professor Martens, as President, strove to achieve — two adjustments to the line, both of which gave more territory to Venezuela, were made, and the minority then signed on to the Award[199].

3.19. Contrary to Venezuela's depiction of what occurred, this was not a case of "either/or", i.e., either the arbitrators issued an Award based on law or one based on compromise. They did both; they reached their individual conclusions by applying the law to the facts, then achieved a majority and finally unanimity by consensus and compromise. Far from "defective", the decision-making process was entirely appropriate and legal. No one needs to explain to the Court that consensus-building is a common practice enabling judicial bodies to produce a majority, in order to render a decision. The fact that, to reach such a consensus, some arbitrators or judges might agree to an outcome that does not fully conform to their own legal opinions does not deprive the ruling of its legal character, much less render it invalid. Nor is it uncommon or inappropriate for such compromises to be made to achieve a unanimous award or judgment, especially when the tribunal considers that unanimity is desirable to avoid ambiguity or ensure compliance by both parties.

(1648) and Utrecht (1714), coupled with the subsequent actions of Spain and the Netherlands, meant that Spain had not acquired such title), citing to Letter from Lord Russell to Lord Salisbury (7 October 1899), in *Papers of 3rd Marquess of Salisbury*, Vol. A/94, Doc. No. 2, p. 126 (MMG, Vol. III, Annex 36). See also *ibid.*, p. 127 (noting that Professor Martens "expressed his opinion on the governing principle in favour of the British contention").

On the subsequent compromise secured by Professor Martens to achieve an unanimous decision, instead of a vote by majority, and citing to *Private Diary Entries of Prof Fyodor Fyodorovich Martens* (4 June 1899-3 October 1899), pp. 9, 11, and 21 (MMG, Vol. III, Annex 33), see MMG, paras. 8.69-8.73.

[199] See MMG, para. 8.69, citing to *Private Diary Entries of Prof Fyodor Fyodorovich Martens* (4 June 1899-3 October 1899), p. 21 (MMG, Vol. III, Annex 33): the British arbitrators accepted an adjustment in the south that ceded (i) "a significant area to the Venezuelans"; and (ii) in the north they accepted that "the borderline should start from the coast of the sea halfway between Cap Mocotomo and Palaya" rather than at Point Barima at the mouth of the Orinoco).

3.20. The legal character of the arbitral proceedings between Great Britain and Venezuela is reflected in its three rounds of written pleadings, consisting of thousands of pages of arguments and annexes submitted by each party, and 54 oral sessions that generated more than 3,200 pages of verbatim transcript. At the conclusion, Venezuela's lead counsel, former United States President Benjamin Harrison, declared that Venezuela had presented "a full and complete discussion of every question of law and fact that we thought was in the case"[200]. The Counter-Memorial itself confirms this by twice referring to Sir Hersh Lauterpacht's evaluation of the proceedings 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"[201].

3.21. The Counter-Memorial also quotes from the contemporaneous correspondence of Lord Russell, one of the British arbitrators, addressed to Lord Salisbury, the Foreign Minister, four days after the issuance of the Award[202]. However, Venezuela fails to quote the most pertinent part, in which Lord Russell described the deliberations leading to the Award:

> "As to the course of the discussion: – 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 a 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

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

[201] VCM, paras. 5.81 and 6.172, note 479, citing to H. Lauterpacht, "The Function of Law in the International Community", *British Contributions to International Law*, 1933, p. 157. Venezuela neglects to mention that H. Lauterpacht considered the *British Guiana/Venezuela* arbitration equal to the *Alabama* arbitration as an "instructive instance" of his thesis that the "history of international arbitration in the last hundred and thirty years does not substantiate the view that important issues are unsuitable for judicial settlement" (*ibid.*, p. 145).

[202] VCM, paras. 5.102 and 6.103; Letter from Lord Russell to Lord Salisbury (7 October 1899) (VCM, Vol. II, Annex 67).

> actually possessed – acquired by conquest or by adverse possession from Spain.
>
> There were not wanting plausible grounds for urging this view, and, it must be admitted that the official correspondence during the Dutch period and much of the diplomatic correspondence since, did read as if the Dutch claims extended to little more than the pedis – possessio and as if all the 'beyond' were Spanish.
>
> However, in view especially of the Treaties of 1648 (Munster) and of 1714 (Utrecht) and of the conduct of both the Powers subsequent to those Treaties we (Collins, L.J. and I) thought this view untenable.
>
> Fuller C.J. [who had been appointed by Venezuela] to the end adhered to the Venezuelan contention but it must be admitted he subsequently assented to a delimitation which ignored it. Mr. Justice Brewer [also appointed by Venezuela] on the other hand while refusing assent to the Spanish view yet in fact worked out a line of delimitation in the first instance, which I think could only have been justified by the substantial adoption of that view.
>
> After long debate, the 5th Arbitrator (Mr. de Martens) endorsed the British view."[203]

3.22. Lord Russell's account leaves little doubt that the Tribunal's deliberations, and the position of the majority, were based on law, and the application of the law to the facts. The legal basis of the Award was further confirmed by Venezuela's lead counsel, former United States President Harrison, in correspondence coincidentally bearing the same date as Lord Russell's (7 October 1899):

> "The case turned upon the question whether Spain had acquired by discovery and her early settlements a prior title to the disputed territory and tho[ugh] both Great Britain and the Dutch, in the Manhattan controversy, were at the very time describing the validity of the Discovery title and the effectiveness of a few small

[203] Letter from Lord Russell to Lord Salisbury (7 October 1899) (VCM, Vol. II, Annex 67) (emphasis original).

> settlements to perfect the title to vast unoccupied tracts – it was hard to make a tribunal apply the old rule …"[204]

3.23. Venezuela concedes that if the dispute had been decided by majority vote, the Award would have been more favourable to Great Britain than the one the Tribunal adopted unanimously. The Counter-Memorial quotes former President Harrison to this effect:

> "[I]f the arbitrators were unanimous, it must have been because their failure to agree would have confirmed Britain in the possession of still more territory."[205]

3.24. The Counter-Memorial also cites to Venezuela's Agent in the arbitration proceedings, Mr. José Rojas. In a communication of 4 October 1899 to his Foreign Minister, which is attached to the Counter-Memorial as Annex 65, Mr. Rojas wrote:

> "Things happened this way. The English arbitrators claimed the Schomburg [*sic*] line. Mr. de Martens, against all hope, expressed he was ready to adhere to the extraordinary British aspiration. The American Arbitrators, after they heard the news on the Chief Justice's Resolution, resolutely opposed it and decided to protest publicly against such decision. There was a large discussion among justices and Mr. de Martens proposed to the American justices, as a transaction, that he will consent to modify the line on the coast, thus that the Orinoco Delta would exclusively correspond to Venezuela if they accepted the rest, to which they agreed as a conscience duty as, given the seriousness of the case, it would have been worse to consent, under protest, the dispossession of the Orinoco."[206]

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[204] Letter from Mr. Harrison to Mr. Miller (7 October 1899) (Vol. III, Annex 26).

[205] VCM, paras. 5.126 and 7.12.

[206] Letter from Rojas to the Foreign Office Minister of Venezuela (4 October 1899) (VCM, Vol. II, Annex 65).

3.25. Lord Russell's correspondence to Lord Salisbury attributes to Professor Martens, as President of the Tribunal, a sense of duty to produce a unanimous Award rather than one decided by a 3-2 majority:

> "[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."[207]

3.26. This was not a matter of "political expediency" or "crude give-and-take" as Venezuela derisively suggests[208]. Professor Martens' motivation to seek a unanimous award was reflected in his diary, in which he wrote of his "moral duty to carry out such negotiations to ensure full unanimity between the arbitrators and to achieve the greatest objective – a unanimous arbitral award"[209]. There is no evidence to contradict Professor Martens' statement of his motives.

3.27. Nor is there evidence that the compromise that Professor Martens negotiated deprived the Award of its legal basis. In a public statement the day after the issuance of the Award, Professor Martens declared that "the boundary line which is laid down by the judges is a line based on justice and law …"[210]. For Lord Russell, the Award, even as adjusted to secure unanimous support, followed the law: "I think the Award gives Her Majesty no territory or advantage to which she is not justly entitled and I think it does give her substantially all to which she is entitled."[211]

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[207] Letter from Lord Russell to Lord Salisbury (7 October 1899) (MMG, Vol. III, Annex 36) (emphasis in original).

[208] VCM, para. 6.184.

[209] *Private Diary Entries of Prof Fyodor Fyodorovich Martens* (4 June 1899-3 October 1899), p. 11 (MMG, Vol. III, Annex 33) (emphasis in original).

[210] "M. De Marten's Opinion", *The New York Times* (4 October 1899).

[211] Letter from Lord Russell to Lord Salisbury (7 October 1899) (MMG, Vol. III, Annex 36).

Venezuela, likewise, is in no position to complain about the compromise, which, as indicated above, was to its benefit, attributing to it more territory than would have been the case if the arbitrators decided the matter by majority vote. The compromise, in fact, came as no surprise to Venezuela. On the eve of the Award's issuance, former President Harrison wrote: "We have had a long and severe tussle here and I do not know how we are to come out of it. We will probably have some sort of compromise line"[212].

3.28. There is, accordingly, no merit to Venezuela's argument that the compromise achieved to obtain unanimity among the arbitrators deprives their Award of its legal basis, such that, on this ground, it should be declared invalid.

## III. An Alleged Failure to Follow the Rules

3.29. The Counter-Memorial contends that the Arbitral Tribunal failed to follow the rules governing the arbitration set out in Articles III and IV of the Washington Treaty. The contention is not sustainable. Article III provided that, in deciding the matters submitted,

> "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."

[212] Letter from Benjamin Harrison to the Hon. Henry White (3 October 1899), p. 2 (MMG, Vol. III, Annex 35).

3.30. This is precisely what the Arbitrators did. As indicated at paragraph 3.3 above, they stated explicitly in the Award that, in determining the boundary-line, they:

> "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".

3.31. Venezuela does not disagree. Instead, it complains that Article III required the Tribunal to make — and spell out — two separate determinations in its Award: first, the extent of the territories belonging to the Netherlands and Spain at the time Great Britain acquired the Dutch possession in 1814; and second, the boundary-line between British Guiana and Venezuela. For Venezuela, these are two "separate … questions"[213], which the Tribunal was obligated to answer separately[214] and the Tribunal failed to provide an answer to the "first question".

3.32. There is no evidence that Venezuela interpreted Article III in this manner at the time it agreed to the Washington Treaty, or during the arbitration proceedings, or after the Award was issued, or at any time prior to the submission of its Counter-Memorial on 8 April 2024. There is a reason this newly-minted construction of Article III was not raised previously: it is plainly at odds with the text.

3.33. Article III expressly required the Tribunal to make only one determination: it "shall *determine* the boundary-line between the Colony of British Guiana and the United States of Venezuela." In contrast, the Tribunal was directed only to "*investigate and ascertain*" the extent of the territories belonging to or that might

[213] VCM, paras. 6.99 and 6.100.

[214] *Ibid.*, para. 6.100.

lawfully be claimed by the Netherlands and Spain in 1814, *as a step toward determining* the boundary between British Guiana and Venezuela in 1899. There was no need for a separate *determination* of the situation in 1814, because, as Article IV (discussed below) made clear, events subsequent to 1814 had to be taken into account by the Tribunal in determining the boundary-line. In particular, Article IV (a) provided that "[a]dverse holding or prescription during a period of fifty years shall make a good title", and that 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". This meant that the 50-year prescription period during which title could vest extended beyond 1814.

3.34. Further, Article IV (c) provided that: "In *determining* the boundary-line, if the territory of one Party be found by the Tribunal to have been *at the date of this Treaty* in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principle of international law, and the equities of the case shall, in the opinion of the Tribunal, require." Thus, the situation in 1814 could be overridden by subsequent events up to 1897, including the occupation by the subjects or citizens of one Party of what the Tribunal decided was the territory of the other Party in 1814. It is only logical, therefore, that rather than *determine* the situation in 1814, Article III required the Tribunal only to *investigate and ascertain* it, as a starting point for its *determination* of the boundary as of 1897.

3.35. And that is exactly what the Tribunal did, as stated in the Award itself, and as verified in the contemporary correspondence of Lord Russell and former President Harrison, cited at paragraphs 3.22 and 3.23, respectively. This confirms that the Tribunal investigated and ascertained the extent of the territory belonging to each of the Netherlands and Spain in 1814 prior to determining the boundary-

line between British Guiana and Venezuela. There was no failure to comply with the obligation set forth in Article III.

3.36. Nor was there a failure to follow the rules prescribed in Article IV. The Counter-Memorial is notably vague on what this alleged failure was. Its central contention is: "As is apparent from the text of the Award, the Tribunal completely ignored the Rules stipulated in Article IV …"[215]. Apparent to whom? Venezuela does not identify which of these Rules was "ignored" or in what way.

3.37. What is clear from the Award itself is that the boundary line determined by the Tribunal largely followed the original Schomburgk line of 1844. As Lord Russell explained in his description of the Award to Lord Salisbury: "The result is a signal vindication of Schomburg's [*sic*] ability and fairness. In two points only is there any departure from his line."[216] Schomburgk's line divided the disputed territory between Great Britain and Venezuela based on which Party occupied and controlled it as of the time of his expedition some 25 years after the British acquired the colony from the Dutch[217]. By adopting that line, the Tribunal complied with its obligation to apply the rules set out in Article IV, including the provisions in Rule IV (a) that it should give effect to occupation and adverse holding based on the 50-year prescription period, and in Rule IV (b) that it "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 applicable to the case, and which are not in contravention of the

[215] VCM, para. 6.129.

[216] *Ibid.*, para. 5.102; Letter from Lord Russell to Lord Salisbury (7 October 1899) (MMG, Vol. III, Annex 36). See also Letter from Mr. Schomburgk to Governor Light (1 July 1839) (Inclosure in Letter from the Colonial Office to the Foreign Office (6 March 1840) (MMG, Vol. III, Annex 16); Letter of Mr. Schomburgk to Governor Light (30 November 1841) enclosing Memorandum by Mr. Schomburgk (MMG, Vol. III, Annex 21).

[217] MMG, para. 3.3.

foregoing rule". As shown in paragraphs 3.17 to 3.28 above, the contemporaneous evidence shows that all members of the Tribunal reached their conclusions about the location of the boundary-line based on international law, before coming to a result that all could support.

3.38. Venezuela also argues that Article IV established a hierarchy among its three Rules, with IV (a) occupying the highest rung, followed by IV (b) and then IV (c)[218]. Yet the plain reading of Article IV does not support such an interpretation. Article IV provides that the Arbitrators "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". There is nothing in the language of Article IV to suggest any order of precedence amongst those Rules or any prescribed sequence in which they must be addressed. Venezuela does not identify any basis for the interpretation it advances; nor does it present any evidence that the Tribunal applied any of these Rules out of their supposed order.

3.39. Finally, the Counter-Memorial criticizes the Arbitrators for not explaining *how* they applied the Rules[219]. This, of course, is an unavoidable consequence of there being no statement of reasons in the Award, a subject addressed above at paragraphs 3.3-3.16. As shown therein, the absence of such a statement does not constitute a basis for invalidating the Award.

3.40. Accordingly, the Counter-Memorial fails in its attempt to prove that the Award is invalid because the Tribunal failed to follow the Rules that governed the arbitration.

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[218] VCM, para. 6.125.

[219] *Ibid.*, para. 6.130.

## IV. An Alleged Excess of Power

3.41. The Counter-Memorial alleges that the Arbitral Tribunal exceeded the powers vested in it by the Washington Treaty in two ways: *first*, the boundary-line it adopted gave British Guiana territory that was also claimed by Brazil, in violation of that State's rights[220]; and *second*, the arbitrators went beyond their mandate to determine the boundary between British Guiana and Venezuela by establishing a navigation regime for two rivers in the border area, the Amakuru and the Barima[221].

3.42. Venezuela had not previously challenged the validity of the 1899 Award based on the alleged transgression of rights belonging to Brazil or any other third State. For this reason, the claim was not anticipated by or addressed in Guyana's Memorial on the Merits. Because the challenge is patently untenable, it requires only a brief discussion here.

3.43. In relation to Brazil, the Counter-Memorial focuses on the portion of the Award describing the boundary line in the extreme south:

> "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"[222].

3.44. It is true, as Venezuela asserts, that some of the territory falling on British Guiana's side of the boundary-line was also claimed by Brazil. At the time, the boundary between British Guiana and Brazil was disputed. However, both in law[223]

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[220] VCM, para. 6.139.

[221] *Ibid.*, paras. 6.136-139.

[222] *Ibid.*, para. 6.139.

[223] See below, paras. 4.58-4.63.

and in fact, the Award had no impact on that boundary or any territorial rights claimed by Brazil.

3.45. *First*, under well-established principles of international law, the 1899 Award was *res inter alios acta* for Brazil and could not be invoked against it; the arbitrators made this explicit in the Award, as Venezuela itself concedes:

> "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"[224].

3.46. *Second*, in fact, this line had no effect on Brazil. In 1901, Great Britain and Brazil agreed to submit their boundary dispute to arbitration, with King Victor Emmanuel II of Italy as sole arbitrator. As Venezuela concedes[225], the King determined that the 1899 Award:

> "cannot be cited against Brazil, which was unaffected by that Judgment"[226].

3.47. Plainly, Venezuela's complaint fails to constitute a basis for nullifying the Award.

3.48. The same is true for Venezuela's other argument that the Arbitral Tribunal exceeded its powers: the establishment of a navigation regime for the Amakuru and Barima Rivers. This part of the 1899 Award provided:

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[224] VCM, para. 6.140.

[225] *Ibid.*, para. 7.69.

[226] *The Guiana Boundary Case (Brazil* v. *Great Britain)* (6 June 1904), *UNRIAA*, Vol. XI, p. 11.

> "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."

3.49. Each of the two rivers followed or crossed the boundary line determined by the Tribunal, and thus traversed both British and Venezuelan territory. There was undisputed evidence that British settlers lived on both sides of these rivers, including in what was determined to be Venezuelan territory, and that they regularly navigated these watercourses to reach the great Orinoco River (entirely in Venezuelan territory to the east) and ultimately the Atlantic Ocean[227].

[227] See e.g., *British Guiana Boundary*, *Arbitration with the United States of Venezuela*, *The Case on Behalf of the Government of Her Britannic Majesty*, London, 1898, Volume I (Vol. III, Annex 27), p. 57 (citing to *British Case*, Volume V, p. 76); p. 62 (noting that "[e]arly in 1797 the Spaniards received information that the English had apportioned all the lands which stretch from Essequibo to Barima", citing to *British Case*, Volume V, pp. 164-165; noting further that "[i]n 1801, the British Commandant … [reported that] the extent of the [British] Colony … shows the boundary commencing at Barima and includes the territories claimed by the Dutch in their Remonstrances", citing to the *British Atlas*, p. 37); p. 65 (noting that in 1838, British "planting, boat-building, and wood-cutting were actively prosecuted in the Pomeroon district, giving employment to a large number of Indians from all the rivers as far as the Amakuru", citing to *British Case*, Volume VI, pp. 84, 104, 132); p. 78, point 2 (noting that "[d]uring the [whole of the 17th and 18th centuries] the Dutch had the control of all the rivers flowing into the Atlantic from the Corentin to the Amakuru"); p. 78, point 5 (noting that "the Dutch occupied various points in the interior on the Rivers Essequibo, Massaruni, Cuyuni, Moruka, Pomeroon, Waini, Barima, and Amakuru and their tributary streams"); and p. 78, point 6 (noting that "[t]he Spaniards recognized the Amakuru or the Barima as being the effective frontier of their possessions").

3.50. The Counter-Memorial asserts that there is nothing explicit in the Washington Treaty that empowered the Arbitral Tribunal to adopt a navigation regime for these rivers, and that the Tribunal's "excursion" into this subject matter was thus "unauthorised by the *compromis* and not covered by the parties' consent, amounting to a plain excess of power"[228]. This argument cannot be reconciled, however, with Venezuela's understanding of the Tribunal's powers during the arbitral proceedings, as well as its view of this part of the Award at the time it was issued — a view it held for the following 60+ years.

3.51. In its written Argument to the Tribunal, submitted on 15 March 1898, Venezuela addressed the consequences if territory found by the Tribunal to belong to one of the Parties was, at the time of the Treaty, actually occupied by settlers from the other Party[229]. In such circumstances, Venezuela explained, the Tribunal would have broad discretion to decide how "with the greatest fairness to the State in whose territory such settlers were found and to the settlers themselves, an adjustment should be made *of the relations between the two* …"[230]. The "relations between the two" naturally extended beyond the question of which State had title to the particular territory. The Tribunal's authority in such circumstances, according to Venezuela, was "provided in the Treaty"[231]. Specifically, under Article IV (c):

> "[T]he Tribunal should itself finally adjust these relations, upon considerations of reason, justice, the principles of international law and the equities of the particular case.
>
> It is not stated by the Treaty what form of adjustment, if any, is to be adopted by the Arbitrators in carrying out the provisions of

[228] VCM, para. 6.148.

[229] MMG, para. 8.52.

[230] *Boundary between the Colony of British Guiana and the United States of Venezuela*, The Printed Argument on behalf of the United States of Venezuela (1898), Vol. I, p. 56, (MMG, Vol. IV, Annex 134) (emphasis added).

[231] *Ibid*.

> Rule (c). The whole matter is left to their judgment and discretion. It is clearly contemplated by the Rule that some provision shall be made to settle the relations of both parties … "[232].

3.52. This part of Venezuela's Argument to the Tribunal was highlighted in Guyana's Memorial on the Merits, at paragraph 8.52. The Counter-Memorial provides no response. It remains entirely mute, choosing to ignore the point. It does not explain why, in light of Venezuela's contemporaneous understanding of the Rules governing the Arbitration, the Tribunal could not have considered itself authorized, in territory occupied by British settlers but awarded to Venezuela, to make an "adjustment of the relations between the two" by providing for freedom of riverine navigation — which was vital not only for commerce but for survival in this remote and undeveloped geographic region.

3.53. The Counter-Memorial similarly passes in silence on Venezuela's approval of this regime at the time the Award was issued, which was described in Guyana's Memorial[233]. Guyana quoted there from the correspondence of José Andrade who served as Venezuela's Minister in Washington during the negotiation of the Treaty and signed it on Venezuela's behalf. In a letter to his Foreign Minister dated 7 October 1899, Minister Andrade wrote:

> "I will say nothing concerning the final clause which declares open to free navigation by merchant ships of all nations, the Rivers Barima and Amacuro in their English section as in the Venezuelan. Therein is seen as application of a theory of international law which wherever it has been put in practice has greatly contributed to the prosperity of States. Venezuela herself has at times applied it to the navigation of the Orinoco."[234]

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[232] *Ibid.*, pp. 56-57 (MMG, Vol. IV, Annex 34).

[233] MMG, para. 8.53.

[234] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 October 1899), p. 2 (MG, Vol. II, Annex 3, quoted at MMG, para. 8.49).

3.54. It is unclear precisely when Venezuela changed its view and decided that this aspect of the Award was no longer an "application of a theory of international law" but an "excess of power." There is no evidence of such a reversal for at least the next six decades. In any event, the Tribunal's establishment of a river navigation regime as a complement to its determination of the boundary-line between British Guiana and Venezuela is entirely justifiable under Article IV (c) of the Treaty and therefore does not constitute an excess of power or a basis for invalidating the Award in whole or in part.

## V. Alleged Fraud and Corruption

3.55. The Counter-Memorial alleges that the entire arbitration, from the 1897 Washington Treaty to the 1899 Award, was "fraudulent"[235]. It was, according to Venezuela, a "fraud":

> "characterised by simulations, undue and extortive pressure, prevarication, deceit, abuse of power and falsehoods of all kinds"[236].

3.56. Rhetoric is one thing, proof is another. Venezuela supplies the former in abundance, the latter not at all. Allegedly, the malefaction consists of three fatal transgressions: first, the use of doctored maps by the British, which deceived the Tribunal about the territorial extent of British claims and occupation; second, improper communications between British counsel and the British arbitrators; and third, collusion between the Russian President of the Tribunal and the British arbitrators to produce an Award favourable to Great Britain in exchange for British concessions to Russia in other parts of the world. None of these allegations are supported by even the thinnest strand of evidence.

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[235] VCM, para. 6.4.

[236] *Ibid.*

3.57. Guyana anticipated and addressed the first and third of these accusations in its Memorial on the Merits, at paragraphs 8.54 to 8.61 and 8.77 to 8.92, respectively. For this reason, and to avoid unnecessary repetition, it will simply summarize here the evidence and conclusions regarding those accusations, adding only some additional information, worthy of the Court's attention, obtained by further historical research. In respect of the second accusation, this is a new allegation which was made for the first time after Guyana submitted its Memorial on the Merits. Guyana therefore provides its response to that new accusation below.

3.58. On the issue of maps, Guyana showed in its Memorial on the Merits that neither Venezuela nor the Arbitral Tribunal were deceived by any of the maps submitted by the British:

– The inaccuracies in the British maps were well known by Venezuela by 1896, at least two years before the arbitral proceedings began, when Venezuela brought them to the attention of President Cleveland's Venezuela Boundary Commission and they were identified in the Commission's Report[237].

– The same inaccuracies were brought to the Arbitral Tribunal's attention during both the written and oral stages of the proceedings; Venezuela's counsel repeatedly challenged the reliability of Great Britain's maps, calling them "misleading" and "untrustworthy"[238].

– British counsel acknowledged these inaccuracies to the Tribunal, prompting Venezuela's lead counsel, former United States President Harrison, to

[237] MMG, paras. 8.56-8.58.

[238] *Ibid.*, para. 8.59.

express gratitude to his British counterpart for "very candidly" accepting that the erroneous maps would not have "probative effect"[239].

3.59. The Counter-Memorial fails to respond to any of these points.

3.60. The issue of improper communications between counsel and arbitrators was first raised by Venezuela in these proceedings in 2022, during the oral hearings on Venezuela's preliminary objection to the admissibility of Guyana's claims. As "evidence," Venezuela relied on two letters from the lead British counsel, Sir Richard Webster, one to Lord Salisbury and one to Colonial Secretary Chamberlain, both dated 19 July 1899. These have been submitted to the Court, again, as Annexes 63 and 64 to the Counter-Memorial.

3.61. In neither letter is there any mention of an actual communication with the British arbitrators. To Lord Salisbury, Sir Richard Webster wrote, in relation to the British claim to Point Barima: "*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."[240] A similar statement about possible future action was made to Mr. Chamberlain:

> "*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 on the part of some members of the Tribunal it is desirable that our arbitrators should appreciate our views."[241]

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[239] MMG, para. 8.60.

[240] Letter from Sir Richard Webster to Lord Salisbury, 19 July 1899 (VCM, Vol. II, Annex 63) (emphasis added).

[241] Letter from Sir Richard Webster to Joseph Chamberlain, 19 July 1899 (VCM, Vol. II, Annex 64) (emphasis added).

3.62. At the oral hearings on Venezuela's preliminary objections, held on 18 November 2022, Guyana refuted Venezuela's pretension that these letters, which constituted Venezuela's entire body of evidence on the issue, demonstrated that there were any communications between British counsel and the British arbitrators, let alone improper ones[242]. Guyana showed that, to the contrary, they proved the *absence* of such communications, and no more than the possibility that they *might* occur under certain conditions that might materialize in the *future*[243].Venezuela offered no evidence that they *did* occur.

3.63. Nor has Venezuela done so in its Counter-Memorial, in which it does no more than cite the same two letters from Mr. Webster, at paragraphs 5.106 and 5.107, but nothing else to establish the existence of any communications of any kind (outside the formal hearings) between any of the British counsel and the British arbitrators. Venezuela does not even *allege* that the possible future communications mentioned by Mr. Webster ever took place. There is no evidence that they did.

3.64. But Venezuela *does* provide evidence of extraordinary communications by *its own counsel* with the arbitrators — specifically, with the *American arbitrators* who Venezuela appointed. Venezuela admits "the fact that the U.S. Arbitrators sought advice on how to cast their vote …"[244].

3.65. Venezuela's source is Mr. Severo Mallet-Prevost, one of the lawyers who served as its counsel during the arbitration. According to Mr. Mallet-Prevost, he was invited by the two American arbitrators to meet with them on the eve of the

[242] CR 2022/22, 18 November 2022, pp. 45-46, para. 12 (Sands).

[243] *Ibid*.

[244] VCM, para. 5.111.

Award, before a final decision on the boundary-line was made[245]. At the meeting, Justice Brewer advised him of the status of the Tribunal's deliberations:

> "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."[246]

3.66. According to Mr. Mallet-Prevost, Justice Brewer and Chief Justice Fuller then asked for their "advice" on whether to agree to Professor Martens' proposal or maintain their minority position and suffer a 3-2 decision resulting in British control at the mouth of the Orinoco River. Venezuela's counsel responded by advising the two arbitrators to accept Professor Martens' proposal in order to secure Venezuelan control of the Orinoco, and that is what they did[247].

3.67. Venezuela is thus in no position to complain about alleged communications between counsel and the arbitrators, or to challenge the validity of the Award on such basis. The only evidence before the Court that such contacts occurred implicates Venezuela, not Great Britain or its counsel. Proper or improper, the extrajudicial contacts between Venezuela's counsel and the American arbitrators advanced Venezuela's interests, by offering it a choice between a unanimous Award in which it secured control of the Orinoco and its mouth (at the cost of some

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[245] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 529 (MMG, Vol. III, Annex 1).

[246] *Ibid.*

[247] *Ibid.,* pp. 529-530 (Mallet-Prevost writes that, after the consultation made by the two American arbitrators, Mr. Harrison opined that "if it should ever be known that we had it in our power to save for Venezuela the mouth of the Orinoco and failed to do so we should never be forgiven. What Martens proposes is iniquitous but I see nothing for Fuller and Brewer to do but to agree" and that he "concurred with General Harrison and so advised Chief Justice Fuller and Justice Brewer.").

territory farther south and east), or a 3-2 decision in which the two-member minority defended Venezuela's position in the arbitration but the majority vote gave to Great Britain the territory from which it could exercise control over the river.

3.68. Venezuela considered securing its control over the Orinoco a great victory. As expressed by Minister Andrade in his communication to the Foreign Minister of 7 October 1899, submitted as Annex 68 to the Counter-Memorial:

> "Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim we sought to achieve through the arbitration."[248]

Venezuela thus has no cause to challenge the validity of the Award based on extrajudicial communications between counsel and the arbitrators.

3.69. Nor can it contest the validity of the Award based on its far-fetched allegation of collusion between Professor Martens and the British arbitrators, or between Great Britain and Russia, to produce a boundary favourable to British interests. Venezuela first raised this fanciful claim in 1962, more than 62 years after the Award was issued. It rested then and still rests, according to the Counter-Memorial, entirely on speculation by Mr. Mallet-Prevost in a memorandum written just before he died in 1944, which was not made public until 1949[249]. As indicated above, this issue was fully addressed by Guyana in its Memorial on the Merits. To summarize:

[248] See also Letter from Minister Andrade to the Venezuelan Minister of Foreign Affairs (7 October 1899) (MG, Vol. II, Annex 3).

[249] See VCM, para 7.78. See also *ibid.*, paras. 6.177, 6.179, 7.3, 7.25, 7.73, notes 695 and 705.

– There is no documentary or testimonial evidence that supports the assertions made by Mr. Mallet-Prevost in his 1944 memorandum. An independent study of the British Foreign Office's papers relating to the arbitration, as well as the correspondence between London and St. Petersburg during this period, revealed not a single document that suggested, even remotely, the existence of "political deal" between Great Britain and Russia, or even the slightest inclination by any arbitrator to foster better relations between the two States[250].

– A study of the archival materials in the Russian Ministry of Foreign Affairs likewise produced nothing to suggest a "deal" between Great Britain and Russia regarding the arbitration, or any attempt by the Russian government to influence Professor Martens, or any communication between that government and Professor Martens about the arbitration; and an examination of Professor Martens' diaries likewise turned up nothing to indicate that he had been in contact with Russian authorities about the arbitration, or took Russian interests into account in conducting the proceedings or producing the Award[251].

– Mr. Mallet-Prevost's allegation that the "deal" was made between Professor Martens and the two British arbitrators in London during an August 1899 recess in the oral hearings is implausible, because only Lord Russell went to London during the recess; the 1944 memorandum offered no proof that Professor Martens or Lord Collins travelled to London during the recess, and Professor Martens' diary records that he spent the time in Paris[252].

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[250] MMG, para. 8.78.

[251] *Ibid.*, para. 8.79.

[252] See MMG, paras. 8.87-8.88; *Private Diary Entries of Prof Fyodor Fyodorovich Martens* (4 June 1899–3 October 1899), pp. 5-8 (with entries from 2, 15, 17, 27 and 29 August 1899). None of these entries mentions that Professor Martens was in London, that he visited London or that he

– The other basis offered by Mr. Mallet-Prevost for his allegation — a "noticeable" change in Lord Collins' demeanour after the recess — is equally unsupportable; apart from the fact that he was not in London at the time the purported "deal" was made there, an independent review of the verbatim record of the oral hearings before and after the recess reveals no change in his demeanour or attitude, or in the nature or frequency of his interventions, or any other basis for concluding that he changed his views during the recess[253].

3.70. Notably, the Counter-Memorial makes no attempt to respond to any of these points, or to any of the other points raised by Guyana in its Memorial on the Merits to refute Mr. Mallet-Prevost's unfounded allegations. There are only three paragraphs in the Counter-Memorial that refer to the supposed "deal" between Great Britain and Russia, in which Venezuela quotes Mr. Mallet-Prevost as saying only that "the Russian Arbitrator was *probably* induced to take the stand which he took by considerations entirely foreign to the question"[254]. Conspicuously, the Counter-Memorial offers no direct quotes from the 1944 memorandum. The impression given is that Venezuela now recognizes the memorandum's manifest lack of credibility and is unwilling to further discredit its case by continued reliance upon it.

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even intended to visit London, while, for instance the entry of 29 August 1899 mentions that Professor Martens was "heading to the Hague to sign all the acts of the [First Hague Peace] conference." The entry of 15 August 1899 confirms that Professor Martens was in France and had been there for the past couple of days, as does the entry of 29 August 1899 (MMG, Vol. III, Annex 33).

[253] MMG, paras. 8.87-8.88.

[254] VCM, para. 5.129 (emphasis added), and its footnote 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") (VCM, Vol. III, Annex 150).

3.71. Mr. Mallet-Prevost himself was far from a neutral or unbiased observer. As the Counter-Memorial acknowledges, United States Secretary of State Olney, after dining with him, wrote to President Cleveland of Mr. Mallet-Prevost's "intense wrath and bitterness of soul at the course and decision of the arbitral tribunal"[255]. Secretary Olney reported in the same communication that Mr. Mallet-Prevost had told him 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"[256]. The Counter-Memorial leaves out the rest of what Secretary Olney wrote to President Cleveland about Mr. Mallet-Prevost:

> "I see that Mr. Mallet-Prevost has been talking with you and giving you his account of the way in which the Venezuelan boundary award was made. He told me, I suppose, practically the same tale. I found, however, in talking with Chief Justice Fuller last Fall that he did not fully concur in Mr. Mallet-Prevost's views."[257]

3.72. This was written in 1901. There is no evidence that Mr. Mallet-Prevost's "wrath and bitterness of soul" subsided, or that he became less partisan and more objective on the subject of the 1899 Award between then and 1944.

3.73. It is therefore plain that there is no evidence — none — that the arbitral proceedings were tainted by fraud or corruption and Venezuela's challenge to the Arbitral Award on this basis must fail. There is thus no need for the Court to decide if these grounds of nullity existed in 1899.

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[255] VCM, para. 5.130, and its foonote 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") (VCM, Vol. III, Annex 150).

[256] *Ibid.*

[257] Letter from Mr. Olney to Mr. Cleveland (6 March 1901) (Vol. III, Annex 28).

# CHAPTER 4

## VENEZUELA'S POST-AWARD CONDUCT

4.1. In Chapter 4 of its Memorial, Guyana describes Venezuela's conduct in relation to the 1899 Award. Following its publication on 3 October 1899, Venezuela immediately heralded the Award. Thereafter, for more than half a century, it repeatedly and unreservedly accepted and affirmed its validity and the boundary which it established.

4.2. Venezuela's decades-long acceptance and affirmation included its participation in a careful and thorough joint demarcation of that boundary, which culminated in the signing of the 1905 Boundary Agreement between Venezuela and Great Britain[258]. On the basis of the Award, Venezuela also delimited and demarcated its boundary with Brazil, and repeatedly refused to countenance any departure or modification of the boundary with British Guiana established by the 1899 Award[259]. Over a period of many years, the Venezuelan Government made numerous public statements which affirmed the validity of the 1899 Award and the boundary which it established. Venezuela stressed it had long "accepted"[260] the Award. It published official Venezuelan maps which depicted Venezuela's boundary with British Guiana following the line established by the 1899 Award[261]. Consistently with the terms of the Treaty of Washington, which provided that the parties shall treat the Award "as a full, perfect, and final settlement of all the

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[258] MMG, paras. 4.10-4.22.

[259] *Ibid.*, paras. 4.23-4.45.

[260] As noted at MMG, para. 4.49, in 1944, the Venezuelan Ambassador to the United States made a statement to the Pan-American Society in Washington in which he stressed that: "*We have accepted the verdict of the arbitration* for which we have so persistently asked" (Speech by the Venezuelan Ambassador to the United States, to the Pan-American Society of the United States (1944), p. 2 (MG, Vol. II, Annex 9) (emphasis added)).

[261] MMG, paras. 4.46-4.53.

questions referred to the Arbitrators"[262], Venezuela characterised the boundary as a "*chose jugée*"[263].

4.3. Venezuela's Counter-Memorial studiously and conspicuously ignores most of its post-Award conduct. To the extent it does address Venezuela's acts and omissions in the years following 1899, Venezuela's response comprises a mixture of bald and unevidenced claims, reliance on statements deliberately taken out of context, and assertions which are demonstrably contradicted by the factual record.

4.4. In Chapter 9 of its Memorial, Guyana identifies the important legal consequences that arise from Venezuela's decades-long recognition, acceptance, affirmation and implementation of the 1899 Award. Venezuela's Counter-Memorial largely does not take issue with the legal conclusions identified by Guyana, or contest or even address most of the factual and legal considerations on which they are based.

4.5. Instead, Venezuela's response to the legal arguments based on its post-1899 conduct consists principally of claims that for many years it was unaware of the matters which it now contends render the 1899 Award a nullity, and that it was unable to challenge the validity of the Award due to "structural coercion" from Great Britain. Venezuela argues that the 1905 Agreement was merely a "technical" instrument whose legal effects are wholly contingent upon the validity of the 1899 Award. It further contends that Guyana is barred both by the Geneva Agreement

[262] Treaty of Washington (1897), Article XIII.

[263] As noted at MMG, para. 4.47, in 1941 Venezuela's Foreign Minister, Dr. Esteban Gil Borges, stated that the view of the Venezuelan Government was "*definitively* that matter was *chose jugée*" (Letter from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador to Venezuela, D. Gainer (15 April 1941) (MMG, Vol. III, Annex 56)).

and by Guyana's own conduct from placing any reliance upon Venezuela's decades-long acquiescence in the Award and the boundary which it established.

4.6. Guyana demonstrates in this Chapter that each of Venezuela's arguments is devoid of merit. This Chapter begins by explaining why Venezuela is wrong to argue that its immediate response to the 1899 Award was not one of general and strong satisfaction (**I**). It then demonstrates how almost all the matters which form the basis for Venezuela's contention of nullity were known to Venezuela as soon as the Award was delivered in October 1899 (**II**). Third, it explains why Venezuela's assertion that "structural coercion" rendered it impossible for Venezuela to challenge the validity of the 1899 Award for many years is without substance and contradicted by the factual record, on which Venezuela passes in complete silence (**III**).

4.7. Guyana then addresses the legal implications of Venezuela's participation in the joint demarcation of the boundary established by the Award and its entry into the 1905 Boundary Agreement, which formally affirmed and codified that demarcated boundary (**IV**). It also addresses the many other official acts by Venezuela between 1899 and the 1960s which positively recognised and affirmed the validity of the 1899 Award and the boundary which it established (**V**).

4.8. This Chapter then responds to Venezuela's spurious contention that the publication of the Mallet-Prevost Memorandum in 1949 "changed everything" (**VI**), and Venezuela's false claim that it contested the validity of the 1899 Award following the publication of that Memorandum (**VII**). The Chapter concludes by demonstrating that Venezuela's argument that Guyana is barred from relying on Venezuela's decades-long affirmation, acceptance and acquiescence in the 1899 Award is groundless, as a matter of law and evidence (**VIII**).

## I. Venezuela's Immediate Reaction to the 1899 Award

4.9. Venezuela asserts that it is "historically erroneous" and "wholly inaccurate to state … that Venezuela welcomed the Arbitral Award of 1899 with satisfaction"[264]. Rather, Venezuela argues, the record shows that it "was immediately seen as a disastrous award" for Venezuela[265].

4.10. These assertions are manifestly contradicted by the evidence before the Court. This shows a multitude of explicit and unequivocal declarations by Venezuela in support of the 1899 Award for several decades. As noted in Guyana's Memorial[266], the evidence includes statements expressing gratification at the overall outcome of the 1899 Award which were made immediately following the delivery of the Award by senior Venezuelan officials and representatives in October 1899, including:

– Venezuela's President, who affirmed that the "award was a source of satisfaction for the country, as international justice had returned a part of its territory that had been usurped and vindicated its right"[267].

– Venezuela's Agent before the Arbitral Tribunal, who explained that, in the "Sentence of Tribunal: England gives up Point Barima and the coast until Point Playa from thence the line goes until Schomburgk's (line) which it follows until the junction of the Cuyuni and Wenamu. This gives us five

[264] VCM, paras. 7.1 and 7.6.

[265] *Ibid.*, para. 7.9.

[266] MMG, para. 9.8.

[267] See "Nouvelles de l'Étranger : Venezuela", *Le Temps* (11 October 1899), quoting from Venezuelan President Ignacio Andrade (Guyana's translation of the French original: "*l'arrêt était un motif de satisfaction pour le pays, car la justice internationale lui avait restitué une partie de son territoire usurpé et donnait raison à son bon droit.*").

thousand square miles east of the Schomburgk line. Arbiters and Counsel for Venezuela were brilliant."[268]

– Mr. Mallet-Prevost and former United States President Harrison, Venezuela's counsel in the Arbitration, who affirmed that "[n]o portion of the entire territory possessed more strategic value than this, both from a commercial and a military standpoint, and its possession by Great Britain was most jealously guarded. This point had been awarded to Venezuela and along with it a strip of coast about 50 miles in length, both giving to Venezuela the entire control of the Orinoco River."[269]

– Venezuela's Ambassador to Great Britain, who acknowledged that, in "view of the impression made by the chaotic condition of the country (Venezuela) on the minds of those concerned with the result of the verdict I had thought that our cause was completely lost. Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim we sought to achieve through arbitration"[270].

4.11. Aside from a bald, general and manifestly wrong assertion that Guyana's reliance on these statements is "made out of context"[271], in its Counter-Memorial

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

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

[270] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 October 1899) (MG, Vol. II, Annex 3). Venezuela's Ambassador added that "for them (Britain)" the Award "has been to a certain extent a costly defeat"; that the Award "proves that Venezuela did well in forcing England to submit the question to arbitration in 1897"; and that in view of the outcome of the Award, "I consider as well employed the humble efforts which, in order to achieve this, I dedicated during the last six years of my official life."

[271] VCM, para. 7.6.

Venezuela completely ignores these statements of its own highest officials, and many others like them.

## II. Venezuela's Contemporaneous Knowledge of the Matters which it Now Claims Render the 1899 Award a Nullity

4.12. Venezuela claims that it was unaware for many decades of the matters which it now alleges render that Award a nullity[272]. This claim is manifestly untrue and is contradicted by the contents of Venezuela's own written pleadings. The factual record and Venezuela's Counter-Memorial demonstrate that as soon as the 1899 Award was delivered, Venezuela was fully aware of almost all the matters which now form the basis of its contention of nullity. Indeed, most of the grounds on which Venezuela attacks the validity of the 1899 Award are based on the text of the Award itself — which was known to Venezuela from the very moment of its delivery, on 3 October 1899.

4.13. In Chapters 2 and 3, Guyana showed that none of these grounds are legally or factually sufficient to support Venezuela's contention that the 1899 Award should be declared invalid[273]. Here, Guyana demonstrates that Venezuela's excuse for not invoking any of these grounds for more than 60 years after the Award was issued — that it had no knowledge of them until 1962 — is equally unsupportable. This is important because it demonstrates that Venezuela's decades-long recognition, approval and affirmation of the Award was done in full knowledge of the matters which it now claims invalidate that Award.

[272] See, e.g., VCM, para. 5.136.

[273] See above, paras. 2.5-2.110, and 3.2-3.73.

## A. VENEZUELA'S ALLEGED UNAWARENESS OF THE GROUNDS FOR INVALIDITY OF THE 1897 TREATY

4.14. As explained in Chapter 2 above, Venezuela contends that the 1897 Treaty was invalid on four grounds:

– *First*, Venezuela claims that the Treaty was the result of a "criminal fraud" perpetrated by the United States, which negotiated the terms of the agreement in collusion with Great Britain, "behind Venezuela's back" and contrary to Venezuela's interests.

– *Second*, Venezuela contends that the Treaty prejudiced Venezuela because it disregarded the agreement concluded between Venezuela and Great Britain in 1850 which prohibited the occupation of "disputed territory" after that date, and because it provided that title to such territory could be obtained by effective occupation for a period of 50 years.

– *Third*, Venezuela contends that the Treaty prejudiced Venezuela because it did not provide for the appointment of any Venezuelan arbitrators.

– *Fourth*, Venezuela contends that it was coerced into signing the Treaty and did not consent to it.

4.15. It is self-evident that the purported basis for the second and third grounds — which both concern the terms of the Washington Treaty — were known to Venezuela not only before the 1899 Award was issued, but even before the Treaty was entered by Venezuela two years earlier. Having signed the Treaty in 1897, it is nonsensical for Venezuela to suggest that it was unaware for many years thereafter of the terms of Article IV (a) of that Treaty (which contained the supposedly prejudicial rule that fifty years of adverse holding shall constitute a good title) and

Article II (which provided for the appointment and nationality of the Arbitrators[274]). It would be equally untenable for Venezuela to contend that it was unaware of the *effects* of those terms until years after the Arbitration. Indeed, Venezuela's Counter-Memorial contends that the alleged injustice of those treaty provisions was evident on their face. Venezuela states, for example, that the 1897 Treaty "was *patently* prejudicial to its interests"[275] and that Article IV (a) of the Treaty "was clearly prejudicial to Venezuelan interests"[276]. Venezuela further states that:

> "Although the 1897 Treaty was signed by José Andrade, Venezuela's representative to the United State[s], 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."[277]

4.16. In other words, Venezuela expressly recognises that the basis for its second and third grounds of challenge to the validity of the Washington Treaty were well known to Venezuela — including its Head of State and the senior representative who formally signed the Treaty on Venezuela's behalf — before Venezuela entered that Treaty.

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[274] As Venezuela observes at para. 5.25 of its Counter-Memorial, the terms of Article II of the 1897 Treaty stipulated that the Arbitrators would comprise two American jurists and two British jurists, and did not provide for the appointment of a Venezuelan arbitrator in the event of the death or incapacity of any of those British or American Arbitrators ("Not only did Article II of the 1897 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.").

[275] VCM, para. 5.4 (emphasis original).

[276] *Ibid.*, para. 5.34. See to similar effect paras. 5.75 and 5.76, where Venezuela states that the 1897 Treaty was "so evidently adverse to Venezuela's interests" and "clearly prejudicial to its rights."

[277] VCM, para. 6.30.

4.17. The same is true of Venezuela's fourth ground of alleged invalidity, which concerns the circumstances in which Venezuela signed the Washington Treaty. As explained in Chapter 2 above, the suggestion that Venezuela was coerced into entering the Treaty is plainly false[278]. But even if (*quod non*) it were true, then Venezuela must have been aware of this at the time when it entered the Treaty; Venezuela could not possibly have been both coerced and at the same ignorant of that coercion.

4.18. It follows that Venezuela cannot seriously hope to sustain an argument that it was unaware of the matters which form the basis for its second, third and fourth grounds of challenge until after the 1899 Award was issued.

4.19. As to Venezuela's first ground of challenge — *viz*. its claim that the terms of the Washington Treaty were deliberately negotiated "behind its back" and contrary to its interests — this allegation is manifestly contradicted by the factual record, as explained in detail in Chapter 2. As the evidence summarised in that chapter makes clear, Venezuela's allegation that it was unjustly excluded from the negotiations of the Treaty, and that the United States negotiated the terms of the Treaty with Great Britain in a manner which was directly prejudicial to Venezuela's interests, is notably belied by the fact that throughout the negotiating process the United States Secretary of State, Mr. Olney, consulted closely with both Venezuela's Minister in Washington, Mr. Andrade, and its legal counsel, Mr. Storrow, regarding the negotiations. Mr. Andrade and Mr. Storrow instructed Mr. Olney regarding what terms would (and would not) be acceptable to Venezuela. Mr. Olney duly acted in accordance with those instructions, and kept his

[278] See paras. 2.94-2.101.

Venezuelan counterparts closely informed of the content and progress of the negotiations[279].

4.20. Furthermore, the record of the arbitration establishes that documents which Venezuela contends constitute evidence of the alleged conspiracy and perfidy of the United States and Great Britain in respect of the Washington Treaty were known to Venezuela during the course arbitration in 1898 and 1899. Venezuela's argument is that during the negotiation of the Treaty there were improper informal exchanges and decisions taken by Mr. Olney and Sir Julian Pauncefote (Great Britain's Ambassador to the United States) in 1896 regarding the terms, interpretation and effect of Article IV of the Treaty, and that Venezuela was deliberately not informed about this[280]. Yet, as explained in Chapter 2[281], the correspondence between Mr. Olney and Lord Pauncefote that included those exchanges was formally admitted into the record during the arbitration and was expressly discussed by Venezuela's counsel, ex-President Harrison, during the course of the hearings before the Tribunal. The existence and content of communications between the United States and Great Britain which Venezuela claims constitute evidence of a secret conspiracy against it have been known to Venezuela for more than 125 years.

4.21. Accordingly, each of Venezuela's four grounds for contesting the validity of the Washington Treaty are based on treaty text or actions of which Venezuela was fully aware of *before* the 1899 Award was issued.

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[279] See paras. 2.42-2.55. See in particular Letter from Mr. Olney to Mr. Brewer (10 November 1896) (Vol. III, Annex 5); Letter from Mr. Storrow to Mr. Olney (29 August 1896) (Vol. III, Annex 7); Letter from Mr. Olney to Mr. Storrow (12 September 1896) (Vol. III, Annex 8); Letter from Mr. Storrow to Mr. Olney (17 September 1896) (Vol. III, Annex 9); Letter from Mr. Storrow to Mr. Olney (26 October 1896) (Vol. III, Annex 10); Letter from Mr. Storrow to Mr. Olney (28 October 1896) (Vol. III, Annex 11); Letter from Mr. Olney to Mr. Storrow (18 November 1896) (Vol. III, Annex 14); Letter from Mr. Storrow to Mr. Olney (29 November 1896) (Vol. III, Annex 15).

[280] See, e.g., VCM, para. 5.7.

[281] See para. 2.77 above.

## B. Venezuela's Awareness of the Absence of Reasons in the 1899 Award at the Time it Was Delivered

4.22. The fact that the 1899 Award did not contain reasons for the Tribunal's decision was self-evident on the face of the Award. This allegedly fatal defect in the Award was therefore known to Venezuela as soon the Award was handed down by the Tribunal, some 125 years ago.

4.23. It is telling that when Venezuela first advanced its contention that the 1899 Award was null and void, it specifically contended that the invalidity of the Award was apparent on the face of the Award. In November 1962, Venezuela's Foreign Minister told the United Nations that:

> "In Venezuela and the United States the arbitral award was carefully noted. *The first conclusion came from a cursory reading is that there is no justification or reason for it. There was no explanation as to why the boundaries were set as they were. It was impossible, historically, to do this. Venezuela was clearly a victim and had been despoiled.* For us this arbitral award has no validity. No one can give validity to something which never existed."[282]

## C. Venezuela's Awareness Upon Reading the Award of the Grounds on Which it Now Claims that the Tribunal Exceeded its Jurisdiction and Failed to Fulfil its Mandate under the 1897 Washington Treaty

4.24. Venezuela's contention that the Tribunal exceeded its jurisdiction and failed to fulfil the mandate conferred under the Washington Treaty is also grounded explicitly on the text of the 1899 Award. For example, in these proceedings Venezuela's Counter-Memorial states:

[282] VCM, Vol. III, Annex 143, p. 15 (emphasis added).

– "The Tribunal's excesses of power … *are plain from the text of the Award.*"[283]

– "*The brevity of the Award evidences* the Tribunal's deliberate disregard for these prescriptions. *Its text … demonstrates* that the Tribunal did not evaluate 'the substance of [its] mandate', let alone do so 'with the utmost care.'"[284]

– "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 … *reflected in objective features of the Award.*"[285]

– "[T]he Tribunal's actions are invalid from the moment of the pronouncement of its decision when it *manifestly* exceeded its powers"[286].

– "*The Tribunal established under the Washington Treaty … 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' 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'."[287]

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[283] VCM, para. 6.188 (emphasis added).

[284] *Ibid.*, para. 6.95 (emphasis added).

[285] *Ibid.*, para. 6.159 (emphasis added).

[286] *Ibid.*, p. 98, para. 57 (emphasis added).

[287] *Ibid.*, para. 6.117 (footnotes omitted, emphasis added).

– "The Award of 3 October 1899 is invalid. It is invalid because the Tribunal, in rendering it, *manifestly* exceeded its power … More specifically, in rendering the 1899 Award, *the arbitral Tribunal … failed to respond to one of the questions put to it in Article III.*"[288]

– "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 … *The Tribunal addressed this question in a short sentence … This is a 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.*"[289]

– "*Th[e] 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 … 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

[288] VCM, para. 6.86 (footnotes omitted, emphasis added).

[289] *Ibid.*, paras. 6.109-6.111 (emphasis added).

investigate the 'substance of [its] mandate' or that it would have to 'conform to the terms by which the Parties have defined this task'."[290]

– "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*."[291]

4.25. As noted in Chapter 3 above, in support of its contention of nullity, Venezuela argues (amongst other things) that the 1899 Award was manifestly invalid because "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"[292]. Yet Venezuela's own Counter-Memorial in this case makes clear that these alleged grounds of nullity were apparent on the face of the Award, known immediately to Venezuela, and were the subject of public commentary shortly after the Award was delivered in 1899:

– "the Tribunal went beyond the limits of its competence in two ways. First, *the Award allocated territories to British Guiana that, at the time, were disputed between the United Kingdom and Brazil* … This 'overreach' clearly could not be based on the *compromis* … That the Award had interfered with Brazil's territorial interests *was a standard feature of early discussions of the decision ... it was undeniable that the tribunal had gone beyond its mandate* … leading commentators like Ernest Nys remained

[290] VCM, para. 6.131 (emphasis added).

[291] *Ibid.*, para. 6.132 (emphasis added).

[292] *Ibid.*, para. 6.137 (emphasis original).

highly critical of the Award, describing the transgression of Brazil's interests as 'une grossière erreur'."[293]

– "[T]he Tribunal went beyond its powers in another … 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 … As is clear from the wording of this passage [of the Award]*, 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 … *By setting out a regime for the Amakura and Barima rivers, the Tribunal clearly went beyond the task entrusted to it by the compromis* … [T]he 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' … 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.*"[294]

In other words, 125 years after the 1899 Award, Venezuela invokes what it knew and accepted and acted upon in October 1899 and subsequently, to claim that the Award is a nullity.

[293] VCM, paras. 6.138-6.141 (emphasis added) (citing commentaries published in 1901 and 1910).
[294] *Ibid.*, paras. 6.143-6.148 (emphasis added).

## D. VENEZUELA'S AWARENESS OF THE GROUNDS FOR ITS CURRENT ALLEGATIONS THAT THE TRIBUNAL FAILED TO APPLY INTERNATIONAL LAW OR THE "RULES" CONTAINED IN THE WASHINGTON TREATY

4.26. Venezuela's related contention that the Award is void because the Tribunal failed to apply international law and the "Rules" set out in the 1897 Treaty is also expressly founded on the text of the 1899 Award. In its Counter-Memorial, Venezuela states for example that:

– "*[T]here is … 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."[295]

– "*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*."[296]

– "*As is apparent from the text of the Award,* the Tribunal completely ignored the Rules stipulated in Article IV, it completely ignored the parties'

[295] VCM, para. 6.171 (emphasis added).

[296] *Ibid.*, para. 5.114 (emphasis added).

extensive arguments and 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*."[297]

– "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'*."[298]

### E. VENEZUELA'S AWARENESS OF THE ALLEGEDLY "POLITICAL" RATHER THAN LEGAL NATURE OF THE 1899 AWARD AND THE FACT THE BOUNDARY WAS THE RESULT OF A COMPROMISE BETWEEN THE ARBITRATORS

4.27. Venezuela's contention that the 1899 Award was not based on legal considerations is explicitly based upon the text of the Award. In its Counter-Memorial, for example, Venezuela states that:

– "*None of this 'lengthy legal contest' is reflected in the Award … The text of the Award reveals nothing approaching a legal process*: not the length of

[297] VCM, para. 6.129 (emphasis added).

[298] *Ibid.*, para. 6.111 (emphasis added).

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. … *On its face, nothing in this Award* gives the reader the impression that the decision was based on legal considerations."[299]

– "*From the text of the Award ... it is clear* that the Tribunal failed to render a decision based in law. … *[T]he Award contains not a trace of legal reasoning*."[300]

– "*[O]n its face*, *the 1899 Award appeared as an arbitrary and purely political* ratification of the British unfounded claims."[301]

– "*[O]n the face of it*, *the 1899 Award appeared to be* an arbitrary and purely political ratification of unfounded British claims."[302]

4.28. More generally, Venezuela's contention that the Tribunal was biased against Venezuela, and that this bias infected the Tribunal's determination of the boundary, is founded upon nothing more than the composition of the Tribunal and the outcome of the Award. Once again these are both matters which Venezuela was obviously aware of in 1899[303].

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[299] VCM, para. 6.173 (emphasis added).

[300] *Ibid.*, paras. 6.167-6.168 (emphasis added).

[301] *Ibid.*, para. 7.2 (emphasis added).

[302] *Ibid.*, para. 7.58 (emphasis added).

[303] In its Counter-Memorial Venezuela states, for example, that "the arbitration panel leaned excessively towards British interests, with *the absence of any Venezuelan nationals among the arbitrators highlighting a glaring procedural anomaly*" (VCM, para. 2.17) (emphasis added) and that "[t]he 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*." (VCM, p. 94, para. 40) (emphasis added).

4.29. Furthermore, the fact that the boundary established by the 1899 Award was partly the result of a compromise between the arbitrators was obvious from the outcome of the Award and was openly acknowledged and reported at the time. The day after the Award was issued, Justice Brewer, one of the arbitrators appointed on behalf of Venezuela, gave an interview to the *New York Times* in which he explained that:

> "it was by the greatest conciliation and *mutual concessions that a compromise was arrived at*. If any of us had been asked to give an award, each would have given one differing in extent and character. The consequence of this was that *we had to adjust our different views*, *and finally to draw a line running between what each thought right*."[304]

## F. Statements by Venezuela Reflecting its Contemporaneous Knowledge of the Matters which it Now Contends Render the 1899 Award a Nullity

4.30. It follows that insofar as Venezuela seeks to impugn the validity of the 1899 Award on the basis of the grounds and arguments summarised above, these are all matters which Venezuela knew of and could have raised from the moment it first read the Award some 125 years ago. This point is reinforced by statements made by representatives of the Venezuelan Government in the period immediately following the 1899 Award, which expressly alluded to several of those alleged defects in the Award — including the claim that the outcome was the result of a compromise brokered by the President of the Tribunal.

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[304] "Judge Brewer's Opinion, Venezuela's Arbitrator Tells How the Verdict Was Reached", *The New York Times* (5 October 1899) (emphasis added) (see also MMG, para. 8.74, and VCM, Vol. III, Annex 171). On the same date, the *Advocate of Peace* published an article which reported that: "The decision of the tribunal *is considered a compromise*. It was made unanimously, the British and American members voting together. Though *appearing to bear the marks of compromise*, the judgment rendered is probably much nearer the right than if it had sustained entirely the contention of either party." ("The Venezuela Boundary Award", *The Advocate of Peace* (1894-1920), Vol. LXI, No. 10 (November 1899), pp. 227-228) (emphasis added).

4.31. For example, as noted in Chapter 3, on 4 October 1899 — the day after the Award was delivered — Venezuela's Agent at the Arbitration, Mr. Rojas, sent a letter to the Foreign Minister of Venezuela which described Mr. Rojas' knowledge of exactly how the alleged compromise had arisen within the Tribunal[305]. Indeed, as explained at paragraphs 3.65 to 3.66 above, Venezuela learned of the compromise described in its Agent's letter to his Foreign Minister even before the Award was issued when the two American arbitrators appointed by Venezuela met with its counsel — Mr. Mallet-Prevost and former President Harrison — and told them about the deliberations that were then taking place. They explained that, in the circumstances, they were inclined to agree with the Tribunal president's proposal rather than maintain their position on the boundary and suffer a majority Award that would be more favourable to Great Britain, and Venezuela's counsel agreed[306].

4.32. Subsequent statements by senior Venezuelan officials offer further proof of Venezuela's knowledge of the arbitrators' compromise. For example, on 22 October 1900, Venezuela's Minister of Foreign Affairs told Venezuela's Commissioner on the Joint Boundary Commission, Sr. Felipe Aguerrevere, that the 1899 Award was "more the result of a compromise than of an essentially judicial examination", and that the boundary established by the Award was "a line de facto, determined without any support or reason"[307].

4.33. It follows that there is no doubt that in the period immediately after the 1899 Award was delivered Venezuela knew of the matters — including the various

[305] See para. 3.24 above, quoting from the Letter from Mr. Rojas to the Foreign Office Minister of Venezuela (4 October 1899) (VCM, Vol. II, Annex 65).

[306] See paras. 3.65-3.66 and Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *American Journal of International Law*, Vol. 43, No. 3 (July 1949), pp. 529-530 (MMG, Vol. III, Annex 1).

[307] Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 21, para. 28 (VCM, Vol. III, Annex 150).

alleged excesses of the Tribunal's jurisdiction and the role that the president of the Tribunal, Professor Martens, allegedly played in procuring the unanimous decision of the Tribunal — which it now contends render the Award a nullity. Yet despite that knowledge, for more than 60 years after 1899 Venezuela made no protest or challenge to the effectiveness of the Award. To the contrary, on the basis of the Award it engaged in numerous official acts which affirmed both the validity of the Award and the boundary which it established[308].

## III. Venezuela's Claim that it was Unable to Challenge the Validity of the 1899 Award due to "Structural Coercion"

4.34. Venezuela has not put into the record any evidence that it questioned or contested the validity of the Award for several decades after it was delivered. This is not in dispute.

4.35. Venezuela attempts to explain away the absence of any such challenge by claiming that it was "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, [as a result of which] Venezuela was not in a position to challenge the 1899 Arbitral Award"[309]. It claims that "in the years immediately following [the 1899 Award] … Venezuela was systematically threatened from the outside by the then powerful and bullying British Empire" and that "[t]hreats to Venezuela by Britain, and also by other empires and powers of the time, are very numerous and prove the situation of structural coercion"[310]. It adds that "as soon as the circumstances allowed, Venezuela made its challenge to the Award known to

[308] See paras. 4.44-4.71 below.

[309] VCM, para. 7.2.

[310] *Ibid.*, paras. 7.21-7.22.

the whole world"[311]. Since Venezuela did not challenge the Award until 1962, the necessary implication of its argument is that the state of alleged "structural coercion" which made it impossible for Venezuela to challenge the Award endured for more than half a century, until 1962.

4.36. Like its claim that it was "coerced" into entering the 1897 Treaty, Venezuela's claim that "structural coercion" rendered it powerless to challenge (or even publicly question) the validity of the 1899 Award is hopeless: it is not substantiated, and it is extensively contradicted by the factual record.

4.37. *First*, it is telling that Venezuela cites no source or evidence in support of any of these assertions. It has not adduced a single document to corroborate its claim that "structural coercion" made it impossible for Venezuela to dispute or even openly doubt the validity of the 1899 Award. It is equally revealing that Venezuela has not adduced any evidence of any private expressions of doubt by Venezuelan officials as to the validity of the 1899 Award during the years-long period when it claims that "structural coercion" prevented it from publicly challenging the validity of the 1899 Award. Had such evidence existed, Venezuela would doubtless have adduced it.

4.38. *Second,* Venezuela's claim that "structural coercion" prevented it from raising any objection or concerns regarding the validity of the 1899 Award is impossible to reconcile with the assertive and sometimes threatening nature of Venezuela's communications to Great Britain regarding the disputed boundary in the period immediately preceding the issuance of the Award. In the words of Venezuela's Counter-Memorial, during that period "Venezuela … never ceased to

[311] VCM, para. 2.19.

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"[312]. The Counter-Memorial adds that "Venezuela continued to protest every act that were [*sic*] an attack on its sovereignty"[313].

4.39. *Third*, Venezuela's claim that it was intimidated into remaining silent about the purported invalidity of the 1899 Award is contradicted by its bellicose actions — including its use of force against British assets and British subjects — in the period immediately after the Award was delivered. For example:

- In January 1901 — just 15 months after the Award was delivered — Venezuelan gunboats landed a force of 20 Venezuelan soldiers on the island of Patos, which was then part of the British colony of Trinidad and Tobago. Venezuelan forces seized several British boats and detained and kidnapped a number of British subjects from that British territory[314].

- In February 1901, another Venezuelan military vessel landed on the island of Patos; its crew proceeded to attack British subjects on the island and seize their boats and other property[315].

[312] VCM, para. 4.178.

[313] *Ibid.*, para. 4.176.

[314] See Letter from the Governor, Sir A. Moloney, to Mr. Chamberlain and enclosures (24 February 1901) (Vol. III, Annex 29).

[315] See Letter from Mr. Grant Duff to the Marquess of Lansdowne (17 April 1901) (Vol. III, Annex 30).

– In December 1901, Venezuelan forces seized a British-owned and British-registered vessel in the Barima River (which the 1899 Award had determined was open to free navigation) and detained its entire crew[316].

– In May 1902, a British vessel was attacked and destroyed by a Venezuelan gunboat in the Venezuelan harbour of Pedernales[317]. The following month a British vessel was seized by a Venezuelan gunboat in the high seas; the vessel and its crew were forcibly taken to the Venezuelan port of Porlamar, where the vessel was confiscated[318]. By the end of the summer of 1902, Venezuela had seized or destroyed no fewer than seven British ships[319].

4.40. Venezuela's willingness and ability to resort to force against British-owned assets and British subjects belies its claim that it somehow felt so intimidated and enfeebled by British imperial domination that it was incapable of expressing any challenge to the validity of the 1899 Award. This is reinforced by the fact that during the course of diplomatic exchanges between Great Britain and Venezuela regarding some of the incidents described above, Venezuelan officials had no hesitation in disputing British title to the island of Patos and expressly asserting Venezuelan sovereignty over the territory[320]. The Venezuelan Government was

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316 See Letters from Acting medical officer, northwestern district, to Government secretary (21 and 27 December 1901) (Vol. III, Annex 31).

317 See Memorandum on existing causes of complaint against Venezuela (20 July 1902), at pp. 611-612 (Vol. III, Annex 32). See also Letter from Mr. Haggard to the Marquess of Lansdowne (30 June 1902) (Vol. III, Annex 33).

318 See *ibid.*, pp. 612-613.

319 See *ibid.*, pp. 608-613 (*Augusto* (seized in January 1901); *Sea Horse* (seized on 26 February 1901); *María Teresa* (seized in January 1901); *Pastor* (seized and attacked on 30 August 1901); *Indiana* (seized and detained in January 1902); *In Time* (destroyed on or about 1 May 1902); *Queen* (seized in June 1902)). See also Letter from Mr. Haggard to the Marquess of Lansdowne (30 June 1902) (Vol. III, Annex 33).

320 See, e.g., Letter from Mr. Eduardo Blanco to Mr. Grant Duff (27 March 1901) (Vol. III, Annex 34) ("As Venezuela holds that the island of Patos lawfully belongs to her, the Government will have to consider the incident as it is affected by that circumstance."); Letter from General

equally forthright in lodging forceful official protests against the British Government in respect of other matters relating to the two States' bilateral affairs[321]. Venezuela's diplomatic exchanges with Great Britain throughout this period were consistently frank and uninhibited.

4.41. *Fourth*, the "naval blockade" to which Venezuela refers lasted just three months and ended in February 1903. Accordingly, even if, *quod non*, the blockade had somehow made it impossible for Venezuela to question the 1899 Award, this would only explain the absence of a challenge to the Award during that brief period; it can provide no justification for the absence of any challenge to the Award for more than half a century after it ended.

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Pachano to Mr. Haggard (20 December 1901) (Vol. III, Annex 35) ("if, as appears from the facts transmitted to your excellency, the event occurred in waters of the island of Patos or within its boundaries, it must be considered in connection with the notorious circumstance that Venezuela considers the island in question as its legitimate possession.").

[321] For example, in 1901 and 1902 the Governments of Venezuela and Great Britain engaged in protracted diplomatic correspondence regarding a ship which Venezuela had declared to be a pirate vessel. In a letter from Venezuela's Minister of Foreign Affairs, General Jacinto Regino Pachano, to the British Government on 24 March 1902, General Pachano stated: "*Venezuela protested at the time to the honorable legation* against the acts of hostility committed against the Government by the said vessel on the coast of the Republic … *Later, it protested against the attitude of indifference or toleration assumed by the governor of Trinidad* [a British colony] in the presence of revolutionary movements openly prepared in the territory of the island against the constitutionally established authorities in the Estados del Oriente. Herewith, in conformity with a special charge from the constitutional President of the Republic, *I present in this note, with all the energy demanded by the case, a new protest* against the unusual act of the colonial authorities, who, after the proceedings had before this respectable legation, harbored said steamer without taking into consideration, to judge from the development of affairs, the aforesaid proceedings." (Letter from Venezuela's Minister of Foreign Affairs, General Jacinto Regino Pachano, to the British Minister Resident, Mr. William Henry Doveton Haggard (24 March 1902) (Vol. III, Annex 36) (emphasis added)). See also Letter from Mr. R. Lopez Baralt to Mr. Haggard (16 July 1902) (Vol. III, Annex 37) ("The vice-president charged with the executive power has taken note of the full assurances which the Government of His Majesty has given with reference to that ship, but these do not alter for the Government of Venezuela the point of view from which it has, from the beginning, regarded that ship, and which now compels it *to protest solemnly against her being recognized by Great Britain as one which is not to be considered as outside international law*." (emphasis added)).

4.42. *Fifth*, it is notable that in the *Venezuelan Preferential Case* before the Permanent Court of Arbitration (an arbitration in 1903 between Venezuela and Great Britain, Germany, Italy, United States, Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway), Venezuela *did* promptly lodge a formal protest against an aspect of the award rendered by that arbitral tribunal. On 15 March 1904 (just three weeks after the tribunal's final award was delivered) Mr. Herbert W. Bowen, Venezuela's Agent, submitted a formal written protest against a passage of the award which Venezuela considered "absolutely erroneous". The letter asserted that Venezuela had "positive proof that the said conclusion of the arbitration is erroneous" and therefore requested that the award be revised accordingly[322]. This demonstrates that in the early 1900s Venezuela was willing and able to protest openly and forcefully against an arbitral award which it considered wrong. In relation to the 1899 Award, it did not do so.

4.43. *Sixth*, Venezuela's argument that the absence of any challenge to the validity of the 1899 Award was the result of British coercion is also contradicted by statements made by Venezuela when it first advanced its contention of nullity in 1962. On 12 November 1962, Venezuela's Foreign Minister, Dr. Marcos Falcón Briceño, told the United Nations that as soon as the 1899 Award was delivered Venezuela "certainly … knew that we had been robbed" but that the absence of any protest against the Award at the time was the result of Venezuela's internal political instability. He acknowledged that "this is our fault, not the fault of Great Britain"[323].

[322] See Protest of Mr. Herbert W. Bowen, Agent for Venezuela, Against the Award submitted to the Secretary-General of the International Tribunal at The Hague (15 March 1904) (Vol. III, Annex 38).

[323] See VCM, Vol. III, Annex 143, p. 23. Venezuela's representative told the United Nations that: "While the arbitral award was being handed down in Venezuela on 3 October, in Venezuela a revolution was taking place which was very near Caracas, the capital of our country. At these moments – in 1899, I think I can say this is an historical fact – *Venezuela was virtually without a Government. Naturally, this is our fault, not the fault of Great Britain*" (emphasis added).

## IV. The Effect of the Joint Demarcation of the Boundary Established by the 1899 Award and the 1905 Boundary Agreement

4.44. As well as the absence of any Venezuelan protest or challenge to the validity of the 1899 Award, Venezuela's affirmation of the Award is clearly demonstrated by its full and active participation — without any reservation of its rights — in a joint demarcation of the border established by the Award. Similarly, Venezuela formally marked the entry into force of the 1905 Agreement with Great Britain and did so unreservedly.

4.45. On 29 March 1900, Venezuela's Minister of Foreign Affairs, Mr. Andueza Palacio, sent a letter to the British Government which described demarcation of the boundary between Venezuela and British Guiana as "a matter of such importance". He explained that it was the position of the Government of Venezuela that "it is mutually beneficial to proceed in all that concerns the sentence of October 1899, by concerted and simultaneous action"[324].

4.46. As explained in Guyana's Memorial[325], consistent with that attitude, between 1900 and 1905 Venezuela and Great Britain embarked upon a thorough demarcation of the entire border established by the 1899 Award. This was a joint exercise, done without reservation. At the conclusion of that joint demarcation exercise, the two States entered a treaty — the 1905 Agreement — which formally confirmed the demarcated boundary as the official boundary between Venezuela and British Guiana. The treaty was entered into without reservation.

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[324] Letter from Mr. Andueza Palacio to British Foreign Office, 29 March 1900 (Vol. III, Annex 39).

[325] See MMG, paras. 4.10-4.22.

4.47. Venezuela does not allege in its Counter-Memorial — how could it? — that "structural coercion" was the cause of either its participation in the joint demarcation of the boundary or its entry into the 1905 Agreement. Venezuela therefore accepts that these official acts were exercises of its own independent sovereign free will.

4.48. However, it seeks to downplay the significance of the 1905 Agreement by arguing that "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"[326]. But the 1905 Agreement was not "merely a technical exercise": it is a treaty which is binding under international law. Indeed, the 1905 Agreement was recorded in the official record of the Ministry of Foreign Affairs of Venezuela under "Public treaties and international agreements of Venezuela"[327]. Moreover, as the statements set out at paragraph 4.56 below demonstrate, Venezuela's attempt to diminish the significance of the 1905 Agreement is belied by its steadfast refusal to countenance any modification of the demarcated boundary.

4.49. Venezuela further contends 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."[328] No legal justification is given for this argument.

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[326] VCM, para. 7.63.

[327] See Ministerio de Relaciones Exteriores, *Tratados Públicos y Acuerdos internacionales de Venezuela: Volumen 3 (1920-1925)* [1927], p. 604 (Vol. III, Annex 40).

[328] VCM, para. 7.64.

4.50. And that argument is wrong in any event. *First*, the 1905 Agreement was a binding treaty entered between two sovereign States, whose purpose was to formally recognise an official "General Map of the Boundary" in order to ensure that both States "possess authentic documents of like tenure *which set forth their respective rights in the territory which has been demarcated*"[329]. The Agreement expressly provided that Venezuela and Great Britain "regard this Agreement as having a perfectly official character with respect to the acts *and rights of both Governments in the territory demarcated*" and that the Governments of the two States "accept the points mentioned below [i.e. the coordinates of their boundary] as correct"[330]. The Agreement therefore confirmed and codified substantive territorial rights.

4.51. *Second*, as set out above, when Venezuela entered the 1905 Agreement — without any reservation — it was aware of the matters which now form the basis for its contention that the 1899 Award was a nullity. Venezuela chose to enter the 1905 Agreement notwithstanding that knowledge. By so doing, Venezuela cannot escape the consequences of its comportment: it unambiguously and without reservation cured any belatedly alleged defect which, *quod non*, might have afflicted the Award. Venezuela's entry into the 1905 Agreement therefore abrogated any possible basis for challenging the boundary demarcated therein.

4.52. As Guyana explained in its Memorial, the 1899 Award and the 1905 Agreement are legally separate juridical acts[331]. One is a judicial decision; the other is a treaty which was freely negotiated, entered and ratified by Venezuela some six years later. These are distinct legal acts with different legal foundations. As the

[329] Agreement between the British and Venezuelan Boundary Commissioners with regard to the Map of the Boundary (10 January 1905), third article (Application, Annex 3) (emphasis added).

[330] *Ibid*., fourth article (emphasis added).

[331] See MMG, paras. 9.19-9.20.

international tribunal in the *Laguna del Desierto* case explained: "A decision on a boundary issue and the demarcation … *are two distinct acts, each of which has its own legal force*."[332]

4.53. While the 1905 Agreement may not have come into being without the Award, this does not mean that the validity of the Agreement is contingent upon the validity of the Award. As an international treaty, it is axiomatic that the validity of the 1905 Agreement depends upon the conditions which govern the validity of treaties. Venezuela has never argued (nor could it credibly argue) that the 1905 Agreement is void, or voidable, or that it has been or could be terminated under any of the grounds recognised under international law[333]. It follows that even if, *quod non*, the 1899 Award was void, the 1905 Agreement remains a valid treaty which is binding on Venezuela. And the boundary which is expressly recognised and enshrined in that treaty is the valid and binding boundary between Venezuela and Guyana.

## V. Venezuela's Prolonged Acceptance of the 1899 Award and Its Recognition and Acquiescence in the Boundary which It Established

4.54. Venezuela accepted the Award upon publication, and it accepted the demarcation of the boundary determined by the 1899 Award upon its entry into the 1905 Agreement. Furthermore, for decades after 1899, Venezuela engaged in a wide range of other official acts which expressly affirmed the Award and which

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[332] *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy ("Laguna del Desierto")*, Decision of 21 October 1994, *UNRIAA*, Vol. XXII, p. 24, para. 67 (emphasis added).

[333] At para. 9.20 of its Memorial on the Merits, Guyana observed that pursuant to the principle reflected in Article 45 of the Vienna Convention on the Law of Treaties, by 1962 Venezuela had lost the right to invoke any ground for invalidating the 1905 Agreement because of its prolonged acceptance not only of the Award but also of the Agreement itself. Venezuela's Counter-Memorial does not dispute this argument.

were manifestly incompatible with any suggestion that it was a nullity. These acts included: (*A*) numerous public statements, decrees and reports promulgated by the Venezuelan Government which positively affirmed and followed that border; (*B*) Venezuela's demarcation of its border with Brazil in strict conformity with the terms of the 1899 Award; and (*C*) Venezuela's publication of numerous official maps depicting its border following the line established by the 1899 Award and demarcated in the 1905 Agreement.

### A. Official Statements, Decrees and Reports by Venezuela which Reflected its Acceptance and Recognition of the Boundary Established by the 1899 Award

4.55. In the decades after 1899, the Venezuelan Government issued many formal public statements, decrees and reports which reflected its acceptance of the 1899 Award and the boundary which it established. Examples of those documents are cited and summarised in Guyana's Memorial[334]. They include statements stressing to Great Britain that the demarcation of the Venezuela-British Guiana boundary must "be of a permanent character calculated to avoid any uncertainty in the future or doubt as to the real frontier between either territory"[335] and emphasising that Venezuela's ratification of the work of the Joint Boundary Commission was "entirely restricted *to that part which is in conformity with the Paris award*"[336]. Recognising how unhelpful these documents are to its case, Venezuela has adopted the only strategy available to it in the Counter-Memorial: it has completely ignored them.

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[334] MMG, paras. 4.46-4.53.

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

[336] Letter from J. de J. Paúl to Sir Vincent Corbett (12 March 1908) (Inclosure in Letter from Sir Vincent Corbett to Sir E. Grey (16 March 1908) (MMG, Vol. III, Annex 51)) (emphasis added).

4.56. In addition to the examples cited in Guyana's Memorial, the statements, decrees and reports by the Government of Venezuela also included the following:

– On 23 May 1905, the Foreign Minister of Venezuela delivered his annual address to the Congress of Venezuela, in which he stated:

> "It gives me particular satisfaction to inform you that the Commission charged with representing Venezuela in the boundary delimitation with British Guiana, pursuant to the Arbitral Award rendered in Paris on October 3, 1899, has successfully completed its mandate. *This effectively resolves the significant territorial dispute that Venezuela maintained with Great Britain for approximately three-quarters of a century*."[337]

– On 23 May 1907, the Foreign Minister of Venezuela informed the Venezuelan Congress that, pursuant to a legal opinion received from legal counsel to Venezuela, a British proposal to replace the straight line from Wenamu to Roraima established by the 1899 Award with a line which follows the mountain ranges which divide waters flowing to Orinoco and Caroní for Venezuela, and Essequibo and Mazaruni for British Guyana, was denied[338].

– On 3 January 1911, the Venezuelan President issued a Presidential Decree which "divi[ded] the border between the State of Bolívar and the Federal Territory of Delta-Amacuro with British Guiana into two National Border

[337] *El Libro Amarillo de los Estados Unidos de Venezuela*, 1905, p. xii (Vol. III, Annex 41) (emphasis added).

[338] Department of Foreign Affairs of Venezuela, *The Yellow Book: Presented to the National Congress in its 1907 Sessions*, p. xxxiv (MMG, Vol. IV, Annex 70). See MMG, paras. 4.24-4.26 for a summary of the relevant background to this proposal and Venezuela's insistence in response that the boundary fixed by the 1899 Award and the 1905 Agreement was immutable.

Offices under the Ministry of Home Affairs" in conformity with the boundary established by the 1899 Award and the 1905 Agreement[339].

– On 22 February 1922, the Venezuelan Ministry of Home Affairs entered an agreement which established the limits of the Caroní religious mission in accordance with the boundary which was established by the 1899 Award and enshrined in the 1905 Agreement[340].

4.57. These additional examples offer further evidence of Venezuela's unqualified endorsement of the Award and the resulting boundary. Venezuela does not allege that it was forced to engage in acts such as those described above as a result of "structural coercion". Venezuela's silence in the Counter-Memorial confirms that these official acts were all done in the exercise of its sovereign free will, and reflected Venezuela's acceptance of the 1899 Award and the resulting boundary.

## B. Demarcation of Venezuela's Boundary with Brazil in Conformity with the 1899 Award and 1905 Agreement

4.58. As explained in Chapter 4, Section IV of Guyana's Memorial, between 1926 and 1928 Venezuela and Great Britain entered agreements with Brazil regarding the location of their respective boundaries and in 1932 the three States concluded a tripartite agreement on the location of the tri-junction point. Those agreements all placed the tri-junction point on the summit of Mount Roraima — the location which the 1899 Award had identified as the border between British Guiana and Venezuela.

[339] Presidential Decree concerning the division of the border between the State of Bolívar and the Federal Territory of Delta-Amacuro with British Guiana into two National Border Offices under the Ministry of Home Affairs (3 January 1911) (Vol. III, Annex 42).

[340] Convenio de la Misión del Caroní (22 February 1922) (Vol. III, Annex 43).

4.59. Throughout the process of fixing the tri-junction point, Venezuela insisted on strict adherence to the terms of the 1899 Award. For example, during the demarcation process it emerged that the boundary-marker installed on Mount Roraima by the Venezuela-British Guiana Boundary Commission in 1904 had inadvertently been placed on one of the edges of Mount Roraima, rather than its summit, and that the geographical coordinates in the 1905 Agreement were therefore inaccurate. As stated by Venezuela in an internal Memorandum of 16 December 1931:

> "In accordance with the Paris Award of 3 October 1899, the boundary line between Venezuela and British Guiana terminates in a straight line connecting the sources of the Venamo River with Mount Roraima summit. This latter point is, moreover, the terminus of the boundary between British Guiana and Brazil.
>
> In 1904, the commissioners charged with demarcating the Award line between Venezuela and British Guiana placed a marker at what they hastily judged should be its terminal point; however, subsequent surveys have confirmed that this marker is not situated on Mount Roraima's summit but rather on one of the edges of the great plateau on which said mountain terminates.
>
> Venezuela's desire is precisely … to adjust the 1904 marker to its proper position on Mount Roraima … . This solution is the only one that enables the boundary line to meet the condition of being a straight line between the Venamo sources and Mount Roraima, as required by the terms of the aforementioned Award."[341]

4.60. In response to a British proposal that the official boundary be modified to correspond with the actual location of the boundary-marker, Venezuela's Foreign Minister was emphatic that the boundary described in the 1899 Award was "the frontier *de droit* between Venezuela and British Guiana" and that this could not be

[341] *El Libro Amarillo de los Estados Unidos de Venezuela*, 1933, p. 189 (Vol. III, Annex 44).

modified by agreement since "the frontier *de droit* … is the result of a public treaty ratified by the Venezuelan legislature" and therefore the "Venezuelan government regret that for constitutional reasons they are *unable to depart from the letter of the award*"[342].

4.61. Venezuela completely ignores these matters in its Counter-Memorial. Instead, it puts forward confused arguments regarding the delimitation of Venezuela's boundary with Brazil. None of those arguments can provide any support for Venezuela's case.

4.62. *First*, Venezuela contends that the 1899 Award erroneously awarded to Great Britain certain territory which was later determined, in the context of a 1904 arbitration between Great Britain and Brazil, to belong to Brazil. On this basis, Venezuela contends that "the border affairs with Brazil … confirm the nullity of the 1899 Award"[343]. This argument is wrong, as shown in Chapter 3[344]. To summarize, Venezuela ignores that the 1899 Award expressly stipulated that it was subject and without prejudice to any existing or future question regarding the location of Brazil's boundaries with Venezuela and British Guiana[345]. It follows that the outcome of the 1904 arbitration between Brazil and Venezuela cannot be relied upon to call into question the validity of the 1899 Award.

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[342] Letter from the Venezuelan Minister for Foreign Affairs, P. Itriago Chacín, to W. O'Reilly (31 October 1931) (MMG, Vol. III, Annex 53), and Telegram from P. Itriago Chacín to W. O'Reilly (23 November 1931) (*ibid.,* Annex 54) (emphasis added).

[343] VCM, para. 7.72.

[344] See paras. 3.43-3.47 above.

[345] The eighth paragraph of the 1899 Award stated: "Provided always that the line of determination fixed by this Award shall be subject and without prejudice to any questions now existing, or which may arise, to be determined between the Government of Her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela."

4.63. *Second*, Venezuela states that "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"[346]. However, Guyana makes no such suggestion in its Memorial. Rather, Guyana accurately and explicitly explains that the 1928 demarcation Agreement between Venezuela and Brazil stipulated that: "the frontier between the two countries should be clearly defined, from the island of Sao Jose to a point *on Mount Roraima where the frontiers of Brazil, Venezuela and British Guiana meet*"[347]. The Venezuela/Brazil Agreement therefore expressly proceeded on the basis that the borders of Venezuela, British Guiana and Brazil met at precisely the location where the 1899 Award had determined the borders of British Guiana and Venezuela met. The Venezuela/Brazil Agreement thus clearly reflects Venezuela's acceptance (as well as Brazil's) of the validity of the boundary established by the 1899 Award.

## C. Venezuela's Publication of Official Maps Depicting its Border with British Guiana Following the Line Established by the 1899 Award

4.64. As set out in Guyana's Memorial[348], Venezuela has published many official maps that depict its border with British Guiana on the basis of the 1899 Award and the 1905 Agreement. It has done so over more than five decades: in 1911[349], 1928[350],

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[346] VCM, para. 7.66.

[347] See MMG, para. 4.35, quoting from the Protocol between Brazil and Venezuela respecting the Demarcation of the Frontier (24 July 1928), in *British and Foreign State Papers*, Vol. CXXX, Part I (1929), p. 448 (emphasis added), also available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015035801896&seq=546 (last accessed on 27 November 2024).

[348] See MMG, paras. 4.31, 4.43-4.45, 4.50-4.51, 4.53, and 4.58.

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

[350] See Department of Internal Affairs of Venezuela, "Mapa Físico y Políticó de los Estados Unidos de Venezuela, Escala 1:1,00,000" (1a ed., 1928) (MMG, Vol. II, Figure 4.8).

1937[351], 1940[352], 1945[353], 1947[354], 1950[355], 1956[356], 1960[357], and 1962[358]. Although Venezuela's Counter-Memorial addresses and exhibits a total of 40 maps from the sixteenth century to the second half of the twentieth century, it has nothing to say about all the maps it commissioned, approved and published between 1905 and 1962, all of which show its boundary with British Guiana to follow the line fixed by the 1899 Award and the 1905 Agreement.

4.65. In addition to the maps shown in Guyana's Memorial, the Government of Venezuela published several other official maps between 1908 and 1950 which depicted precisely the same boundary line between Venezuela and British Guiana, none of which were mentioned in Venezuela's Counter-Memorial.

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

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

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

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

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

[356] See United States of Venezuela, Department of National Cartography, Ministry of Public Works, Mapa de la República de Venezuela (1956) (MMG, Vol. II, Figure 4.16). See also Republic of Venezuela, Department of National Cartography, Ministry of Public Works, Mapa Físico y Político de la República de Venezuela (1955) (MMG, Vol. II, Figure 4.15).

[357] See United States of Venezuela, Department of National Cartography, Ministry of Public Works, Mapa de la República de Venezuela (1960) (MMG, Vol. II, Figure 4.17).

[358] See United States of Venezuela, Department of National Cartography, Ministry of Public Works, Mapa de la República de Venezuela (1962) (MMG, Vol. II, Figure 4.18).

4.66. In November 1939, the Venezuelan Ministry of Promotion published a map of the Venezuelan state of Bolivar, which borders Guyana. It is reproduced as **Figure 4.1** below[359].

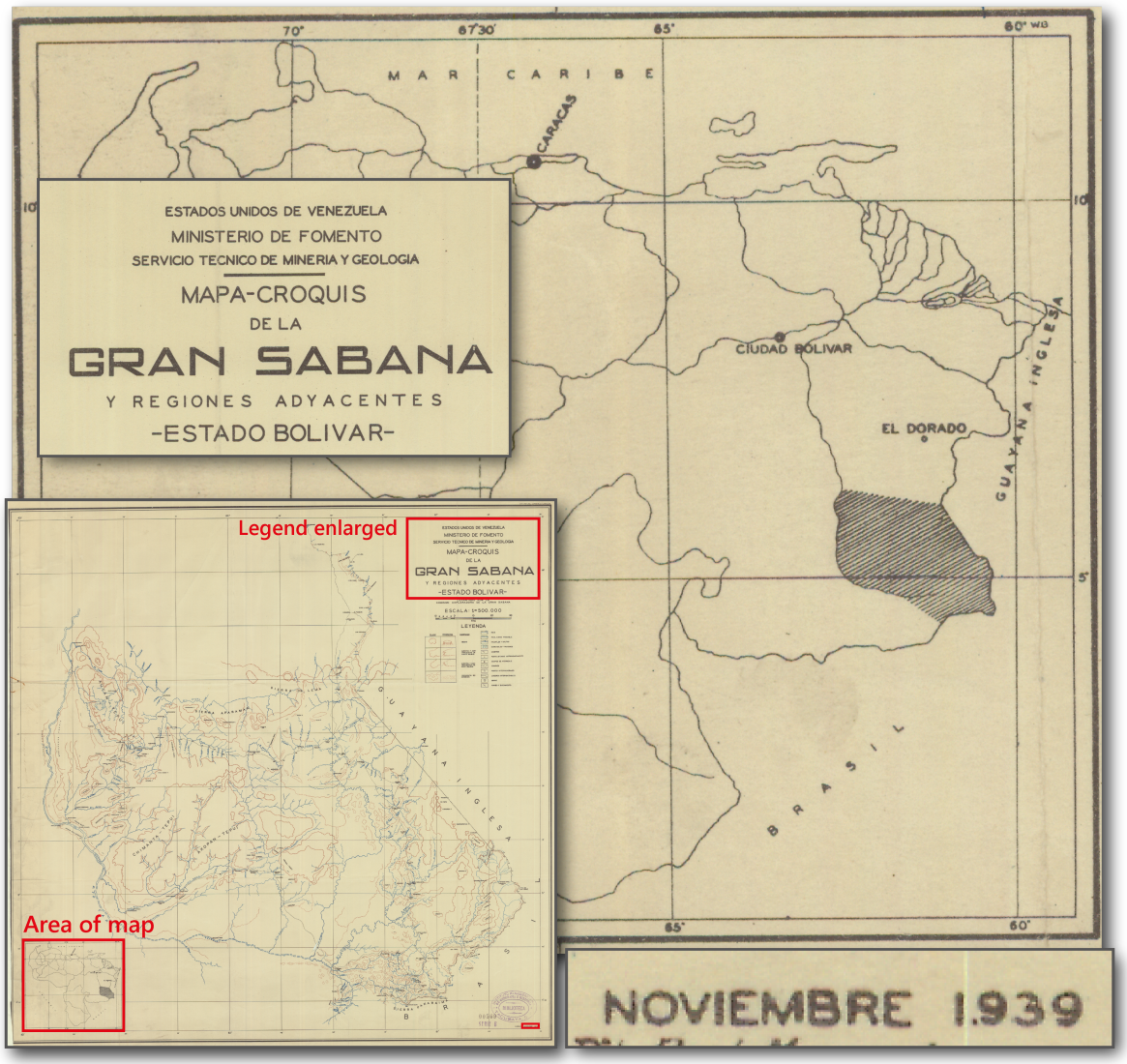



Figure 4.1. United States of Venezuela, Ministry of Promotion, Sketch map of the Grand Sabana and adjacent regions – State of Bolivar (November 1939)

[359] See also Vol. II, Figure 4.1, pp. 1 and 2.

4.67. In 1947, the Venezuelan Ministry of Public Works published a map of Venezuela, reproduced as **Figure 4.2** below[360], which showed the boundary with British Guiana following the line established by the 1899 Award.




Figure 4.2. United States of Venezuela, Ministry of Public Works, Index Map of Venezuela's Landing Sites (1947)

[360] See also Vol. II, Figure 4.2, pp. 3 and 4.

4.68. In March 1950, the Venezuelan Ministry of Promotion published a geological map of Venezuela, reproduced as **Figure 4.3** below[361], which depicted the same boundary as the maps shown above.




Figure 4.3. United States of Venezuela, Ministry of Promotion, Geological Map of Venezuela (March 1950)

[361] See also Vol. II, Figure 4.3, pp. 5 and 6.

4.69. In May 1950, Venezuela's Ministry of Mining and Hydrocarbons published a map of the western region of Venezuela which once again depicted Venezuela's border with British Guiana following the line established by the 1899 Award. That map is reproduced as **Figure 4.4** below[362].




Figure 4.4. United States of Venezuela, Ministry of Mining and Hydrocarbons, Map of Eastern Natural Resources of Venezuela (May 1950)

[362] See also Vol. II, Figure 4.4, pp. 7 and 8.

4.70. In 1950, the Venezuelan Ministry of Mining and Hydrocarbons published a geological and mining map of the Venezuelan state of Bolivar which (like the 1939 map of Bolivar shown in Figure 4.1 above) depicted the border with British Guiana following the line established by the 1899 Award. A copy of that map is reproduced as **Figure 4.5** below[363].




Figure 4.5. United States of Venezuela, Ministry of Mining and Hydrocarbons, Geology Directory, Mining and Geological Map of the State of Bolivar (1950)

[363] See also Vol. II, Figure 4.5, pp. 9 and 10.

4.71. Once again, Venezuela does not suggest that it was coerced — structurally or otherwise — in relation to any of the official maps it commissioned and published, as set out above or in Guyana's Memorial. Venezuela is bound to accept that throughout that period it respected the boundary as determined by the 1899 Award, and that it published those maps on the basis of its belief that they accurately depicted the location of Venezuela's boundaries.

## VI. Venezuela's Claim that the Publication of the Mallet-Prevost Memorandum in 1949 "Changed Everything"

4.72. In an attempt to avoid the consequences of its decades-long acquiescence in the 1899 Award, Venezuela alleges that it was the publication of the Mallet-Prevost Memorandum in July 1949 that "changed everything", and that, "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"[364]. These arguments are false.

4.73. *First*, Venezuela claims that "until the 1950's, Venezuela was not cognisant of the circumstances under which the 1899 Award was granted"[365]. This is wrong and not supported by any evidence. As demonstrated in Section II above, the matters on which Venezuela's contention of nullity is based were fully known to Venezuela at the time of the 1899 Award. Indeed, it is notable that when Venezuela first made its contention of nullity in February 1962, it stated that the Mallet-Prevost Memorandum "confirmed" the information which had been "gathered by the Agent of Venezuela" in 1899[366] — in other words, the contention was not premised upon

[364] VCM, para. 7.25.

[365] *Ibid.*, para. 7.75.

[366] Letter from the Permanent Representative of Venezuela to the Secretary-General of the United Nations (14 February 1962), para. 15 (VCM, Vol. III, Annex 140).

information newly revealed by the Memorandum — and stated that the "strange circumstances in which the Paris decision had been arrived at *began to unfold from the very day of the decision*"[367].

4.74. In other words, the publication of the Mallet-Prevost Memorandum in 1949 did not "chang[e] everything", as Venezuela now claims. It did no more than reiterate what Venezuela has said it already knew and believed from the time the Award was issued, and at all times thereafter.

4.75. *Second*, the suggestion that the Mallet-Prevost "changed everything" ignores the fact that, as Guyana explained in Chapter 8 of its Memorial[368] (and as it further explains above in Chapter 3) even if the Memorandum were authentic (of which there is no independent documentary evidence) it contains a substantial number of obvious and significant errors which make clear that it cannot be treated as an accurate or reliable account of the events which it purports to describe[369]. A document replete with such manifest inaccuracies cannot be said to have fundamentally changed Venezuela's understanding of the true circumstances surrounding the 1899 Award.

4.76. *Third*, Venezuela's claim is further belied by the fact that for at least thirteen years after the publication of the Mallet-Prevost Memorandum, Venezuela continued to engage in official acts which were inconsistent with the alleged nullity of the Award. For example, as noted above[370], the Government of Venezuela published several official maps between 1950 (i.e., the year after the publication of

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[367] Statement made by the Representative of Venezuela at the 1302nd Meeting of the Fourth Committee (2 February 1962), para. 34 (VCM, Vol. III, Annex 141) (emphasis added).

[368] See MMG, paras. 8.16-8.22 and 8.77-8.92.

[369] See paras. 3.69-3.73 above.

[370] See paras. 4.68-4.70 above.

the Mallet-Prevost Memorandum) and 1962 which depicted its boundary with British Guiana following the line established by the 1899 Award. Such acts are wholly inconsistent with the claim that publication of the Memorandum was a pivotal moment. It was not.

## VII. Venezuela's Claim that it Challenged the Validity of the 1899 Award Very Shortly After the Mallet-Prevost Memorandum was Published

4.77. Venezuela claims that it "first brought its claim before the OAS in 1951 and 1954, very shortly after the Mallet-Prevost Memorandum had come to light"[371]. This is not correct.

4.78. A careful review of the statements made by Venezuela in 1951 and 1954 confirms that neither claimed or asserted that the 1899 Award was a nullity, or that the boundary between Venezuela and British Guiana did not follow the line established by that Award. Nor did either statement repeat or call attention to any of the criticisms of the Award made in the Memorandum:

– The 1951 "Declaration" merely expressed the "opinion of the Government of Venezuela" that, "in view of the special circumstances prevailing when the frontier line with the British Guiana was defined", no change in the status of British Guiana would prevent Venezuela "from pressing its just demand that the injury suffered by the Nation on that occasion should be redressed by an equitable rectification of the frontier."

– The 1954 "Declaration" similarly stated that: "Government of Venezuela declares that no change of status which may occur in [British Guiana] can prevent the National Government from pressing its just demand that the

[371] VCM, para. 7.26.

injury suffered by the Nation when its frontier line with British Guiana was demarcated should be redressed by an equitable rectification of the frontier, in view of the unanimous feelings of the Venezuelan people and the special circumstances prevailing at the time."[372]

4.79. It is clear that neither of these "Declarations" contained any statement impugning the validity of the 1899 Award or the boundary which it established[373]. On the contrary, both "Declarations" assumed the existence of an established and legally binding "frontier" (i.e., the boundary which was "defined" by the 1899 Award and subsequently "demarcated" by the Joint Boundary Commission) which Venezuela desired should be the subject of a future "equitable rectification".

4.80. It is notable that when Venezuela first raised the alleged invalidity of the 1899 Award before the United Nations in 1962, its representative to the United Nations referred to Venezuela having filed "reservation[s]" in 1951 and 1954. Venezuela's representative did not suggest that those "reservation[s]" challenged the validity of the 1899 Award or the boundary which the Award established. The absence of any such challenge is entirely consistent with the representative's observation, in 1962, that: "Between 1950 and 1958, we in Venezuela were ruled by a dictatorial Government, *which was not sensitive about this problem nor unduly concerned about it*."[374]

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[372] See Statement made by the Representative of Venezuela at the 1302nd meeting of the Fourth Committee (22 February 1962), para. 52 (MG, Vol. II, Annex 19).

[373] Venezuela acknowledges at para. 7.77 of its Counter-Memorial that the statements in 1951 and 1954 did "not expressly speak[] of nullity of the 1899 Award".

[374] VCM, Vol. III, Annex 143, p. 23 (emphasis added).

## VIII. Venezuela's Arguments that Guyana is Barred from Relying on Venezuela's Prolonged Acquiescence and Acceptance of the Award

4.81. In its Counter-Memorial, Venezuela argues that Guyana is prohibited from relying on Venezuela's prolonged acquiescence and acceptance of the 1899 Award. Venezuela makes two arguments in support of that proposition: *first*, it contends that Guyana's reliance on Venezuela's acquiescence and acceptance is contrary to the object and purpose of the Geneva Agreement[375]; *second*, it argues that Guyana is estopped from relying on that acquiescence and acceptance[376]. Both arguments are entirely without merit.

### A. The Geneva Agreement Does Not Prevent Guyana from Relying on Venezuela's Prolonged Acceptance and Acquiescence

4.82. Venezuela contends that Guyana's argument based on Venezuela's prolonged acceptance of the 1899 Award "is in direct contradiction with the object and purpose of the Geneva Agreement [which] fully validates – indeed, as premise and its very *reason d'être* … Venezuela's right to contend that the Award of 1899 is null and void"[377]. This contention is directly contradicted by numerous other statements in Venezuela's Counter-Memorial, which repeatedly assert that the Geneva Agreement had nothing to do with the validity of the 1899 Award[378].

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[375] See VCM, paras. 7.47-7.48.

[376] See *ibid.*, paras. 7.49-7.57.

[377] *Ibid.*, para. 7.48.

[378] See, e.g., VCM, para. 2.9 ("Guyana has falsely represented that the Geneva Agreement was meant to resolve a dispute over the validity or invalidity of the Arbitral Award. In reality, *the Agreement was entered into in order to leave behind that particular dispute*"); para. 3.3 ("*The subject matter of the Agreement was never related to the validity or invalidity of the Award*"); para. 3.118 ("*The object of the Agreement was never related to the validity or invalidity of the Award*"); p. 78, para. 1 ("*The determination of the invalidity of the 1899 Arbitral Award was therefore buried with the signing of the Geneva Agreement*."); para. 3.51 ("the parties specifically agreed that their controversy should be 'amicably resolved in a manner acceptable to both parties' (preamble), in seeking 'satisfactory solutions for the practical settlement' of their territorial

4.83. Venezuela contends that the Geneva Agreement creates "binding obligations of the Parties to find a mutually satisfactory solution to a territorial dispute" and therefore "no question of prolonged acquiescence or acceptance may be opposed to Venezuela"[379]. This is wrong. Nothing in the text or object of the Geneva Agreement supports Venezuela's argument that the treaty somehow bars Guyana from relying on Venezuela's decades-long acceptance of the 1899 Award in support of Guyana's case that the 1899 Award is valid.

4.84. The text of the Geneva Agreement makes clear that it is concerned with the resolution 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"[380]. It is not concerned with anything else. In its Judgment of 18 December 2020, the Court explained that "the object and purpose of the Geneva Agreement … was to ensure a definitive resolution of the dispute between Venezuela and the United Kingdom"[381] which "originated from their opposing views as to the validity of the 1899 Award"[382].

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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."); para. 2.10 ("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*.") (all emphasis added). Venezuela's argument is also in notable contrast to the argument advanced by Venezuela in its Memorandum submitted to the Court on 28 November 2019, which stated that: "The validity or nullity of the Award *is not the core of the dispute*." (para. 105) (emphasis added).

[379] VCM, para. 7.79.

[380] Geneva Agreement (1966), Article I.

[381] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 490, para. 130.

[382] *Ibid*., p. 473, para. 65. See also Chapter 2 above.

4.85. The Geneva Agreement therefore recognises that a dispute had arisen between the parties *as a result of* Venezuela's contention that the 1899 Award was void, and is intended to establish a binding framework for resolving that dispute. To be sure, the Agreement recognises the existence of a dispute which is *caused by* Venezuela's contention of nullity; however, nothing in the Agreement "validates" or "confirm[s]" that Venezuela was *entitled to advance* that contention.

4.86. Indeed, the only constraint imposed by the Geneva Agreement on the arguments which Guyana may deploy in support of its case before the Court is contained in Article V (2), which restricts the Parties' ability to rely on acts taking place *after* the Agreement was signed to support or undermine a claim to territorial sovereignty[383]. Nothing in the Agreement fetters Guyana's ability to rely on acts by Venezuela which took place *before* the Geneva Agreement was signed.

4.87. Moreover, Venezuela's argument is based upon a fundamental misunderstanding of the nature of Guyana's position. As Guyana expressly stated in its Memorial, "as in the *King of Spain* case, the preclusion of Venezuela's nullity claim is not procedural but substantive and it operates to cure any defect that might have otherwise constituted a ground for the invalidity of the Award"[384]. Contrary to Venezuela's argument in the Counter-Memorial, Guyana does not contend that Venezuela is prohibited by its past conduct from advancing a contention of nullity in these proceedings. Rather, it contends that Venezuela's past conduct cures any

[383] Article V (2) provides: "No acts or activities taking place while this Agreement is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the territories of Venezuela or British Guiana or create any right of sovereignty in those territories, except in so far as such acts or activities result from any agreement reached by the Mixed Commission and accepted in writing by the Government of Guyana and the Government of Venezuela. No new claim, or enlargement of an existing claim, to territorial sovereignty in those territories shall be asserted while this Agreement is in force, nor shall any claim whatsoever be asserted otherwise than in the Mixed Commission while that Commission is in being."

[384] MMG, para. 9.16.

flaw which might otherwise have formed the basis for invalidating the Award. There is absolutely nothing in the Geneva Agreement which prevents Guyana from making this argument against Venezuela.

### B. GUYANA IS NOT ESTOPPED FROM RELYING ON VENEZUELA'S PROLONGED ACQUIESCENCE AND ACCEPTANCE OF THE AWARD

4.88. Venezuela asserts that before Guyana filed its Application with the Court, "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"[385] challenge the Arbitral Award. It claims that: "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"[386]. Venezuela goes even further, arguing that: "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."[387] On the basis of these claims, Venezuela contends that "the rule of estoppel clearly precludes Guyana from trying to oppose to Venezuela an alleged prolonged acceptance"[388].

4.89. Venezuela's argument that Guyana is estopped from relying on Venezuela's prolonged acceptance and acquiescence is both factually and legally baseless.

4.90. *First*, Venezuela has publicly recognised that its contention of nullity is bound to fail before the Court precisely because of its prolonged acquiescence in

[385] VCM, para. 7.49.
[386] *Ibid.*, para. 7.51.
[387] *Ibid.*, para. 7.53.
[388] *Ibid.*, para. 7.55.

the 1899 Award. Mr. Falcón Briceño was the Foreign Minister of Venezuela who presented Venezuela's contention of nullity before the United Nations Special Committee in 1962. In 1983, he delivered a speech (the transcript of which Venezuela cites repeatedly in its Counter-Memorial[389]) in which he discussed the Court's decision in the *King of Spain* case[390] before going on to explain that, in light of that case law, Venezuela's contention of nullity would be bound to fail before the Court:

> "If mandatory jurisdiction existed in the International Court of Justice, we could of course not appear there, *purely and simply because it would not be convenient for us in that way*. The case would have to proceed on an ex aequo et bono basis — that is, by addressing the bottom line of the matter. *This is because there is already jurisprudence in the Court that would oppose a situation of this kind*."[391]

4.91. *Second*, Venezuela is wrong to suggest that the United Kingdom never referred to Venezuela's prolonged acquiescence in response to Venezuela's contention of nullity. In the same year that Venezuela first made its contention of nullity before the United Nations, the United Kingdom explained in the Seventeenth Session of the Special Political Committee that Venezuela had long accepted the validity of the 1899 Award and consequently it could not seek to reopen the questions determined by that Award. In a statement of 13 November 1962, the United Kingdom representative explained that:

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[389] See VCM, footnotes 590, 674, 693, 700.

[390] *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua)*, *Judgment*, *I.C.J. Reports 1960*, p. 192.

[391] Dr. Marcos Falcón Briceño, "Orígenes de la Actual Reclamación de la Guyana Esequiba" (1981), p. 58 (Vol. III, Annex 25) (translation of the original Spanish: "*Si existiera, por supuesto la jurisdicción obligatoria de la Corte International de Justicia, nosotros no podríamos presentarnos allí pura y simplemente, porque no nos convendría en esa forma, tendría que ser sobre la base exequo et bono, es decir yendo al fondo del asunto. Porque ya hay jurisprudencia en la Corte que se opondría a una circunstancia de este tipo …*") (emphasis added).

> "history itself has shown, *the award was in fact accepted by both Governments* and a boundary commission was appointed with the agreement of both Governments to implement the provisions of the award. *My Government cannot therefore agree that there can be any dispute over the question settled by the award*. Those are the essential points on which the position of my Government is based."[392]

4.92. He continued:

> "*History records no protest at this time on the part of the Venezuelan Government. … For some forty years very little was heard of the arbitration award. It appeared to have been accepted by all concerned.* Indeed, in 1941 the Venezuelan Minister for Foreign Affairs himself *told His Majesty's Minister in Caracas that his Government were definitely of the opinion that the boundary question was a* chose jugée*; that the Venezuela/British Guiana frontier was final and well defined* and that the author of articles which had appeared in the Venezuelan press about that time questioning the 1899 award 'had obviously never had access to the archives of his Ministry'."[393]

4.93. The United Kingdom was clear that, as a result of its decades-long acceptance of the 1899 Award, Venezuela could not seek to impugn the validity of the Award:

> "At the time of the [1897] agreement, at the time of the award, at the time of the demarcation, *neither party expressed itself as dissatisfied or considered itself otherwise than bound by the provisions of the agreement. This state of affairs continued for forty-four years … But a further thirteen years elapsed before any official approach was made by the one party to the other claiming that the award was unjust and required revision. I ask members of this Committee to*

[392] Statement made by the Representative of the United Kingdom at the 349th meeting of the Special Political Committee (13 November 1962), p. 2 (MG, Vol. II, Annex 24) (emphasis added).

[393] *Ibid*., pp. 9-10 (emphasis added).

> *consider most seriously the implications if, after fifty-seven years from the date on which a frontier settlement is put into effect, it is allowed to be re-opened*, particularly when there is no new evidence which has to be taken into account. It seems to my Government that there will be no frontier agreement in any part of the world which cannot be questioned on such a basis and no international agreement which cannot be brought into doubt."[394]

4.94. *Third*, the Government of Guyana also made numerous statements which referred to Venezuela's prolonged recognition and acceptance of the 1899 Award and the boundary line described therein, and which explained that in light of this unqualified acquiescence Venezuela could not seek to impugn the validity of the Award. For example, in April 1981, the President of Guyana, Forbes Burnham, made a public statement in response to Venezuela's recent announcement that it was unwilling to extend the Port-of-Spain Protocol. President Burnham explained that Guyana's position was that the 1899 Award was valid, but that:

> "Even if the Award was invalid, the boundary laid down pursuant to the Award *has acquired full validity as a result of Venezuelan recognition, acquiescence and other conduct relating thereto*."[395]

4.95. Later that year, Guyana submitted a Memorandum to the United Nations which explained that Venezuela's claim of nullity "completely disregards the fact" that the boundary established by the 1899 Award "was fully respected and observed by both sides and by the international community for upwards of sixty years"[396]. In a section headed "Acceptance of the Award", Guyana stressed that:

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[394] *Ibid*., pp. 15-16 (emphasis added).

[395] Guyana, Ministry of Foreign Affairs, Memorandum on the Guyana/Venezuela Boundary, 1980 (enclosed with Letter from the Permanent Representative of Guyana to the United Nations addressed to the Secretary-General (2 November 1981) (VCM, Vol. III, Annex 148), p. 14) (emphasis added).

[396] *Ibid.*, p. 2 (emphasis added).

> "For over six decades successive generations of British, Guyanese and Venezuelans and, indeed, the rest of the international community accepted as settled and final the boundary as laid down by the Arbitral Tribunal and as demarcated by the Venezuela/British Mixed Boundary Commission."[397]

4.96. The Memorandum went on to state that Venezuela's challenge to the validity of the Award was "without merit" because "the material on which challenge is sought to be brought to these alleged grounds was always within the full knowledge of Venezuela which nevertheless positively affirmed the validity of the boundary for six decades"[398]. The correctness of that proposition is demonstrated by the matters summarised at paragraphs 4.13 to 4.33 above.

4.97. In April 2014, Guyana sent a Note Verbale to Venezuela emphasising that Guyana "does not accept that there is a dispute regarding the Essequibo" because "the Government of Venezuela accepted and acted upon the said Award for some sixty years including by joining the demarcation of the bilateral land boundary"[399]. In August 2014, Guyana sent a further Note Verbale to Venezuela which stated that: "The fact that Venezuela has challenged the validity of the Arbitral Award, *after accepting it for several decades, does not give it the right to assert or to claim sovereignty … over any part of the territory that was awarded to Guyana.*"[400]

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[397] *Ibid.*, p. 5 (emphasis added).

[398] *Ibid*., p. 6 (emphasis added).

[399] Note Verbale from the Ministry of Foreign Affairs of the Republic of Guyana to the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela, No. DG/07/04/2014 (14 April 2014) (MG, Vol. III, Annex 81) (emphasis added)

[400] Note Verbale from the Ministry of Foreign Affairs of the Republic of Guyana to the Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela, No. 976/2014 (25 August 2014) (Vol. III, Annex 45) (emphasis added).

4.98. *Fourth*, the fact that Venezuela's acquiescence in the 1899 Award (and the legal consequences of that acquiescence) had been raised against Venezuela was expressly noted by other States shortly after Venezuela first made its contention of nullity. For example, in September 1965 the Office of the Legal Adviser at the United States State Department produced a memorandum on the dispute between Venezuela and British Guiana which explained that "the response to these allegations [by Venezuela] has been largely confined to insisting that there is no truth to them and that, in any case, revived claims are barred by the Treaty of Arbitration, which states that the Award shall be regarded by the parties 'as a full, perfect, and final settlement,' *and by the legal concept of 'estoppel',* i.e.*, the lack of protest against the Award for many years*"[401].

4.99. *Fifth*, and in any event, even if Venezuela were correct (which it plainly is not) that the United Kingdom and Guyana had not previously made any statement contending acquiescence by Venezuela, Guyana would not be estopped from making such an argument before the Court. The mere absence of a positive statement regarding the effects of Venezuela's acquiescence would not constitute "a statement or representation made by one party to another" regarding Venezuela's entitlement to contend that the 1899 Award is a nullity; still less would Venezuela be capable of establishing any "reliance upon it by [Venezuela] to [its] detriment or to the advantage of the party making it"[402].

4.100. Ignoring all of this evidence, Venezuela now blithely claims that "the United Kingdom before Guyana's independence, and then Guyana since its independence,

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[401] Memorandum by Mr. Jerome Henry Silber, Office of the Legal Adviser, to Mr. John Calvin Hill, Director, Office of Colombian-Venezuelan Affairs (7 September 1965), p. 9 (Vol. III, Annex 46) (emphasis added).

[402] See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application to Intervene*, *Judgment*, *I.C.J. Reports 1990*, p. 118, para. 63.

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*"[403]. Where, how and by whom was this made "fully clear"? Venezuela does not tell the Court: it provides no citations to the evidentiary record to support this fanciful allegation. As the Court has recognized, the "contention [of nullity] by Venezuela *was consistently opposed by the United Kingdom* in the period from 1962 until the adoption of the Geneva Agreement on 17 February 1966, *and subsequently by Guyana* after it became a party to the Geneva Agreement upon its independence"[404]. Given their consistent and emphatic opposition to Venezuela's attempt to reopen the matters determined by the Award, the suggestion that the United Kingdom and Guyana somehow represented to Venezuela that its decades-long acceptance and acquiescence in the Award would "not be opposed" to it is nonsense.

## IX. Conclusion

4.101. The result of Venezuela's decades long acceptance, implementation and affirmation of the 1899 Award and the boundary which it established could not be clearer. As Venezuela's former Foreign Minister correctly noted more than 40 years ago, the Court's case law makes clear that its challenge to the validity of the Award — first made more than 60 years after its issuance — will fail on long-established principles of law recognised by the Court[405].

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[403] VCM, para. 7.57.

[404] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 473, para. 64.

[405] Dr. Marcos Falcón Briceño, "Orígenes de la Actual Reclamación de la Guyana Esequiba" (1981), p. 58 (Vol. III, Annex 25).

4.102. As well as being firmly rooted in the applicable law and facts, this outcome gives effect to the Court's longstanding recognition that "when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality"[406]. As the Court explained in *Territorial Dispute (Libyan Arab Jamahiriya* v. *Chad)*: "Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court."[407] Indeed, as the arbitral tribunal observed in the *Bay of Bengal Maritime Boundary Delimitation*, both land and maritime delimitations "must be stable and definitive to ensure a peaceful relationship between the States concerned in the long term"[408]. By declaring that the 1899 Award and the boundary which it established are valid and binding upon the Parties, the Court will help to secure the stability and finality which are indispensable to peaceful relations between Venezuela and Guyana based on international law. Any other approach will have the effect of undermining the certitude and stability of the legal order.

[406] *Temple of Preah Vihear (Cambodia* v. *Thailand)*, *Merits*, *Judgment*, *I.C.J. Reports 1962*, p. 34.

[407] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, *I.C.J. Reports 1994*, p. 37, para. 72.

[408] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, *Award*, 7 July 2014, *UNRIAA*, Vol. XXXII, p. 63, para. 216.

# CHAPTER 5

# VENEZUELA'S VIOLATIONS OF THE PROVISIONAL MEASURES ORDERED BY THE COURT AND APPROPRIATE REMEDIES

## I. Venezuela's Violations of the Provisional Measures

5.1. On 1 December 2023, the Court unanimously indicated the following Provisional Measures:

(a) Venezuela "shall refrain from taking any action which would modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area";

(b) Both Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"[409].

5.2. Two days later, on 3 December 2023, Venezuela conducted a "consultative referendum" on the following questions, among others:

> "Do you agree with Venezuela's historic position of not recognizing the Jurisdiction of the International Court of Justice to resolve the territorial dispute over Guayana Esequiba?
>
> .....
>
> Do you agree with the creation of the Guayana Esequiba State and that an accelerated and comprehensive plan be developed for the present and future population of that territory, including, *inter alia*, the granting of Venezuelan citizenship and identity cards, in accordance with the Geneva Agreement and International Law,

[409] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Provisional Measures*, Order of 1 December 2023, para. 45 (1)-(2).

consequently incorporating that State into the map of Venezuelan territory?"[410]

5.3. Two days after that, on 5 December 2023, having received the answers to these questions that it expected, Venezuela announced that it would:

> "1. Creat[e] [a] High Commission for the Defense of Guayana Esequiba … .
>
> 2. Activate a debate in the National Assembly on the Organic Law for the Defense of Guayana Esequiba. This legal instrument, after discussion and approval, will allow the creation of [the Venezuelan state of] Guayana Esequiba and the enforcement of the decisions approved by the people in the consultative referendum.
>
> 3. Creat[e] the Comprehensive Defense Zone of Guayana Esequiba. It will be integrated by three Areas of Integral Development and 28 Sectors of Integral Development, dependent militarily and administratively on the Region for the Integral Defense of Guayana.
>
> 4. Provisionally designat[e], pending approval of the Organic Law for the Defense of Guayana Esequiba, Alexis Rodríguez Cabello as the Sole Authority of the Guayana Esequiba. Its political-administrative seat will be in Temeremo.
>
> 5. Authoriz[e] Petróleos de Venezuela and the Venezuelan Corporation of Guayana to create the divisions of PDVSA Esequibo and CVG Esequibo. Likewise, president Nicolás Maduro will gran[t] licenses for the exploration and exploitation of oil, gas and minerals.
>
> 6. The new map of Venezuela must be published and distributed in all schools, high schools and universities in the country. In this sense, community councils, Local Committees of Sourcing and

[410] Republic of Venezuela, National Electoral Council, Resolution on Referendum to be held on 3 December 2023 (20 Oct. 2023) (Request for Provisional Measures, Annex 1). The text of the Resolution is set out in the Court's Order on Provisional Measures (*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Provisional Measures*, Order of 1 December 2023, para. 15).

> Production and the Venezuelan Army are called upon to join the distribution of the new Map of Venezuela in the communities.
>
> 7. Activate a Social Care Plan for the population of Guayana Esequiba, and carry out a census and grant identity card[s] to its inhabitants. To this end, an office of the Administrative Service of Identification, Migration and Foreign Affairs (Saime) will be established in Temeremo.
>
> 8. Establish a rule that prohibits contracting with companies that operate or collaborate in the unilateral concessions given by Guyana in the sea to be delimited.
>
> 9. Approve a Special Law that creates environmental protection areas and new national parks in Guayana Esequiba."[411]

5.4. In response to Venezuela's announcement of these measures, which individually and collectively disregarded and contradicted the Court's Order on Provisional Measures, the Secretary General of the Organization of American States issued the following statement:

> "[T]he aggressive stance of … Venezuela towards … Guyana … has escalated to a point of significant concern for regional security and constitutes a matter that threatens the stability and territorial sovereignty within our hemisphere.
>
> .....
>
> The recent actions taken by … Venezuela not only jeopardize the development and stability of Guyana, but also pose a broader risk to

[411] Ministry of Popular Power for Ecosocialism, Announcements for the Protection and Defence of the Guayana Esequiba, available at http://www.minec.gob.ve/anuncios-para-la-proteccion-y-defensa-de-la-guayana-esequiba/ (Guyana's translation; emphasis added) (last accessed on 27 November 2024); National Assembly of Venezuela, NA will debate this Wednesday Organic Law for the Defense of the Guayana Esequiba (5 December 2023), available at https://www.asambleanacional.gob.ve/noticias/an-debatira-este-miercoles-ley-organica-para-la-defensa-de-la-guayana-esequiba (last accessed on 27 November 2024); Ministry of Popular Power for Science and Technology, President Maduro announces action plan for the defence of the Esequibo territory, available at https://mincyt.gob.ve/presidente-maduro-anuncia-plan-accion-defensa-territorio-esequibo/ (last accessed on 27 November 2024).

the security of Latin America and the Caribbean — a situation that has been repeatedly condemned by the Caribbean Community (CARICOM)."[412]

5.5. Venezuela's measures also prompted condemnations from the Bahamas[413], Belize[414], Canada[415], France[416], the United Kingdom[417], the United States[418],

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[412] Organization of American States, Statement from the OAS General Secretariat Regarding Recent Actions from the Regime in Venezuela towards Guyana (7 December 2023), available at https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-082/23 (emphasis added).

[413] Office of the Prime Minister of the Commonwealth of the Bahamas, Statement From Prime Minister Davis On Venezuela's Territorial Claims On Guyana (7 December 2023), available at https://opm.gov.bs/statement-from-prime-minister-davis-on-venezuelas-territorial-claims-on-guyana/ ("I am disheartened that after all that CARICOM has done to protect the sovereignty and territorial integrity of the Bolivarian Republic of Venezuela …that [country] should now seek to annex territory in a CARICOM state. The Bahamas demands that Venezuela respect the settled borders and abide by the 1 December 2023 ruling of the International Court of Justice").

[414] Government of Belize, Statement by Belize on the Guyana Venezuela Border Situation (8 December 2023), available at https://www.pressoffice.gov.bz/wp-content/uploads/2019/12/Dec-8-PR276-Statement-by-Belize-on-the-Guyana-Venezuela-Border-Situation-1.pdf (Belize "is deeply concerned about recently announced decisions by the Government of … Venezuela by which it purports to exercise rights of administrative sovereignty over the Essequibo region, an integral part of the territory of the Cooperative Republic of Guyana. The decisions and plans announced by Venezuela challenge directly the sovereignty and territorial integrity of Guyana and heighten tensions between the two countries. Furthermore, Venezuela's actions and decisions violate … the binding provisional measures ordered by the International Court of Justice …").

[415] Canada, @CanadaFP, *X* (9 December 2023), available at https://x.com/canadafp/status/1733580488403517720 ("Canada has been monitoring developments following the Venezuelan consultative referendum over the Essequibo and is deeply concerned by growing tensions. Canada reiterates its support for a peaceful and diplomatic solution.").

[416] Ministère de l'Europe et des Affaires Étrangères, Guyana – Conversation between Mme Colonna and the President of Guyana (12 December 2023), available at https://www.diplomatie.gouv.fr/en/country-files/guyana/news/article/guyana-conversation-between-mme-colonna-and-the-president-of-guyana-12-dec-2023 ("The Minister reiterated the importance of Guyana's sovereignty and territorial integrity being respected in line with the principles of the United Nations Charter. France calls on Venezuela to refrain from any unilateral action." The Minister "recalled that France calls on the parties to fully implement the ICJ's decisions, particularly its order of 1 December 2023.").

[417] Foreign, Commonwealth & Development Office, @FCDOGovUK, *X* (7 December 2023), available at https://x.com/fcdogovuk/status/1732773292128281072 ("The UK is concerned by the recent steps taken by Venezuela, with respect to the Essequibo region of Guyana. We believe this is unjustified and should cease. We are clear that the border was settled in 1899 through international arbitration.").

[418] United States Department of State, Secretary Blinken's Call with Guyanese President Ali (6 December 2023), available at https://www.state.gov/secretary-blinkens-call-with-guyanese-president-ali/ (following Venezuela's announcements of 5 December 2023, "Secretary of State

the Caribbean Community[419], and the Commonwealth Ministerial Group on Guyana[420].

5.6. Ignoring these protests, Venezuela promptly took steps to implement and apply these measures. On 8 December 2023, President Maduro signed six presidential decrees, *inter alia*, (i) creating a new "Comprehensive Defense Zone" in the disputed territory ("*ZODI-Guayana Esequiba*"); (ii) designating Mr. Alexis Rodríguez Cabello as the "only" authority in this territory; (iii) authorizing the state-owned companies PDVSA and CVG to grant concessions for the exploitation of oil and minerals, respectively, in that territory; (iv) ordering the incorporation of the territory in Venezuela's official maps; (v) declaring environmentally protected areas and national parks in the territory; and (vi) establishing the High Commission for the Defense and Recovery of the Guayana Esequiba[421].

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Antony J. Blinken spoke with Guyanese President Dr. Mohamed Irfaan Ali to reaffirm the United States' unwavering support for Guyana's sovereignty.").

[419] CARICOM, Caribbean Community, @CARICOMorg, *X* (8 December 2023), available at https://x.com/caricomorg/status/1733305723273044327 ("CARICOM Heads of Government met in caucus on Friday December 8 to discuss the situation with regard to the Venezuela Guyana border controversy and agreed to issue the following statement: CARICOM firmly supports Guyana in pursuance of the resolution of its border controversy with Venezuela through the process of the ICJ. Further, CARICOM urges Venezuela to respect the conservatory measures determined by the ICJ in its recent ruling until a final resolution.").

[420] The Commonwealth, Commonwealth ministerial group urges peaceful resolution between Guyana and Venezuela (11 December 2023), available at https://thecommonwealth.org/news/commonwealth-ministerial-group-urges-peaceful-resolution-between-guyana-venezuela ("The Group reiterated its firm and steadfast support for the ICJ process underway as the appropriate and lawful means to address the matter under international law, the maintenance and preservation of the sovereignty and territorial integrity of Guyana, its right to self-defence and the unobstructed exercise of its rights to develop the entirety of its territory for the benefit of its people.").

[421] See Presidential Press, Six decrees for the protection and defense of the Guayana Esequiba (8 December 2023), available at https://prensapresidencialvenezuela.gob.ve/index.php/2023/12/08/en-claves-seis-decretos-para-la-proteccion-y-defensa-de-la-guayana-esequiba/ (last accessed on 27 November 2024); Delcy Rodríguez, @delcyrodríguezv, *X* (9 December 2023) (available at https://x.com/delcyrodriguezv/status/1733312835453603868) ("Today the President @NicolasMaduro signed a series of decrees in the framework of the Action Plan for the defence and protection of Venezuela's new state, our Essequiba Guiana"; Guyana's translation of the original Spanich: "Hoy el Pdte. @NicolasMaduro firmó una serie de decretos en el marco del Plan de Acción para la defensa y protección del nuevo estado de Venezuela, nuestra Guayana Esequiba");

5.7. In response to the tensions created by Venezuela's actions, CARICOM, the Community of Latin American and Caribbean States (CELAC), the Secretary-General of the United Nations, the President of Brazil and the Prime Ministers of Dominica and St. Vincent and the Grenadines invited the Presidents of Guyana and Venezuela to meet at Argyle, in St. Vincent and the Grenadines. On 14 December 2023, they issued the "Argyle Declaration," in which President Ali of Guyana and President Maduro of Venezuela pledged that their countries would not "threaten or use force against one another" or "escalat[e] any conflict or disagreement"[422].

5.8. Venezuela promptly violated the commitments it had undertaken. Just eight days after that Joint Declaration, on 22 December 2023 Venezuela transgressed Guyana's airspace with a military helicopter[423]. Later that month, it deployed a naval force to the waters adjacent to the disputed territory to "expel" a British ship conducting a friendly mission to Guyana[424]. On 15 January 2024, Venezuela announced the construction of a military base for tanks, a 3.8 km military airstrip,

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Venezuela's Ministry of the Popular Power for Science and Technology (8 December 2023), available at https://mincyt.gob.ve/presidente-nicolas-maduro-firma-decretos-plan-defensa-guayana-esequiba/ (last accessed on 27 November 2024) ("President Nicolás Maduro signs decrees of the Action Plan in defence of Essequiba Guiana"; Guyana's Translation of the Spanish original: "Presidente Nicolás Maduro firma decretos del Plan de Acción en defensa de la Guayana Esequiba").

[422] The Joint Declaration of Argyle for Dialogue and Peace Between Guyana and Venezuela (14 December 2024), available at https://www.minfor.gov.gy/sites/default/files/2024-02/FINAL - Joint Declaration of Argyle for Dialogue and Peace between Guyana and Venezuela - December 14, 2023.pdf, points 1 and 6.

[423] Headquarters Intelligence Corps Base Camp Ayanganna, Thomas Lands, Georgetown, *Venezuela Military Helicopter Flew Over Guayana's Airspace* (22 December 2023) (Vol. III, Annex 47).

[424] Venezuela's National Assembly, Annual Address of Citizen Nicolás Maduro Moros (15 January 2024), available at https://www.asambleanacional.gob.ve/storage/documentos/botones/mensaje-anual-a-cargo-del-ciudadano-nicolas-maduro-moros-20240118234823.pdf (last accessed on 27 November 2024), p. 32.

and a bridge to nearby Ankoko Island[425], an insular feature in the Cuyuni River attributed in part to Guyana and in part to Venezuela by the 1899 Award, and seized in its entirety by Venezuela in 1966[426]. **Figure 5.1** below[427] shows where the boundary resulting from the Award divides Ankoko between Venezuela and Guyana. Publicly available satellite images from January 2024 confirm the recent expansion of Venezuela's military facilities on the island[428]. These ongoing activities have added a military dimension to the dispute, further aggravating it.

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[425] See video embedded in gnb_tachira, ("Guardia Nacional Bolivariana" or "GNB"), *Instagram* (15 January 2024), available at https://www.instagram.com/reel/C2IEp1cLW1X/?igsh=MXZteXprYWo0NXJ2eg (last accessed on 27 November 2024) (the video posted by an account linked to the GNB shows construction materials in Ankoko island; three armoured vehicles and amphibious armoured personnel carriers ("APCs")). See also Video "Sixth Corps of Engineers of the Bolivarian Army Building the Homeland", embedded in *X* (19 January 2024), available at https://x.com/6TOCING_EJB/status/1748465769992630783 (last accessed on 27 November 2024) (informing the construction of a tank park in Ankoko and a bridge to that island. The video shows construction materials, APCs, and heavy river ferry, along with this tweet: "The @6TOCING_EJB Complying with instructions from the @CEOFANBVE from Isla de Ankoko, edo Bolívar; continue engineering works on the banks of the Cuyuní river, where the Mabey Compact 200 bridge is being built along with the construction of the tank farm in the jungle." (Guyana's translation of the Spanish original: "El @6TOCING_EJB Cumpliendo instrucciones del @CEOFANBVE desde la Isla de Ankoko, edo Bolívar; continúan los trabajos de Ingeniería a orillas del río Cuyuní, donde se construye el puente Mabey Compact 200 y la construcción del tancodromo en selva."). See also video embedded in Bolivarian Army, @somos_ejército, along with tweet: "#Enterate || GJ Domingo Hernández Lárez, Strategic Operational Commander of the FANB, reviewed the Ankoko Island in #Bolívar state in order to inspect the construction of the tankodrome (tank farm), promoted by the 11 Armoured Brigade together with the @6TOCING_EJB, improving the FANB's response system in this important border area with the state of Guayana Esequiba and repelling any eventuality that attempts against the Republic" (Guyana's translation), *X* (25 January 2024), available at https://x.com/somos_ejercito/status/1750548445130019157 (last accessed on 27 November 2024); pictures and video embedded in GJ. Domingo Hernández Lárez, @dhernandezlarez, *X* (25 January 2024), available at https://x.com/dhernandezlarez/status/1750501357075706075 (last accessed on 27 November 2024) (posting three pictures and one video of Venezuela's military activities in Ankoko island, and asserting that the army "is firm and willing to comply with its mission to defend the national sovereignty and support with the effort of the development of the country"; Guyana's translation); G. J. Domingo Hernández Lárez, @dhernandezlarez, "Llegó la torre de control de Anacoco", *X* (27 March 2024), available at https://x.com/dhernandezlarez/status/1773165663302861238 (last accessed on 27 November 2024) (informing and showing that the "tower of control of Ankoko" has arrived).

[426] See Application, para. 51; MG, para. 2.52.

[427] See also Vol. II, Figure 5.1, p. 11.

[428] See Christopher Hernandez-Roy, Henry Ziemer, Rubi Bledsoe, Joseph S. Bermudez Jr., and Jennifer Jun, "Miscalculation and Escalation over the Essequibo: New Insights into the Risks of Venezuela's Compellence Strategy", *Center for Strategic & International Studies*




Figure 5.1. Venezuela's Occupation of Ankoko Island

5.9. On 21 March 2024, the Venezuelan National Assembly approved the Organic Law for the Defense of Guayana Essequiba proposed by President Maduro on 5 December 2023[429]. This Law came into force on 3 April 2024[430]. It:

– converted the territory in dispute into a new state of Venezuela[431];

– established the executive and legislative branches of the new state[432], and the office of comptroller[433];

– vested the Venezuelan courts with jurisdiction over the territory[434];

– required the President of Venezuela to "implement a special plan for the protection and development of the present and future population" of the territory[435];

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(9 February 2024), available at https://www.csis.org/analysis/miscalculation-and-escalation-over-essequibo-new-insights-risks-venezuelas-compellence (last accessed on 27 November 2024).

[429] Asamblea Nacional Poder Legislativo, República Bolivariana de Venezuela, Poder Legislativo sanciona Ley Orgánica para la Defensa del Esequibo, available at https://www.asambleanacional.gob.ve/noticias/poder-legislativo-sanciona-ley-organica-para-la-defensa-del-esequibo (last accessed on 27 November 2024); Asamblea Nacional, @Asamblea_Ven, "#21Mar || Queda aprobado por Unanimidad el Proyecto de Ley Orgánica para la Defensa de la Guayana Esequiba.", *X* (21 March 2024), available at https://x.com/asamblea_ven/status/1770880327424106558 (last accessed on 27 November 2024).

[430] See Organic Law (Vol. III, Annex 1), First Transitory Article. See also Nicolás Maduro, @NicolasMaduro, "Con mucho orgullo, amor y compromiso firmé y promulgué esta Ley Orgánica vinculante y obligante que ha aprobado la Asamblea Nacional, ha valido la pena rescatar el sueño de las libertadoras y los libertadores, de luchar por nuestra tierra y nuestros derechos. Más temprano que tarde, recuperaremos los derechos de Venezuela sobre la Guayana Esequiba. ¡Así lo juro y así será!", *X* (4 April 2024), available at https://x.com/nicolasmaduro/status/1775686454863176164 (last accessed on 27 November 2024) (Guyana's translation: "With great pride, love and commitment, I signed and promulgated this binding and mandatory Organic Law approved by the National Assembly, it has been worth rescuing the dream of the liberators, of fighting for our land and our rights. Sooner rather than later, we will recover Venezuela's rights to Guayana Esequiba. So I swear and so it will be!").

[431] Organic Law, Article 8 (Vol. III, Annex 1).

[432] *Ibid.*, Articles 11, 12, First and Second Transitory Articles.

[433] *Ibid.*, Article 13.

[434] *Ibid.*, Article 16.

[435] *Ibid.*, Article 29.

– mandated that every map of Venezuela include the territory as an integral part of Venezuela and prohibited the publication of maps failing to meet this requirement[436];

– authorized the President to "adopt the necessary reciprocal measures, in accordance with international law, to guarantee the rights of [Venezuela] over the territory"[437]; and

– established the "duty" of all Venezuelans "to safeguard, protect and vindicate [Venezuela's] sovereignty over the territory of the Guayana Esequiba"[438].

5.10. In response to the Judgments and Orders of the Court, the Organic Law also required that every "[p]ublic officials, authorities and representatives of Public Powers, as well as citizens, shall refrain from executing, causing to be executed, or assisting in the execution of ... judgments ... or any other decision ... issued by any tribunal or Court whose jurisdiction has not been recognised by the Republic ..."[439].

5.11. The Caribbean Community characterized Venezuela's adoption of the Organic Law as:

> "an unacceptable escalation of tensions between that country and the Cooperative Republic of Guyana [which] has threatened to undermine peace and security in Latin America and the Caribbean"[440].

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[436] *Ibid.*, Article 23.

[437] *Ibid.*, Article 27.

[438] *Ibid.*, Article 8.

[439] *Ibid.*, Article 6.

[440] Caribbean Community, Statement On The Unacceptable Escalation Of Tensions And Threats To Regional Peace And Security Occasioned By The Adoption Of "The Organic Law For The Defence Of Guyana Essequiba" On April 3, 2024, By The Bolivarian Republic Of Venezuela

5.12. The Secretary General of the Commonwealth stated that "Venezuela's latest actions", including the Organic Law, "appear to directly contravene the ICJ Order and also the spirit of the" Argyle Declaration. He "urged … Venezuela to abide by the principles of international law and to manage the dispute in ways that guarantee the peace and stability of the Caribbean region"[441].

5.13. On 15 April 2024, the United Nations Security Council expressed its "concern about the possible escalation of tensions between Venezuela and Guyana", and reminded the parties of "their obligations to comply with the [Court's] Order of Provisional Measures"[442].

5.14. Undeterred, Venezuela responded that it is "carrying out a process of affirmation of sovereignty over the disputed territory"[443].

5.15. There can be no doubt that Venezuela's actions violate the Court's Order of 1 December 2023 in that they both: (i) purport to "modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area" by integrating the area into Venezuela and subjecting it to Venezuelan control; and (ii) constitute actions

(8 April 2024), available at https://caricom.org/statement-on-the-unacceptable-escalation-of-tensions-and-threats-to-regional-peace-and-security-occasioned-by-the-adoption-of-the-organic-law-for-the-defence-of-guyana-essequiba-on-a/.

[441] The Commonwealth, Statement by the Commonwealth Secretary-General in support of Guyana after Venezuela's recent legislation on the April 3rd Organic Law on Essequibo (6 April 2024), available at https://thecommonwealth.org/Statement-by-the-Commonwealth-Secretary-General-in-support-of-Guyana.

[442] United Nations, Security Council, Press Statement on Guyana–Venezuela Situation, SC/15665 (15 April 2024), available at https://press.un.org/en/2024/sc15665.doc.htm.

[443] Presidential Elections 2024: Nicolás Maduro won, the defender of the historical rights over Guayana Essequiba (2 August 2024), available at https://comisionesequibo.gob.ve/?p=8023 &lang=en (last accessed on 27 November 2024).

"which might aggravate or extend the dispute before the Court or make it more difficult to resolve"[444].

5.16. Nor is there any doubt that the Provisional Measures ordered by the Court are binding upon the parties to which they are addressed[445]. Indeed, in the *Nicaragua* case, the Court established that when it "finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights"[446]. Further, having decided that it has jurisdiction over the present dispute[447], the Court "also has jurisdiction to deal with

[444] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Provisional Measures*, Order of 1 December 2023, para. 45 (1)-(2).

[445] Arbitral Award of 3 October 1899 (Guyana v. Venezuela), *Provisional Measures*, Order of 1 December 2023, para. 44; *LaGrand (Germany* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 506, para. 109; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, *Provisional Measures*, *Order of 7 December 2021*, *I.C.J Reports 2021*, p. 392, para. 96; *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, *Provisional Measures*, *Order of 16 March 2022*, *I.C.J. Reports 2022*, p. 230, para. 84; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, *Provisional Measures*, *Order of 23 July 2018, I.C.J. Reports 2018*, p. 433, para. 77. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 223, para. 435 (noting that "the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993" and thus acknowledging that provisional measures constitute international obligations).

[446] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, *Merits*, *Judgment*, *I.C.J. Reports 1986*, p. 144, para. 289.

[447] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, p. 493, para. 138 (1).

submissions requesting it to determine that an order indicating measures … has not been complied with"[448], and to order remedies[449].

## II. Appropriate Remedies

5.17. As Guyana has shown in the preceding Chapters of this Reply, the evidence and applicable law confirm the validity of the 1899 Arbitral Award and the land boundary that was delimited by the Award and demarcated by the Parties in their 1905 Agreement. Guyana therefore seeks a Judgment on the Merits to these effects, as set out in its Submissions, which follow this Chapter. However, Guyana submits that, in light of Venezuela's conduct described above — including its violation of the Order on Provisional Measures and enactment of the Organic Law requiring rejection of all the Court's Orders and Judgments — further action by the Court will be required if it is to achieve a "definitive settlement of the land boundary dispute between Guyana and Venezuela"[450].

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[448] *LaGrand (Germany* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 484, para. 46. ICSID tribunals have followed the same approach: see, e.g., *Victor Rey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures, 25 September 2001, paras. 17, 20; *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, para. 92; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, paras. 75-76; and *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Provisional Measures, 13 December 2012, para. 120.

[449] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, pp. 236, 238, paras. 469, 471 (7) (ordering satisfaction as reparation for the violations to the provisional measures committed by Serbia and Montenegro); *LaGrand (Germany* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 508, para. 116 (implying that its jurisdiction would have extended to remedies "had Germany's submission included a claim for indemnification.").

[450] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 2020*, pp. 492-493, paras. 135, 137, and 138 (1). See also *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, *Preliminary Objection*, *Judgment*, *I.C.J. Reports 2023*, pp. 270, 282, paras. 11, 68 (1).

5.18. Put simply, Venezuela's conduct does not augur well for its compliance with the Judgment of the Court, should it confirm the validity of the 1899 Award and the boundary established under it. Indeed, if Venezuela is to be taken at its word, as expressed in its newly enacted Organic Law, it can be expected to evade compliance with such a Judgment. In these circumstances, Guyana submits that it is appropriate for the Court to fashion remedies both to address Venezuela's violations of the provisional measures, and to ensure that its Judgment is respected, including by specifying the actions required of Venezuela to put itself into compliance with that Judgment.

5.19. To this end, Guyana submits that, if the Judgment on the Merits should uphold the validity of the 1899 Award and the boundary established thereunder, the Court should order Venezuela: (i) to withdraw from any part of Guyana's territory as defined under the Award, including the part of Ankoko Island that the Award attributed to Guyana; (ii) refrain from asserting or purporting to exercise sovereignty over any part of Guyana's territory; (iii) repeal all measures that purport to annex, administer or control any part of Guyana's territory; (iv) refrain from taking any actions that violate Guyana's territorial integrity or sovereignty; and (v) provide satisfaction.

5.20. There is ample precedent for such remedies. *First*, States have been ordered to withdraw from areas that, according to the Judgments of the Court, fall within the territory of another State[451]. In the *Temple of Preah Vihear* case, for example, the Court ruled that the Temple was "situated in territory under the sovereignty of

[451] *Temple of Preah Vihear (Cambodia* v. *Thailand)*, *Merits*, *Judgment*, *I.C.J. Reports 1962*, p. 6; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, pp. 451-452, and 457, paras. 314-315, and 325 (V) (A) and (B); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, *Judgment*, *I.C.J. Reports 2018*, pp. 170, 226, paras. 77-78, 205 (3) (A)-(B).

Cambodia"[452] and that, "in consequence", Thailand was "under an obligation to withdraw any military or police forces, or other guards or keepers, stationed … at the Temple, or in its vicinity on Cambodian territory"[453].

5.21. Similarly, in *Land and Maritime Boundary between Cameroon and Nigeria*, after determining the areas where each State enjoyed sovereignty, the Court ruled that each of them was under an obligation to withdraw its administration and its military and police forces from the territories which fell within the sovereignty of the other[454]. The Court added that they should carry out this obligation "expeditiously and without condition"[455].

5.22. In the joined cases of *Maritime Delimitation in the Caribbean Sea and Pacific Ocean* and *Land Boundary in the Northern Part of Isla Portillos*, the Court found that Nicaragua had "violated Costa Rica's … sovereignty … by establishing and maintaining a military camp" at Isla Portillos and ordered "Nicaragua to remove [the] camp"[456].

5.23. These cases indicate that, if the 1899 Award and the resulting boundary are upheld by the Court, Venezuela should be ordered to withdraw from the part of Ankoko Island that falls on Guyana's side of the boundary[457]. The area under

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[452] *Temple of Preah Vihear (Cambodia* v. *Thailand)*, *Merits*, *Judgment*, *I.C.J. Reports 1962*, p. 36.

[453] *Ibid*, p. 37.

[454] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, *Judgment*, *I.C.J. Reports 2002*, pp. 451-452, and 457, paras. 314-315, and 325 (V) (A) and (B).

[455] *Ibid*.

[456] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, *Judgment*, *I.C.J. Reports 2018*, pp. 170, 226, paras. 77-78, 205 (3) (A)-(B).

[457] See MG, para. 2.52. Also, the Map signed by the Commissionaires of Venezuela and the United Kingdom that demarcated the boundary between Venezuela and British Guiana in 1905, in

Venezuelan occupation is shown on the illustrative map *supra*[458]. As mentioned above, Venezuela has occupied this area since 1966[459], despite Guyana's protests[460], and, in clear violation of the Court's Order of 1 December 2023, has been enhancing its military facilities there since January 2024[461].

5.24. *Second*, there is also precedent for requiring States to repeal domestic measures that encroach on another State's territory or on that State's powers over it[462]. In the *Alleged Violations* case between Nicaragua and Colombia, the Court

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accordance with the 1899 Award showed that the eastern area of Ankoko now occupied by Venezuela, corresponded to Guyana. See *Guyana/Venezuela Boundary, The Ankoko Affair*, 1981, Appendix II (Vol. III, Annex 48).

[458] See Figure 5.1, p. 163.

[459] See para. 5.8, and e.g., Guyana, Ministry of Foreign Affairs, Memorandum on the Guyana/Venezuela Boundary, 1980 (enclosed with Letter from the Permanent Representative of Guyana to the United Nations addressed to the Secretary-General (2 November 1981) (VCM, Vol. III, Annex 148, p. 8).

[460] See Cable from Primer Minister and Minister of Foreign Affairs of Guyana, Mr. F.S. Burnham, to Minister of Foreign Affairs of Venezuela, Dr. Ignacio Iribarren Borges, concerning the Ankoko Island (14 October 1966) (Vol. III, Annex 49); Note Verbale from the Prime Minister and Minister of External Affairs of Guyana to the Minister of Foreign Relations of Venezuela, No. CP(66)603 (21 October 1966) (MG, Vol. II, Annex 40); Letter from the Vice President and Minister of Foreign Affairs of the Cooperative Republic of Guyana to the Secretary-General of the United Nations (3 June 2016), referring to the "continued illegal occupation of Guyana's half of Ankoko island by the Venezuelan military" (MG, Vol. IV, Annex 105). See further United Nations, General Assembly, 37th Session, Agenda item 9, United Nations Doc. A/37/PV.16 (4 October 1982), paras. 279 and 282 (MG, Vol. III, Annex 57); Ministry of the Popular Power for the Social Process of Labor, Our Esequibo and the spoliation of Exxon Mobil (with respect to the 50th Anniversary of the Geneva Agreement) (17 February 2016), available at https://www.mpppst.gob.ve/mpppstweb/index.php/2016/02/17/nuestro-esequibo-y-la-expoliacion-de-exxon-mobil-a-proposito-del-50-aniversario-del-acuerdo-de-ginebra/ (noting that, of the "disputed territory", "the eastern part of the river island of Anacoco in the river Cuyuni is under the sovereignty of Venezuela, but has been protested by Guyana" (Guyana's translation)).

[461] See para. 5.8, and Christopher Hernandez-Roy, Henry Ziemer, Rubi Bledsoe, Joseph S. Bermudez Jr., and Jennifer Jun, "Miscalculation and Escalation over the Essequibo: New Insights into the Risks of Venezuela's Compellence Strategy", *Center for Strategic & International Studies* (9 February 2024), available at https://www.csis.org/analysis/miscalculation-and-escalation-over-essequibo-new-insights-risks-venezuelas-compellence.

[462] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2022*, p. 341, para. 199; *Legal Status of Eastern Greenland*, *Judgment*, *1933*, *P.C.I.J.*, *Series A/B*, *No. 53*, p. 75 (finding that a Norwegian legislative measure that purported to occupy a territory that belonged to Denmark, was unlawful, as well as any steps

found that a Colombian Presidential Decree extended that State's contiguous zone into Nicaragua's exclusive economic zone, and attributed to Colombia rights that belonged exclusively to Nicaragua[463]. On this basis, it ordered Colombia to bring the Presidential Decree into conformity with international law, by means of its own choosing[464].

5.25. The same approach should be applied to Venezuela's Presidential Decrees of 5 December 2023 and to the Organic Law which entered into force on 3 April 2024. Specifically, Venezuela should be required, by means of its own choosing, to:

– Withdraw all decrees and measures by which Venezuela purports to exercise sovereignty, administration or control over Guyana's territory;

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taken in respect of that purported occupation). The Court has ordered States to repeal different types of domestic measures that contravene international law. See, e.g., *Free Zones of Upper Savoy and the District of Gex*, *Judgment*, *1932*, *P.C.I.J.*, *Series A/B*, *No. 46*, p. 172 (ordering France to withdraw a custom line in the District of Gex, a customs-free zone); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 32, para. 78 (3) (ordering Belgium to, by means of its own choosing, cancel an arrest warrant unlawfully issued against the Congo's Ministry of Foreign Affairs); *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2004*, p. 70, para. 152 (ordering the review and reconsideration of United States judicial measures rendered against several Mexican nationals in violation of United States obligations under the Vienna Convention on Consular Relations); *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, *Judgment*, *I.C.J. Reports 2012*, p. 155, para. 139 (4) (ordering Italy to ensure that judicial decisions that violated Germany's sovereign immunity cease to have effect); *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, *Judgment*, *I.C.J. Reports 2014*, p. 298, para. 245 (ordering Japan to revoke authorizations under an unlawful domestic programme for whaling, and to refrain from granting any further whaling permits in pursuance of that programme); *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*, *Provisional Measures*, *Order of 3 October 2018*, *I.C.J. Reports 2018*, p. 623 (ordering the USA to remove impediments to free exportation of specific products to Iran).

[463] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, *Judgment*, *I.C.J. Reports* 2022, pp. 338, 340, and 367, paras. 187, 194, and 261 (5).

[464] *Ibid.*, paras. 194, 261 (6).

– Revoke any powers granted to Venezuela's President, National Assembly, courts, or to any other State authority, institution or individual officer in regard to Guyana's territory;

– Dissolve any entity to which Venezuela has attributed powers over Guyana's territory, such as the High Commission for the Defense of Guayana Esequiba, as well as all other executive, legislative and administrative agencies created to exercise such powers;

– Terminate the "Social Care Plan for the population of Guayana Esequiba", and any ongoing census of the population of Guyana's territory, as well as all military activities conducted in furtherance of Venezuela's attempt to exercise sovereignty over, annex, administer or control Guyana's territory; and

– Withdraw from schools, public offices and other places, any map depicting Guyana's territory as being part of Venezuela.

5.26. In the *Whaling* case, the Court ruled that "measures that go beyond declaratory relief are warranted"[465] because Japan's whaling program, JARPA II, which it found to be unlawful, was ongoing. In addition to ordering Japan to revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, the Court ordered Japan to "refrain from granting any further permits … in pursuance of that programme"[466].

[465] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, *Judgment*, *I.C.J. Reports 2014*, p. 298, para. 245.

[466] *Ibid*.

5.27. Venezuela's measures adopted in defiance of the Court's Order are unlawful and ongoing. Venezuela has described them as part of a "process of affirmation of sovereignty" over the disputed territory, and stated that "Venezuela is carrying out the process of affirmation of sovereignty over the disputed territory"[467] Indeed, Venezuela has insisted that it "will recover the Esequibo"[468] and will not "recognize the decision that could be adopted" by the Court[469]. For these reasons, Guyana submits that the Court should restrain Venezuela from engaging in any future measure that furthers the objective of exercising sovereignty, administration or control over Guyana's territory.

5.28. Finally, Guyana submits that the Court should include a declaration of Venezuela's breaches of the Order on Provisional Measures in the operative part of its Judgment on the Merits, as a means of satisfaction.

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[467] Presidential Elections 2024: Nicolás Maduro won, the defender of the historical rights over Guayana Essequiba (2 August 2024), available at https://comisionesequibo.gob.ve/?p=8023&lang=en (last accessed on 27 November 2024).

[468] See the title of Communiqué embedded in Delcy Rodríguuez, delcyrodirguezv, "The truth of Venezuela will prevail in the face of the territorial dispossession committed through a fraudulent and criminal award. Venezuela as a whole, in national union, will recover the Guayana Esequiba by means of the Geneva Agreement. The moment of truth has arrived!", *threads* (8 April 2024), available at https://www.threads.net/@delcyrodriguezv/post/C5gIN2xOFo1 (last accessed on 27 November 2024); Nicolás Maduro, @NicolasMaduro, "Con mucho orgullo, amor y compromiso firmé y promulgué esta Ley Orgánica vinculante y obligante que ha aprobado la Asamblea Nacional, ha valido la pena rescatar el sueño de las libertadoras y los libertadores, de luchar por nuestra tierra y nuestros derechos. Más temprano que tarde, recuperaremos los derechos de Venezuela sobre la Guayana Esequiba. ¡Así lo juro y así será!", *X* (4 April 2024), available at https://x.com/nicolasmaduro/status/1775686454863176164 (last accessed on 27 November 2024) (Guyana's translation: "With great pride, love and commitment, I signed and promulgated this binding and mandatory Organic Law approved by the National Assembly, it has been worth rescuing the dream of the liberators, of fighting for our land and our rights. Sooner rather than later, we will recover Venezuela's rights to Guayana Esequiba. So I swear and so it will be!").

[469] Statement imbedded in Delcy Rodríguez, @delcyrodriguezv, "Venezuela reafirma ante la #CIJ sus derechos históricos sobre la Guayana Esequiba. El Acuerdo de Ginebra de 1966 es el único instrumento válido para dirimir, por la vía del diálogo, esta controversia territorial. ¡El Sol de Venezuela nace en el Esequibo!", *X* (11 June 2024), available at https://x.com/delcyrodriguezv/status/1800571795898274303/photo/1 (last accessed on 27 November 2024) (Guyana's translation: Venezuela reaffirms before the #CIJ its historical rights over the Esequiba Guiana. The Geneva Agreement of 1966 is the only valid instrument to settle, through dialogue, this territorial dispute. The Venezuelan sun is born in the Essequibo!]?

## SUBMISSIONS

For the reasons given in this Reply, and reserving the right to supplement, amplify or amend the present Submissions, the Co-operative Republic of Guyana respectfully requests the International Court of Justice:

To adjudge and declare that:

1. The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is the boundary between Guyana and Venezuela;

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;

3. As a consequence, Venezuela must:

   (a) withdraw from any part of Guyana's territory as defined under the Award, including the part of Ankoko Island that the Award attributed to Guyana;

   (b) refrain from asserting or purporting to exercise sovereignty over any part of Guyana's territory and from taking any actions that violate Guyana's sovereignty or territorial integrity as defined in the Award;

   (c) repeal by means of its own choosing all decrees and measures that purport to annex, administer or control any part of Guyana's territory, and in particular:

(i) dissolve any entity to which Venezuela has attributed powers over Guyana's territory, such as the High Commission for the Defense of Guayana Esequiba, as well as all other executive, legislative and administrative agencies created to exercise such powers;

(ii) terminate the "Social Care Plan for the population of Guayana Esequiba", and any ongoing census of the population of Guyana's territory, as well as all military activities conducted in furtherance of Venezuela's attempt to exercise sovereignty over, annex, administer or control any part of Guyana's territory;

(d) refrain from publicly claiming or teaching its people that the Award is a nullity or the outcome of a fraudulent process, or that Venezuela was wrongly deprived of the Essequibo region, and withdraw from schools, public offices and other places, any map depicting any part of Guyana's territory as defined by the Award as part of Venezuela;

4. Venezuela has failed to comply with the obligations set out in the Order of 1 December 2023.

9 December 2024

Hon. Carl B. Greenidge
Co-operative Republic of Guyana
Agent

# APPENDIX

## ARBITRAL AWARDS RENDERED IN THE 19TH AND EARLY 20TH CENTURIES WITHOUT STATEMENTS OF REASONS

1. This Appendix identifies arbitral awards rendered by jurists during the 19th and early 20th centuries that do not include a statement of reasons for the decision taken. It disproves Venezuela's assertions that "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", and that "[t]he importance attached to the legal expertise and background of the five selected arbitrators [in the 1898-1899 arbitration] shows that the parties expected a decision explaining in legal terms the reasons behind the territorial delimitation."[1]

2. As shown below, there are multiple awards rendered by "jurists" and non-sovereigns during the relevant time period that did not state any reasons. In fact, amongst these unreasoned awards, there is the 1895 Award of the Venezuela-United States Commission[2]. The Venezuelan jurist who signed the Washington Treaty of 1897 on behalf of Venezuela, Dr. José Andrade, was Venezuela's Commissioner in that case. It is notable that the same Venezuelan jurist who signed the Washington Treaty had very recently rendered an unreasoned award.

3. There are awards without a statement of reasons, rendered by "jurists" and non-sovereigns, throughout the late 18th, 19th and early 20th centuries. This was the case in the *Treaty of Ghent* award of 1817 — as well as the *St. Croix River* award

[1] VCM, paras. 6.64-6.65.

[2] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 422.

of 1798 — both between the United States and the United Kingdom. This practice was followed particularly in frontier disputes, including the *Puna de Atacama* award between Chile and Argentina rendered on 24 March 1899, only few months before the 1899 Award.

4. A leading compendium and commentary of arbitral case law of this period[3], authored by Belgian Professor Henri La Fontaine, noted that both the Washington Treaty and the 1899 Award were "absolutely normal and do not call for any commentary"[4].

5. Jurists continued to omit statements of reasons in arbitral awards issued after 1899. The 1903 *Alaska Boundary* award in the arbitration between the United States and the United Kingdom, and the 1904 *San Domingo Company* award between the United States and the Dominican Republic are two such examples.

6. The following Section describes nine unreasoned awards rendered by jurists and other non-sovereigns during the relevant period[5].

[3] *UNRIAA*, Vol. I, p. 4 (considering La Fontaine's treatise as the first "collection" of a "truly … general character"); H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. xvi (describing the treatise as "*le premier et modeste recueil d'une jurisprudence Internationale*").

[4] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 556 (Original in French: "*Bien que la question souleva de vives discussions dans la presse, le compromis qui institua l'arbitrage et la sentence intervenue ont un caractère absolument normal et n'appellent aucun commentaire.*").

[5] Principal sources include: the treatise by Belgian Professor Henri La Fontaine, *Pasicrisie Internationale 1794-1900*, already mentioned; the treatise by French Professor Albert de Geouffre de La Pradelle de Leyrat, *Recueil des Arbitrages Internationaux (1856-1872)*; and Volumes XXVIII and XXIX of the *UNRIAA*, covering cases from the 18th and early 19th centuries.

## I. *River Saint Croix (United Kingdom/United States)* (25 October 1798)

7. This award concerned one of multiple disputes regarding the boundary between Maine (United States) and New Brunswick (then British North America, now Canada). Article II of the 1783 Treaty of Paris between the United States and the United Kingdom vaguely established that this boundary should follow "the source of St. Croix River"[6], but it did not specify which was the St. Croix River.

8. In 1794, the United States and the United Kingdom concluded the Treaty of Amity, Commerce and Navigation between the United States and the United Kingdom (the "Jay Treaty"). Article V of that Treaty established that the "question" as to "what river was truly intended under the name of the river St. Croix … shall be referred to the final decision of commissioners …"[7]. That same Article required the declaration of the Commission to "contain a description of the said river," and to "particularize the latitude and longitude of its mouth, and of its source".[8]

9. The second paragraph of Article V established the mechanism for appointment of commissioners[9], It did not require the commissioners to be "jurists", like the Washington Treaty, but both the United States and the United Kingdom appointed jurists:

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[6] The Definitive Treaty of Peace Between the Kingdom of Great Britain and the United States of America signed in Paris on 3 September 1783, Article 2, available at https://avalon.law.yale.edu/18th_century/paris.asp.

[7] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, pp. 1-2.

[8] *Ibid*.

[9] *Ibid*., p. 2 ("One commissioner shall be named by His Majesty and one by the President of the United States, by and with the advice and consent of the senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original commissioners.").

– The United Kingdom appointed Thomas Barclay, who studied law under John Jay and joined the British army in 1776[10].

– The United States appointed David Howell. He was professor of law, mathematics and natural philosophy at Brown University, Attorney General of Rhode Island in 1789, and a justice of the United States Supreme Court at the time of his appointment[11].

– The third commissioner was Egbert Benson of New York, who was the first Attorney General of the State of New York and a justice of the United States Supreme Court at the time he was appointed to the Commission[12].

10. The Commission had to "be sworn impartially to examine and decide the said question according to such evidence as shall respectively be laid before them …"[13]. This formula was common in agreements to arbitrate disputes in the 19th century.

11. Finally, the Parties agreed to "consider such decision as final and conclusive, so as that the same shall never thereafter be called into question, or made the subject of dispute or difference between them"[14].

12. The Commission did not include a statement of reasons for its decision in its 1798 award. It simply noted that it was sworn to "impartially … examine and decide the said question, according to such evidence as [was] respectively … laid

[10] Henry S. Burrage, *The St. Croix Commission, 1796-98*, 1898, p. 3.

[11] *Ibid.*, pp. 3-4.

[12] *Ibid.*, p. 5.

[13] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 2.

[14] *Ibid*.

before" it, and that "having heard the evidence" it had decided the coordinates of the River St. Croix[15].

## II. *Decision under Article IV of the Treaty of Ghent (United States/United Kingdom)* (24 November 1817)

13. In 1814, the United States and the United Kingdom signed the Treaty of Ghent. This Treaty ended the war between both nations that began in 1812. Article IV of the Treaty established that the claim of the United States that "several Islands in the Bay of Passamaquoddy" and "the Island of Grand Menan in the said Bay of Fundy" were comprehended between its boundaries, "shall be referred to two commissioners …"[16].

14. Both States appointed jurists as commissioners, although the Treaty of Ghent did not require them to do so:

– The United Kingdom appointed once again Thomas Barclay, the same jurist who was appointed in the *St. Croix River* case[17].

– The United States appointed John Holmes, Esq., a Senator from the State of Maine.

[15] *Declaration under Article V of the Treaty of 1794 between the United States and Great Britain, respecting the true River Saint Croix*, 25 October 1798, *UNRIAA*, Vol. XXVIII, pp. 3-4.

[16] Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, signed in Ghent on 24 December 1814, available at https://www.loc.gov/resource/llsalvol.llsal_008/?sp=234&st=image. See also H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 7.

[17] Henry S. Burrage, *The St. Croix Commission, 1796-1798*, 1898, p. 3.

15. The commissioners were tasked by Article IV of the Treaty to "impartially … examine and decide upon the said claims according to such evidence as shall be laid before them," and to "decide to which of the two contracting parties the several Islands" mentioned by Article IV, "do respectively belong, in conformity with the true intent of the" Treaty of Peace of 1783[18].

16. Article IV of the Treaty required the commissioners to state reasons *only in case they did not reach an agreement*. The Treaty explained that such statements would assist a "friendly sovereign or state"[19] to settle the matter undecided by the commissioners.

17. Since the commissioners agreed on a decision, they did not include a statement of reasons. They simply stated that they had "been duly sworn impartially to examine and decide upon" the claims submitted, and "decided" that the islands of the Bay of Fundy belonged to the United States, and that "all the other islands in the Bay of Passamaquoddy" and other islands belonged to the United Kingdom[20].

## III. *Halifax Fisheries Commission (United States/United Kingdom)* (23 November 1877)

18. The Commission was established under Articles XXII and XXIII of the Treaty of Washington of 8 May 1871 (the "1871 Treaty"). This Treaty between the

[18] Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, signed in Ghent on 24 December 1814, available at https://www.loc.gov/resource/llsalvol.llsal_008/?sp=234&st=image. See also H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, pp. 7-8.

[19] *Ibid*., Article IV. See also H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 8.

[20] *Decision under Article IV of the Treaty of Ghent of 1814, between the United Kingdom and the United States relating to the Islands in the Bay of Fundy*, Decision of 24 November 1817, *UNRIAA*, Vol. XXVIII, p. 8.

United States and the United Kingdom sought to settle multiple pending matters, including claims arising from the American Civil War (1861-1865), boundaries, and fisheries. The award in question concerned fishing privileges in waters off Newfoundland (Canada). Pursuant to Article XXII of the 1871 Treaty, the Commission had to determine the amount of compensation, if any, owed by the United States for those privileges.

19. The 1871 Treaty did not establish that the commissioners should be "jurists." However, all its members were:

- The United Kingdom appointed Sir Alexander Tilloch Galt, lawyer from Montreal, Quebec, who became one of the founders of the Canadian Confederation.

- The United States appointed Ensign Hosmer Kellogg, a lawyer and politician from Massachusetts.

- The Austro-Hungarian Ambassador to the United Kingdom appointed the third commissioner, Maurice Delfosse, a Belgian lawyer and politician. He was the Minister of Justice of Belgium from 1908 to 1912.

20. The award contains no statement of reasons. It provides only that the United States should pay US$5.5 million to the United Kingdom[21].

[21] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 149.

## IV. *Award of Chief Justice Melius de Villiers, as to the boundary question between Great Britain and the South African Republic (Transvaal) in the Cape Colony* (5 August 1885)

21. This award was rendered pursuant to the 1884 Convention for the Settlement of the Transvaal Territory (the "London Convention"). This Convention superseded the earlier 1881 Pretoria Convention that ended the First Boer War (1880-1881). The dispute concerned the southwest boundary of the United Kingdom with the South African Republic. Article II of the London Convention provided that "the President of the Orange Free State shall be requested to appoint a referee to whom" the two arbitrators named by the United Kingdom and South Africa "shall refer any questions on which they may disagree …"[22].

22. The President of the Orange Free State appointed Chief Justice Melius de Villiers of that State as referee. The party-appointed arbitrators disagreed, and, following referral, the Chief Justice issued his award on 5 August 1885. The award described the boundary and provided the relevant coordinates. It did not include a statement of reasons[23].

## V. *Bering Sea Fisheries (United States/United Kingdom)* (15 August 1893)

23. This was another dispute between the United States and the United Kingdom. It concerned the "jurisdictional rights of the United States in the waters of Behring's Sea", the "preservation of the fur-seal in or habitually resorting to the

[22] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 244.

[23] *Ibid*.

said sea," and "the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters …"[24].

24. An award was rendered pursuant to the Washington Treaty of 29 February 1892 (the "1892 Treaty")[25].

25. Article I of the 1892 Treaty stipulated that the tribunal was to be composed by seven "jurists of distinguished reputation in their respective Countries"[26]. The United States would appoint two arbitrators; the United Kingdom another two. The last three arbitrators were to be appointed by the President of France, the King of Italy and the King of Sweden and Norway:

- The United States appointed John M. Harlan, Justice of the United States Supreme Court, and John T. Morgan, Senator of the United States, both jurists by profession.

- The United Kingdom appointed Lord Hannen, British barrister and judge, and Sir John Thompson, Minister of Justice and Attorney General of Canada.

- The President of the French Republic named the Baron de Courcel, Senator and Ambassador of France[27].

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[24] *Traité fixant les bases d'un arbitrage pour examiner le litige relatif aux pêcheries dans la mer de Behring* of 28 February 1982, Article I, in H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 423.

[25] *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals*, Decision of 15 August 1893, *UNRIAA*, Vol. XXVIII, pp. 263-276.

[26] *Ibid*., p. 267. See also H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 423.

[27] The Baron de Courcel was not an attorney by profession, although the Treaty established that the members of the Tribunal had to be "jurists". He was the only non-lawyer member, although he had extensive experience in international legal matters under his role as diplomat.

– The King of Italy named Marquis Emilio Visconti Venosta, Italian lawyer, and former Minister of Foreign Affairs and Senator of the Kingdom of Italy.

– The King of Sweden and Norway named Mr. Gregers Gram, jurist, arbitrator, and Minister of State.

26. Five specific legal questions were presented to the Tribunal. The award of 15 August 1893 provided its answers to each of the five questions. It did not provide a statement of reasons for those answers[28].

27. Article VIII of the 1892 Treaty allowed the Parties to "submit to the Arbitrators any question of fact involved" and to "ask for a finding thereon …"[29]. Based on this provision, the United Kingdom submitted a statement of facts. The Tribunal "unanimously f[ou]nd the facts as set forth in the said statement to be true"[30]. However, it did not provide any statement of reasons for this finding.

## VI. *Award by the Venezuela-United States Mixed Commission at Washington* (26 March 1895)

28. The award was rendered pursuant to the Convention between the United States of America and the United States of Venezuela of 19 January 1892 (the "1892 Convention"), ratified on 28 July 1894.

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[28] *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals*, Decision of 15 August 1893, *UNRIAA*, Vol. XXVIII, pp. 263-276.

[29] *Traité fixant les bases d'un arbitrage pour examiner le litige relatif aux pêcheries dans la mer de Behring* of 29 February 1982, Article VIII, available at H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 424.

[30] *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals*, Decision of 15 August 1893, *UNRIAA*, Vol. XXVIII, p. 276.

29. This award is especially pertinent because, as mentioned, Venezuela's Minister in Washington, Dr. José Andrade, who subsequently negotiated and signed the 1897 Washington Treaty on behalf of Venezuela, was one of the three commissioners, and the Commission did not provide a statement of reasons for its award.

30. In the 1892 Convention, the Parties agreed to "submit the claim of the [United States company] 'Venezuela Steam Transportation Company' against the Government of Venezuela to the arbitration of a board of three commissioners, one to be appointed by the President of the United States of America, one by the President of the United States of Venezuela, and the third to be chosen by the two appointed …"[31].

– The United States appointed General Noah L. Jeffries, attorney and member of the United States army.

– Venezuela appointed Don José Andrade, a Venezuelan jurist who studied law at Columbia College, and served as Venezuelan Minister at Washington, in which capacity he signed the Washington Treaty on behalf of Venezuela.

– They appointed Mr. Johan August Wilhelm Grip, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Sweden and Norway at Washington, as third commissioner[32]. He had studied law in Uppsala University in Sweden.

[31] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, p. 422.

[32] *Ibid*.

31. The award stated no reasons. It noted Venezuela's objection to jurisdiction and, without providing reasons, it rejected the objection. Then, by a majority, the Commission awarded US$141,500 to the United States in gold and unanimously disallowed another claim from the United States[33].

## VII. *Award relating to the demarcation of the Puna de Atacama boundary between Argentine Republic and Chile (Chile* v. *Argentina)* (24 March 1899)

32. This dispute concerned the delimitation of the boundary between Chile and Argentina in the *Puna de Atacama*, a high plateau located 4,500 meters above sea level in proximity to the current borders of Argentina, Chile and Bolivia.

33. The Tribunal was established pursuant to an Agreement of 2 November 1898 between Chile and Argentina. In Article 1, Chile and Argentina agreed to:

> "Designate an Argentinean delegate and another Chilean and the current Minister of the United States of America in Argentina so that, in their capacity as demarcators and in view of the documents and facts of the matter, proceed by majority to draw definitely the boundary line …."[34]

34. Pursuant to this provision:

– Argentina appointed Dr. José E. Uriburu, lawyer and former president of Argentina.

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[33] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, p. 422.

[34] *Ibid*., p. 586 (Guyana's translation of the Spanish original: "*Designar á un delegado argentino y á otro chileno y al ministro actual de los Estados Unidos de Norte América acreditado en República Argentina para que, en calidad de demarcadores y en vista de los documentos y antecedentes de la cuestión, procedan par mayoría á trazar de una manera definitiva la línea divisoria á que se refiere la base primera del acuerdo de diez y siete de abril de mil ochocientos noventa y seis.*").

– Chile appointed Don Enrique Mac-Iver, a Chilean lawyer, politician, and diplomat. He held several government posts in Chile, including Ministry of the Interior, Minister of Treasury, Congressman and Senator.

– The final member of the Commission was Mr. William I. Buchanan, Minister Plenipotentiary of the United States in Argentina. Although he was not a jurist, he was United States delegate in the 1907 Second Hague Peace Conference and was also the United States agent in the *Orinoco Steamship Company* arbitration between the United States and Venezuela[35].

35. Article IV of the 1898 Agreement provided that there should be a statement of reasons only for a dissenting opinion[36]. Therefore, the award did not include a statement of reasons.

## VIII. *The Alaska Boundary Case (United Kingdom/United States)* (20 October 1903)

36. This arbitration concerned a longstanding dispute between Russia and the United Kingdom, which then controlled Canada's foreign relations, over the border with Alaska. The United States inherited this dispute when it purchased Alaska from Russia in 1867.

[35] "William Insco Buchanan", Editorial Comment, *American Journal of International Law*, Vol. 4, 1910, No. 1, pp. 161-162.

[36] H. La Fontaine, *Pasicrisie Internationale 1794-1900*, *Histoire Documentaire des Arbitrages Internationaux*, 1902, p. 586 ("Fourth — If there is dissent regarding the solution adopted, the dissident member may record its dissent by signing as such, but may not determine the grounds that motivates it."( Guyana's translation of the Spanish original: "Cuarto—*Si hubiere disidencia en cuanto á la solución adoptada, el miembro disidente podrá hacerla constar firmando como tal, pero no podrá determinar los fundamentos que la motivan*.")).

37. The United Kingdom and the United States concluded the Convention between Great Britain and the United States of America for the Adjustment of the Boundary Between the Dominion of Canada and the Territory of Alaska of 24 January 1903 (the "1903 Convention") to settle this dispute. Article I of the 1903 Convention established that a Tribunal of "six impartial jurists of repute … shall consider judicially the questions submitted to them …"[37].

– The United States appointed Elihu Root, attorney and Secretary of War, Henry Cabot Lodge, attorney and Senator from Massachusetts, and George Turner, jurist and Senator from the State of Washington.

– The United Kingdom appointed Sir Allen Bristol Aylesworth, Canadian jurist and later Minister of Justice of Canada, Sir Louis-Amable Jetté, Canadian jurist and Lieutenant-Gouverneur du Québec, and Lord Alverstone, Lord Chief Justice of England.

38. Article IV of the 1903 Convention presented seven questions to the Tribunal. Pursuant to Article III, the Tribunal had to "consider … the Treaties respectively concluded between His Britannic Majesty and the Emperor of All the Russias … and between the [United States]" as well as "any action of the several Governments … so far as the same tends to show the original and effective understanding of the Parties in respect to the limits of their several territorial jurisdictions …"[38].

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[37] *Convention Between Great Britain and the United States of America for the Adjustment of the Boundary Between the Dominion of Canada and the Territory of Alaska*, 24 January 1903, Article I, *UNRIAA*, Vol. XV, p. 485.

[38] *Convention Between Great Britain and the United States of America for the Adjustment of the Boundary Between the Dominion of Canada and the Territory of Alaska of 24 January 1903*, Article III, *UNRIAA*, Vol. XV, p. 487.

39. In the award, the Tribunal provided the answer to each question and how it was voted (unanimously or by majority)[39]. No statement of reasons was required and none was provided.

## IX. *San Domingo Improvement Company Claim (United States* v. *Dominican Republic)* (14 July 1904)

40. This award was rendered pursuant to the Protocol and Agreement to Naming of Arbitrators Signed at Santo Domingo on 31 January 1903 (the "1903 Protocol"). Under this Agreement, a tribunal was established to decide the terms on which the Dominican Republic should pay US$4.5 million for the seizure of property from an American company, San Domingo Improvement Company, and related American companies, that were constructing a railroad in the Dominican Republic.

41. Three arbitrators composed the Tribunal:

- The United States elected John G. Carlisle, lawyer, Congressman and Senator.
- The Dominican Republic elected Don Manuel de Jesús Galván, lawyer and diplomat from the Dominican Republic.
- The third arbitrator was George Gray, lawyer and judge from the United States.

42. The decision of the Tribunal consisted of seven articles, establishing the time of delivery of properties (Article 1); the rate of interest (Article 2); the amount

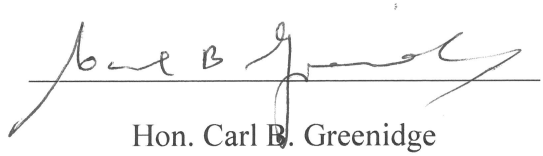
[39] *The Alaska Boundary Case (Great Britain, United States of America)*, *Award of the Alaska Boundary Tribunal*, 20 October 1903, *UNRIAA*, Vol. XV, pp. 492-493.

of monthly instalments (Article 3); security and mode of collection (Article 4); and other miscellaneous provisions (Articles 5-7). It did not state reasons for any of its decisions.

## Certification

I certify that the annexes are true copies of the documents reproduced therein and that the translations into English are accurate translations of the documents annexed.

9 December 2024



Hon. Carl B. Greenidge
Co-operative Republic of Guyana
Agent

## Volume II

## MAPS AND FIGURES

Figure 4.1. United States of Venezuela, Ministry of Promotion, Sketch map of the Grand Sabana and adjacent regions – State of Bolivar (November 1939)

Figure 4.2. United States of Venezuela, Ministry of Public Works, Index Map of Venezuela's Landing Sites (1947)

Figure 4.3. United States of Venezuela, Ministry of Promotion, Geological Map of Venezuela (March 1950)

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Figure 5.1. Venezuela's Occupation of Ankoko Island

**Volume III**

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Annex 2. Letter from Venezuela's Foreign Minister, Mr. Simón Camacho, to United States Secretary of State, Mr. Frederic Frelinghuysen (15 January 1883), in *Correspondence in Relation to the Boundary Controversy between Great Britain and Venezuela*, Washington, 1896, pp. 40-41

Annex 3. Letter of Mr. Joseph Chamberlain to Mr. Selborne (20 December 1895), in University of Birmingham, *Joseph Chamberlain Collection*, *Correspondence relating to the Venezuelan boundary dispute – 1896-1899*, JC7/5/1B/1-81

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Annex 5. Letter from Mr. Olney to Mr. Brewer (10 November 1896), in *Richard Olney's Papers*, Library of Congress, Reel 23

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Annex 7. Letter from Mr. Storrow to Mr. Olney (29 August 1896), in *Richard Olney's Papers*, Library of Congress, Reel 22

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Annex 26. Letter from Mr. Harrison to Mr. Miller (7 October 1899), in *Benjamin Harrison Papers*, Series 1, *General Correspondence and Related Material, 1787-1912; 1899, Apr. 13-1901, Feb. 27*, Library of Congress, available at https://www.loc.gov/resource/mss25064.mss25064-042_0018_1222/?sp=163

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Annex 29. Letter from the Governor, Sir A. Moloney, to Mr. Chamberlain and enclosures (24 February 1901), in *The Venezuelan Arbitration before The Hague Tribunal*, *1903*, Washington, 1905, pp. 457-464

Annex 30. Letter from Mr. Grant Duff to the Marquess of Lansdowne (17 April 1901), in *The Venezuelan Arbitration before The Hague Tribunal, 1903,* Washington, 1905, pp. 481-482

Annex 31. Letters from Acting medical officer, northwestern district, to Government secretary (21 and 27 December 1901), in *The Venezuelan Arbitration before The Hague Tribunal, 1903,* Washington, 1905, pp. 526-527

Annex 32. Memorandum on existing causes of complaint against Venezuela (20 July 1902), in *The Venezuelan Arbitration before The Hague Tribunal, 1903,* Washington, 1905, pp. 608-613

Annex 33. Letter from Mr. Haggard to the Marquess of Lansdowne (30 June 1902), in *The Venezuelan Arbitration before The Hague Tribunal, 1903,* Washington, 1905, pp. 606-608

Annex 34. Letter from Mr. Eduardo Blanco to Mr. Grant Duff (27 March 1901), in *The Venezuelan Arbitration before The Hague Tribunal, 1903,* Washington, 1905, p. 470

Annex 35. Letter from General Pachano to Mr. Haggard (20 December 1901), in *The Venezuelan Arbitration before The Hague Tribunal, 1903*, Washington, 1905, pp. 524-525

Annex 36. Letter from Venezuela's Minister of Foreign Affairs, General Jacinto Regino Pachano, to the British Minister Resident, Mr. William Henry Doveton Haggard (24 March 1902), in *The Venezuelan Arbitration before The Hague Tribunal, 1903*, Washington, 1905, p. 351

Annex 37. Letter from Mr. R. Lopez Baralt to Mr. Haggard (16 July 1902), in *The Venezuelan Arbitration before The Hague Tribunal, 1903*, Washington, 1905, p. 622

Annex 38. Protest of Mr. Herbert W. Bowen, Agent for Venezuela, Against the Award submitted to the Secretary-General of the International Tribunal at The Hague (15 March 1904), in *The Venezuelan Arbitration before The Hague Tribunal, 1903*, Washington, 1905, pp. 140-141

Annex 39. Letter from Mr. Andueza Palacio to British Foreign Office (29 March 1900), United Kingdom, National Archives, Kew, FO 80/424

Annex 40. Ministerio de Relaciones Exteriores, *Tratados Públicos y Acuerdos internacionales de Venezuela: Volumen 3 (1920-1925)* (1927) (extract)

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Annex 43. Convenio de la Misión del Caroní (22 February 1922), in República de Venezuela, Ministerio de Justicia, Comisión Indigenista, Fuero Indígena Venezolano, Parte II: Periodo de la República (1811 a 1954), Texto No. 89

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