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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2026

Public sitting

held on Monday 4 May 2026, at 3 p.m., at the Peace Palace,

President Iwasawa presiding,

***in the case concerning* Arbitral Award of 3 October 1899**
(Guyana *v.* Venezuela)

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le lundi 4 mai 2026, à 15 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

***en l'affaire de la* Sentence arbitrale du 3 octobre 1899**
(Guyana c. Venezuela)

COMPTE RENDU

Present:	President	Iwasawa
	Vice-President	Sebutinde
	Judges	Tomka
		Xue
		Nolte
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
		Hmoud
		Okowa
	Judges *ad hoc*	Wolfrum
		Couvreur
	Registrar	Gautier

Présents : M. Iwasawa, président
M^me^ Sebutinde, vice-présidente
M. Tomka
M^me^ Xue
MM. Nolte
Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi
Hmoud
M^me^ Okowa, juges
MM. Wolfrum
Couvreur, juges *ad hoc*

M. Gautier, greffier

The Government of the Co-operative Republic of Guyana is represented by:

Hon. Hugh Hilton Todd, Minister for Foreign Affairs and International Cooperation,

as Head of Delegation;

Hon. Carl B. Greenidge, former Minister for Foreign Affairs and International Cooperation,

as Agent;

Ms Sharon Roopchand-Edwards, Permanent Secretary of the Ministry of Foreign Affairs and International Cooperation,

HE Mr Keith George, Ambassador, Adviser to the Minister of Foreign Affairs and International Cooperation,

as Co-Agents;

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comme membres de la délégation.

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The PRESIDENT: Please be seated. The sitting is open.

The Court meets this afternoon to resume hearing the first round of oral argument of Guyana on the merits in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*.

Je donne maintenant la parole à M. Alain Pellet. Vous avez la parole, Monsieur.

M. PELLET : Merci, Monsieur le président.

LA VALIDITÉ DE LA SENTENCE ARBITRALE

1. Monsieur le président, Mesdames et Messieurs les juges, nous sommes le 3 octobre 1899. C'est le jour où, il y a 127 ans, la sentence dont le Venezuela conteste aujourd'hui la validité a été rendue. C'est à cette date qu'il faut se placer pour comprendre son contexte, pour comprendre le droit applicable à cette institution, encore naissante, qu'était l'arbitrage international : c'était quelque chose entre le règlement juridictionnel tel que nous le connaissons et la négociation diplomatique. Comme l'écrivait Frédéric Passy en 1892, « l'arbitrage n'est pas encore une institution, "c'est un accident heureux" »[1].

2. Le modèle le plus abouti en était le fameux arbitrage de l'*Alabama*[2], mais la masse des précédents était constituée par les sentences rendues par des souverains choisis par les parties au différend ou par des commissions mixtes composées de représentants des États en cause, qui recherchaient une solution de compromis — comme celles instituées par le traité Jay conclu entre les États-Unis et la Grande-Bretagne en 1794 ou par celui entre les États-Unis et le Mexique de 1868[3]. Les sentences étaient souvent peu ou pas motivées. Le président du tribunal qui a rendu la sentence objet du différend soumis à la Cour, Friedrich Fromhold Martens (on a ajouté la particule « de » *ex post*), et ses coarbitres étaient profondément imprégnés de ces pratiques dans lesquelles on ne pouvait guère entrevoir de règles coutumières en dehors du caractère obligatoire de la sentence.

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[1] Frédéric Passy, *La question de la paix*, Conférence au familistère de Guise (avril 1891), cité par F. Dreyfus, *L'arbitrage international*, Calmann-Lévy, Paris, 1892, p. 294.

[2] *Réclamations des États-Unis d'Amérique contre la Grande-Bretagne relatives à l'Alabama*, sentence rendue le 14 septembre 1872 par le tribunal d'arbitrage constitué en vertu de l'article premier du traité de Washington du 8 mai 1871, *Recueil des sentences arbitrales (RSA)*, vol. XXIX, p. 125-134. Voir aussi, par exemple : D. Schindler, « Les progrès de l'arbitrage obligatoire depuis la création de la Société des Nations », *Recueil des cours de l'Académie de droit international de La Haye (RCADI)*, vol. 25, 1928, p. 241.

[3] Voir le traité d'amitié, de commerce et de navigation entre Sa Majesté britannique et les États-Unis d'Amérique (ou traité Jay), 19 novembre 1794, ou la convention entre les États-Unis d'Amérique et le Mexique — règlement des réclamations, 4 juillet 1868.

3. C'est dans ce contexte qu'elle a été rendue. Et il faut avoir cela à l'esprit car sa validité doit être appréciée à la lumière du droit de l'époque. C'est l'un des axiomes de base du droit international intertemporel tel que Max Huber l'a énoncé dans sa célébrissime sentence de l'*Île des Palmes*. Ce principe avait déjà été appliqué dans des sentences antérieures[4] et il l'a été fréquemment dans des décisions plus récentes[5] : « un acte juridique doit être apprécié à la lumière du droit de l'époque, et non à celle du droit en vigueur au moment où s'élève ou doit être réglé un différend relatif à cet acte »[6].

4. C'est à l'aune de ce principe qu'il faut apprécier les sept chefs d'invalidité de la sentence qu'invoque le Venezuela dans le chapitre V de la duplique avec autant de véhémence que de frivolité. Vous pouvez les voir sur vos écrans. M. Reichler a démontré ce matin l'inanité du premier de ces moyens fondés sur la prétendue invalidité du compromis de 1897. Pour ce qui concerne la sentence elle-même, j'éprouve quelque difficulté à voir comment on peut répondre séparément aux griefs vénézuéliens, formulés dans la section D et sous les chiffres 1, 2 et 5 de la section E : du fait que les arbitres n'ont pas motivé et n'avaient pas l'obligation de motiver leur sentence, la réponse à ces trois objections se trouve nécessairement dans celle à la question E.4 : c'est de la procédure qu'il a suivie, des délibérations entre ses membres et de l'attention qu'ils ont prêtée aux plaidoiries des parties que l'on peut déduire que le tribunal a parfaitement respecté son mandat. Quant au moyen E.3 — j'ai quelquefois un peu l'impression de jouer à la bataille navale —, je montrerai brièvement pour terminer que le tribunal n'a pas statué *ultra petita*.

I. L'absence de motivation de la sentence

5. Le Venezuela voit dans l'absence de motivation une cause d'invalidité et d'annulation qui se suffit à elle-même. Je dois dire qu'il est un peu lassant d'avoir à le répéter car la duplique n'apporte

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[4] Voir *Affaire des Grisbådarna (Norvège/Suède)*, sentence, 23 octobre 1909, *RSA*, vol. XI, p. 159 ou *The North Atlantic Coast Fisheries Case (Grande-Bretagne/États-Unis)*, sentence, 7 septembre 1910, *RSA*, vol. XI, p. 196.

[5] *Indo-Pakistan Western boundary (Rann of Kutch) between India and Pakistan*, sentence, 19 février 1968 ; *Spółdzielnia Pracy Muszynianka* v. *Slovak Republic*, PCA Case No. 2017-08/AA629, sentence, 7 octobre 2020, par. 264.

[6] *Île de Palmes (Pays-Bas/États-Unis d'Amérique)*, CPA, sentence, 4 avril 1928, p. 845 (traduction française de Charles Rousseau *in Revue générale de droit international public (RGDIP)*, t. XLII, 1935, p. 172 — texte anglais originel : *RSA*, vol. II, p. 845 ; « a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled ». Voir aussi mémoire du Guyana (ci-après, « MG »), par. 6.44, ou réplique du Guyana (ci-après, « RéG »), par. 3.12.

aucun élément nouveau, mais le doute n'est pas permis, ni le texte du compromis (**A**), ni aucune règle coutumière n'imposait qu'elle soit motivée (**B**).

A. Le compromis n'impose ni expressément, ni implicitement, que la sentence fût motivée

6. Il est patent que, à la différence d'autres compromis conclus à la même époque ou antérieurement, le traité de Washington, dont les dispositions sont, comme le Venezuela y insiste, « précises » et « détaillée[s] »[7] en ce qui concerne la substance du différend et la procédure à suivre, ne contient *aucune* disposition imposant au tribunal de motiver sa sentence.

7. Le Venezuela n'en tente pas moins de déduire de cette obligation « un certain nombre d'éléments caractéristiques » — ces soi-disant éléments caractéristiques ne sauraient emporter la conviction[8] :

— La composition du tribunal ? Oui, il s'agit de juristes ; et, s'il est exact que les sentences rendues à la fin du XIX^e^ siècle par des commissions mixtes sont plus nombreuses — mais pas unanimes — à être motivées que ne le sont celles émanant de chefs d'État, il est impossible de déduire une obligation coutumière de cette pratique inconstante.

— Le délai pour rendre la sentence ? Cette clause a été mécaniquement copiée sur celles, identiques, que l'on trouve dans les compromis de 1871 entre les États-Unis et la Grande-Bretagne concernant l'affaire *Halifax*[9] ou de 1892 entre les États-Unis et le Venezuela qui organisent la soumission des réclamations de la *Venezuela Steam Transportation Company* à la commission mixte entre le Venezuela et les États-Unis[10]. Il paraît donc fort hasardeux d'en tirer quelque conclusion que ce soit, d'autant plus que le délai était purement indicatif. Mais, qu'importent les arrière-pensées supposées, dès lors que les méthodes de travail du tribunal lui ont permis de s'acquitter de sa fonction.

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[7] Voir notamment DV, par. 5.125 5.139, 6.67, 6.94, 6.163, etc.

[8] RéG, par. 3.9-3.11.

[9] *Traité entre les États-Unis et la Grande-Bretagne*, 8 mai 1871, reproduit dans *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress with the Annual Message of the President*, December 4, 1871, Doc. No. 236.

[10] *Convention pour soumettre à l'arbitrage les réclamations de la Venezuela Steam Transportation Company*, 19 janvier 1892, reproduite dans H. La Fontaine, *Pasicrisie internationale 1794-1900 : histoire documentaire des arbitrages internationaux*, 1902, p. 420-422.

— La précision de la mission confiée aux arbitres ? Je vais y revenir. Pour l'instant, il suffit de constater qu'en dépit de la précision de la description de la tâche impartie au tribunal — d'une manière générale et tout particulièrement par les articles III et IV —, l'obligation de motiver n'y figure justement pas — malgré la précision générale de la fonction donnée au tribunal.

8. Cela dit, je remarque au passage que ces directives sont énoncées en termes permissifs comme le montrent les extraits surlignés de l'article IV du compromis dans la projection en cours. Et je me permets d'attirer votre attention en particulier sur le dernier membre de phrase, qui réunit en une même formule « la raison, la justice, les principes du droit international et les considérations d'équité propres à l'affaire ».

B. Il n'existait pas, en 1899, de règle coutumière imposant la motivation

9. Faute de texte conventionnel pertinent, le Venezuela affirme que le tribunal aurait dû motiver sa sentence en vertu du droit coutumier : selon « *le droit international applicable à l'époque* [, l]es arbitres étaient … soumis à une obligation générale de motiver la sentence »[11]. Je note au passage que le Venezuela reconnaît du même coup que c'est bien *au moment où la sentence a été rendue* qu'il faut se placer — ou peut-être même plutôt en 1897, quand le compromis a été signé. Nous sommes d'accord sur ce point, mais assurément pas sur le contenu du droit coutumier ni même sur son existence. La pratique antérieure — que nos contradicteurs négligent totalement — était partielle et inconstante et l'obligation de motiver n'était certainement pas « acceptée comme étant le droit » (**1**). Faute de pouvoir établir son existence par la pratique suivie durant le XIX^{e} siècle, le Venezuela se réclame de celle du siècle suivant[12] (**2**). Curieux concept je dois dire que celui de « pratique *ex post* »...

1) ***La pratique antérieure à la sentence du 3 octobre 1899***

10. Le cœur de la « démonstration » — si c'en est une — menée par le Venezuela se lit ainsi :

> « En somme, la sentence de 1899 fut rendue à une époque où l'obligation de motiver une décision arbitrale était *largement reconnue* par les États, et sur le fondement

[11] DV, par. 5.91.

[12] Voir contre-mémoire du Venezuela (ci-après, « CMV »), par. 6.19-6.20 et 6.78 ; DV, par. 5.103 et 6.90.

> d'un traité d'arbitrage dont les caractéristiques particulières *laissaient escompter* que le tribunal motiverait sa décision. »[13]

11. Alors, je ne veux pas me livrer à une glose de la prose de nos contradicteurs, mais je ne peux m'empêcher de rendre hommage à la relative prudence de cette affirmation : le devoir de motiver était « *largement* reconnu » et les circonstances de l'époque « *laissaient escompter* que le tribunal motiverait sa décision ». On est loin d'une affirmation carrée. Et c'est à raison.

12. Il est en effet manifeste qu'aucune pratique « suffisamment répandue et représentative, ainsi que constante »[14], susceptible d'établir l'existence d'une règle coutumière ne peut être identifiée à la date critique. Et c'est encore plus vrai s'agissant de l'*opinio juris*.

13. La sentence du 3 octobre 1899 est, à l'époque, loin d'être isolée. Vous trouverez dans vos dossiers, sous l'onglet n° 6.1, une liste, non exhaustive, des sentences non motivées ou dont la motivation est réduite à presque rien. Cette liste confirme le constat de Charles Rousseau : la motivation « ne s'est imposée qu'assez tard dans la procédure arbitrale internationale »[15].

14. Pour neutraliser ces très nombreux précédents, le Venezuela avance :

— Que certains sont très anciens[16] ; c'est exact mais ils n'en sont que plus significatifs : ils ont précédé la sentence de 1899, ils ont donné le « la », et ils ont inspiré la pratique postérieure.

— Que ces précédents émanent en partie de chefs d'État de pays tiers dont les raisons pour ne pas motiver pouvaient être particulières[17] ; c'est peut-être vrai aussi en partie mais ils n'en font pas moins partie d'une pratique, alors acceptée comme étant le droit, dont il résultait que la motivation des sentences arbitrales, pour utile ou souhaitable qu'elle puisse être, n'était nullement une condition de leur validité.

— Le Venezuela relève également que, dans certains cas, les compromis appelaient le tribunal à décider conformément aux principes de la justice et de l'équité[18] ; certes, mais avant l'adoption

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[13] DV, par. 5.95.

[14] Commission du droit international (ci-après, la « CDI »), Projet de conclusion sur la détermination du droit international coutumier, tel que reproduit dans *Annuaire de la Commission du droit international (ACDI)*, 2018, vol. II, deuxième partie, conclusion 8, p. 104.

[15] C. Rousseau, *Droit international public*, t. V, *Les rapports conflictuels*, Sirey, Paris, 1983, p. 348.

[16] DV, par. 5.98.

[17] CMV, par. 6.64.

[18] DV, par. 5.98.

du Statut de la CPJI — et comme l'attestent encore les travaux préparatoires à ce Statut[19] —, la séparation entre ces « principes » et « le droit international » n'était pas rigide. Le texte de l'article IV du compromis de 1897 et le libellé de plusieurs autres, mêlant ces diverses sources en un énoncé unique, témoignent de cette imprécision et de cette perméabilité[20].

— Toujours selon le Venezuela, parmi les sentences que nous avons citées, certaines devraient être exclues de la liste car elles seraient motivées[21] ; en les lisant, vous ne pourrez, Mesdames et Messieurs les juges, que convenir que les motivations y sont réduites à leur plus simple expression.

— Le Venezuela relève enfin que certains compromis prévoyaient expressément que les arbitres n'étaient pas appelés à motiver la décision[22] ; alors c'est inexact s'agissant de certaines des affaires que cite le Venezuela[23] ; et l'on doit plutôt en déduire *a contrario* que, en l'absence de telles mentions, la motivation n'était pas obligatoire. De même, le fait que d'autres compromis, antérieurs à 1899, prévoyaient expressément que le tribunal devait motiver sa décision doit être interprété comme signifiant que cela n'allait pas de soi[24].

15. Il est vrai que le Venezuela semble faire remonter l'obligation de motiver au projet de règlement adopté en 1875 par l'Institut de droit international[25]. Ce texte, qui était novateur à l'époque, implique très exactement le contraire de ce que nos contradicteurs veulent en déduire : il

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[19] Voir CPJI, Comité consultatif de juristes, *Documents présentés au Comité et relatifs à des projets déjà existants pour l'établissement d'une Cour permanente de Justice internationale*, 1920, p. 359 ; *Prises d'eau à la Meuse, arrêt, 1937, C.P.J.I. série A/B nº 70*, opinion individuelle du juge Hudson, p. 76. Voir aussi A. Pellet, *Recherche sur les principes généraux de droit en droit international*, thèse soutenue le 9 février 1974, p. 384 et suiv.

[20] Voir *Traité entre les États-Unis et la Grande-Bretagne*, 8 mai 1871, reproduit dans *Papers Relating to the Foreign Relations of the United States, Transmitted to Congress with the Annual Message of the President*, December 4, 1871, Doc. No. 236 ; *Convention pour soumettre à l'arbitrage des prétentions de Venezuela Steam Transportation Company*, 19 janvier 1892, reproduite dans H. La Fontaine, *Pasicrisie internationale 1794-1900 : histoire documentaire des arbitrages internationaux*, 1902, p. 420-422. Voir aussi l'*Affaire du chemin de fer de Lourenco Marques (Grande-Bretagne et États-Unis c. Portugal)*, sentence, 29 mars 1900, et *ACDI*, 1953, vol. I, p. 235.

[21] DV, par. 5.99.

[22] DV, par. 5.98.

[23] Voir, par exemple, les actes signés à Santiago, le 2 novembre 1898, convenant de tenir une conférence et une commission à Buenos Aires afin de tracer la ligne de démarcation dans la Puna d'Atacama, article IV, reproduit dans H. La Fontaine, *Pasicrisie internationale 1794-1900 : histoire documentaire des arbitrages internationaux*, p. 585-586.

[24] Voir, par exemple, les conventions d'arbitrage conclus par le Chili avec la France le 2 novembre 1882, article VI, et avec la Grande-Bretagne le 26 septembre 1893, article V (https://history.state.gov/historicaldocuments/frus1883/d46?ut_). Voir aussi *Convention between Great Britain and Nicaragua for the settlement of certain claims arising out of the disturbances in the Mosquito Reserve in 1894*, 1er novembre 1895 (https://history.state.gov//historicaldocuments/frus1896/d247?utm_).

[25] Voir CMV, par. 6.60, et DV, par. 5.89. Voir aussi Institut de droit international, *Projet de règlement pour la procédure arbitrale internationale*, session de La Haye, 1875.

s'agit non pas de la codification (qui de toute manière n'aurait été que doctrinale) d'une norme coutumière, mais *d'un vœu* que formule l'Institut sous forme de recommandation adressée aux États.

16. Selon le préambule, l'Institut,

> « *[d]ésirant* que le recours à l'arbitrage pour la solution des conflits internationaux soit de plus en plus pratiqué par les peuples civilisés, *espère concourir utilement à la réalisation de ce progrès en proposant*, pour les tribunaux arbitraux, le règlement *éventuel* suivant. Il le *recommande* à l'adoption entière *ou partielle* des États qui concluraient des compromis » (les italiques et le soulignement sont de nous).

L'article 23 dispose que « [l]a sentence arbitrale doit être rédigée par écrit et contenir un exposé des motifs *sauf dispense* stipulée par le compromis » (les italiques sont de nous). Et surtout, aux termes de l'article 24, « [l]a sentence, *avec les motifs s'ils sont exposés* — cela veut dire qu'ils pourraient ne pas l'être —, est notifiée à chaque partie » (les italiques et le soulignement sont de nous) — ce qui signifie clairement que l'Institut n'excluait pas la possibilité de sentences non motivées même s'il recommandait que l'on y renonce. Comme on l'a écrit quelques années plus tard, le projet de l'Institut était « un projet à consulter, "un règlement éventuel" »[26].

17. Bien sûr, Monsieur le président, je ne prétends pas qu'il existait, avant l'adoption de la sentence de 1899, une norme *excluant* la motivation des sentences arbitrales — ce serait contraire à l'idée même qui est à la base de l'institution arbitrale : l'autonomie de la volonté des parties contractantes. Mais ce que montre très clairement l'étendue des précédents que je viens de discuter, c'est qu'il n'existait pas non plus de règle coutumière imposant que la sentence soit motivée et faisant de l'absence de motivation une cause de nullité. Pour qu'une telle règle se forme, il est indispensable qu'« existe une pratique générale qui est acceptée comme étant le droit (*opinio juris*) »[27]. Une telle pratique n'existait pas en 1899 ; elle n'était évidemment pas « acceptée comme étant le droit ». Ce n'est qu'ensuite qu'elle s'est cristallisée pour devenir une obligation coutumière.

2) *L'affirmation progressive postérieure de l'obligation de motiver est sans effet sur la validité de la sentence*

18. Du reste, le Venezuela n'insiste pas : il abandonne très vite le projet de règlement de 1875 pour affirmer, en citant Castberg, que l'obligation de motiver fut « définitivement consacrée par le

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[26] F. Dreyfus, *L'arbitrage international*, Calmann-Lévy, Paris, 1892, p. 293.

[27] CDI, Projet de conclusions sur la détermination du droit international coutumier, conclusion 2 (Deux éléments constitutifs) ; voir l'article 38, par. 1 *b)*, du Statut de la Cour ou *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark ; République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 44, par. 77.

droit international positif en vertu de l'article 52 de la convention de 1899 pour le règlement pacifique des conflits internationaux »[28] — ce qui implique, *a contrario*, que la norme ne préexistait pas à la convention. On peut noter aussi que, à une exception près, « le droit positif » dont il est question ici — celui de la convention de 1899 —est purement conventionnel.

19. Cette exception — car il y a une exception —, rétroactive, lui est *postérieure* de plus de 60 ans. Selon le contre-mémoire, la Cour aurait « confirmé », dans son arrêt *de 1960* sur la *Sentence arbitrale rendue par le roi d'Espagne*, que « l'absence de motivation dans une sentence est une cause de nullité »[29], c'est ce que disent les Vénézuéliens. Comme Nilufer Oral le montrera tout à l'heure, la Cour ne fait rien de tel.

20. Quant à l'article 52 du règlement de l'Institut, il dispose en effet que « [l]a sentence arbitrale, votée à la majorité des voix, est motivée » ; mais il s'agit toujours d'un texte de développement progressif, disposant *pour l'avenir*, qui ne prétend pas codifier une règle existante. Et d'ailleurs, Castberg ajoute immédiatement (à propos de la sentence Cleveland dans l'affaire *Cerruti*) que l'« on ne pouvait pas encore, à l'époque où cette sentence fut rendue, à savoir en 1897 — c'est l'année de la signature du compromis pour nous —, considérer comme acquise au droit international positif la règle que les sentences arbitrales doivent être motivées »[30].

21. Dans la foulée de ce premier argument d'autorité qui se retourne contre lui, le Venezuela en a invoqué un autre, tout aussi imprudent : l'affirmation d'Augusto Pierantoni selon lequel « [l]es motifs en fait et en droit, s'ils sont une garantie exigée par la loi de procédure, sont *un besoin* de la société internationale »[31]. Cette citation est tirée d'une consultation rédigée par ce juriste italien à la demande du Gouvernement colombien, mécontent de la solution retenue par le président Cleveland dans cette même affaire *Cerruti*. Il s'agit d'un plaidoyer *pro domo en faveur* des avantages de l'arbitrage tel qu'il *devrait*, selon lui, être pratiqué, et il ne s'agit pas d'une démonstration de *l'existence* d'une norme de droit positif exigeant la motivation et faisant de son absence une cause

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[28] CMV, par. 6.60 citant Castberg, « L'excès de pouvoir dans la justice internationale », *RCADI*, vol. 35 (1931), p. 389.

[29] CMV, par. 6.62 ; voir aussi DV, par. 5.90.

[30] F. Castberg, « L'excès de pouvoir dans la justice internationale », *RCADI*, vol. 35 (1931), p. 389.

[31] A. Pierantoni, « La nullité d'un arbitrage international » (1898) 30, *Revue de droit international et de législation comparée*, p. 459, cité *in* CMV, par. 6.60 (les italiques sont de nous).

de nullité. Certes, la sentence fut ensuite soumise à révision, mais il fallut pour cela que les deux États concluent un *nouveau* compromis à cette fin[32].

22. Quant aux travaux préparatoires à la convention de La Haye de 1899, ils montrent certes que la position de Martens, qui était opposée à faire de la motivation un principe conventionnel, était sinon « marginale »[33] du moins minoritaire (et d'ailleurs il y a eu un vote), mais pas que les délégués à la conférence considéraient que la motivation était une obligation *déjà ancrée* dans le droit positif. Bien plutôt qu'aux yeux de la majorité elle était éminemment souhaitable, position d'ailleurs que Martens a partagée dans son principe[34].

23. La sentence qui est l'objet du différend n'est pas motivée parce qu'elle n'avait pas à l'être, ni en vertu du traité de 1897, ni en droit coutumier. Elle n'avait de ce fait rien de scandaleux, ni d'inhabituel, ni d'illicite. Est-ce que vous voulez vraiment, Mesdames et Messieurs les juges, ouvrir la porte à la remise en cause des sentences non motivées rendues tout au long du XIX^{e} siècle et inciter les parties perdantes, il y a plus d'un siècle, à demander des rejugements ? Je ne suis pas sûr que ce soit une très brillante idée…

II. La sentence du tribunal a été rendue conformément au compromis de 1897

24. Monsieur le président, dans la section E du chapitre V de sa duplique, le Venezuela impute à charge au tribunal arbitral cinq autres prétendus manquements à ses obligations qui seraient autant de motifs d'annulation pour excès de pouvoir. Ils sont pour l'essentiel des conséquences directes de l'absence de motivation et tombent de ce chef. Je vais cependant les analyser, en distinguant ceux qui reviennent à accuser le tribunal de n'avoir pas respecté le compromis faute d'avoir exercé la compétence qu'il leur conférait (**A**) du troisième qui, au contraire, consiste à lui reprocher d'être allé au-delà en statuant *ultra petita* (**B**).

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[32] *Affaire Cerruti (Colombie/Italie)*, sentence, 6 juillet 1911, *RSA*, vol. XI, p. 337-395.

[33] DV, par. 5.88.

[34] J. B. Scott, *The Proceedings of the Hague Peace Conference*, 1920, p. 740.

A. Il n'existait pas, en 1899, de règle coutumière imposant la motivation

1) ***Le tribunal a statué conformément aux articles III, IV et V du traité de Washington***

25. Monsieur le président, le tribunal a exercé sa compétence conformément à son statut. L'article III du traité de Washington fixe l'objet du différend ; l'article IV précise la manière dont celui-ci doit être réglé.

26. En application de l'article III, les arbitres ont

> « recherché et établi jusqu'où s'étendaient les territoires qui appartenaient respectivement aux Pays-Bas Unis et au Royaume d'Espagne, ou étaient susceptibles d'être *licitement* revendiqués par ceux-ci, au moment de l'acquisition par la Grande-Bretagne de la colonie de la Guyane britannique »[35].

À cette fin, les arbitres ont expliqué avoir « entendu et examiné les exposés oraux et écrits des conseils représentant respectivement Sa Majesté la Reine et les États-Unis du Venezuela » et examiné « de façon impartiale et attentive … les questions qui leur ont été soumises ». C'est exactement ce qu'ils ont fait. J'y reviendrai dans quelques instants.

27. Quant à prétendre que le tribunal aurait dû répondre séparément à la partie de la question concernant l'étendue du territoire d'une part et la détermination de la ligne frontière d'autre part, je me souviens qu'un jeune avocat avait essayé, en 1986, de persuader la chambre de la Cour constituée dans l'affaire *Burkina Faso/République du Mali* du bien-fondé de la distinction[36]. En vain : non sans bon sens, la chambre a considéré que — et je cite la chambre — « l'effet d'une décision judiciaire, qu'elle soit rendue dans un conflit d'attribution territoriale ou dans un conflit de délimitation, est nécessairement d'établir une frontière »[37].

28. À l'appui de son accusation d'excès de pouvoir, le Venezuela se fonde sur la célèbre décision du comité *ad hoc* CIRDI dans l'affaire *Klöckner* rendue en 1985, pour affirmer que les tribunaux ne sont pas appelés à « se borner à "postuler" » l'existence d'un principe, sans le démontrer[38]. C'est un raisonnement qui se tient peut-être mais qui est anachronique. Il revient à reprocher à la sentence de 1899 de n'être pas motivée ; or, comme je l'ai rappelé, elle n'avait pas à

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[35] Les italiques sont de nous.

[36] *Différend frontalier (Burkina Faso/République du Mali)*, procès-verbaux des audiences publiques, 1986, p. 69 (Pellet) ; voir aussi p. 46 (Salembere) et mémoire du Burkina Faso (3 octobre 1985), p. 65-72, par. 14-41.

[37] *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 563, par. 17.

[38] DV, par. 5.125, se référant à : « *Klöckner* v. *Cameroon*, Decision on Annulment, 3 May 1985, para. 79. 238-239 ».

l'être. Le raisonnement — si c'en est un — du Venezuela me rappelle ces fabulettes enfantines dont la dernière strophe renvoie à la première : « La sentence n'est pas motivée — le Venezuela prétend qu'elle est nulle — parce qu'elle n'est pas motivée — il est impossible de prouver qu'elle est nulle — parce qu'elle n'est pas motivée, etc. ».

2) *Le tribunal s'est prononcé en droit et en toute impartialité conformément au traité de Washington*

29. Monsieur le président, selon le Venezuela, au lieu de débattre des arguments juridiques présentés par les parties, « les arbitres ont pris une décision à la hâte » et le tribunal « a cru bon de trancher les diverses questions juridiques complexes dont il était saisi en moins de six jours, avant de prononcer une sentence dépourvue de motivation le 3 octobre 1899, en fin de matinée »[39].

30. Plus que la sentence elle-même, les retranscriptions des audiences tenues en 1899 et les témoignages écrits des membres du tribunal sur le déroulement de la procédure et des délibérations témoignent de l'attention qu'ont portée les arbitres aux titres revendiqués par les deux États.

31. Comme y insiste le Venezuela, les délibérations entre les arbitres sont intervenues après le dépôt de longs mémoires écrits et la présentation des plaidoiries orales des parties dans le cadre d'« "un long débat judiciaire"[40] étalé sur 56 audiences, qui ont donné lieu à 3 200 pages de transcription »[41]. Pendant ces longues journées passées à écouter les arguments de droit et de fait des parties, dans le respect total du principe du contradictoire, les arbitres ont eu amplement le temps d'échanger leurs impressions à leur sujet et ils l'ont fait. Les échanges entre les cinq membres du tribunal relatés dans la lettre de Lord Russell à Lord Salisbury du 7 octobre 1899, qui est résumée au paragraphe 8.44 de notre mémoire, sont un exemple emblématique, parmi d'autres, de l'existence et du sérieux de ces délibérations[42].

32. De nombreux autres éléments du dossier qui concernent le déroulement des audiences confirment pleinement que le tribunal a fidèlement appliqué le compromis. Les arbitres ont interrogé les parties sur les aspects juridiques et factuels de l'affaire à de multiples occasions durant les

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[39] CMV, par. 5.112-5.113.

[40] CMV, par. 5.112, note 515 ; H. Lauterpacht, « The Function of Law in the International Community », *British Contributions to International Law*, 1933, p. 149.

[41] CMV par. 5.112.

[42] Letter from Lord Russell to Lord Salisbury (7 Oct. 1899), *in* Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 126. MG, vol. III, annexe 36.

audiences[43]. Par exemple : sur l'application des règles contenues à l'article IV du compromis[44], sur les activités hollandaises et espagnoles dans la zone disputée[45], sur la date critique[46], sur le titre territorial[47] ou sur la prescription cinquantenaire[48].

33. Il ressort aussi du dossier que Martens était profondément soucieux d'aboutir à l'adoption d'une sentence unanime. Ce souhait, que critique âprement le Venezuela[49], n'avait (et n'a) rien de répréhensible.

34. À la date du 21 octobre 1899, Martens écrit dans son journal qu'il considérait qu'il avait « non seulement [le] droit, mais surtout le devoir moral, de mener de telles négociations pour obtenir une parfaite communauté de vues entre les arbitres et atteindre l'objectif ultime, une sentence arbitrale rendue à l'unanimité »[50]. Mais — et ce « mais » est très important — il n'a pas sacrifié pour autant les principes fondamentaux qui gouvernaient la procédure arbitrale : après s'être fait une opinion personnelle sur les faits et le droit applicable, il a recherché l'approbation de ses collègues[51].

35. Le journal de Martens[52] et l'interview du juge Brewer, l'un des arbitres américains nommés par le Venezuela, parue dans le *New York Times* du 5 octobre 1899[53], confirment que c'est bien ainsi que les choses se sont passées. Faute de temps, je ne peux pas commenter en détail les pages pertinentes de ces deux documents, mais ils sont fort importants. Nous les avons inclus dans les dossiers des juges (ils figurent aux onglets n^{os} 6.2 et 6.3). Je me permets, Mesdames et Messieurs de

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[43] Voir, par exemple, MG, par. 3.48, 8.47, 8.59-8.60 et 8.91, et DV, par. 3.20 et 3.51.

[44] *Boundary between the Colony of British Guiana and the United States of Venezuela*, Second Day's Proceedings (15 June 1899), MG, vol. IX, annexe 98, p. 18 ; voir, d'une manière générale, p. 17-21.

[45] Voir, par exemple, *Boundary between the Colony of British Guiana and the United States of Venezuela*, Third Day's Proceedings (21 Jube 1899), p. 100-115 (Brewer, Webster, Russel, Collins) et Fourteenth Day's Proceedings (13 July 1899), p. 818-827 (Russel, Webster, Harrison, Soley, Collins, Fuller).

[46] Sur la date critique, *ibid*., Twenty-Eighth Day's Proceedings (12 August 1899), p. 1750-1756 (Russel, Soley, Martens, Brewer, Harrison, Fuller, Collins).

[47] Sur le titre territorial (Martens) : *ibid*., Thirty-Second Day's Proceedings, p. 2025-2030 (Martens, Coley, Collins, Russel, Webster, Mallet-Prevost).

[48] Voir MG, par. 8.47-8.48.

[49] DV, par. 5.156.

[50] Private Diary Entries of Prof Fyodor Fyodorovich Martens (4 June 1899-3 October 1899), RéG, annexe 33, p. 11 de l'annexe.

[51] Voir Letter from Lord Russell to Lord Salisbury (7 October 1899) (MG, vol. III, annexe 36).

[52] Voir Private Diary Entries of Prof Fyodor Fyodorovich Martens (4 June 1899-3 October 1899), RéG, annexe 33, p. 9-12 (la traduction est de nous).

[53] « Judge Brewer's Opinion, Venezuela's Arbitrator Tells How the Verdict Was Reached », *The New York Times*, 5 October 1899.

la Cour, de vous engager à les lire attentivement : ces extraits montrent que chacun des arbitres s'était fait une opinion en droit et qu'ils se sont ensuite tous ralliés à la solution proposée par le président — d'assez mauvaise grâce pour ce qui est des deux membres anglais du tribunal, que l'on peut qualifier de minoritaires ; toutefois, ils ont tous signé la sentence sans protester. Le travail du tribunal a d'ailleurs été salué dans les derniers jours des audiences par Harrison, le *lead counsel* de la partie vénézuélienne, qui a félicité le tribunal pour avoir « *mené avec minutie cette longue enquête historique et* … retracé l'histoire *du titre des Pays-Bas et ... de celui de l'Espagne* [en] remontant jusqu'en 1814 »[54].

36. Ces mêmes arguments font justice du moyen que le Venezuela veut tirer de la violation de l'article V du compromis qui prévoit que les arbitres « procéderont à l'examen impartial et minutieux des questions qui leur auront été soumises ». En se fondant sur deux lettres[55], le Venezuela soutient que les conseils nommés par la Grande-Bretagne auraient communiqué de façon irrégulière avec les arbitres britanniques[56]. Ici encore, le Venezuela s'obstine à ignorer deux siècles d'évolution de l'arbitrage international qui restait, en 1899, influencé par la pratique des négociations diplomatiques[57]. Et la preuve en est du reste que, pour leur part, les conseils vénézuéliens ont rencontré les arbitres nommés par le Venezuela à l'issue des audiences et avant le rendu de la sentence[58]. Aujourd'hui de tels conciliabules seraient assurément mal vus (sans nécessairement entraîner, d'ailleurs, l'annulation de la sentence[59]), mais nous sommes obstinément en 1899.

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[54] Boundary between the Colony of British Guiana and the United States of Venezuela, Fifty Second Day's Proceedings (21 Sept. 1899), p. 3087 (General Harrison). MG, vol. IV, annexe 114 (la traduction est de nous).

[55] Letter from Sir Richard Webster to Joseph Chamberlain, 19 July 1899 (CMV, annexe 64) et Letter from Sir Richard Webster to Lord Salisbury, 19 July 1899 (CMV, annexe 63) auxquelles se réfère le Venezuela dans CMV, par. 6.155-6.156, et DV, par. 5.148.

[56] RéG, par. 3.60-3.64. Voir aussi DV, par. 5.150.

[57] Voir *supra*, par. 1.

[58] CMV, par. 5.111, et DV, par. 3.64-3.65.

[59] Voir, par exemple, *Methanex Corporation* v. *United States of America*, sentence finale sur la juridiction et le fond, CNUDCI, 3 août 2005, par. 58-60. Voir aussi *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, sentence partielle, 30 juin 2016, par. 177.

B. Le tribunal n'a pas excédé sa compétence

37. J'en arrive au dernier des moyens invoqués par le Venezuela à l'appui de son accusation d'excès de pouvoir selon lequel « [l]e tribunal a agi hors du cadre de sa compétence, en statuant sur des questions étrangères au traité de Washington » — autrement dit, il aurait statué *ultra petita*[60].

38. Je le dis d'emblée, nous sommes tout à fait conscients qu'un tribunal a le devoir de répondre aux demandes des parties telles qu'elles s'expriment dans le compromis — et c'est bien ce qu'a fait la sentence —, mais aussi celui de s'abstenir de statuer sur des points non compris dans ces demandes[61]. À cet égard également, le tribunal Martens s'est conformé aux exigences du droit de l'arbitrage. Cela est vrai qu'il s'agisse de la prétendue atteinte aux droits du Brésil (**1**) ou du régime des eaux des rivières Amakuru et Barima (**2**).

1) ***La prétendue atteinte aux droits du Brésil***

39. Monsieur le président, le Venezuela lit dans la sentence une décision portant atteinte aux droits du Brésil. Elle ne fait rien de tel.

40. *Primo*, il suffit de lire le texte de son unique paragraphe dans lequel figure le mot « Brésil » pour constater que le tribunal ne se prononce pas sur les droits de ce pays et qu'il prend même, au contraire, soin de les préserver :

> « [L]a ligne de délimitation est fixée par la présente sentence *sous réserve et sans préjudice* des éventuelles questions actuelles ou futures *qu'il reviendra au Gouvernement de Sa Majesté britannique et à la République du Brésil, ou à ladite République et aux États-Unis du Venezuela, de trancher* »[62.]

Le tribunal ne pouvait pas être plus clair : il n'a pas voulu statuer, et il n'a pas statué, sur les droits du Brésil.

41. *Secundo*, si le tribunal « a déterminé la frontière entre le Brésil et la Guyane britannique »[63], cela n'a porté atteinte aux droits ni du Brésil, ni du Venezuela. S'agissant du Brésil,

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[60] Voir CMV, p. 288-295, par. 6.138-6.142, et DV, p. 182-186, par. 5.133-5.143 et 6.46.

[61] Cf. *Demande d'interprétation de l'arrêt du 20 novembre 1950 en l'affaire du droit d'asile (Colombie c. Pérou), arrêt, C.I.J. Recueil 1950*, p. 402.Voir aussi *Barcelona Traction, Light and Power Company, Limited (nouvelle requête : 1962) (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 37, par. 49 ; ou *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 431, par. 88.

[62] Les italiques sont de nous.

[63] DV, par. 5.133.

il n'était pas partie à l'instance et la sentence est pour lui *res inter alios acta*[64]. Quant aux droits du Venezuela, ils sont intégralement préservés et il ne prétend d'ailleurs pas le contraire : les quelques développements pertinents de ses écritures sur cet aspect du différend[65] concernent la prétendue atteinte que la sentence aurait portée aux droits *du Brésil* et non à ceux du Venezuela — aucune *cause of action* donc.

42. *Tertio*, la sentence du roi d'Italie Victor-Emmanuel II rendue en 1904 en application du traité du 6 novembre 1901 entre la Grande-Bretagne et le Venezuela a du reste reconnu expressément que la sentence de 1899 « ne peut être opposée au Brésil, qui n'a pas été affecté par cette sentence »[66]. En outre, ultérieurement, durant les années 1920, les trois États ont conclu une série de traités précisant la délimitation de leurs frontières respectives[67] et, en 1932, ils ont fixé définitivement le tripoint sur la ligne retenue par la sentence de 1899 conformément à la demande insistante *du Venezuela* lui-même[68]. La professeure Oral y reviendra dans un instant.

2) *Licéité de la fixation du régime des eaux des rivières Amakuru et Barima*

43. Monsieur le président, le Venezuela soutient aussi que le tribunal aurait excédé sa compétence en fixant un régime de liberté de navigation sur les rivières Amakuru et Barima, toutes deux affluents du fleuve Orénoque.

44. Le passage pertinent est assez long. Il est en partie projeté à l'écran. Il en résulte qu'en temps de paix les deux rivières sont « ouvert[e]s[[69]] à la navigation des navires marchands de tous les pays » moyennant paiement de redevances et de droits de douane.

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[64] Voir, par exemple, *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), exception préliminaire, arrêt, C.I.J. Recueil 1952*, p. 109 ; *Différend territorial et maritime (Nicaragua c. Colombie), requête du Honduras à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II)*, p. 444, par. 72.

[65] Voir *supra* note 60.

[66] Sentence du 6 juin 1904, *The Guiana Boundary Case (Brazil v. Great Britain)*, *RSA*, Vol. XI, p. 22 (la traduction est de nous).

[67] Voir MG, par. 4.33-4.37 ; RéG, par. 4.63.

[68] Voir MG, par. 4.33 et 9.17 ; RéG, par. 4.58.

[69] Le Greffe, dont la traduction officieuse est précieuse, traduit l'anglais « rivers » par « fleuves ». Dès lors que ces cours d'eau se jettent dans le fleuve Orénoque et non directement dans la mer, le mot français « rivières » me semble plus approprié.

45. Les deux rivières, l'Amakuru et la Barima, ont toujours joué un rôle essentiel pour les transports et le commerce des populations des deux côtés de la frontière, car ils constituaient la seule voie d'accès à la mer.

46. Selon nos contradicteurs, le traité n'aurait pas autorisé le tribunal à se prononcer sur le régime de navigation de ces cours d'eau[70] et il est vrai que le compromis n'appelait pas expressément les arbitres à aménager le régime des cours d'eau frontaliers. Mais la règle *c)* énoncée à l'article IV les incite à aménager le *régime* frontalier puisque

> « *[s]i*, lors de la détermination du tracé de la ligne frontière, *le tribunal juge* qu'un territoire de l'une des Parties était, à la date de conclusion du présent traité, occupé par les sujets ou citoyens de l'autre Partie, *il sera donné à cette occupation l'effet qu'exigent selon lui la raison, la justice, les principes de droit international et les considérations d'équité propres à l'affaire* ».

Il n'est pas question ici de modification de la frontière mais de modifier, en équité, les effets humains négatifs que sa détermination pouvait avoir.

47. C'est d'ailleurs très exactement la position qu'avait prise *le Venezuela* dans sa plaidoirie écrite du 1er novembre 1898 devant le tribunal arbitral[71]. Cette plaidoirie aurait mérité une longue citation. Un petit extrait est projeté à l'écran — je ne sais pas si on arrive à le lire — mais le temps m'est compté et, ici encore, je me permets, Mesdames et Messieurs les juges, de vous renvoyer à ce que plaidaient alors les avocats du Venezuela. Nous en avons reproduit d'autres extraits à l'onglet no 6.4 de vos dossiers. C'est aussi très exactement ce que nous plaidons aujourd'hui : l'ajustement envisagé à l'article IV, règle *c)*, du compromis intervient *après que la frontière a été fixée*, non pas en tant que modification de son tracé, mais pour atténuer les inconvénients qui pourraient résulter du tracé pour les riverains, ressortissants de l'un ou l'autre État. Comme l'écrivaient aussi les avocats du Venezuela en 1898 : « *Le traité est muet* quant aux *modalités de l'ajustement auquel les arbitres devront*, le cas échéant, procéder aux fins de l'exécution de la règle *c)*. *Ce point est tout entier laissé à leur jugement et à leur discernement.* »[72]

48. Dans sa duplique, le Venezuela fait machine arrière et s'efforce de neutraliser cette interprétation pourtant irrécusable. Il y affirme que cette disposition « prévoyait de possibles

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[70] Voir notamment DV, par. 5.143.

[71] Voir MG, par. 8.52.

[72] *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. 56-57 (les italiques sont de nous).

ajustements du tracé de la ligne frontière eu égard à des facteurs spécifiques »[73]. C'est évidemment faux. Comme le Venezuela — le *Venezuela*, Monsieur le président — l'avait noté durant ses plaidoiries de 1898, une fois cette détermination faite (et il n'est pas question ici de la modifier mais d'en tirer les conséquences)

> « [s]e poserait *alors* la question de savoir comment, de la façon la plus juste tant pour l'État sur le territoire duquel ces colons se trouvent que *pour ces colons eux-mêmes*, *il pourrait être procédé à un ajustement des relations entre eux* ; il a donc été prévu dans le traité qu'*il incomberait au tribunal de procéder à l'ajustement définitif* »[74].

Cet ajustement porte non pas sur la frontière mais *sur les relations entre les deux États*, et doit intervenir au bénéfice des habitants. C'est exactement ce qu'ont fait les arbitres en prévoyant un régime spécial de navigation sur les eaux des deux rivières dans l'intérêt des nationaux des deux parties.

49. Pour surplus de droit, je rappelle que, quand bien même le compromis n'aurait pas énoncé la règle IV *c)*, rien n'aurait empêché le tribunal de procéder, en vertu de son pouvoir inhérent, à un tel ajustement dans l'intérêt des habitants des territoires en cause[75].

50. Au paragraphe 5.104 de sa duplique, le Venezuela s'enferme à nouveau dans un intéressant cercle vicieux. Il y écrit : « La sentence … ne permet en rien de savoir si ces dispositions ont été respectées. Il est ainsi impossible de déterminer si le tribunal a agi dans le cadre de son mandat et, partant, la sentence est nulle et non avenue pour cause d'excès de pouvoir. » Retour aux fabulettes enfantines…

51. On peut pourtant en sortir, Mesdames et Messieurs les juges :

— la sentence n'est pas motivée ;

— parce que le compromis ne l'impose pas et, lorsqu'elle a été rendue, il n'existait aucune règle non écrite l'imposant ;

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[73] DV, par. 5.139.

[74] *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, MG, annexe 134 (les italiques sont de nous). Voir aussi les échanges entre le représentant britannique, Sir Richard Webster, et Lord Russel, agissant en sa qualité d'arbitre, *ibid.*, Second Day's Proceedings (15 June 1899), p. 22.

[75] *Sentence du tribunal arbitral rendue au terme de la première étape de la procédure entre l'Érythrée et la République du Yémen (Souveraineté territoriale et portée du différend), décision du 9 octobre 1998, RSA*, vol. XXII, p. 329-330, par. 526. Voir aussi, *mutatis mutandis*, *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 117, par. 252 2) *b)*.

— s'il est vrai que l'obligation de motiver, devenue coutumière après l'adoption des conventions de La Haye et du fait de leur application, a sûrement constitué un progrès ;

— en l'espèce, l'abondant dossier soumis à la Cour, permet incontestablement de s'assurer de la validité de la sentence de 1899 au moment où elle a été prononcée ;

— dès lors, il ne peut faire de doute que le tribunal est resté dans les limites de sa compétence tout en résolvant aussi largement que possible le différend qui lui avait été soumis.

52. Si vous voulez bien lui donner la parole, Monsieur le président, ma collègue et amie, la professeure Nilufer Oral, montrera que ces conclusions s'imposent avec d'autant plus de force que le Venezuela, qui a accueilli positivement la sentence dès son prononcé, a laissé passer plus de 60 ans avant de s'aviser de sa prétendue nullité. Quant à moi, il ne me reste qu'à vous remercier de votre attention.

Le PRÉSIDENT : Je remercie le professeur Pellet. I now give the floor to Professor Nilüfer Oral. Madam, you have the floor.

Ms ORAL:

THE POST-AWARD CONDUCT

1. Mr President, distinguished Members of the Court. It is a great honour for me to appear on behalf of the Co-operative Republic of Guyana in these proceedings.

2. Today, I will address the six decades of conduct by Venezuela during which it freely accepted the validity of and meticulously complied with the 1899 Arbitration Award and the boundary established by the 1905 Boundary Agreement.

3. Mr President, my presentation will be in two parts. In Part 1, starting in 1899 through the early 1960s, a period spanning more than 60 years, I will present the numerous instances of Venezuela's constant and fully given acceptance of and compliance with the Award. There were no deviations, not a single one, throughout this period. In Part II, I will address the legal effects of this prolonged acceptance of and acquiescence to the 1899 Award and the 1905 Boundary Agreement.

I. Venezuela's contemporaneous acceptance and six decades of consistent conduct (1899-1962)

4. Mr President, I will now take us back in time and provide overwhelming evidence that between 1899 and 1962, Venezuela accepted and recognized the legal validity of the Arbitration Award. Indeed, at times, Venezuela insisted that the Award be implemented to the letter, and no matter how minor, refused to accept any alterations to the boundary as determined by the Award!

A. Immediate acceptance of the Award as final and binding (1899)

5. Venezuela accepted the Award as valid and binding from the moment it was issued on 3 October 1899. Venezuela celebrated the result as a victory, at least in part, because Venezuela had acquired the most valuable part of the disputed territory — the mouth of the Orinoco River, with the territory on both banks. This gave Venezuela control over the largest and most strategically and commercially important river on the north coast of South America. Venezuela's success and the importance of the area were underscored by its counsel, former US President Harrison and his co-counsel, Mr Mallet-Prevost, in statements published by *The Times*, on 4 October 1899, the day after the Award was issued:

> "Within the Schomburgk line lay the Amakuru river and Point Barima, the latter forming the southern entrance to the great mouth of the Orinoco. No portion of the entire territory possessed more strategic value than this, both from a commercial and a military standpoint, and its possession by Great Britain was most jealously guarded."[76]

6. Counsel continued highlighting the territory that the British had lost:

> "This in no way expressed the extent of Venezuela's victory. Great Britain had put forward a claim to more than 30,000 square miles of territory west of the Schomburgk line, and it was this territory which in 1890 Great Britain was disposed to submit to arbitration. Every foot of this territory had been awarded to Venezuela."[77]

7. Venezuela's Agent in the arbitration, Dr José Rojas, agreed with his counsel's assessment in a telegram to the Foreign Minister. That telegram is preserved and quoted in a message dated 7 October 1899 from Venezuelan Ambassador José Andrade, and states the following:

> "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

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[76] "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times* (4 Oct. 1899), p. 612.

[77] *Ibid.*

> junction of the Cuyuni and Wenamu. This gives us five thousand square miles east of the Schomburgk line. Arbiters and Counsel for Venezuela were brilliant."[78]

8. The reference to Point Barima and the coastline west of Point Playa shows the great importance that both parties attached to this territory. This was equally voiced by Ambassador José Andrade's letter of 7 October 1899, who in glowing words said: "Greatly indeed did justice shine forth when in the determination of the frontier we were given exclusive dominion over the Orinoco which was the principal aim we sought to achieve through arbitration."[79]

9. A press article from *Nouvelles de l'Étranger* quoted similar satisfaction with the Award from the President of Venezuela, Mr Ignacio Andrade, dated 11 October 1899 saying: "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" [80].

10. While Venezuela's reactions to the 1899 Award included some disappointment at not receiving a greater share of the disputed territory, this does not equate to challenging the Award as being invalid or void. Venezuela never challenged the legality or the validity of the 1899 Arbitral Award for the next 62 years.

11. Venezuela's failure to challenge the legality of the Award for 62 years is especially prejudicial to its current claim that the Award is invalid. Each and every one of the challenges to the Award Venezuela now makes in these proceedings were available to it since October 1899. Yet, during the next six decades Venezuela did not make any of these claims.

12. Let's take them one at a time, as they appear in Venezuela's Rejoinder. *The first reason* invoked for the Award's alleged invalidity is that "it was rendered on the basis of an invalid treaty". Mr Reichler showed you this morning that Venezuela's arguments against the validity of the 1897 Treaty of Washington are entirely unsustainable. Venezuela could not help but be aware of each of these alleged deficiencies in the Treaty at the time it was being negotiated, agreed and ratified. Yet, neither in 1897 nor in 1899 did Venezuela give voice to any of these allegations. Nor did it do so for another 60-plus years.

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[78] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 Oct. 1899), p. 1. MMG, Vol. II, Annex 3.

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

[80] « Nouvelles de l'Étranger : Venezuela », *Le Temps* (11 Oct. 1899) (Translation of Guyana).

13. *Second*, Venezuela argues that the Award is invalid "because the Tribunal failed to state the reasons on which it was based"[81]. Professor Pellet has amply demonstrated that this is not a valid basis for challenging an arbitral award issued in 1899. This point is also raised in a very telling report dated 4 May 1900 — exactly 126 years ago from today — prepared by Dr Rafael Seijas[82]. Dr Seijas, an international lawyer and former Foreign Minister who was also a member of the committee tasked with examining the wording of the 1897 Treaty which conferred jurisdiction on the Court, in fact expressly advised Venezuela that there were no grounds for challenging the Award, including the absence of reasons. Plainly and clearly, Venezuela knew in 1899, at the moment of issue, that the Award did not include a statement of reasons. Yet Venezuela chose not to complain about this or challenge the Award on that basis for over 60 years.

14. *Third*, Venezuela argues that the arbitral tribunal manifestly exceeded its power, in particular, by failing to respond to all the questions put to it, failing to apply the applicable law, deciding matters outside the scope of its competence, failing to act impartially, *and* failing to issue a decision based on law. Here again, Professor Pellet addressed these issues. Importantly for present purposes, all these alleged shortcomings of the Award would have been obvious to Venezuela upon its first reading. And the facts show that for the next six decades none was invoked as a basis for challenging the Award.

15. Venezuela argues in these proceedings that it only *first* acquired evidence of the purported legal defects in the 1899 Award *after* the 1949 publication of the Mallet-Prevost memorandum[83]. This is plainly untrue. It is entirely contradicted by the evidence. Every one of the challenges Venezuela now makes to the validity of the Award is based on facts that were known to Venezuela *at the time* the Award was issued in October 1899, or very shortly thereafter. One example, among many that could be offered, on 22 October 1900, Venezuela's Minister for Foreign Affairs wrote to Venezuela's Commissioner on the joint Boundary Commission that the 1899 Award was "more the result of a compromise than of an essentially judicial examination", and that the boundary established

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[81] RV, Chapter V.D.

[82] Report of Counsellor Dr Rafael Seijas (4 May 1900), p. 189. MMG, Vol. IV, Annex 66.

[83] RV, paras. 27, 6.73.

by the Award was "a line *de facto*, determined without any support or reason"[84]. That was more than 61 years before Venezuela first challenged the Award on these grounds.

B. Affirmation Through Implementation: The 1900–1905 Demarcation and Boundary Agreement

16. Mr President, Venezuela did more than to fail to protest or challenge the validity of the 1899 Award; in fact, it positively endorsed the Award and insisted on strict compliance with it. As much as Venezuela would like to discount the relevance of its conduct during the five-year demarcation period between 1900 and 1905 as merely a technical exercise, the 1905 Agreement is a legally binding treaty that represents years of collaborative hard work between the representatives of British Guiana and of Venezuela which Venezuela willingly and freely signed. As detailed in Guyana's pleadings, soon after the delivery of the 1899 Award, Venezuela and Great Britain established a Joint Boundary Commission. Now, today, more than one century later, Venezuela would have us believe that it was coerced into participating in the boundary demarcation by Great Britain. The evidence offered is that Great Britain refused Venezuela's request to delay the start of the work responding that it, Great Britain, would start demarcation without Venezuela. Venezuela's current argument, in its Rejoinder, that it was "forced to endure against its will the line described in the 1899 Award" simply does not hold up against the facts. Indeed, it was Venezuela that first insisted, in a letter from its Foreign Minister, Mr Andueza Palacio, to the British Foreign Office dated 29 March 1900 — less than six months after the arbitral award was issued — that the demarcation of the boundary was "a matter of such importance" and that "it is mutually beneficial to proceed in all that concerns the sentence of October 1899, by concerted and simultaneous action" [85]. How can Venezuela now argue, with any credibility, that it was forced to engage in the boundary demarcation against its will?

17. Between 1900 and 1905, the joint Venezuela-British Boundary Commission engaged in the demarcation of the 825 km-boundary. During this time there was not a single utterance from Venezuela expressing any objection, reservation or concern about the boundary being demarcated.

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

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

To the contrary, the Venezuelan members of the joint Boundary Commission — who reported directly to the Venezuelan Ministry of Foreign Affairs — worked with great commitment and meticulous care to comply with the 1899 Award.

18. When the work of the joint Boundary Commission ended, Dr Tirado, the Venezuelan Chief Commissioner, reported to the Foreign Ministry: "I am personally very proud of being able to present a plan of the outcome of our work which, considering the very unfavourable conditions under which our various journeys were made, is wonderfully accurate."[86]

19. On 10 January 1905, a formal and official international agreement was concluded on the location of the entire land boundary between British Guiana and Venezuela. Dr Tirado, who signed the 1905 Agreement, described the demarcation as an "honourable task": "The honourable task is ended, and the delimitation between our Republic and the Colony of British Guiana an accomplished fact."[87]

20. The evidence shows that Venezuela fully and willingly participated in the five-year long demarcation process and freely and consensually signed the final 1905 Boundary Agreement. There is no evidence to the contrary. Indeed, just months after the signing of the Boundary Agreement, Venezuela's Foreign Minister, in his annual address to the Congress on 23 May 1905, voiced his "satisfaction" that the territorial dispute with Great Britain had been finally resolved:

> "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."[88]

21. There is simply no evidence that the Foreign Minister felt coerced to make this very positive statement that the dispute with Great Britain had been resolved. Venezuela then went on to further affirm its acceptance of the boundary by duly recording the 1905 Agreement in the official record of the Ministry of Foreign Affairs of Venezuela, with no reservations[89].

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

[87] *Ibid*.

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

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

C. Venezuela's insistence on strict conformity with the Award

22. On the other hand, there is abundant evidence, Mr President, that, in the course of demarcating the boundary, Venezuela was very strict in ensuring that the boundary followed the 1899 Award. It refused to accept any modifications to the boundary as described in the Award, even in cases when Venezuela's own Chief Boundary Commissioner, Dr Tirado, advised it would be to Venezuela's advantage.

23. For example, in October 1905, Venezuela rejected a British proposal for the replacement of the circuitous portion of the boundary line conforming to the watershed between the Orinoco and the Essequibo Rivers — as provided for by the Award, with the straighter Venamo River. Although the proposal was supported by Dr Tirado, the Government of Venezuela rejected the proposed deviation from the Award[90]. The fact that Venezuela felt free to reject Britain's request further counters its claim of so-called "structural coercion".

24. An incident that took place in 1911 further evidences Venezuela's insistence that the boundary strictly follow the 1899 Award. When a boundary marker near the Atlantic Coast was swept away by the sea, Venezuela insisted that the new marker

> "must be placed at the precise site in which the boundary line between the two countries out the new coast which was fixed in the year nineteen hundred in accordance with the award signed at Paris the 3rd of October 1899 by the Mixed Commission Anglo-Venezuelan"[91].

25. As the Court can now see on its screens, that same year, 1911, Venezuela published a Physical and Political Map of its territory. As shown in the enlarged map, the map follows the boundary established by the 1899 Award and as drawn by the 1905 Agreement. Also, the legend clarifies that this map was commissioned and signed by the then President of Venezuela, General Juan Vicente Gomez, on the occasion of the Centennial of Venezuela's independence[92]. This is but one of many official Venezuelan maps, issued over decades, that consistently gave effect to the 1899 Award, a record we will examine with you today.

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

[91] Letter from General Juan Vicente Gomez, President of the United States of Venezuela (1 Feb. 1911). MMG, Vol. III, Annex 52.

[92] MMG, fig. 4.6.

D. Venezuela's insistence on strict conformity with the Award

26. For decades on Venezuela continued to respect the line fixed by the 1899 Award and implemented by the 1905 Agreement. For instance, on 22 February 1922, the Venezuelan Ministry of Home Affairs entered into an agreement with the Caroní religious mission, which established the territory where the Mission would be responsible for the "civilization and evangelization" of tribes[93]. The limits of the Mission's territory were established in accordance with the boundary as decided by the 1899 Award and enshrined in the 1905 Boundary Agreement[94].

27. Venezuela continued to freely affirm that boundary. In 1926, Brazil and the United Kingdom agreed that their boundary lay "where Venezuelan territory commences . . . on the said Roraima mountains", as established by the 1899 Award and the 1905 Boundary Agreement[95]. There was no protest from Venezuela to this agreement between Brazil and Great Britain. As shown by subsequent events, it was quite the contrary: *first*, only two years later, in 1928, President of Venezuela, Juan Vicente Gómez, re-commissioned the production of an official Physical and Political map of the country. As shown in the enlarged image on your screen, that map implemented, again, the line of the 1899 Award and the 1905 Boundary Agreement[96].

28. *Second*, and most importantly, the following year, 1929, Venezuela implemented *that same* boundary in its frontier delimitation with Brazil, as shown by the text of that agreement projected on your screens: "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"[97].

29. This was explicit recognition of the fact that the frontier between Venezuela and British Guiana had already been determined.

30. Another compelling example is while fixing the tri-junction point, it became apparent that the boundary marker installed by the Venezuelan-British Guiana Boundary Commission in 1904 had

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[93] *Convenio de la Misión del Caroní* (22 February 1922), art. 1. RG, Vol. III, Annex 43.

[94] *Ibid.*, art. 2. RG, Vol. III, Annex 43.

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

[96] MMG, Figure 4.8.

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

been placed on the edges of Mount Roraima, not on its summit, as mandated by the 1899 Award. The British suggestion to maintain this 1904 marker was rejected by Venezuelan Foreign Minister Pedro Itriago Chacín. In his reply on 31 October 1931, he demanded the re-establishment of the marker as mandated by the 1899 Award. In his message, he described that boundary as a "frontier de droit"[98]. And he explained that "[the] Venezuelan government regret that for constitutional reasons they are unable to depart from the letter of the award"[99]. The British ultimately acceded to the Venezuelan position.

31. Thus, that same year of 1931, the marker on your screens of the tri-junction point between Brazil, Venezuela and British Guiana was established exactly where this point was placed by the 1899 Award.

32. The following year, on 3 November 1932, the Venezuelan Foreign Minister provided yet another statement, now expressing satisfaction with the placement:

> "The Government of the Republic has noted with satisfaction that His Majesty's Government has decided to accept the Venezuelan proposal that the boundary in question should be a straight line drawn from the source of the Wenamu river to the point of trijunction on Mount Roraima of the frontiers of Venezuela, British." [100]

33. Five years later, in 1937, the official map of Venezuela was once again updated. As shown on your screens, that update continued to depict the border with neighbouring British Guiana *in accordance* with the 1899 Award and the 1905 Boundary Agreement[101].

34. The following year, in November 1939, the Venezuelan Ministry of Promotion published a map of the Venezuelan state of Bolivar, which borders Guyana. This map also implements the frontier of the 1899 Award and the 1905 Boundary Agreement[102].

35. Moving on, as you can see on your screens, in 1940, Venezuela's Ministry of Public Works and its National Cartography Directorate prepared the *Atlas of Venezuela*, which likewise reflected

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

[99] *Ibid*.

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

[101] MMG, Figure 4.9.

[102] RG, Figure 4.1.

the boundary as determined by the 1899 Arbitral Award and implemented through the 1905 Boundary Agreement[103].

E. Venezuela's confirmation of the Award's validity after World War II and through 1962

36. In the post-World War II period, as Great Britain began to prepare British Guiana for independence, there was no suggestion from Venezuela that the 1899 Award or the 1905 Boundary Agreement were legally invalid, or null and void. To the contrary, Venezuela continued to accept and recognize the binding authority of the Award and the Agreement.

37. Indeed, in 1945, Venezuela adhered to the map presented by the United Nations upon its creation. The map clearly follows the border of the 1899 Award and the 1905 Boundary Agreement, as shown on your screens[104].

38. Two years later, in 1947, Venezuela produced two different official maps, again implementing the same frontier. *First*, the Physical and Political map shown on your screens[105]. *Second*, the index map of Venezuela's landing sites, now on your screens[106].

39. Shortly thereafter, and of great relevance, in 1948, Venezuela's Congress promulgated the Organic Law of the Federal Territories[107]. Article 5 provided that "The Delta Amacuro Federal Territory" of Venezuela "is formed by the region found within the following boundaries: the Gulf of Paria and the Atlantic Ocean to the north, the Atlantic Ocean and British Guyana to the east, as defined by the Border Treaty between Venezuela and Great Britain"[108].

40. In the following year, 1949, the infamous Mallet-Prevost memo was published by the *American Journal of International Law*. Professor Sands will address that memo in some detail. The point I want to make is that nothing in that memo altered the Venezuelan Government's consistent position on the legality of the 1899 Arbitral Award or the 1905 Boundary Agreement. Indeed,

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[103] MMG, Figure 4.10.

[104] MMG, Figure 4.12.

[105] MMG, Figure 4.13.

[106] RG, Figure 4.2.

[107] United States of Venezuela, *[Ley orgánica de los Territorios Federales] Organic Federal Territories Law* (14 Sept. 1948), Article 5. MMG, Vol. IV, Annex 89.

[108] *Ibid.*

Venezuela continued throughout the following decade to regard them as legally valid and binding. This is clearly reflected in the official maps it published during this period.

41. I will take you through them. *First*, in 1950, right after the publication of the Mallet-Prevost memorandum article, it published not one, not two, not three, but four different, official maps, all incorporating the 1899 Award "to the letter".

(a) The first one, on your screens, is yet another official Physical and Political map of Venezuela[109].

(b) The second, now on your screens, is a geological map published by Venezuela's Ministry of Promotion[110].

(c) The third map depicts the eastern natural resources of Venezuela and was published by its Ministry of Mining and Hydrocarbons[111].

(d) The fourth and final one is a mining and geological map of the Venezuelan state of Bolivar, published again by its Ministry of Mining and Hydrocarbons[112].

42. Again, all these maps faithfully implemented the 1899 Award.

43. Venezuela continued to implement this Award throughout the 1950s. In 1955, Venezuela published an updated version of its Physical and Political map, the one commissioned in 1911, and updated in 1928, 1937 and in 1950. As in its previous four iterations, this map implemented *again* the frontier of the 1899 Award[113]. The following year, in 1956, the Ministry of Public Works published a "Map of the Republic of Venezuela", again depicting the boundary of the 1899 Award[114]. Four years later, the same Ministry maintained that same boundary in another "Map of the Republic of Venezuela" published in 1960[115].

44. Mr President, Members of the Court, as you are well aware, two years later, in 1962, Venezuela voiced for the first time its legal challenge to the validity of the Arbitral Award. Yet, that

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[109] MMG, Figure 4.14.

[110] RG, Figure 4.3.

[111] RG, Figure 4.4.

[112] RG, Figure 4.5.

[113] MMG, Figure 4.15.

[114] MMG, Figure 4.16.

[115] MMG, Figure 4.17.

same year of 1962, Venezuela published another "Map of the Republic of Venezuela", which respects the 1899 Award[116].

F. Official cartography as continuous State practice (1911-1962)

45. Mr President, we have shown to the Court through a period of decades, multiple official statements of Venezuela recognizing and expressing satisfaction with the 1899 Award, as well as clear and consistent conduct demarcating and defending the boundary drawn in accordance with the Award. We have presented to you at least 16 official Venezuelan maps spanning the period from 1911 to 1962, all showing the boundary between Venezuela and British Guiana exactly following the line described in the 1899 Arbitral Award and as demarcated in the 1905 Boundary Agreement. We have looked for official maps showing a different boundary. We have found none. Not a single one. Certainly, there are none in Venezuela's pleadings in this case. If they have found one since the filing of their Rejoinder last August, and if it is admissible in evidence as a readily available publication, we look forward to seeing it on Wednesday.

46. In Guyana's view, the consistent depiction of the international boundary on Venezuela's official maps as conforming strictly to the 1899 Arbitral Award and the 1905 Boundary Agreement, over a period of at least 61 years, should be given considerable weight by the Court. In its jurisprudence, the Court has paid particular regard to such maps.

47. In the case concerning the *Temple of Preah Vihear (Cambodia* v. *Thailand)* the dispute centred on a particular map which depicted a boundary line produced by a mixed boundary commission established between France and Siam in 1904 which placed the Temple of Preah Vihear in Cambodian territory. Thailand's failure to challenge the validity of the map until 1958 — some 54 years later, despite opportunities to do so, was a determining factor for the Court[117]. The Court found it significant that Siamese and Thai officials continued to produce the map showing the Temple of Preah Vihear on Cambodian Territory all during this time, without placing any reservations or notations on these maps challenging the boundary[118]. The same could be said for Venezuela between

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[116] MMG, Figure 4.18.

[117] *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 27.

[118] *Ibid.*, p. 29.

1911 and 1962, which could have included a reservation or notation on its official maps — but never did so.

48. Based on the consistent conduct of Siamese and Thai officials for more than five decades, in the Temple of Preah Vihear case, the Court explained as follows:

> "[L]ooked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to negative this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line."[119]

II. The legal consequences of Venezuela's prolonged acceptance and acquiescence

49. I come now to Part II of my presentation, on the legal consequences of Venezuela's consistent, open, clear and freely given recognition and acceptance of the validity of the 1899 Arbitral Award and 1905 Boundary Agreement for more than 60 years, between 1899 and 1962.

A. The *King of Spain* case: recognition and preclusion after acceptance

50. The consistent conduct of a State, including by its highest officials, over a period of years, can produce legal consequences. One of the leading cases is *Arbitral Award Made by the King of Spain on 23 December 1906*[120].

51. That case is factually and legally similar to the current case and thus of particular relevance here. As in the present case, in 1906, Honduras and Nicaragua had by treaty submitted a disputed part of their boundary to arbitration. The outcome of the 1906 Arbitration Award favoured Honduras. However, it was not until 1912, when, for the first time Nicaragua challenged the validity of the Award — and only after decades of failed negotiations did the case reach the Court in 1960 through agreement by the Parties.

52. Briefly, Nicaragua challenged the validity of that arbitral award for reasons similar to those invoked by Venezuela. In particular, Nicaragua claimed that the arbitrator exceeded his jurisdiction, that he committed essential error, and that he provided inadequate reasons to support his conclusions.

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[119] *Ibid.*, pp. 32-33.

[120] *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 192 (hereinafter the "*King of Spain* case").

53. Honduras defended the arbitral award based on the conduct of Nicaragua which until 1912 had accepted the award as valid[121]. Nicaragua responded, much like Venezuela, claiming that it was unable to challenge the award earlier because it had been "unaware" of the award's defects at the time it was issued, and for six years thereafter. This argument failed.

54. This Court ruled that

> "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."[122]

55. While no case will be identical on all points, the *King of Spain* case is nearly identical in the relevant aspects. With one notable difference: in the *King of Spain* case, the time between the arbitral award and Nicaragua's challenge to its validity was just six years, whereas in our case the time gap is more than 60 years — ten times longer. Venezuela's failure to challenge the 1899 Award thus produces legal consequences. By 1962, it was too late for Venezuela to make a viable legal challenge on grounds known to it for more than six decades.

56. In its more candid moments, Venezuela itself recognized the weakness of its argument. The same Foreign Minister who asserted the first formal challenge to the 1899 Award in February 1962, Dr Falcón Briceño, wrote that existing jurisprudence would "oppose a situation of this kind" — namely a challenge to an award whose validity had already been long accepted. He therefore suggested proceeding *ex aequo et bono*[123]. In other words, Venezuela itself recognized that, under applicable international law, its claim could not succeed.

57. In these proceedings, Venezuela has conjured up a new argument to avoid the legal reality that for over 60 years it has accepted, applied and acquiesced in the 1899 Award. Venezuela now contends that the 1966 Geneva Agreement gave it a new right to challenge the 1899 Award it had clearly supported during those six decades. That is not a persuasive argument. By the 1966 Agreement Great Britain and Guyana only recognized that Venezuela claimed (since 1962) that the 1899 Award was a nullity. It did no more than that. It certainly did not address the substance of

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[121] *King of Spain* case, p. 210.

[122] *Ibid.*, p. 213

[123] Dr Marcos Falcón Briceño, *"Orígenes de la Actual Reclamación de la Guyana Esequiba" (1981)*, p. 58. RG, Vol. III, Annex 25.

Venezuela's claim, or the grounds on which Great Britain and Guyana could oppose it, or Venezuela's right to raise it 60 years later. It is now for the Court to determine whether Venezuela is precluded from challenging the validity of the Award on the same bases it could have asserted in 1899 or at any time shortly thereafter — or 60 years later. The Geneva Agreement did not revive a right that had long been lost. It did not create a new right.

B. Independent validity of the 1905 Boundary Agreement

58. Mr President, it is Guyana's submission that both the 1899 Award and the 1905 Agreement are fully valid and that no grounds exist for challenging the legal validity of either. However, we should underscore that the 1899 Award and the 1905 Boundary Agreement are two legally distinct juridical acts, and any possible defect affecting the validity of one of them has no bearing on the validity of the other. As stated by the arbitral tribunal in the *Laguna del Desierto* case, between Argentina and Chile: "A decision on a frontier dispute and its demarcation are two distinct acts, each of which has its own legal force."[124]

59. Venezuela has not disputed — and could not dispute — the validity of the 1905 Agreement, which has stood as a valid treaty for more than 115 years. In any event, by 1962 and pursuant to the principle reflected in Article 45 of the Vienna Convention on the Law of Treaties, Venezuela had lost the right to invoke any grounds for invalidating the 1905 Agreement because of its prolonged acceptance not only of the Award but also, and particularly, of the 1905 Agreement itself.

60. Moreover, as a boundary agreement, the agreed boundary has a life independent of the treaty. As the Court explained in its 2007 ruling on preliminary objections in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*,

> "it is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed" [125].

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[124] *Case concerning a boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, United Nations, *Reports of Arbitral Awards (RIAA)*, Vol. XXII, p. 24, para. 67 (*Laguna del Desierto*).

[125] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 832, p. 861, para. 89.

61. Venezuela's failure to challenge the Boundary Agreement and the boundary it established for 57 years between 1905 and 1962 constitutes its acquiescence and results in its forfeiture, under Article 45 *(b)* of the Vienna Convention on the Law of Treaties, of any right to challenge their validity.

62. Venezuela cannot avoid these consequences by arguing that it is not a party to the Convention. In *Somalia* v. *Kenya*, the Court held

> "that under customary international law, reflected in Article 45 of the Vienna Convention, a State may not invoke a ground for invalidating a treaty . . . if, after having become aware of the facts, it must by reason of its conduct be considered as having acquiesced in the validity of that treaty"[126].

63. Mr President, in conclusion, the evidence is resoundingly clear that from the very instant when the 1899 Award was delivered some 127 years ago — until 1962, Venezuela constantly accepted, recognized, complied with and insisted on strictly following the Award. It was well aware of any possible grounds for challenging the award. As much as Venezuela now denies this, its officials repeatedly expressed their satisfaction and depicted the outcome as a victory having gained the most valuable part of the disputed territory, the mouth of the Orinoco River.

64. Mr President, Members of the Court, this is the end of my presentation. I thank you for your courtesy, and I ask that you invite Guyana's next speaker, Professor Philippe Sands KC, to the podium, but perhaps after a coffee break.

The PRESIDENT: I thank Professor Oral. Before I give the floor to the next speaker, the Court will indeed observe a break of 15 minutes. The hearing is suspended.

The Court adjourned from 4.30 p.m. to 4.45 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite Professor Philippe Sands to address the Court. You have the floor, Sir.

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[126] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 3, p. 24, para. 49.

Mr SANDS:

THE MALLET-PREVOST MEMORANDUM

1. Mr President, Members of the Court, it is truly an honour for me to appear in this case on behalf of Guyana, a case that is of such importance for this country.

2. I am going to address the document that has come to be known as the Mallet-Prevost memorandum. The story of this document is so fantastical it could rather feature in a novel by Gabriel García Márquez, or an opera by Verdi. And the document is, of course, to a very great extent, the basis for Venezuela's contention of the nullity of the 1899 Award, first evoked only in 1962. Yet the memorandum's origin — and its purpose — are shrouded in uncertainty and mystery. Indeed, even its very existence is open to question.

3. Two things are clear. First, the memorandum is not an accurate or reliable account of events relating to the 1899 Arbitration. And second, it provides no support whatsoever for Venezuela's claim that the 1899 Award is a nullity. As I will show, far from being a true and authoritative account, the memorandum is simply a mishmash of unreliable anecdotes, a farrago of entirely groundless speculation and outlandish allegations about a so-called illicit Anglo-Russian "deal", one that is said to have been secretly conceived, and then consummated, during the Arbitration.

4. The memorandum purports to describe events that occurred in 1899, during the conduct of the proceedings. Yet it was apparently written almost half a century later, and it took even longer to see the light of day and be made vaguely public. It was said to have been created in the mid-1940s by a partisan author, a lawyer who purported to recount events and conversations which had allegedly taken place more than four decades earlier, and who — for reasons known only to himself — insisted that the memorandum and its contents must remain secret until after his death. It is a most curious document, replete with demonstrable inaccuracies and devoid of any credible or corroborated new information about the Arbitration. In short, it is about as far from an independent and reliable account of events as it is possible to get.

I. The origin of the Mallet-Prevost memorandum

5. Before addressing its content, let me say something about its origins. The story begins — or maybe it is more accurate to say ends — in July 1949, when an article appeared in the *American*

Journal of International Law by an American lawyer named Otto Schoenrich, who happened to be a retired partner of the Curtis, Mallet-Prevost law firm[127]. Mr Schoenrich's article purported to recite the contents of a document supposedly produced five years earlier, in 1944, by one Mr Severo Mallet-Prevost.

6. Some 45 years earlier, Mr Mallet-Prevost had been a member of Venezuela's legal team at the 1899 Arbitration in Paris. Prior to that Arbitration, he had spent several years as the Secretary to the US President Grover Cleveland's Commission on the Boundary Between Venezuela and British Guiana. As a young lawyer, Mr Mallet-Prevost had spent years studying, developing and advocating Venezuela's territorial claims in respect of the Essequibo region.

7. In later life, Mr Mallet-Prevost became a partner in the same American law firm as Mr Schoenrich. And, according to Mr Schoenrich's article, in February 1944 Mr Mallet-Prevost produced a memorandum which purported to recount certain experiences and impressions of the 1899 Arbitration. Now that document was allegedly "found among his papers" following his death in December 1948. And it was supposedly accompanied by an instruction that it not be made public while Mr Mallet-Prevost was still alive. After his death, Mr Schoenrich, by unexplained means, somehow obtained the memorandum from Mr Mallet-Prevost's archives, and then submitted an article to the *American Journal of International Law* which purported to posthumously publish the text of the memorandum. It is a sort of groundhog day here: last year I appeared before you in a case concerning a treaty that no one could find or had seen, this year it is a document that no one could find or had seen.

8. One of the many curious features of the supposed memorandum is that the *only* evidence that exists about it is in the article written by Mr Mallet-Prevost's former colleague in 1949. The original memorandum has never been located or produced or seen by any other human being. Indeed, apart from Mr Schoenrich, no one has seen this memorandum. It has disappeared without a trace — assuming it ever existed at all. There is no evidence before this Court to show that the supposed document might have been anything other than a figment of Mr Schoenrich's fertile imagination. Nor is there any explanation whatsoever as to why Venezuela waited 13 years before the outing of

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[127] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 523. MMG, Vol. III, Annex 1.

the supposed memorandum, in 1949, before it did anything at all. As Professor Oral has said, throughout those 13 years between 1949 and 1962, Venezuela continued faithfully to accept, respect and apply the Award and the 1905 Agreement that drew the boundary. It did not act on the memorandum, nothing.

9. Notwithstanding this behaviour, Venezuela now places great weight on a supposed memorandum that no living person has ever seen; that is said to have been written 82 years ago; and which claims to describe alleged events that occurred 127 years ago.

10. Nevertheless, and we would say, improbably, Venezuela asserts in its Rejoinder — without any caveat — that the memorandum "is the first eyewitness testimony of the unlawful process leading to the 1899 Award"[128]. And it asserts that it was only because of the publication of the memorandum that what it calls "the 'inner history' of the 1899 Award came to light"[129]. Those are its words. The memorandum, in Venezuela's words, "reveals . . . what until then was only assumed: that the 1899 Award had nothing to do with an award based on the application of international law"[130]. According to Venezuela's Counter-Memorial, "[t]he Mallet-Prevost Memorandum of July 1949, in disclosing a 'fait nouveau', changed everything"[131]. In other words, they seem to be saying, but for this memorandum, we would not be here gathered today.

11. Since Venezuela places so much reliance on the memorandum, my speech will proceed on the assumption, but it is only that, that the memorandum somehow existed and that its contents were as described in the 1949 article. But since the original has never been located or produced, that is only an assumption; it is not an admission. In the 77 years since the publication of the 1949 article, the existence and authenticity of the supposed memorandum have never been corroborated, and it is highly doubtful that they ever will be.

12. But let us assume, hypothetically, that the memorandum did exist, what do we know about its origins and purpose? The answer is: very little. The text of the so-called memorandum itself says nothing whatsoever about why or in what circumstances it was created. In the 1949 article,

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[128] RV, p. 225.

[129] RV, para. 6.71.

[130] *Ibid.*

[131] CMV, para. 7.25.

Mr Schoenrich claims that, following a conversation about the 1899 Arbitration with Mr Mallet-Prevost in early 1944, Mr Schoenrich had urged Mr Mallet-Prevost to produce a written account of the matters they had discussed, and that his colleague had subsequently done this. Note, there is no indication of any verbatim record, any contemporaneous notes or anything like that. Beyond Mr Schoenrich's brief words, however, there is no evidence whatsoever about why Mr Mallet-Prevost suddenly decided, in February 1944 — at the age of 84, and just four years before his death[132] — to supposedly put pen to paper.

13. Nor does the memorandum offer any insight as to why Mr Mallet-Prevost was apparently unwilling for the matters described in the memorandum to be made public during the remaining four years of his life. His reluctance to publicly stand by the claims in the memorandum is striking; it is unexplained, and inferences can be drawn.

14. One thing we do know, however — amazing coincidence — is that just one month before he purportedly wrote the memorandum in February 1944, Venezuela had conferred its highest national award on him: the Order of the Liberator. That decoration, personally presented to Mr Mallet-Prevost by Venezuela's President in January 1944, was bestowed in recognition of his services as a "long-standing . . . friend and adviser"[133] to Venezuela.

15. In the words of Venezuela's Ambassador to the United States, the honour recognized "the high estimation in which the Venezuelan people hold and will always hold" Mr Mallet-Prevost, "to whom Venezuela owes a long-standing debt"[134]. According to Mr Schoenrich's 1949 article, the decoration was specifically conferred on the gentleman "in recognition of his services in connection with the boundary dispute"[135].

16. In the absence of any explanation from Mr Mallet-Prevost about what prompted him, in February 1944, to produce the memorandum, it is difficult to escape the reasonable inference that it might somehow have been connected to his receipt of that prestigious Venezuelan accolade just a

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[132] See Obituary of Mr Mallet-Prevost, *New York Times*, 11 December 1948. Available at https://www.nytimes.com/1948/12/11/archives/-vialletprevost-legal-leader-88-lawyer-a-founder-of-the-pan-i.html.

[133] Speech by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944). MMG, Vol. II, Annex 9.

[134] *Ibid*.

[135] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 526. MMG, Vol. III, Annex 1.

few weeks earlier. What is certain is that Mr Mallet-Prevost was, throughout his life, a loyal servant of Venezuela, whose commitment to Venezuela's territorial claims was celebrated and recognized with Venezuela's highest civilian honour. As a senior official in the British Government noted shortly after Venezuela first raised its contention of nullity in the early 1960s, the Mallet-Prevost memorandum represents "an aged lawyer's flights of fancy" produced while "he was suffering from the immediate after-effect of the receipt of a high Venezuelan decoration"[136]. This is a colourful description but, we would say, it is apt.

17. As a dedicated servant of, and advocate for, Venezuela, Mr Mallet-Prevost was no doubt disappointed that Venezuela had not been awarded even more territory by the 1899 Award. Indeed, in a December 1899 letter, from Mr Olney to US President Grover Cleveland, the writer described Mr Mallet-Prevost as being consumed by "intense wrath and bitterness of soul at the course and decision of the Arbitral Tribunal"[137]. There is no indication that Mr Mallet-Prevost's wrath and bitterness about the Award subsequently diminished.

18. But on any view, it cannot seriously be disputed that the supposed memorandum was not written by a man who can be said to have been independent of Venezuela or impartial, if indeed it was ever written at all. On the contrary, he was an impassioned, devoted, lifelong friend, servant and advocate for Venezuela.

II. The inaccurate and unreliable contents of the memorandum

19. Whatever its true provenance, one thing about the supposed Mallet-Prevost memorandum is crystal clear: on its own terms it is not — and cannot be treated as — an accurate and reliable account of events. Indeed, the memorandum contains numerous factual inaccuracies.

20. I will just limit myself to one glaring example. The supposed memorandum describes how Mr Mallet-Prevost attended a dinner in London in January 1899, during which he spoke with Lord Russell about international arbitration. According to the memorandum, Lord Russell told Mr Mallet-Prevost that "international arbitration should . . . take into consideration questions of

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

[137] Extract from letter from Richard Olney to President Grover Cleveland (27 December 1899) quoted in Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 43. CMV, Vol. III, Annex 150.

international policy" rather than being determined exclusively on legal grounds. The memorandum goes on to state — you will be able to now see it on the screen — "*[f]rom that moment I knew* that we could not count upon Lord Russell to decide the boundary question on the basis of strict rights"[138].

21. Now, there is a little problem with the timing of this memorandum: at the date of the alleged dinner and the conversation between Mr Mallet-Prevost and Lord Russell, in January 1899, Lord Russell had no connection with the Arbitration concerning the boundary between Venezuela and British Guiana. The two British arbitrators appointed to the Arbitral Tribunal under the Treaty of Washington were Lord Herschell and Lord Justice Collins. If Lord Russell had been an arbitrator, perhaps —but not even necessarily — there may have been some interest in some words he may have said. But he was not an arbitrator. He was not a participant in the Arbitration at that time.

22. It was only after Lord Herschell's unexpected and untimely death following an accident in March 1899 — two months after the supposed dinner conversation recounted in the memorandum — that Lord Russell was appointed to the Tribunal in place of the late Lord Herschell. At the date of Mallet-Prevost's conversation with Lord Russell in January 1899, Lord Russell had no role in the Arbitration, and no one — including Mr Mallet-Prevost — could have had any reason to imagine that he might become involved. It follows that the claim in the memorandum that, "[f]rom that moment" Mr Mallet-Prevost knew Venezuela could not rely upon Lord Russell to determine the boundary question based on strict rights is a claim which cannot be true.

23. Shortly after the publication in 1949 of Mr Schoenrich's article, a British researcher and official, Clifton Child, undertook a detailed analysis of the claims contained in the memorandum. Child's critique was published in the *American Journal of International Law* in 1950. It is blunt and it is scathing on the accuracy of the memorandum's supposed claims. As Child notes, it was "sheer nonsense for Mr Mallet-Prevost to suggest that, from the moment when he dined with the Lord Chief Justice in January [1899], he knew that he could not count upon the latter to be fair"[139].

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

[139] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 684. MMG, Vol. III, Annex 3.

24. Child's 1950 article identified this as but one of several "major errors" in the memorandum[140]. Child identified various "misstatements of fact in Mr Mallet-Prevost's narrative which also show how badly his memory must have served him"[141]. Pause: he was 84 years old at the time he supposedly wrote the memorandum. These included, for instance, inaccuracies regarding the timing and duration of the Tribunal's hearings and its recesses. Through a careful examination of the facts, Mr Child's article — which is well worth reading (you can find it at tab 8.1 of your folders) — lays bare the complete unreliability of the memorandum on its own grounds and provides a comprehensive rebuttal of the claims set out in it.

III. The memorandum's claim of a secret Anglo-Russian "deal"

25. The most serious allegation in the supposed memorandum is that during the Arbitration proceedings, Great Britain and Russia somehow struck a secret "deal" concerning the outcome of the Arbitration, which the President of the Tribunal, Mr Martens, and the two British arbitrators then conspired to foist upon the two hapless Americans. The memorandum claims that during a recess in August 1899, "the two British arbitrators returned to England and took Mr Martens with them", and that it was during that visit that Russia and Great Britain concluded a secret deal regarding the outcome of the Arbitration.

26. So, a reasonable person asks themselves the question: what is the evidence in the memorandum in support of a pretty serious charge? The answer is: nothing. There is nothing. Well, not quite nothing. What is there? What there is, is Mr Mallet-Prevost's belief that following that break in the Arbitration there was what he called a "noticeable" change in the demeanour of one of the two British arbitrators, Lord Justice Collins.

27. Writing in 1944, Mr Mallet-Prevost claimed to recall that, prior to that recess, Lord Justice Collins had asked "numerous questions . . . which were critical of the British contentions and gave the impression that he was leaning toward the side of Venezuela". After the recess, however, Lord Justice Collins "asked very few questions and his whole attitude was entirely different from what it had been". This alone is what led Mr Mallet-Prevost to believe that "something must have

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[140] *Ibid.*, p. 683.

[141] *Ibid.*, p. 685.

happened in London to bring about the change". He surmised that the change in Lord Justice Collins' demeanour could only be explained on the basis that, "during Martens' visit to England[,] a deal had been concluded between Russia and Great Britain to decide the case along the lines suggested by Martens and that pressure to that end had in some way been exerted on Collins to follow that course"[142].

28. It is a bit like me watching you very closely over the course of a hearing, and noticing that one of you is sitting slightly differently, and that is all I have got. It is hopeless. There is no evidence before the Court to support that contention. Not a shred. Nothing at all. Mr Mallet-Prevost's claim of a secret Anglo-Russian deal is a concocted fantasy. The suggestion that two of Great Britain's most senior judges and one of the world's foremost international jurists secretly colluded to force a political deal on two of the most senior judges from the United States is completely unsupported by evidence and (to put it mildly) inherently improbable. Indeed, Venezuela only belatedly invokes, in the Rejoinder, a passing line in one biographical entry claiming that Lord Collins "successfully defend[ed] the interests of the Foreign Office in [the] boundary dispute" with Venezuela[143]. But even taken at its highest, this line says nothing about a sudden change in Lord Collin's demeanour, or his conduct during the Arbitration, or a supposed "deal" with Russia.

29. There is no documentary or other evidence to support this extraordinary allegation. The absence of any documentary corroboration is confirmed by a painstakingly researched biography of Professor Martens produced by the eminent Russian international lawyer Vladimir Pustogarov. Pustogarov explains that,

> "in working with the archival materials of the Russian Ministry of Foreign Affairs connected with Martens' activity, *not the slightest trace was discovered of a 'deal' between England and Russia* or that Martens, the President of the Tribunal, received instructions regarding the case from his own Government. On the contrary, the diary entries of Martens testify that he acted in the arbitral tribunal autonomously and independently. *They contain no indications at all of the 'deal' ascribed to him.*"[144]

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[142] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *The American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 530. MMG, Vol. III, Annex 1.

[143] RV, para. 6.65.

[144] Vladimir Vasilevich Pustogarov & William E. Butler, Our Martens — F.F. Martens, International Lawyer and Architect of Peace (Kluwer Law International, 2000), pp. 210-211 (emphasis added). Available at https://peacepalace.on.worldcat.org/oclc/1062360873.

30. It is a similar conclusion as that reached by Mr Child back in 1950, in his meticulously researched critique of the claims made in the Mallet-Prevost memorandum. Mr Child explained that his research had established that,

> "in the fifteen bound volumes of British Foreign Office papers relating to the arbitration and in the almost equally voluminous dispatches and telegrams which passed between London and St. Petersburg during this period[,] *there is not one single document which by the widest stretch of the imagination could be considered to indicate a 'deal' between Great Britain and Russia* of the sort suspected by Mr Mallet-Prevost"[145].

31. Beyond that, the allegation is totally inconsistent with the contemporaneous records produced by some of the arbitrators during the proceedings. For instance, Professor Martens himself described in his private diary how the two British arbitrators:

> "were apparently angry that 1) under my influence they had to waive something that . . . they considered already belonged to them and 2) that due to the unanimity which I persistently demanded they had to make concessions to the Americans"[146].

32. Professor Martens' contemporaneous diary entries describe the extent to which he successfully persuaded the British arbitrators to make *concessions* which would result in Great Britain receiving substantially less territory than the British arbitrators considered it should receive. For example, Professor Martens described how, during the Tribunal's intensive deliberations, Lord Russell "waived his line, ceding a significant area to the Venezuelans. Further to the south, after my question, he again waived what he demanded"[147]. These are not the words of a man intent on colluding with the British arbitrators to impose a preordained outcome on Venezuela, one that overwhelmingly favoured Great Britain at the expense of Venezuela.

33. The memorandum's claim that Professor Martens and the British arbitrators travelled to England during the August 1899 recess is also unsupported by any evidence. As Guyana explained in its Memorial[148], throughout the Arbitration proceedings the press reported on the movements of members of the Tribunal. Yet although there were reports that Lord Russell had travelled to England during the recess when the "deal" was said to have been made, there is no report or record of either

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[145] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 687. MMG, Vol. III, Annex 3 (emphasis added).

[146] *Private Diary Entries* of Professor Fyodor Fyodorovich Martens (4 June 1899-3 Oct. 1899), p. 10. MMG, Vol. III, Annex 33.

[147] *Ibid.*, p. 11.

[148] MMG, Vol. I, para. 8.88.

Lord Justice Collins or Professor Martens having made a trip to England during that recess. It is therefore unlikely that they did so. In fact, none of the five August 1899 entries in Professor Martens' diaries mention any trip to London; the entry for 15 August 1899 confirms that he was in France and the 27 August 1899 entry records him as heading to The Hague to sign the acts of the first Peace Conference[149].

34. Nor is there any evidence to support a sudden change in the attitude of Lord Justice Collins after that recess. Venezuela acknowledges in its Rejoinder that the memorandum's claim about a change in the attitude of Lord Justice Collins is based exclusively on Mr MalletPrevost's recollection in 1944, that it is nothing more than "impressions"[150], supposedly formed 45 years earlier and never forgotten. Those "impressions" are not supported by any facts. As Mr Child explained, a detailed analysis of the record of the oral proceedings shows no appreciable change in either the frequency or the nature of Lord Justice Collins' interventions before and after the recess[151]. Mr Mallet-Prevost's "impressions" about a change in Lord Justice Collins' demeanour are — we submit — a figment of a partisan imagination.

35. Apart from these points, the claim of a secret Anglo-Russian deal is very hard to square with the state of diplomatic relations between Russia and Great Britain in 1899. As a result of the Transvaal crisis, in southern Africa, which culminated in the outbreak of the Second Boer War in October 1899, tensions were running high and the relationship between Great Britain and Russia was under intense strain throughout that year[152]. Against this backdrop, the suggestion that these two countries might have entered a secret deal regarding the outcome of the 1899 Arbitration is — we say — fanciful. As Mr Child explained:

> "Had Mr Mallet-Prevost reflected for a moment upon the state of relations between Great Britain and Russia in the summer of 1899 he must inevitably have realized how difficult, if not impossible, from a political point of view, a 'deal' between the two countries would have been."[153]

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[149] Private Diary Entries of Prof. Fyodor Fyodorovich Martens (4 June 1899-3 October 1899), pp. 5-8. MMG, Vol. III, Annex 33.

[150] See RV, para. 6.65.

[151] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 685. MMG, Vol. III, Annex 3.

[152] See MMG, Vol. I, para. 8.90.

[153] Clifton J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899", *American Journal of International Law*, Vol. 44, No. 4 (1950), p. 688. MMG, Vol. III, Annex 3.

36. Finally, the claim of a secret Anglo-Russian deal cannot be reconciled with the outcome of the Arbitration. As you know, the Award determined that the mouth of the Orinoco River belonged to Venezuela. This was an outcome which, in the words of the Mallet-Prevost memorandum itself, "gave to Venezuela the most important strategic point at issue"[154]. The day after the Award was delivered, Mr Mallet-Prevost and former US President Benjamin Harrison publicly emphasized that "[n]o portion of the entire territory possessed more strategic value . . . both from a commercial and a military standpoint" as the mouth of the Orinoco River[155]. Professor Oral has already taken you through this text. A similar sentiment was expressed by none other than Venezuela's Foreign Minister on 7 October 1899, when he declared: "Greatly indeed did justice shine forth when in the determination of the frontier we were given the exclusive dominion over the Orinoco which was the principal aim we sought to achieve through[out] the arbitration."[156]

37. The suggestion that Russia and Great Britain hatched a secret deal to illicitly benefit Great Britain, but which awarded the most prized strategic asset of all to Venezuela, is hardly persuasive.

38. While the allegation of a secret Anglo-Russian deal is outlandish, it is also instructive — for it starkly demonstrates the unreliability of the claims made in the memorandum, which contains much by way of speculation and nothing by way of substance. It is long on fantasy and short on facts. It lay dormant for 13 years after its publication. In the years since 1962, Venezuela has used it repeatedly to generate heat and smoke, but no light and no illumination.

IV. The alleged meeting between Mr Mallet-Prevost and the American arbitrators during the Tribunal's deliberations

39. And that brings me to the claims in the memorandum regarding the meeting which is said to have taken place between Mr Mallet-Prevost and the two American arbitrators while the Tribunal was deliberating. According to the memorandum, Mr Mallet-Prevost was called to meet with the two American arbitrators, who told him that the British arbitrators were inclined to rule that the boundary

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[154] Otto Schoenrich, "The Venezuela-British Guiana Boundary Dispute", *American Journal of International Law*, Vol. 43, No. 3 (July 1949), p. 530. MMG, Vol. III, Annex 1.

[155] "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times* (4 Oct. 1899), p. 6. Available at https://tinyurl.com/y2nx9mj8.

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

followed the Schomburgk Line, but that Professor Martens was "anxious to have a unanimous decision; and if we agree to accept the line which he proposes he will secure the acquiescence of Lord Russell and Lord [Justice] Collins and so make the decision unanimous". The memorandum alleges that the American arbitrators asked for Mr Mallet-Prevost's "advice" on whether they should agree to Martens' proposal. According to Mr Schoenrich's account, Mr Mallet-Prevost then consulted with Venezuela's lead counsel, former President Harrison, before advising the American arbitrators that Venezuela's position was that they should concur in the proposal[157].

40. The account of these alleged discussions between Mr Mallet-Prevost, a counsel, and the two American arbitrators, is uncorroborated. It finds no support in the accounts of the Tribunal's deliberations given by either of the American arbitrators, or in any other documents. The notion that someone of that age could recall, verbatim, sequences said to have been spoken half a century earlier is, to say the least, improbable.

41. It is also instructive to note that, in the aftermath of the Arbitration, Mr Mallet-Prevost apparently made statements on the Arbitration with which the American arbitrators did not agree. A letter from Secretary of State Olney dated 6 March 1901, for example, records that

> "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*."[158]

42. But there is even more: even if the claim about the discussions between Mr Mallet-Prevost and the American arbitrators was true, and even if the words were accurate, it would provide no support for Venezuela's contention of nullity. Allow me to highlight two points.

43. First, there is nothing irregular about the description of the Tribunal's discussions and deliberations. The fact the Tribunal's deliberations involved a series of mutual concessions and compromises facilitated by the President will hardly come as a surprise to anyone involved in international judicial or arbitral work, still less an irregularity. As any international judge or international arbitrator knows, discussion, negotiation, compromise, give-and-take are the hallmarks of judicial adjudication. That is especially so where the matter to be determined is not one that

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

[158] Letter from Mr Olney to Mr Cleveland (6 March 1901). RG, Vol. III, Annex 28 (emphasis added).

involves a binary yes/no outcome, but rather a matter — such as the drawing of an international boundary line — with innumerable possible permutations. There is nothing unusual about a panel of arbitrators initially holding diverging views on the correct outcome of a case, before ultimately coalescing around one outcome, following a process of discussion, negotiation, compromise, usually brokered by the tribunal's chair or president. That is, we would say, the very essence of a collegial approach.

44. Second, even if the alleged exchanges between Mr Mallet-Prevost and the American arbitrators did happen in the way described in the memorandum — and there is no evidence before you that they did — it does not lie in Venezuela's mouth to complain about them. The alleged exchanges took place between arbitrators appointed *on behalf of Venezuela* and counsel *instructed by Venezuela* to represent and argue *Venezuela's case* at the Arbitration. According to the memorandum, those two arbitrators wanted to know *Venezuela's preferred outcome*. Having obtained that information from Venezuela's lawyer, the arbitrators appointed on behalf of Venezuela then allegedly proceeded to act in accordance with *Venezuela's stated preference*. There is nothing in the memorandum, no suggestion, that the arbitrators appointed by Great Britain, or the British lawyers representing Great Britain, were party to any of these discussions.

45. In these circumstances, we submit it is simply not open to Venezuela to argue that the alleged but uncorroborated communications between Mr Mallet-Prevost, one of its own counsel, and the two American arbitrators, who they appointed, vitiate the validity of the 1899 Award. There is no suggestion by Venezuela that Mr Mallet-Prevost acted contrary to Venezuela's interests or without its authority.

46. Nor is there any suggestion that the American arbitrators acted against Venezuela's interests. On the contrary, the memorandum claims that they acted consistently with Venezuela's wishes and endorsed an Award which gave Venezuela the most prized asset of all. It follows that even if the alleged conversations between those arbitrators and Mr Mallet-Prevost happened as described in the memorandum — and there is no evidence before you that they did — this could not affect the validity of the Award.

V. Conclusion

47. I turn to my conclusions. Ever since Venezuela first claimed nullity in 1962, it has placed great weight on the Mallet-Prevost memorandum. But even a cursory analysis of its claims makes clear that the document simply cannot bear the weight which Venezuela seeks to place upon it. As a source of credible evidence about what happened at the 1899 Arbitration, the value of the supposed document is zero. If you were to conclude otherwise, you would be opening the door to more mischief in the future.

48. I will not be around in 44 years, but hopefully my colleague Mr Craven — who you will hear from shortly — will still be around. Imagine him writing an analogous memorandum in 2070, alleging a conversation with one of you in this case, which is later found in his papers, after his death, and then causes one of his colleagues to write a law review article, a more junior colleague from his chambers, and more than a decade later, at some point in the 2080s, that memorandum is relied upon by Guyana to come back to this Court, to seek to reopen whatever judgment you will give in this case. I am sorry, but that is an absurd scenario. But that is what they are arguing. That is what Venezuela relies on today.

49. What will Venezuela say on Wednesday about a memorandum said to have been produced almost half a century after the conversation, meetings and impressions which it purports to describe? What on earth is Venezuela going to say about a supposed document that may — or may not — have been authored by an individual with a deep allegiance to Venezuela, who had spent years advocating for Venezuela's claims to the territory in dispute, and whose loyal commitment to Venezuela had just been recognized through a prestigious national decoration? What on earth is Venezuela going to say about the identity and motives of the supposed memorandum's supposed author, and the circumstances and timing of its supposed creation? And what is Venezuela going to say about 13 years of silence after the supposed memorandum was revealed in the American journal? Mr President, Venezuela has opened before us a world of theatre and fiction, not law, not fact.

50. The claim of a secret Anglo-Russian deal is wholly unsupported by any evidence. Claims about Mr Mallet-Prevost's conversations are demonstrably untrue or wholly uncorroborated. Even if they ever took place — and there is no reliable evidence that they did — they provide no support whatsoever for any contention of nullity.

51. In a nutshell, this document — this supposed document — is a giant red herring. It does not support Venezuela's attack on the validity of the 1899 Award. Its only real value, we say, is to confirm that that attack is entirely devoid of any substance whatsoever.

52. Mr President, distinguished Members of the Court, Guyana trusts that you will deliver the final word on Venezuela's embrace of a regional principle of magical realism. This is the stuff of a novel; it is not the stuff of a pleading before this Court. I thank you for your patient attention and now ask you to call the very youthful Mr Craven to the podium.

The PRESIDENT: I thank Professor Sands. I now give the floor to Mr Edward Craven. You have the floor, Sir.

Mr CRAVEN:

VENEZUELA'S VIOLATION OF THE COURT'S PROVISIONAL MEASURES ORDERS AND GUYANA'S SUBMISSIONS

1. Mr President, Members of the Court, it is an honour to appear before you, and a privilege to address you on behalf of Guyana.

2. In this final speech of Guyana's first round, I will address three issues: *first*, Venezuela's repeated violations of the Court's provisional measures Orders; *second*, the remedies required for those violations; and *third*, Guyana's submissions in relation to the validity of the 1899 Award and the related question of the location of the Parties' land boundary.

A. Venezuela's violation of the Court's provisional measures Orders

3. Mr President, one theme which emerges very clearly from both the written pleadings and the speeches you have heard today is Venezuela's wilful disregard for the Court's judgments. Venezuela makes no secret of the fact that it rejects the Court's judgment on jurisdiction, and I need not repeat what Professor d'Argent said on this earlier today.

4. You will recall that, in addition to continuing to dispute the Court's jurisdiction in its Counter-Memorial and Rejoinder, Venezuela's Government held a nationwide referendum in December 2023 to seek and obtain support for "Venezuela's historic position of not recognizing the

Jurisdiction of the International Court of Justice to resolve the territorial dispute over Guayana Esequiba"[159].

5. In the two and a half years since that referendum, Venezuela has repeatedly declared that it does not recognize the Court's jurisdiction in this case. Indeed, less than 48 hours before the start of this hearing, the Venezuelan Government issued a press release, which you will find behind tab 9.1 of your judges' folders. That press release states, as you see on the screen:

> "Faithful to its historical position and the popular mandate expressed in the consultative referendum of December 3, 2023, Venezuela ratifies that it does not recognize the jurisdiction of the Court in the territorial dispute over Guayana Esequiba, nor the decision it may adopt on this matter. Therefore, its attendance at these oral hearings does not imply, in any way, its consent or recognition of said jurisdiction."[160]

6. Now, regrettably, as well as repudiating the Court's jurisdiction and declaring publicly that it will not accept the Court's final Judgment, Venezuela has also overtly and repeatedly rejected and violated the Court's provisional measures Orders. The Court has made two such Orders in these proceedings, following requests by Guyana which were prompted by Venezuela's explicit threats to Guyana's sovereignty and its territorial integrity. Venezuela has wilfully and flagrantly breached both Orders.

7. In October 2023, Venezuela announced plans to conduct the national referendum to which I just referred. In addition to the question inviting support for Venezuela's repudiation of the Court's jurisdiction, the proposed referendum also included a question concerning Venezuela's plans for "the creation of the Guayana Esequiba State", and the development of

> "an accelerated and comprehensive plan . . . for the present and future population of that territory, including, *inter alia*, the granting of Venezuelan citizenship and identity cards . . . consequently incorporating that State into the map of Venezuelan territory"[161].

8. Faced with that unambiguous threat to its sovereign territory, Guyana filed an urgent request for provisional measures. On 1 December 2023, the Court unanimously ordered provisional measures. The Court observed that Venezuela had made "official statements [which] suggest that

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[159] Republic of Venezuela, National Electoral Council, Resolution on Referendum to be held on 3 December 2023 (20 October 2023). See the Court's translation of this document in *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 661, para. 15.

[160] Government of Venezuela, Press Release, 2 May 2026, available at https://x.com/yvangil/status/2050658388175163840, last accessed 3 May 2026) (Guyana's translation).

[161] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 662, para. 15.

Venezuela is taking steps with a view towards acquiring control over and administering the territory in dispute"[162], and that there was a real and immediate risk of irreparable prejudice to Guyana's plausible right to sovereignty over that territory[163]. Accordingly, the Court unanimously ordered that,

> "[p]ending 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"[164].

9. The Court also unanimously ordered that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"[165].

10. How did Venezuela respond to that unanimous and unambiguous provisional measures Order? With immediate defiance and instant disobedience. Just two days after the Order was made, on 3 December 2023, Venezuela held the referendum which had prompted Guyana's Request for provisional measures and the resulting Order. Just two days after that, on 5 December 2023, the Venezuelan Government announced that it would create *a Venezuelan state* of "Guayana Esequiba"[166].

11. On 8 December 2023 — just one week after the Court made its provisional measures Order — the Venezuelan President signed a series of presidential decrees which, in the words of the Court's subsequent second provisional measures Order, were "aimed at acquiring and exercising control and administration over the territory in dispute"[167]. In other words, aimed at doing exactly what the first provisional measures Order prohibited.

12. As the Court noted, the Venezuelan decrees (i) created a new "Comprehensive Defense Zone" in the territory; (ii) they designated a Venezuelan official as the "Sole Authority" in that territory; (iii) they authorized Venezuelan State-owned companies to grant concessions for the exploitation of oil and minerals in the territory; (iv) they ordered the territory to be incorporated in

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[162] *Ibid.*, p. 666, para. 36.

[163] *Ibid*., p. 666, para. 37.

[164] *Ibid.*, p. 668, para. 45.

[165] *Ibid*.

[166] Ministry of People's Power for the Social Process of Labor, "Venezuela announces nine strategic actions for the protection and defense of the Essequibo", available at https://www.mpppst.gob.ve/mpppstweb/index.php/2023/12/05/venezuela-anuncia-nueve-acciones-estrategicas-para-la-proteccion-y-defensa-del-esequibo/, (Guyana's translation, 5 December 2023, last accessed on 2 May 2026).

[167] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Request for the Modification of the Order Indicating Provisional Measures of 1 December 2023, Order of 1 May 2025*, para. 27.

Venezuela's official maps; (v) they declared the creation of Venezuelan national parks and environmental protection zones in the territory; and (vi) they established the so-called "High Commission for the Defense and Recovery of the Guayana Esequiba"[168].

13. A few weeks after those presidential decrees were promulgated, Venezuela unlawfully violated Guyanese territorial sovereignty. Its military entered Guyana's airspace[169]; it deployed naval forces in waters adjacent to the territory claimed by Venezuela[170]; and it expanded military infrastructure on Ankoko Island[171]. As shown on your screens, Ankoko Island is an insular feature in the Cuyuni River, which the 1899 Award divides between the Parties. The eastern portion of the island falls within Guyana's territory, yet Venezuela has occupied it since 1966 and, following the Court's first provisional measures Order, it has further intensified its military presence there. That intensification was carried out in clear defiance of the Court's Order, and it constitutes an unlawful incursion of Guyana's sovereignty.

14. But Venezuela did not stop at that. On 21 March 2024, the Venezuelan National Assembly enacted a far-reaching law[172] which purported to convert the territory claimed by Venezuela into a new state of Venezuela — the so-called "Guayana Esequiba" state[173]. You will find a copy of that law — the Organic Law for the Defence of the Guayana Esequiba — behind tab 9.2 of your judges' folders. Amongst other things, the law purported to create executive and legislative branches for that new Venezuelan state[174]; it purported to confer the Venezuelan courts with jurisdiction over the territory claimed by Venezuela[175]; it required that every map of Venezuela depict the territory as an

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[168] *Ibid*.

[169] Headquarters Intelligence Corps Base Camp Ayanganna, Thomas Lands, Georgetown, *Venezuela Military Helicopter Flew Over Guayana's Airspace* (22 December 2023). RG, Vol. III, Annex 47.

[170] See RG, Vol. I, para. 5.8.

[171] *Ibid*.

[172] Organic Law for the Defence of the Guayana Esequiba, *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6.798 (3 April 2024). RG, Vol. III, Annex 1.

[173] *Ibid*., Art. 9.

[174] *Ibid*., Art. 11, 12, First and Second Transitory Articles.

[175] *Ibid*., Art. 16.

integral part of Venezuela[176]. It also imposed a legal "duty" on all Venezuelans to "safeguard, protect and vindicate . . . Venezuela's sovereignty over the territory of the Guayana Esequiba"[177].

15. Mr President, short of a military intrusion into the territory, it is difficult to conceive of a more flagrant violation of the Court's first provisional measures Order. Venezuela's enactment of this law was, in substance and in intent, an attempted *de jure* annexation of the territory. By purporting to subject the territory to Venezuela's legislative, executive and judicial jurisdiction, Venezuela was quite plainly seeking, in the words of the Court's first provisional measures Order, to "modify the situation that currently prevails in the territory in dispute, whereby . . . Guyana administers and exercises control over that area"[178]. And Venezuela was self-evidently acting in a manner that "might aggravate or extend the dispute before the Court or make it more difficult to resolve"[179].

16. Venezuela's actions prompted widespread condemnation by the international community, including a statement by the Security Council on the obligation to comply with the Court's provisional measures Order[180]. Venezuela ignored all this and it doubled down. In August 2024, Venezuela publicly declared that it was proceeding with "a process of affirmation of sovereignty over the disputed territory"[181]. In January 2025, the Venezuelan President announced that Venezuela would hold elections in "Guayana Esequiba" in which "the people of Guayana Esequiba" would elect a "Governor of Guayana Esequiba state"[182]. To be clear, Venezuela was planning to hold elections in *Guyana's* territory — elections in which *Guyanese* citizens would be called upon to elect a *Venezuelan* governor to rule over them.

17. Venezuela's announcements and its declarations of intent were yet further violations of the Court's first provisional measures Order. In the face of Venezuela's defiance of that Order and its

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[176] *Ibid*., Art. 23.

[177] *Ibid*., Art. 8.

[178] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 668, para. 45.

[179] *Ibid.*

[180] UNSC, *Security Council Press Statement on Guyana–Venezuela Situation*, SC/15665 (15 April 2024, last accessed on 2 May 2026) (available at https://press.un.org/en/2024/sc15665.doc.htm).

[181] Presidential Elections 2024: Nicolás Maduro won, the defender of the historical rights over Guayana Esequiba (2 August 2024, last accessed on 2 May 2026) (available at https://comisionesequibo.com.ve/?p=8023&lang=en).

[182] See *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 May 2025*, para. 29.

escalating threats to Guyana's sovereignty and territorial integrity, Guyana made a second request for provisional measures in March 2025.

18. On 1 May 2025, the Court granted that request and made a second provisional measures Order. The Court explained, as you see on the screen, that

> "by adopting legislative measures and decrees concerning the territory in dispute and by announcing the holding of elections therein, the Respondent has confirmed its intention of acquiring and exercising control and administration over the territory in dispute. The acts taken by Venezuela since 1 December 2023 further confirm that the Respondent intends to incorporate the territory in dispute into its own territory."[183]

19. The Court described Venezuela's actions as "grave developments"[184]. Accordingly, the Court unanimously "*[r]eaffirm[ed]* the provisional measures indicated in its Order of 1 December 2023, which should be immediately and effectively implemented"[185].

20. The Court also went on to indicate a further specific provisional measure, namely that

> "[p]ending a final decision in the case, [Venezuela] shall refrain from conducting elections, or preparing to conduct elections, in the territory in dispute, which the [Guyana] currently administers and over which it exercises control."[186]

21. Venezuela once again flagrantly defied the Court's Order. The day after that Order was issued, Venezuela put out a communiqué which "categorically reject[ed]" the Order[187]. Venezuela pronounced that,

> "true to its historical position, *it does not and will never* recognize the jurisdiction of the International Court of Justice *or abide by any decision emanating from it* to settle the territorial dispute around Guyana Esequiba, in a process that has been rigged from the beginning[188].

22. On 19 May 2025, the President of Venezuela declared that "Venezuela is going to elect governance of the State of Guayana Esequiba, a sovereign state of Venezuela. And it is going to elect deputies from Guayana Esequiba."[189] Six days later, on 25 May 2025, the Venezuelan Foreign

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

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

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

[186] *Ibid.*

[187] Press Release Government of the Bolivarian Republic of Venezuela, 2 May 2025. See Annex 1 to Guyana's letter to the Court dated 9 June 2025. (Also available at https://x.com/EmbaVenezUK/status/1918290458247348534 (last accessed 2 May 2026).)

[188] *Ibid.* (emphasis added).

[189] Declaration of Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela, 19 May 2025. See second document (including Guyana's translation into English) enclosed with Guyana's letter to the Court dated 9 June 2025. (Also available at https://www.youtube.com/watch?v=WRFHxOtTvME (last accessed 2 May 2026).)

Minister announced that "we are electing, for the first time, the authorities who are going to represent the state of Guayana Esequiba"[190]. The following day, the Venezuelan President proclaimed that the Venezuelan people *had* elected "a governor" of "the Essequibo"[191].

23. Despite those statements, Venezuela did not, in fact, conduct elections in Guyana's territory. Instead, it confined actual voting to parts of its own territory bordering Guyana. Nevertheless, by declaring that a new "governor" would be, and had been, elected for "the State [of] Guayana Esequiba, a sovereign state of Venezuela", Venezuela had undoubtedly "prepar[ed] to conduct elections . . . in the territory in dispute" and it had clearly engaged in further conduct which "might aggravate or extend the dispute before the Court or make it more difficult to resolve"[192]. Indeed, it is difficult to escape the conclusion that this is precisely what Venezuela was seeking to achieve by making those statements.

24. Less than three months later, on 8 August 2025, three "resolutions" passed by Venezuela's Superior Tribunal of Justice were published in Venezuela's Official Gazette[193]. Those "resolutions" purported to extend the jurisdiction of three different Venezuelan courts to Guyana's Essequibo region. The resolutions were yet another example of Venezuela deliberately engaging in actions which sought to "modify the situation that currently prevails in the territory in dispute" and which undoubtedly "might aggravate or extend the dispute . . . or make it more difficult to resolve".

25. In short, the factual record demonstrates that from the moment the Court made its first provisional measures Order on 1 December 2023, Venezuela deliberately, repeatedly and flagrantly violated the provisional measures indicated by the Court. Venezuela has not sought to deny those violations, or to pretend that its actions were not likely to aggravate or extend the dispute between

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[190] Declaration by Yván Eduardo Gil Pinto, Minister of Foreign Affairs of the Bolivarian Republic of Venezuela, 25 May 2025. See third document (including Guyana's translation into English) enclosed with Guyana's letter to the Court dated 9 June 2025. (Also available at https://www.youtube.com/watch?v=Jzb6xPvEtFQ (last accessed 2 May 2026).)

[191] Speech of Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela, 26 May 2025. See fourth document (including Guyana's translation into English) enclosed with Guyana's letter to the Court dated 9 June 2025. (Also available at https://www.youtube.com/shorts/ZqRbavq5MeE (last accessed 2 May 2026).)

[192] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 668, para. 45.

[193] Superior Tribunal of Justice, Resolution No. 2025-0008 (4 June 2025); Resolution No. 2025-0009 (4 June 2025); and Resolution No. 2025-0016 (16 July 2025). See copies and certified translations of these resolutions enclosed with Guyana's letter to the Court dated 24 September 2025. (Also available at https://www.tsj.gob.ve/gaceta-oficial# via search of 8 August 2025.)

the Parties. On the contrary, it has publicly proclaimed that "it does not and will never . . . abide by any decision emanating from" the Court[194].

26. Through both its words and its deeds, Venezuela has demonstrated its disregard, its disobedience and its contempt of the Court's provisional measures Orders. Those Orders are, of course, binding and they create international legal obligations for Venezuela[195]. The Orders plainly have been violated, and this calls for appropriate remedial measures.

B. Remedies for violations of the provisional measures

27. Mr President, I now turn to that issue. Guyana requests two remedial measures:

— *First*, the Court should declare that Venezuela has violated the two provisional measures Orders which the Court has made in these proceedings.

— *Second*, the Court should order Venezuela to revoke by means of its own choosing each and every law, decree and other domestic act which has been enacted or taken in violation of those provisional measures Orders, including the legislation which purports to incorporate Guyana's sovereign territory within Venezuela and the legislation which purports to extend Venezuela's legislative, executive and judicial jurisdiction to that territory; and the Court should also order that Venezuela must withdraw and destroy the official maps that purport to depict "Guayana Esequiba" as part of Venezuela.

28. These measures are requested because Venezuela is under the obligation, by way of reparation for its breaches of the provisional measures, to "reestablish the situation which would, in all probability, have existed if [those breaches] had not been committed"[196].

29. In the *Arrest Warrant* case, the Court held that "the situation which would, in all probability, have existed if [the illegal] act had not been committed" could not be re-established merely by a finding by the Court that the impugned arrest warrant was unlawful under international

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[194] Press Release Government of the Bolivarian Republic of Venezuela, 2 May 2025. See Annex 1 to Guyana's letter to the Court dated 9 June 2025. (Also available at https://x.com/EmbaVenezUK/status/1918290458247348534 (last accessed 2 May 2026).)

[195] See *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109; *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 (I)*, p. 230, para. 84; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (I)*, p. 29, para. 83.

[196] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

law. That was because the arrest warrant was "still extant, and remain[ed] unlawful". Accordingly, the Court held that the State which had issued the unlawful warrant was required, by means of its own choosing, to revoke the warrant and to inform the authorities to whom it had been circulated of that revocation[197].

30. Similarly, in *Jurisdictional Immunities of the State*, the Court ruled that

> "[t]he decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established"[198].

31. Accordingly, the Court ordered that Italy "must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law shall cease to have effect"[199].

32. Mr President, an analogous order should be made in the present case in respect of Venezuela's violations of the Court's provisional measures Orders. Having enacted a series of laws and other domestic acts which flagrantly and deliberately violate those Orders, Venezuela should be required to comprehensively revoke all of those measures by effective means of its choosing. And having violated the provisional measures Orders by producing and circulating official maps which depict vast swathes of Guyana's territory as belonging to Venezuela, the Court should require Venezuela to revoke and destroy all of those unlawful maps.

33. An order in these terms is a logical, reasonable and legally inescapable consequence of Venezuela's breaches. There can be no possible suggestion that such an order would be impossible or disproportionately burdensome for Venezuela. On the contrary, it would be simple and entirely straightforward to comply with. Guyana is entitled to an order in these terms, and it is what the preservation of the Court requires in the face of Venezuela's extensive and persistent breaches.

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[197] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 32, para. 76.

[198] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 153-154, para. 137.

[199] *Ibid*., p. 155, para. 139 (4).

C. Conclusion

34. Mr President, Members of the Court, I now turn to the final part of my presentation, which concerns Guyana's submissions regarding the subject-matter of this dispute over which the Court upheld its jurisdiction. Guyana will, in the conventional way, formally present its submissions at the end of the second round. However, Guyana wishes to conclude its first round by briefly addressing the declarations which it will invite the Court to make in its Judgment on the merits. As the Court will appreciate, in view of the sheer extent of Venezuela's claims over Guyana's sovereign territory, and the existential threat which they pose to Guyana, the Court's declarations in this case are of absolutely crucial importance to Guyana.

35. As Guyana has demonstrated in its written pleadings — and as the speeches you have heard today make clear — Venezuela's contention that the 1899 Award is void, and Venezuela's repudiation of the boundary established by that Award and by the 1905 Boundary Agreement, are entirely without merit. Venezuela's attack on the validity of the Award and the boundary which it established is devoid of factual or legal support. It is — to be clear — nothing less, and nothing more, than an attempt to provide a fig leaf for the annexation of Guyana's sovereign territory — territory which has formed an integral part of Guyana since long before its emergence as a sovereign State some 60 years ago.

36. The Court's role is of singular importance in this case, in affirming the legal reality clearly, authoritatively and unambiguously. And, therefore, Guyana will respectfully ask the Court to make the declarations set out in the submissions in Guyana's Reply[200]. These include adjudging and declaring that the 1899 Award is valid and binding upon Guyana and Venezuela and that the boundary established by the Award and the 1905 Boundary Agreement is the boundary between the Parties. They include adjudging and declaring that Guyana enjoys full sovereignty over all the territory between that boundary and the Essequibo River, and that Venezuela is required to fully respect Guyana's sovereignty and territorial integrity in accordance with that boundary. And they include declarations which logically and necessarily follow from this, which will be spelled out in our final submissions.

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[200] See RG, Vol. I, p. 175.

37. Mr President, we submit that those elements are required in order to vindicate the rule of law, the authority of the Court and the sovereign rights of Guyana, as well as to fulfil the mandate of the Secretary-General of the United Nations when he selected the Court as the means for resolving the dispute back in 2018. They are the logical and inescapable consequences of upholding Guyana's Application. They reflect, and they give effect to, the validity of the 1899 Award, which — it must be recalled — was explicitly intended by the 1897 Washington Treaty to constitute "a full, perfect, and final settlement" of the Parties' land boundary[201].

38. A judgment in the terms sought by Guyana will provide the key which finally unlocks the resolution of this decades-long dispute. The Court can, with its Judgment in this case, provide the foundation for enduring peace and security in the region on the basis of the rule of international law; and it can definitively and finally settle a long-standing source of tension and conflict between the Parties. Above all else, the Court's Judgment can and should affirm Guyana's territorial integrity in the clearest possible terms and place its sovereignty over the Essequibo beyond any possible question.

39. The declarations which Guyana seeks will allow a line to finally be drawn under a dispute which has endured for far too long. They will bring complete clarity and certainty to the legal status of the Parties' boundary — something which will benefit not only the Parties themselves but all States in the region and beyond. Above all, it will allow the Parties to turn a page, and to begin a new chapter in their relationship — a relationship which, it is sincerely to be hoped, will be characterized by amity, stability, respect for the rule of international law and respect for the inviolability of Guyana's sovereign territory, and of Venezuela's sovereign territory, based on the boundary established more than 126 years ago.

40. Mr President, Members of the Court, I thank you very much indeed for your kind attention. This concludes Guyana's first round of oral arguments.

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[201] 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 America, 5 U.K.T.S. (2 Feb. 1897), Article XIII. Guyana's Application Instituting Proceedings, Annex 1.

The PRESIDENT: I thank Mr Craven, whose statement brings the first round of oral argument of Guyana to a close. The oral proceedings in the case will resume Wednesday 6 May 2026 at 10 a.m., when Venezuela will begin its first round of oral argument.

The sitting is closed.

The Court rose at 6 p.m.

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