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CR 2026/27

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2026

Public sitting

held on Wednesday 6 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 mercredi 6 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
		Abraham
		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
MM. Tomka
Abraham
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

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

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

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

I now invite Professor Danae Azaria to address the Court. You have the floor, Madam.

Ms AZARIA:

STRUCTURAL COERCION

1. Mr President, honourable judges, it is an honour and a privilege for me to appear before you on behalf of the Bolivarian Republic of Venezuela.

2. Guyana asks this Court to establish that the 1899 Arbitral Award is valid and binding. This request faces an obstacle. As Professor Mbengue demonstrated this morning, the 1966 Geneva Agreement has superseded whatever may have been the previous legal situation. Professor Zimmermann then showed that the Geneva Agreement requires the parties to it to reach a mutually satisfactory solution to settle the border controversy.

3. What the Court will hear this afternoon is *why* the parties to the Geneva Agreement agreed to change the legal framework for solving their territorial controversy.

4. In my presentation, I will refer to the circumstances that surrounded the conclusion of the 1897 Washington Treaty, the issuance of the 1899 Award, and Venezuela's conduct after the 1899 Award. I will be followed by Professors Palchetti and Tams, who will discuss why the Award was invalid. Then, Professor Thouvenin will show that Venezuela did not waive its right to invoke the Award's invalidity.

I. Venezuela's conduct must be interpreted in its contemporaneous circumstances

5. Mr President, honourable judges, the conduct of a State — its action or silence — must be interpreted against the factual circumstances in which that conduct occurs. This is the methodology of this Court[1], and the methodology of the International Law Commission[2].

6. In the present situation, four distinct factors must be considered and must be given weight:

— *first*, the factual realities that existed, in Latin America, and in Venezuela in particular, at the end of the nineteenth century and the beginning of the twentieth century;

— *second*, the application in Latin America, during that period, of the Monroe Doctrine;

— *third*, the military activities of several colonial powers, and especially of Great Britain, in that region; and

— *fourth*, the fact that the two States whose conduct is relevant in the present situation, were, on the one hand, Great Britain, a major colonial Power and a military super-Power of the world at the time when the events took place, and on the other hand, Venezuela, a war-torn Latin American developing country[3].

7. During the late nineteenth century and the early twentieth century, Venezuela had seen parts of her territory being annexed by Great Britain and was in fear of further annexation and military action by Great Britain — a pattern of conduct on the part of the imperial Power that was regrettably common in Latin America and other parts of the world. Venezuela was also the victim of force by major European colonial Powers, including Great Britain. Guyana does not dispute these facts[4].

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[1] Indicatively, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 28, para. 49; *Nuclear Tests (Australia* v. *France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 269-270, para. 51; *Nuclear Tests (New Zealand* v. *France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 474-475, para. 53; *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, pp. 138-139; *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 23. See also other tribunals, indicatively: *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, United Nations, *RIAA*, Vol. XXI, Part II, p. 187, para. 169 *(a)*.

[2] International Law Commission (ILC), Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, Report of the ILC on the work of its Seventieth session (30 April-1 June and 2 July-10 August 2018), UN doc. A/73/10, p. 80, para. 18; ILC, Draft conclusions on the identification of customary international law, with commentaries, (2018), ILCYB (2018) Vol. II, Part Two, p. 94; ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, (2016), ILCYB (2006) Vol. II, Part Two, 161, p. 162, para. 3(2).

[3] See similar reasoning in *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, dissenting opinion of Sir Percy Spender, p. 128.

[4] RG, para. 2.96; Letter from Venezuelan Chargé d'Affaires in the United States of America, Fr. Antonio Silva, to Diplomatic Agent of Venezuela in New York, Col. George Gibbons (18 September 1888), available at http://www.guyananews.org/Western/1888-1891.pdf, p. 910, quoted in Guyana's Reply, para. 2.21.

These events made Venezuela deeply apprehensive of her neighbour's relentless hunger for more land. Her fear was well founded.

8. The evidence supporting this state of affairs is overwhelming.

II. The facts that led to the 1897 Treaty and the 1899 Award

9. In particular, I will begin with the facts that led to the 1897 Treaty and the 1899 Award.

A. Circumstances prior to the start of negotiations

10. The voluminous evidence provided in the written submissions by Guyana and Venezuela shows that, in the years *prior* to the negotiations that led to the 1897 Washington Treaty, Great Britain was expanding over Venezuela's land and posed an *existential* threat to Venezuela.

11. But, let us focus on the circumstances immediately preceding the start of negotiations between Great Britain and the United States for the arbitration that would resolve the boundary dispute between Great Britain and Venezuela.

12. These negotiations began in January 1896. The evidence shows that Great Britain and the United States of America were both well aware that, immediately prior to negotiations, Great Britain's conduct put Venezuela in duress and vitiated its free will.

13. I will offer two examples.

14. *First*, in July 1895, less than six months from the beginning of negotiations, the US Secretary of State (Mr Olney) sent a letter to Mr Bayard intended for the British Prime Minister, Lord Salisbury. The letter is in tab 36 of your folders. In his letter, Olney asserted the Monroe Doctrine but also explained that the conduct of Great Britain towards Venezuela "in effect deprives Venezuela of her free [agency] and puts her under virtual duress."[5]

15. My learned friend, Mr Reichler, relied, on Monday, on this very letter. But he conveniently forgot to mention this part, or *perhaps* deliberately avoided to point it out. *Perhaps* this is because Guyana's counsel prefers this Court to believe that, in the nineteenth century, Venezuela and Great

[5]RG, para. 2.29 ("in effect deprives Venezuela of her free will and puts her under virtual duress"); Letter from Richard Olney to Thomas Bayard, 20 July 1895, Manuscript Division, Library of Congress Washington, D.C. Richard Olney Papers MSS35139, Box 158/Reel 62 DNI 224, pp. 357-367, Annex 152, Venezuela's Counter-Memorial, pp. 455 at 473-474 ("in effect deprives Venezuela of her free agency and puts her under virtual duress").

Britain were two countries on equal footing "exchang[ing] various proposals for the delimitation of the boundary," as he put it[6].

16. *Second*, only three months after Olney's letter to Lord Salisbury, Lord Salisbury sent an *ultimatum* to Venezuela's President, President Crespo. He demanded reparation for the brief arrest by Venezuela of British policemen at Yuruan, an area that both Venezuela and Britain claimed. This *ultimatum* threatening force had been publicly reported[7]. On 20 October, the *New York Herald* reported that Great Britain had already sent Maxim guns to the border with Venezuela[8]. This is *only one month* before the beginning of negotiations that led to the Washington Treaty.

17. Contrary to the misleading narrative that has been put forward by Guyana's counsel, Olney's letter to Lord Salisbury, and Great Britain's ultimatum to Venezuela prove that the United States of America and Great Britain knew that seeking help from the United States was the only way for Venezuela to stop Britain's expansion over her territory. And they also knew that Venezuela lacked free will.

18. Guyana's counsel has also suggested before you that the United States was Venezuela's greatest champion. But the widely known historical facts simply do not support this narrative. It is because of Britain's defiance of the Monroe Doctrine, in writing by Lord Salisbury himself, that US President Cleveland invoked, in the US Congress, in December 1895, the *Monroe Doctrine* against the expansion of British Guiana, and proposed a boundary commission. Not because of some humanitarian benevolence and friendship towards Venezuela, as Guyana's counsel asks this Court to believe.

19. This reality also explains why the United States was not concerned about Venezuela's interests during the negotiations for the arbitration between Great Britain and Venezuela. Once Great Britain participated in the negotiations with the US and no longer mentioned . . .

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[6] CR 2026/24, p. 48, para. 6.

[7] English Ultimatum: A Note Sent to the President of Venezuela by the Marquis of Salisbury — Force Threatened, *The Rocky Mountain News (Daily)*, Volume 36, Number 293, 20 October 1895, available at https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18951020-01.2.4&e=-------en-20--1--img-txIN%7ctxCO%7ctxTA--------0------ (last accessed: 5 May 2026).

[8] "Maxim Guns for Guyana — Mr Chamberlain's Radical Measures for Obliging Venezuela to Come to Terms", *The New York Herald*, 19 October 1895: https://gallica.bnf.fr/ark:/12148/bpt6k4787808x/f1.item.zoom (last accessed: 5 May 2026).

The PRESIDENT: Counsel, could you slow down a bit? The interpreters are having some difficulty.

Ms AZARIA: Yes, of course. Once Great Britain participated in the negotiations with the United States and no longer mentioned or defied the Monroe Doctrine[9], the relationship between Great Britain and the United States had been smoothed over.

B. Circumstances during the negotiations

20. I now turn to the period *during* the negotiations that led to the Washington Treaty of 2 February 1897.

21. The process of negotiations began in January 1896. It was the United States of America and Great Britain — not Venezuela — that negotiated this Treaty. To be clear, this was the Treaty that would establish the Arbitral Tribunal to settle the disputed territorial boundary of Great Britain and Venezuela. Venezuela was not included.

22. During these negotiations between Great Britain and the United States, Venezuela continued to be in great fear of Great Britain and reported British aggression. There is ample evidence in the written submissions.

23. I will provide four examples from the period between August and December 1896: *the final months of the negotiations*. These (and other documents in the written submissions) show the *despair* of senior Venezuelan officials about British aggression.

24. *First*, on 18 August 1896, Venezuela's Ambassador to the United States, Mr Andrade, informed Mr Olney, the US Secretary of State, that during negotiations, there had been a "*new aggression* by Great Britain"[10].

25. *Second*, a few months later, on 5 December 1896, Mr Andrade sent another letter to Mr Olney informing him about Venezuela's objectives vis-à-vis the negotiations. You can see the

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[9] Venezuela Boundary Dispute, 1895-1899, Office of the Historian, USA Department of State, https://history.state.gov/milestones/1866-1898/venezuela#:~:text=The%20Venezuelan%20Boundary%20Dispute%20officially,30%2C000%20square%20miles%20for%20Guiana (last accessed 5 May 2026).

[10] Letter from José Andrade to Richard Olney, 18 August 1896, English Translation, Microcopy No. T 93. Roll 8. Volume 8. April 2, 1896, August 11, 1906, The United States National Archives and Records Administration, Annex 9, RV, p. 81 (emphasis added).

letter in tab 55 of your folders. Mr Andrade stated: "Venezuela expects by treaty or by diplomatic notes through you agreement to *prevent aggression* or unfriendly acts."[11]

26. Counsel for Guyana relied on this very letter, including this extract, on Monday, to promote the narrative that Venezuela was "so determined" to sign the Washington Treaty. But he ignored to place emphasis on the critical detail in this letter: Venezuela's aim was "to prevent aggression" against her.

27. *Third*, a few days later, in December 1896, Venezuela's Minister of Foreign Affairs, Mr Rojas, informed the Venezuelan Ambassador in the United States, Mr Andrade, of Venezuela's decision to accept, in principle, the draft text submitted to her. You can see this letter in tab 37 of your folders. His words are haunting. He wrote:

> "Although the project [of a treaty] raises serious difficulties, the Government, taking into consideration, on the one hand, *what it owes to the United States of America*, *and* on the other, *the dangerous consequences of the abandonment in which the refusal would place Venezuela*, has decided to accept, not simply and flatly, but with certain modifications, the proposed articles, *in whose preparation, unfortunately, it was not included*."[12]

28. This letter confirms that Venezuela was fully aware that the only way to stop Great Britain's expansionist ambitions and aggression was the support of the United States. If this support were to be withdrawn, "dangerous consequences" would inevitably follow.

29. *Fourth*, Venezuela requested that a change be made to the draft text so that Venezuelan arbitrators would sit on the tribunal. Olney replied that the matter was closed between Great Britain and the United States. You can see the text, including this sentence, in tab 56 of your folders. Indeed, Guyana's Counsel referred to this very document on Monday, but again, he avoided to mention that in the end of this very document, Olney "reprimanded" Venezuela that her attitude — namely her request that the treaty provided that Venezuelan nationals would sit as arbitrators — was *offensive* and *tended to block all negotiations*[13].

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[11] Cable from José Andrade to Richard Olney, 5 December 1896, Record Group 84. Series: United States Diplomatic Records for Venezuela, 1835-1936, Vol. 23 (July 23, 1895 to January 7, 1897). The United States National Archives and Records Administration, Annex 12, RV, Vol. II, pp. 99-101 (emphasis added).

[12] Letter from Ezequiel Rojas to José Andrade, 9 December 1896, Translation, Ministerio de Relaciones Exteriores, Estados Unidos de Venezuela, Gran Bretaña, Límites de Guayana, bases propuestas por los Estados Unidos, 1896-1897, folio 303, p. 37. CMV, Vol. II, Annex 59, p. 464 (emphasis added).

[13] Telegram from Olney to Storrow, 12 December 1896, Manuscript Division, Library of Congress, Washington, D.C.; Richard Olney Papers General Correspondence and Related Material, 1830-1925 (BOX 66-68, REEL 24), (1896: Nov. 11-Dec. 26), p. 458. CMV, Vol II, Annex 60; RV, Vol. II, Annex 15, p. 113 (emphasis added).

30. The necessary implication of this warning by the United States — an implication that Venezuela understood clearly — was that the United States would withdraw its support, should Venezuela insist on her proposed "offensive" amendments. "Dangerous consequences"[14] would follow: Great Britain would use force, and Venezuela would lose more land.

31. Guyana does not dispute the "threat of British military activity"[15] against Venezuela. Instead, it claims brazenly, in its Reply, that these "dangerous consequences" were apparently "unspecified"[16] and counsel for Guyana alluded to this on Monday.

32. Yet, the extensive factual record shows that these "dangerous consequences" were well known to Venezuela, and they were very specific.

33. *First*, *Britain's further expansion over Venezuela's land* was one of these "dangerous consequences". Guyana itself relies on several communications by Venezuelan officials to US senior officials in the years immediately prior to the negotiations which prove Venezuela's profound apprehension about British claims of "apparently indefinite" annexation[17]. Indeed, Guyana's counsel again relied on one of these documents on Monday. But he did not place emphasis on the critical detail. In 1888, the Venezuelan Chargé d'Affaires in the United States sent a letter to the US President asking for help — and yes, they were asking for help — in order to prevent Great Britain's "attempted acts of spoliation, encroachment, and appropriation to herself of very nearly one-third of our whole republic"[18].

34. *Second*, *aggression by Great Britain* was the other "dangerous consequence". An ultimatum threatening force had been sent by Great Britain to Venezuela only one month before the negotiations began; and British aggressions were being reported even during the negotiations.

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[14] Letter from Ezequiel Rojas to José Andrade, 9 December 1896, Translation, Ministerio de Relaciones Exteriores, Estados Unidos de Venezuela, Gran Bretaña, Límites de Guayana, bases propuestas por los Estados Unidos, 1896-1897, folio 303, p. 37. CMV, Vol. II, Annex 59, p.464.

[15] RG, para. 2.96.

[16] RG, para. 2.95.

[17] Letter from Mr. Olney to Mr. Bayard (20 July 1895), United States Department of State, Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress December 2, 1895, Part 1 (1896), Document 527, available at https://history.state.gov/historicaldocuments/frus1895p1/d527. RG, para. 2.20.

[18] Letter from Venezuelan Chargé d'Affaires in the United States of America, Fr. Antonio Silva, to Diplomatic Agent of Venezuela in New York, Col. George Gibbons (18 September 1888), available at http://www.guyananews.org/Western/1888-1891.pdf, p. 910. RG, para. 2.21; CR 2026/24, p. 49, para. 10.

35. Mr President, *this* is the nefarious historical background — the *structural coercion* background — of the 1897 Washington Treaty between Great Britain and Venezuela, which can hardly be called an "agreement".

C. Circumstances during arbitration

36. Yet, the injustices that Venezuela suffered did not stop there, Mr President. They continued during the arbitration. The arbitral tribunal did not merely rely on the unjust and invalid Washington Treaty. It also opted to manifestly exceed its power. These issues will be addressed by Professors Palchetti and Tams.

37. I will focus on the circumstances surrounding Venezuela's behaviour after the Arbitral Award was issued.

III. The circumstances of Venezuela's post-Award conduct

38. Now, once the invalid Award was issued, the picture remained the same: "might makes right" — *but* with an additional "dystopian twist". Venezuela was now expected to adhere to international justice — a justice that was really a farce, as Professors Palchetti and Tams will consider.

39. It is essential to point out that Venezuela did not have evidence to challenge the Award's invalidity on the ground that the tribunal manifestly exceeded its power. Evidence came into her possession, as Professor Thouvenin will point out, only in the second half of the twentieth century.

40. But the record also shows that, in the meantime, Venezuela had no choice *but* to endure the Award.

41. For one thing, when the Award was issued, it was publicly reported that "the United States will force Venezuela to accept the verdict and that it will act appropriately if there are problems with the enforcement of the decision."[19]

42. Further, between 1899, when the Award was issued, and 1903[20], Venezuela was embroiled in a civil war. During this period, Venezuela lacked a fully operational government and

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[19] S. J. Hermann González Oropeza and Pablo Ojer, *Report submitted by the Venezuelan experts on the issue of the boundaries with British Guiana to the National Government on the Issue of the Boundaries with British Guiana* (18 March 1965). MMG, Vol. IV, Annex 74, p. 39, para. 25.

[20] RV, para. 6.97.

administration. These circumstances must be considered when assessing Venezuela's conduct, as the Court has rightly noted, in *Somalia* v. *Kenya*[21].

43. The British Foreign Office was indeed well aware of Venezuela's vulnerable situation. For instance, on 19 March 1900, Mr Palacio, Venezuela's Minister of Foreign Affairs, sent a letter to the British Foreign Office informing that the Venezuelan Government was facing difficulties "in connection with public order"[22].

44. So, what was the response of Great Britain to this letter? Well, Britain informed Venezuela that it would *unilaterally* conduct the demarcation. And then, proceeding alone, it erected parts of the boundary in October that same year. The report of Venezuelan experts, that have been submitted by Guyana itself, describes vividly and clearly these facts[23]. Faced with this clear pressure and the fear of losing more land, at a particularly vulnerable moment during the civil war, Venezuela had no choice *but* to send the Demarcation Commission[24].

45. Venezuela's fear was further proven by a report of Venezuela's former Minister of Foreign Affairs, Rafael Seijas, on 4 May 1900, who points out — in the first page of his report — that any challenge of the Award by Venezuela would highly likely lead to further annexation by Great Britain[25].

46. Venezuela's apprehension vis-à-vis Great Britain was confirmed, unfortunately, by subsequent events.

47. Between 1902 and 1903, Great Britain, along with Germany and Italy, blockaded and bombed Venezuela's ports. The blockade ended only when Venezuela was forcibly defeated. As a condition to raise the blockade, Great Britain imposed to Venezuela the payment of 5,500 pounds in cash, and the signature of the 1903 Protocol, according to which the rest of the British claims would

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[21] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, *Judgment, I.C.J. Reports 2021*, p. 236, para. 79.

[22] Letter from Mr. Andueza Palacio to British Foreign Office (29 March 1900), United Kingdom, National Archives, Kew, FO 80/424, Annex 31. RG, p. 343.

[23] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional]* Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana (18 Mar. 1965), MMG, Vol. IV, Annex 74, p. 39, para. 27.

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

[25] Report of Counsellor Dr Rafael Seijas (4 May 1900), MMG, Annex 66, p. 141 ("[A]s regards to Great Britain, its contempt for the weak being notorious and its persistence in laying hands on the mouth of our great river, a plan on which it has been working since the end of the 18th century, it is considered not only that it would not agree with Venezuela's opinion that the case should be reopened, but that it would take advantage of it with a view to retaining what it still holds, and *very probably extending its encroachment*." (emphasis added)).

be submitted to arbitration. In those arbitration proceedings, Counsel for Venezuela demonstrated the "vast inequality of strength between Great Britain and Venezuela"[26]. You can find the pertinent extract of his speech in tab 38 of your folders. He stated:

> "[Great Britain] is one of the most powerful nations of the earth, and she was confronting one of the weakest nations, then torn by internal commotion and needing every particle of strength she possessed and every dollar of revenue she could collect at her ports to maintain her own existence . . . This disparity in strength is clearly shown [he continued] in the Statesman's Yearbook for 1903, an accepted authority in such matters, which details the great and efficient standing army of Great Britain, as well as her supreme control of the seas by her vast navy, while it reports that the army of Venezuela consists of 9,000 men, and her navy of 3 steamers, 2 sailing vessels, and some small gunboats"[27].

48. Such was the documented "vast inequality" between Venezuela and Great Britain. Against this background, the forcible defeat of Venezuela unequivocally communicated a powerful message to the war-torn young Republic, as it would to any reasonable observer. If Great Britain was capable and willing to use force to collect £5,500 in cash and to submit the rest of its claims to arbitration, then surely Great Britain was able and willing to go so far, if not further, had Venezuela challenged the 1899 Award, which concerned boundaries — a matter of the greatest importance for the British Empire.

49. Guyana's Counsel endeavoured to give the impression, on Monday, that Venezuela *enthusiastically* insisted on abiding by the 1905 demarcation. Yet, the facts show that, in the face of the indisputably tremendous military disparity between Great Britain and Venezuela, and against the background of repeated aggressions and threats of annexation that Venezuela had endured, she was left with no option *but* to endure the Award for years as a safeguard — as a shield — against the expansive ambitions of the British Empire. Or, as the Venezuelan experts have put it, "in order to prevent further troubles"[28].

50. That Venezuela's apprehension was substantiated is further borne out by Great Britain's continued territorial ambitions following the boundary demarcation. In 1906, Great Britain requested

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[26] *The Venezuelan Arbitration before The Hague Tribunal 1903, Proceedings of the Tribunal under the Protocols between Venezuela and Great Britain, Germany, Italy, United States, Belgium, France, Mexico, the Netherlands, Spain, Sweden and Norway, signed at Washington May 7, 1903* (1905), p. 1130, in RV, para. 6.88.

[27] *Ibid.*

[28] Hermann González Oropeza, S.J. & Pablo Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional]* Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana (18 Mar. 1965), MMG, Vol. IV, Annex 74, p. 39, para. 27.

alterations to the boundary line that had been demarcated in 1905, pursuant to the 1899 Award[29]. Venezuela's Minister of Foreign Affairs responded that the proposed modification by Great Britain "amounts to a veritable cession of territory"[30]. And it is for this very reason that he also maintained in writing in his response, the need to not depart from the 1905 demarcation. Guyana's counsel mentioned this response on Monday, but conveniently avoided to mention this significant detail[31].

51. Thus, this uncontested and well-documented sequence of threats and aggressions prior to the Washington Treaty and after the 1899 Award instilled a well-founded fear in Venezuela, which remained a critical factor that determined Venezuela's conduct for decades vis-à-vis this Award.

IV. Conclusion

52. Mr President, honourable judges, I turn to my conclusions — indeed the inescapable conclusions.

53. Any objective observer must consider these factual circumstances, in the late nineteenth century and the early twentieth century, prior and during the negotiations of the Washington Treaty, and after the issuance of the invalid 1899 Award, in order to understand Venezuela's conduct. There is not only overwhelming evidence of Venezuela's fear as to Great Britain's attitude towards her during this period. Rather, there is also overwhelming evidence that Venezuela's fear was well founded, and that she only was able to obtain evidence that the Award was invalid in the second half of the twentieth century.

54. It is these overall factual circumstances of the case brought by Guyana, Mr President, that simply do not allow the interpretation that Venezuela ever renounced its right to invoke the invalidity of the 1899 Award.

55. Venezuela was in a position to challenge the Award, when she obtained evidence of its invalidity. That time coincided with the period of decolonization, which enabled Venezuela to challenge the Award through peaceful means and negotiations. These negotiations led to the Geneva

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[29] Letter from Señor Paúl to Mr. O'Reilly (4 Sept. 1907) (Inclosure in Letter from Mr. O'Reilly to Sir Edward Grey (5 Sept. 1907)). MMG, Vol. III, Annex 48, pp. 5-6.

[30] *Ibid.*

[31] CR 2026/25, p. 35, para. 23.

Agreement, which has superseded an unjust and invalid Award, and has set the legal framework for the Parties to it to solve their border controversy by reaching a mutually satisfactory solution.

56. I thank you indeed for your kind attention and request you to call to the podium Professor Palchetti.

The PRESIDENT: I thank Professor Azaria for her statement. I now give the floor to Professor Paolo Palchetti. Sir, you have the floor.

Mr PALCHETTI:

THE INVALIDITY OF THE 1899 ARBITRAL AWARD (I)

I. Introduction

1. Mr President, Members of the Court, it is an honour to appear before you on behalf of the Bolivarian Republic of Venezuela.

2. Guyana instituted these proceedings asking the Court to adjudge and declare that the 1899 Award is valid and binding. As Professor Mbengue established this morning, there is a problem with that request.

3. Whether the award is valid or not is irrelevant. And this has been so since the conclusion of the Geneva Agreement.

4. Despite this, Venezuela will deal with the question of the Award's invalidity to contribute to better understanding the reasons that led the parties to agree on a different legal framework for settling their territorial controversy. This will also allow Venezuela to rebut Guyana's false allegations concerning the Award.

5. Venezuela's historical position is that the Award is invalid because of the invalidity of the 1897 Arbitration Treaty, because of the lack of reasons in the award and because of excess of power. In the next 40 minutes, I will present Venezuela's historical position concerning the first two grounds of invalidity. After me, Professor Tams will present the reasons why Venezuela has historically maintained that the Award is invalid because of excess of power.

II. Guyana's attempt to give new life to an unjust, fraudulent, and invalid decision — a decision that in 1966 Guyana and Venezuela agreed to leave behind

6. Before addressing the grounds of invalidity of the Award, let me clarify what the 1899 Award represents for Venezuela, and for anyone looking at the facts objectively. The history of this Award is, above all, a history of great injustice. For Venezuela, it has long represented an offence to national dignity.

7. Through it, the United States and Great Britain conducted a political transaction behind Venezuela's back. They got exactly what they wanted. As Professor Moncada said this morning, the United States achieved the vindication of the Monroe Doctrine and the recognition of its hegemony in the Western hemisphere. Great Britain, in turn, through the Award obtained the territory of Guayana Esequiba. That doing so meant sacrificing Venezuela's legitimate rights mattered little. As Professor Azaria has just shown, Venezuela was in any event in no position to resist.

8. Exposing the political transactions carried out behind Venezuela's back is central to this case. Guyana has striven in these proceedings to distort the facts in order to erase any trace of the injustices suffered by Venezuela. In a complete contradiction to the facts, Guyana now casts Venezuela as the main beneficiary, rather than as the victim, of the Anglo-American confrontation.

— As you have heard on Monday[32], Guyana insists that it was Venezuela that requested the intervention of the United States. This is correct, but also beside the point. What matters is that the United States did not protect Venezuela's interests, pursuing its own interests instead.

— Guyana repeatedly referred to the role of the US Secretary of State, the US lawyers who acted as Venezuelan advisers and counsel, and the two US justices sitting on the tribunal. In reality, this only highlights one thing: that Venezuela was absent from the entire process. It was absent from the negotiations, and it was absent from the arbitral proceedings in Paris.

— Guyana would have you believe that the Award was grounded in law. The only evidence it provides is the fact that the parties were offered ample opportunity to present their case to the tribunal: three rounds of written pleadings, more than 200 hours of oral proceedings. That proves nothing. Instead of insisting on the 200 hours of oral pleadings, Guyana should explain how it is possible that it took only six days for the tribunal to render its decision. Two hundred hours of

[32] CR 2026/24, pp. 53-54, para. 25 (Reichler).

oral proceedings and six days for rendering a decision: if we apply the same ratio to the present proceedings, Members of the Court, you should render your judgment in less than a day. *Bonne chance!*

— Guyana even pretends that the Award was favourable to Venezuela. Let us be clear: Great Britain was awarded more than 90 per cent of the Venezuelan territory it had claimed. As put by one of the British arbitrators[33], the outcome for Venezuela was "disastrous".

9. Mr President, I do not intend to revisit each and every fact showcasing the injustices perpetrated at Venezuela's expense. These facts are exhaustively set out in Venezuela's written pleadings. But on one point I must insist: whatever one thinks of the territorial rights claimed by Venezuela at the time, it is simply not credible to present the arbitration between Great Britain and Venezuela as an ordinary one. The circumstances in which the arbitration agreement was negotiated and under which the arbitral proceedings were conducted are unprecedented. They reveal the state of subjugation to which Venezuela was reduced. External observers agree on this. This is how Paul Reuter characterized this arbitration:

> "Beaucoup de circonstances rendaient cet arbitrage des plus singuliers ; les conditions dans lesquelles le Venezuela avait consenti à se faire représenter, en dehors de tout protectorat ou de toute institution régulière, par un pays tiers semblent se rencontrer rarement dans une procédure arbitrale, et révèlent une situation quasi coloniale."[34]

10. And this is how a contemporary observer, Monsieur de la Chanonie, who attended the Paris proceedings, presented arbitration following the Anglo-Venezuelan experience: arbitration is "un moyen, économique et assez sûr, d'opérer sans vacarme ni scandale la spoliation des petits États"[35].

11. Mr President, the uncomfortable reality concerning the 1899 Award is precisely this: the United States and Great Britain used arbitration to dispossess Venezuela of its legitimate rights. And today Guyana asks the Court to breathe new life into that unjust decision.

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[33] See Letter from Lord Russell to Lord Salisbury, 7 October 1899, in CMV, 8 Apr. 2024, vol. I, annex 67.

[34] P. Reuter, "La motivation et la révision des sentences arbitrales à la Conférence de la paix de La Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Vénézuéla", in *Mélanges offerts à Juraj Andrassy* (Dordrecht, Springer, 1968), p. 238.

[35] L. de la Chanonie, "Une application du principe de l'arbitrage", in *Revue d'Europe*, March 1900, p. 222.

12. Because this is what this case is about: whether to validate an unjust decision that was made possible only by the quasi-colonial imbalance imposed on Venezuela. An unjust decision — let me reiterate this point — that in 1966 Guyana and Venezuela agreed to leave behind, and replace with an obligation to negotiate, a mutually acceptable solution.

13. Guyana's main argument is that the applicable law and the required standard of proof allow for no practical possibility of challenging the Award's validity. The margins are too narrow, the standards too high. Guyana wants the Court to recognize that, whatever past injustice, the award is now protected by the law. *Dura lex sed lex*, or rather *summum jus, summa iniuria*.

14. Guyana's argument rests on three formalistic pillars:

— Firstly, *pacta sunt servanda* and the binding character of international arbitral awards;

— Secondly, the principle of intertemporal law;

— Thirdly, burden of proof.

Not one of these justifies the conclusions that Guyana seeks to draw from them.

15. *Pacta sunt servanda* is sacrosanct. But it does not stand alone. The preamble of the Vienna Convention on the Law of Treaties is clear on this point: "the principle of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized". There is no hierarchy among the three principles. Yet, free consent and good faith were systematically violated throughout the negotiations of the Arbitration Treaty.

16. Nor is there any presumption of validity of an arbitral award. Arbitral awards are final and binding if, and only if, they satisfy the conditions for their validity under international law. The 1899 Award never met these conditions.

17. On the principle of intertemporal law, I have one main observation. It concerns the general principles governing the invalidity of awards. In its attempts to foreclose any possibility of challenging the validity of the Award, Guyana has twisted the principle of intertemporal law to advance several untenable propositions. It has doubted the existence, in 1899, of rules providing for grounds of invalidity of awards[36]. It has argued that, at that time, an arbitral award could be nullified only if this was envisaged in the *compromis*[37]; it has claimed that, at the relevant time, there was no

[36] MMG, Vol. I, para. 6.47.

[37] MMG, Vol. I, paras. 6.48-49.

obligation to state reasons. None of these propositions withstands scrutiny. Guyana's emphasis on intertemporal law is only an attempt to mask the grave irregularities committed by the Arbitral Tribunal. It is primarily defensive and fails at that task.

18. Finally, I come to the burden of proof. It is a fact that, given the exceptional circumstances under which the Award was rendered, Venezuela and Guyana are manifestly not in the same position with regard to access to evidence. Unsurprisingly, Guyana places great emphasis on burden of proof. It insists that the burden of proof is exclusively on Venezuela[38]; it also pretends that a heightened standard of proof applies to the nullity of awards[39].

19. Guyana's emphasis on the burden of proof is misconceived. This Court has already emphasized the need to account for the circumstances of each case. The rule that the party alleging a fact must submit the relevant evidence — as the Court put it — "is not an absolute rule applicable in all circumstances. There are situations where 'this general rule would have to be applied flexibly'"[40]. Moreover, "[d]epending on the circumstances of the case, it may be that 'neither party is alone in bearing the burden of proof'"[41].

20. This Court has also recognized "that a State that is not in a position to provide direct proof of certain facts 'should be allowed a more liberal recourse to inferences of fact and circumstantial evidence'"[42].

21. The circumstances of the present case are well known.

— First, Venezuela did not directly participate in the negotiation of the Arbitration Treaty nor in the arbitral proceedings. It was "represented" — so to say — by US officials who fully controlled what happened during the negotiations and the proceedings. Consequently, Venezuela has no direct access to the relevant evidence.

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[38] MMG, Vol. I, paras. 6.35-37.

[39] MMG, Vol. I, paras. 6.38-42.

[40] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Judgment, I.C.J. Reports 2022 (I)*, p. 54, para. 116; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 15; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660-661, paras 54-56; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

[41] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Judgment, I.C.J. Reports 2022 (I)*, p. 54, para. 117.

[42] *Ibid.*, para. 120 (citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18).

— Second, it is the United Kingdom and the United States that held most of the documents and evidence relevant to this case. Venezuela was able to access it only to the extent that they have allowed Venezuela access.

— Third, to this day, and despite repeated requests by Venezuelan authorities[43], the United Kingdom has blocked access to the information it holds in its archives.

— Lastly, Guyana, the successor State to Great Britain, is in a better position to provide evidence. All the more so since Guyana did, in fact, receive documents related to the Arbitration from Great Britain.

22. In sum, there is a clear asymmetry between the Parties in the access to evidence. What is more, this asymmetry is the result of deliberate choices made by the States that control the evidentiary record.

23. Venezuela submits that, in these circumstances, it cannot "be alone in bearing the burden of proof"[44].

24. It falls upon Guyana to establish its contention that the Award complied with the requirements of the Washington Treaty and, in particular, that it was based on law.

25. So far, Guyana's strongest argument on this relies on the absence of reasons in the Award. As you heard on Monday[45], Guyana pretends that, as the Award does not contain any reasons, it is not possible to prove that the Tribunal did not follow the instructions of the *compromis*. For Guyana, this is sufficient to conclude that the Award is valid. This argument is hopeless. I will come back to the absence of reasons in the Award later on.

III. The Award is invalid because of the invalidity of the Arbitration Treaty

26. I turn now to the grounds of invalidity of the Award, starting with the invalidity of the 1897 Arbitration agreement.

27. Venezuela and Guyana agree that, at the relevant time, the invalidity of the *compromis* was a ground to hold an award null and void under international law. They also agree that, at the relevant

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[43] RV, Vol. I, Annex 41.

[44] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 54, para. 117 (citing *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 56).

[45] CR 2026/25, p. 20, para. 24 (Pellet).

time, error and fraud were causes of invalidity of a treaty. But they disagree on the facts. Or, to be more precise, Guyana has failed to engage with the facts and evidence presented by Venezuela. In its written pleadings, Venezuela has repeatedly referred to the existence of confidential documents exchanged between the United States and Great Britain during the negotiation of the Arbitration Treaty and which were never transmitted to Venezuela. These confidential documents played a fundamental role in the arbitral proceedings. On Monday, Guyana did not address these confidential documents, persisting instead in distorting reality by portraying the United States as the generous, transparent and selfless ally that forcefully defended Venezuela's interests[46].

28. Mr President, let us examine these confidential documents and their use during the Paris proceedings. In your folder the core materials and evidence are included. These documents prove that Venezuela was a victim of fraud which led it to incur in an essential error. They also provide a window into the farce — a farce that was staged in Washington and in Paris during the negotiations of the Treaty and the arbitration proceedings.

***(a)* Confidential documents were exchanged during the negotiations**

29. I start with the negotiation of the 1897 Treaty. The two main actors in these negotiations were the US Secretary of State, Olney, and the English Ambassador in Washington, Pauncefote. Both acknowledged that, during the negotiations, exchanges of confidential Notes and letters took place. At tab 13 of your folders, you will find a letter of Pauncefote referring to "strictly personal" diplomatic correspondence exchanged with Olney[47]. And, at tab 14 — now on the screen — you can find a letter from Olney mentioning what he refers to as "informal and private notes, none of which were regarded by me as of an official character or were allowed to go on to the files of the State Department"[48].

30. We do not know the content of these informal and private Notes, nor do we know why Olney did not want them included in State Department files. Guyana provides no explanation for this

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[46] CR 2026/24, p. 61, para. 55 (Reichler).

[47] Letter of Former British Ambassador at Washington, Sir Julian Pauncefote, to the Former Secretary of State Olney, 12 May 1899, reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Vol. III, New York, 1979), p. 24.

[48] Letter from Richard Olney to Sir Pauncefote, 24 May 1899, in RV, Annex 19 (also reproduced in J. Gillis Wetter, *The International Arbitral Process: Public and Private*) (Vol. III, New York, 1979), p. 25.

secrecy. What we do know is that at least one of these confidential Notes concerned an essential part of the Treaty, namely the clause establishing that prescription during a period of 50 years makes good title.

31. At tab 15 of your folders you will find the text of Article IV of the Treaty. As you can see, Article IV4 *(a)* indicates that the period for prescription is 50 years. What it does not indicate is the critical date for calculating the 50 years. If you look instead at the clause in paragraph *(c)*, you will immediately notice that, unlike in paragraph *(a)*, paragraph *(c)* indicates the critical date. That date is "the date of the Treaty". This discrepancy strongly suggests that the critical date under paragraph *(a)* is different from the critical date in paragraph *(c)*. If the critical date for calculating the 50-year prescription period is not the date of the Treaty, 1897, what could it be? Well, it can be argued that the critical date is the one indicated in Article III of the Treaty, "the time of the acquisition by Great Britain of the Colony of British Guiana", namely 1814. This would mean that the prescription period was the period between 1764 and 1814 — and it is clear that this interpretation is not only reasonable, but it would best protect Venezuela's interests as it would preclude the Tribunal from taking into account Great Britain's conduct for assessing prescription. Similarly, the critical date could be 1850, the date on which Venezuela and Great Britain committed by treaty to not occupy the disputed territory — and this would also be a reasonable interpretation and one protecting Venezuela's interests.

32. Mr President, we do not need to answer this question. It only matters in so far as it shows that the confidential note exchanged between Olney and Pauncefote concerned an essential part of the Arbitration Treaty. Great Britain and Venezuela had opposite views regarding the title justifying sovereignty over the contested territory. Venezuela placed emphasis on historical title, Great Britain on occupation and *de facto* control. The calculation of a prescription period was one of the core issues. Guyana does not contest this.

33. Yet, was Venezuela informed of the contents of these confidential notes before ratifying the Treaty? It was not, and there is no evidence proving that it was. However, Guyana claims that it

was unlikely that the contents of the notes were unknown to Mr Storrow. Who is Mr Storrow? He is the US lawyer who acted as Venezuela's legal adviser during the negotiations[49].

34. At tab 16 of your folders you will find the point of view of someone who was more familiar with Storrow, and his working methods, than Guyana's counsel are. It is a letter by Benjamin Harrison, the head of the US legal team representing Venezuela before the tribunal, sent in 1899, to another member of the US team, Mallet-Prevost. Harrison candidly admitted,

— firstly, that the Venezuelan Government had no knowledge of the confidential notes;

— secondly, that these notes most probably were known to Storrow, "for his relations to Mr Olney were very confidential";

— and thirdly, that "it is quite possible that Mr Storrow, knowing the impracticability of some of those he had to deal with, may have purposely left this matter a little vague"[50] — a little vague.

35. This letter provides clear illustration of the farce staged by the United States, a farce upon which Guyana has built its entire case. Olney is in strict contact with the Venezuelan representative, but behind the mask of the Venezuelan representative there is Storrow, Olney's close associate. Storrow would be expected to inform the Venezuelan Government but, knowing the "impracticability" of Venezuelan officials, he only communicates with Olney. For Guyana, there is nothing wrong with that. Venezuela was informed — Guyana argues — because it was unlikely that the Venezuelan representative, Storrow, did not know. Mr President, Members of the Court, what a farce, what a charade! And this is only the first act.

(b) Great Britain's use of the confidential documents during the arbitral proceedings

36. For the second act, we must go to Paris. At tab 17 of your folders there is an excerpt of the memorial submitted by Venezuela to the arbitral tribunal[51]. As you can see, in its written pleadings, Venezuela argued that the critical date for calculating the prescription period was the date when Great Britain acquired the Colony of British Guiana. Following this argument, Article IV *(a)* did not apply

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[49] RG, para. 2.76.

[50] Letter from Benjamin Harrison to Mallet-Prevost, 9 March 1899. RV, Annex 16.

[51] *Venezuela-British Guiana Boundary Arbitration, The Printed Argument on Behalf of the United States of Venezuela Before the Tribunal of Arbitration* (Vol. I, New York, Evening Post Job Printing House, 1898), pp. 18-22.

to the period subsequent to 1814. Clearly, neither the US lawyers defending Venezuela, Harrison, nor the Venezuelan Government were aware of the content of the confidential notes.

37. This argument sparked serious concern in Great Britain. In 1899, British lead counsel Richard Webster wrote to the US lawyers representing Venezuela. He made it clear that the argument on the critical date for prescription was contrary to what Olney and Pauncefote had agreed in their confidential notes. He also demanded that the argument be withdrawn, announcing that it was Britain's intention to present the confidential documents to the Tribunal. At tab 18 you will find Webster's letter[52].

38. On the same day, Pauncefote wrote to Olney to convey his surprise at the argument advanced by Venezuela, mentioning that Britain would make use of the confidential notes. This letter is at tab 13 of your folder.

39. So we have Great Britain demanding that the US lawyers representing Venezuela change their legal strategy. This alone goes against any principle of justice and decency. It must be recognized, however, that this time, the US lawyers informed the Government of Venezuela. At tab 19 of your folders you have a letter expressing Venezuela's surprise: "The Government of Venezuela is unable to comprehend upon what authority the British lawyers demand from those of Venezuela a relinquishment of our case."[53] In this and in other letters[54], the Government of Venezuela repeatedly instructed the US lawyers representing Venezuela not to withdraw the argument.

40. What did these lawyers do? At tab 20 of your folders you have a clear description of what happened[55]. Mr President, Members of the Court, we are in Paris, it is 13 July 1899. Britain's lead counsel, Webster, and the US lead counsel representing Venezuela, Harrison, meet to discuss the interpretation of Article IV of the Treaty. The two men agree "the good faith of the United States . . . was involved in the matter" — but what good faith was that? It was the good faith of the United States vis-à-vis Great Britain, not vis-à-vis Venezuela. Webster requests again the withdrawal of the argument that the critical date is 1814. Harrison offers no resistance. He only asks for one thing: to

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[52] Letter from Richard Webster to Mallet-Prevost, 12 May 1899. RV, Annex 18.

[53] Letter from J. Calcaño to J. Andrade, 23 March 1899. RV, Annex 17.

[54] Letter from J. Calcaño to J. Andrade, 7 April 1899. CMV, Annex 62.

[55] Letter with Annexure of Great Britain's Leading Counsel, Sir Richard Webster, to Sir Thomas Sanderson, 13 June 1899, in J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Vol. III, New York, 1979), p. 27.

save appearances. He cannot formally withdraw the argument: "His client, Venezuela, would not let him make a public withdrawal."

41. In the end, the argument was, in fact, withdrawn. In an oral statement before the tribunal, Harrison candidly recognized that, in light of the confidential note, the prescriptive period applied to the years after 1814. You have this statement at tab 21 of your folder[56].

42. As this Court can see, the first act — the negotiation — and the second act — the arbitral proceedings — are part of the same script. The only difference is that, in the second act, Venezuela was informed. But the instructions given by the Government of Venezuela were completely ignored.

43. Other examples of the fraud could be provided. Time does not allow me to address Great Britain's use of another piece of confidential correspondence, concerning this time the 1850 Agreement between itself and Venezuela. I refer you to Venezuela's written pleadings, where you will find the relevant facts and evidence.

44. Before concluding on the invalidity of the Arbitration Treaty, let me make one point concerning evidence. The documents you have in your folder mainly consist of the correspondence exchanged between British and/or American officials involved in the negotiation of the Treaty or the Paris proceedings. Venezuela obtained these documents several decades after the Award was rendered. When it finally did, it immediately denounced the invalidity of the Treaty and of the Award. It is clear that, under these circumstances, no acquiescence or loss of right can be invoked against Venezuela. You will hear more on this from Professor Thouvenin later on.

45. I will now conclude on the invalidity of the Treaty. The evidence before you shows, first of all, the injustice — the injustice suffered by Venezuela. But it also proves that its consent to the arbitration agreement was vitiated by error and by fraud:

— Firstly, Venezuela was misled about the meaning of the clause on prescription set forth in Article IV of the Treaty;

— Secondly, the error concerns an essential part of the Treaty;

— Thirdly, Venezuela did not contribute to this error. The correspondence between the United States and Great Britain remained confidential and was not transmitted to Venezuela. Moreover,

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[56] *British Guiana-Venezuela Boundary Arbitration, Arbitration between the Governments of Her Britannic Majesty and the United States of Venezuela. Proceedings (Vol. 7, Paris, 1899)*, pp. 1753-1754. Also in J. Gillis Wetter, *The International Arbitral Process: Public and Private* (Vol. III, New York, 1979), pp. 28-30.

with their disloyal behaviour, US lawyers representing Venezuela contributed to keeping Venezuela in the dark;

— Finally, the recourse to confidential notes reveals that the United States and Great Britain intentionally left Venezuela in the dark to overcome any resistance to the ratification of the treaty. This amounts to fraud.

46. The Arbitration Treaty being invalid for error and fraud, only one conclusion follows: the Arbitral Award is itself invalid.

IV. Invalidity for lack of reasons

47. I turn to the second ground of invalidity: the Award's complete failure to state reasons.

(a) The obligation to state the reasons in the Award already existed in 1899

48. Writing in 1904 — in his introduction to the *Recueil des arbitrages internationaux* — Louis Renault observed: *"Il importe au plus haut point que non seulement la justice soit juste, mais encore qu'elle le paraisse."*[57] Justice, in other words, must not only be done, it must also be seen to be done. Guyana clearly defends a different position. Guyana denies that any obligation to state reasons existed in 1899. This does not withstand scrutiny.

49. Renault's position was not merely an aspiration. It had already found expression in several general rules of procedural law. Amongst these, there was the rule establishing the obligation to state the reasons for the awards.

50. Almost a quarter of a century before the Award was rendered, the Institut de droit international had already recognized the existence of this obligation. A few months before the Award, the same rule was codified by the First Hague Conference.

51. The Court's case law points in the same direction. In the *Arbitral Award Made by the King of Spain* case, Honduras and Nicaragua accepted that lack of reasons was a ground of invalidity at the relevant time. The Court — *jura novit curia* — decided the issue of lack of reason on that very basis. On Monday, Guyana took a rather bizarre position on the Court's Judgment. It argued that your Judgment is not relevant since the Court rendered it more than 60 years after the Award[58]. This

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[57] A. de Lapradelle, *Recueil des arbitrages internationaux*, préface de Louis Renault (Paris, Pedone, 1905), p. XI.

[58] CR 2026/25, p. 19, para. 19 (Pellet).

is true. But the Court was assessing the validity of an Award rendered in 1906. Perhaps, Guyana is not so sure about the applicability of the principle of intertemporal law. Or perhaps it has no better arguments to dismiss this precedent.

52. Arbitral practice confirms the existence at the relevant time of an obligation to state reasons. The overwhelming majority of the awards rendered in this period were reasoned — some briefly, but reasoned, nonetheless. On Monday, for lack of better arguments, Guyana resubmitted the list of unreasoned arbitral awards it had already presented in its Reply, simply adding a few more[59]. In its Rejoinder, Venezuela has already demonstrated that all these awards can be easily distinguished[60].

53. I will not burden the Court by repeating what Venezuela has already demonstrated in its written pleadings. Rather, I will now move to a final observation.

***(b)* Lack of reasons as evidence of excess of power**

54. Mr President, Members of the Court, lack of reasons is not only a self-standing ground of invalidity of the Award. It is also a fact that can be used to prove the Tribunal's excess of power.

55. You will hear more on excess of power from Professor Tams. What I wish to place before the Court now is the logical link between the two grounds. Excess of power arises when a tribunal departs from the mandate granted to it under the *compromis*. But, how does one verify whether that mandate was respected? The answer is simple: through the tribunal's reasoning. But what if the award does not state the reasons?

56. It is enough to raise this question to understand that the Tribunal's decision to not state the reasons was not innocent. It was not, as Guyana presents, a mere consequence of the absence of an obligation. It was a deliberate choice. This choice was even more striking when considering the context.

— Just a few weeks before, the Hague Peace Conference had recognized the existence of an obligation to state the reasons;

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[59] CR 2026/25, p. 16, para. 13 (Pellet).

[60] RV, paras. 5.98-5.99.

— The Treaty of Washington clearly required the Tribunal to render a decision based on the strict application of specified legal principles;

— And, finally, the absence of Venezuelan arbitrators rendered even more important that the authority of the decision should rest on a properly reasoned award.

57. So, what inferences could then be drawn from the fact that the Award does not indicate, even briefly, the reasons upon which it rests? In 1899, at the Hague Peace Conference, the German delegate, Zorn, responding to Martens, the President of the Anglo-Venezuelan Tribunal, observed: "Arbitral awards must be legal decisions, and a legal decision without the reasons in which it is based is inconceivable"[61]. If the Tribunal did not take care to present the Award as a decision based on law, a reasonable explanation is, most simply, that it was not.

58. Indeed, the absence of reasons was the only way that the Tribunal could mask the fact that its decision did not result from the application of the rules outlined in the Arbitration Treaty.

59. This concludes my presentation. I thank the Members of the Court for their kind attention and would ask Mr President to give the floor to Professor Tams.

The PRESIDENT: I thank Professor Palchetti. I now call Professor Christian Tams to the podium. You have the floor, Sir.

Mr TAMS:

THE INVALIDITY OF THE 1899 ARBITRAL AWARD (II)

I. Introduction

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

2. My presentation pursues the argument set out by Professor Palchetti: he has shown that the 1899 Award was invalid because it was based on an invalid treaty and because it was unreasoned. I will present to you a third ground of invalidity: in rendering the Award, the Tribunal exceeded its powers under the Washington Agreement. In fact, it committed multiple excesses of power,

[61] Division of International Law of the Carnegie Endowment for International Peace, *The Proceedings of The Hague Peace Conferences. Translation of the Official Texts*, The Conference of 1899 (New York, 1920), p. 616.

approaching its tasks with scant respect for its mandate. That is why the United Kingdom and Venezuela left the Award behind when concluding the Geneva Agreement — an agreement that, as my colleagues have shown this morning, tasked its parties to seek a mutually acceptable solution to their long-standing controversy.

3. On Monday, Guyana sought to defend the 1899 Award. But much of this defence was rather timid. At the time — you heard — arbitration was still in its infancy: *"un accident heureux"* [62]. An obligation to give reasons was emerging but had not yet fully crystallized. It was still fine at the time, says Guyana, for arbitrators to meet with counsel during deliberations. And in any event, as the Award was unreasoned, it was impossible to establish that the arbitrators had violated their mandate. And so on and so forth.

4. Mr President, in the face of such defensive moves, let me begin by stating clearly that the legal régime governing excess of power is not in doubt.

5. First, it is clear that awards — including those rendered in 1899 — can be challenged for excess of power. Excess of power is, as the ILC would later note, "the oldest and most universally recognized ground of nullity"[63].

6. Second, it is clear and it was clear, in 1899, that excess of power can take different forms[64]. Obviously, a tribunal exceeds its power if it decides on matters not submitted to it. But excess of power also covers instances in which a tribunal failed to pronounce on issues it must address — this is sometimes referred to as a "negative" excess of power. And finally, awards can be challenged where the tribunal disregards the applicable law or decides *extra legem*. None of this is in dispute.

7. Third, it is clear how excess of power is to be assessed. It needs to be asked whether a tribunal respected the terms of its mandate. In your jurisprudence, you have formulated the central proposition in terms that you see on the slide: "in the performance of the task entrusted to it, the tribunal 'must conform to the terms by which the Parties have defined this task'"[65] — and these are

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[62] CR 2026/25, p. 12 (Pellet).

[63] ILC, Draft Convention on Arbitral Procedure, Texts and Commentaries, UN doc. A/CN.4/92, p. 107.

[64] See references in CMV, paras. 6.91-6.92.

[65] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 49 (citing *Delimitation of the Maritime Boundary in the Gulf of Maine, Judgment, I.C.J. Reports 1984*, p. 266, para. 23).

exactly the words used by Guyana on Monday[66]. So, "conforming to the terms" of the mandate — that is the test. It is a test that requires, as the ILC put it in its work on arbitral procedure — and I quote again: it requires "a careful comparison of the award . . . with the relevant provision of the *compromis*"[67] — the *compromis* that is the sole basis of the tribunal's power, in our case: the Washington Agreement.

8. Mr President, Members of the Court, what does such a careful comparison reveal in our case? Venezuela submits that, when rendering the 1899 Award, the tribunal committed multiple excesses of power. I will highlight three of these:

(i) First, a negative excess of power: the tribunal failed to fulfil one of the tasks entrusted to it.

(ii) Second, an excess of power in the obvious sense: the tribunal decided matters that were plainly outside its competence.

(iii) And third, the tribunal failed to comply with its most solemn duty: the duty to render an award based on law.

II. The tribunal failed to respond to one of the two questions put to it

9. Mr President, I begin with the tribunal's mandate. It was set out in Article III of the Washington Treaty. You see the language on the screen, and the language is clear. The parties gave the tribunal two tasks and formulated both of them in mandatory language using the verb "shall". The tribunal had to . . .

(i) first investigate and ascertain the extent of the territories belonging to the Netherlands and Spain in 1814 — I am paraphrasing and simplifying; and

(ii) secondly, the tribunal had to determine the boundary line.

10. Now, there is no doubt that the tribunal determined the boundary line; it complied with the second task. But not the first. The Award is silent on titles: the tribunal does not tell the parties what it had investigated and ascertained. And on the face of it, this seems a fairly glaring negative excess of power.

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[66] CR 2026/25, p. 20 (Pellet).

[67] ILC, Draft Convention on Arbitral Procedure, Texts and Commentaries, UN doc. A/CN.4/92, p. 108.

11. On Monday, Guyana sought to explain away the tribunal's failure. It suggested that ascertaining the titles was merely a prelude to the boundary decision. The tribunal really had only one task, says Guyana: it had to determine the boundary. But this does not withstand scrutiny.

12. It does not withstand scrutiny because it misconstrues the role of the arbitrator — as it was well defined in the late nineteenth century. *Balasko*, on whose work Guyana relies, made the point very clearly: "le Tribunal doit juger tout point prévu au compromis, fût-il d'avis qu'il n'y a pas lieu de l'examiner" [the "tribunal must adjudicate every point referred to it in the *compromis*, even if in its opinion it does not arise to be considered"][68]. Every point must be adjudicated, even if the tribunal considers it irrelevant. In their opinion in the 1991 *Arbitral Award* case before this Court, Judges Aguilar Mawdsley and Ranjeva put matters very clearly: requests framed in a *compromis* "la[y] down the terms of the difficulty". And further, "a judge seriously fails to perform his mission whenever he decides not to answer a question"[69]. And looking at the 1899 Award, how can we escape the view that the Paris tribunal "seriously failed to perform its mission"?

13. Now, Mr President, there are exceptions. The parties to the compromise can of course give the tribunal discretion. The arbitration agreement between Guinea-Bissau and Senegal which was at issue in the 1991 *Arbitral Award* case illustrates this. You see it on the slide. And you see that the tribunal in that case (like the one in the case we are discussing) had two tasks — it was to respond to two questions. But you see immediately from the highlighting that the tribunal in *Guinea-Bissau* v. *Senegal* had discretion: it only had to address the second question if it responded to the first in the negative. This was said so expressly in paragraph 2, "categorically", as this Court observed, and it was material to the 1991 decision[70]. This discretion is exceptional — and it is instructive how this Court, in 1991, approached the exception. In the 1991 Judgment, this Court distinguished between arbitration agreements that gave tribunals discretion (like Article 2 you still see on the slide) and, on the other hand, arbitration agreements that raised, "successive questions which [are] not made

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[68] A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public*, Paris, Pedone, 1938, p. 200.

[69] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, dissenting opinion of Judges Aguilar Mawdsley and Ranjeva, p. 126, para. 18.

[70] See *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 50 ("categorical").

conditional on each other"[71]. The clear implication is that normally, tribunals have no discretion; they must address all requests put to them.

14. Mr President, international practice points us to examples of special agreements that raise such "successive questions which [are] not made conditional on each other" — to use the terms again — and it makes clear that in the presence of such a mandate, tribunals have no discretion. Another arbitration involving Guinea-Bissau — not the one with Senegal, but the one with its southern neighbour, Guinea — is instructive. It was decided in 1985, on the basis of an arbitration agreement that (like in our case) tasked the tribunal to assess titles first, and then to determine the boundary[72]. And naturally the tribunal in the *Guinea/Guinea-Bissau* arbitration engaged with both — it addressed titles first, and the boundary second. It conformed to the terms of its mandate.

15. Mr President, the arbitral tribunal in our case was required to do the same, and for a further reason. It could have no doubt how crucial the question of title was for the parties. Both parties made detailed submissions on the question, and stressed its relevance. *Pars pro toto*, let me to take you to a passage from General Harrison's concluding argument, which is focused specifically on Article III defining the mandate and the tribunal's dual task under the provision. You see the text on the slide; I will read excerpts. Article III, said General Harrison,

> "introduces the Netherlands and Spain. It does not declare simply that they [the arbitrators] shall find the boundary between the existing claimants, but they are to ascertain the extent of the territories belonging to or that might lawfully be claimed by the Netherlands or the Kingdom of Spain by the time of this acquisition [in 1814]".

And further — Harrison still continues — this was a duty not laid upon the tribunal for nothing, and it was "a duty that the Tribunal cannot put off, manifestly"[73].

16. Mr President, Members of the Court, in light of all this, it is clear that the tribunal could not simply ignore the first of the two tasks entrusted to it. It could not, in Harrison's terms, "put off this duty". But it did — and it thereby manifestly violated its mandate. And in fact, Venezuela cannot but agree with one of the leading scholars on this dispute, Gilles Wetter, whose in-depth treatment of the dispute is instructive in many ways and whose assessment of the Award we have included at

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[71] See *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 50.

[72] See *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision of 14 February 1985, in RIAA XIX, 149, at 151.

[73] Verbatim Record, p. 3087.

tab 50 of the judges' folder: by not fulfilling its first task, Wetter said, the tribunal had committed a "serious dereliction of its duties", a dereliction that, Wetter continued, was "no doubt . . . a valid ground for a nullity claim"[74].

III. The tribunal decided matters outside its mandate

17. Mr President, I move on to my second point. While the tribunal ignored the first of its two tasks, it decided a further issue — which was never submitted to it. In the final section of the Award, the tribunal set out a régime for free navigation on two rivers, the rivers Amakuru and Barima. Its decision on the point is quite detailed — and you see it on the slide. It occupies almost as much space as the tribunal's description of the boundary. In essence, two of the Orinoco's tributaries were to be open to shipping, subject to the payment of fees, but within complex parameters defined in the Award. The details need not concern us: Yet what must concern us is that, with the stroke of a pen, the tribunal turned the Amakuru and Barima rivers into internationalized watercourses. This, incidentally, was very much what Great Britain had wanted, as is clear from Lord Russell's correspondence[75].

18. Mr President, Members of the Court, nothing in the Treaty of Washington had empowered the Tribunal to impose a navigation régime for the Amakuru and Barima rivers. Guyana accepts that the decision on navigation finds no textual basis in Article III[76], which defined the Tribunal's mandate. So on the face of it, this is an obvious case of a Tribunal "adjudg[ing] on a matter not submitted to [it]"[77].

19. On Monday, Guyana tried to explain away the Tribunal's excess of power by pointing you to Article IV *(c)* of the Washington Treaty. It tried to present the imposition of the navigation régime as an adjustment of the boundary, which it says was a proper exercise of the Tribunal's discretion

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[74] Wetter, *The International Arbitral Process: Public and Private*, Vol. III, Oceana 1979, p. 345.

[75] See CMV, para. 6.147 with references.

[76] CR 2026/25, p. 20 (Pellet).

[77] H. Lauterpacht, "The Legal Remedy in Case of Excess of Jurisdiction" in *The British Yearbook of International Law (BYIL)*, 1928, pp. 117-118.

under that provision. But this plainly misconstrues the "terms by which the Parties . . . defined [the Tribunal's] task" [78].

20. If you look at the opening words on the slide, you see that Article IV is about "Rules". Those Rules, the Tribunal had to apply "[i]n deciding the matters submitted" to it under Article III, that is the question of titles and boundaries. Article IV is an applicable law clause — not a clause extending the Tribunal's mandate. And litt. *(c)*, on which Guyana relied, confirms this: it suggests that the Tribunal — exceptionally, if Rules *(a)* and *(b)* have been exhausted — might resort to other considerations, but only "[i]n determining the boundary-line". And even beyond this, litt. *(c)* is very specific: it defines precisely under which circumstances the Tribunal could exercise discretion, namely where "territory of one Party [is] found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party". Then, but only then, can "effect . . . be given to [the] occupation". So we are looking at adjustments to "the boundary-line" — "territory" — "occupation" . . . None of this remotely fits the navigation régime decision. To get from Rule IV *(c)* to the imposition of a detailed régime of free navigation requires a quantum leap.

21. And perhaps it is telling that Guyana made no effort to justify the decision by reference to the terms of the Washington Treaty. Instead, it relied on a statement by counsel for Venezuela that emphasized the Tribunal's alleged discretion in applying Rule IV *(c)* [79]. But that statement is taken completely out of context — it had nothing to do with navigation.

22. In fact, the parties did not address the issue of navigation on the Barima and Amakuru Rivers. The Tribunal acted entirely upon its own initiative when imposing a navigation régime. And Gillis Wetter's assessment is, again, helpful, and Wetter did not mince words at the end of his enquiry. The decision on navigation, he said, was an "extraordinary action *ultra vires*" — a "blind, unauthorized excursion into an area wholly outside the conception of the draftsmen of the Treaty, the parties and their counsel" [80].

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[78] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 53, para. 49 (citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 266, para. 23).

[79] CR 2026/25, pp. 27-28 (Pellet).

[80] J. Gillis Wetter, *The International Arbitral Process: Public and Private*, Vol. III, Oceana Publications, Inc. 1979, pp. 345-346.

23. Mr President, to conclude on this point, it is difficult to ignore the discrepancy: the issue that the parties had argued at length — *titles* — is ignored by the Tribunal. On an issue the parties did not discuss — *navigation* — the Tribunal renders a decision with important consequences. One dereliction of duty, one decision *ultra vires*. Two manifest excesses of power that shaped this Award, and that render it invalid.

IV. The Tribunal failed to comply with its duty to render an award based on law

Mr President, I would now move on to my third and final point, which would take me about 15 to 18 minutes to develop. I can go on, of course, but I wonder whether you would prefer to have a break now? I am in your hands.

The PRESIDENT: I think you should complete your pleading.

Mr TAMS: OK, thank you, Mr President.

24. So I come to my third point, the third excess of power: The Tribunal was mandated to render an award based on law — but it failed in this, its most solemn, duty. Instead of deciding on the basis of legal considerations, it rendered a decision based on political expediency. As put by Paul Reuter in his assessment, "l'arbitrage avait été rendu sur la base d'un marchandage purement politique et sans tenir autrement compte des règles fort précises énoncées à l'article IV du compromis"[81]. "Un marchandage purement politique" — this was horse-trading. Horse-trading explained the decision.

25. Mr President, Guyana on Monday sought to portray Venezuela's claims on this point as the stuff of "theatre and fiction", based on no more than one single document — the Mallet-Prevost memorandum — which, Guyana suggests, may not even have existed[82]. But for all the noise it made on Monday, Guyana did not engage with the evidence — evidence that clearly shows that, in its deliberations, the Tribunal was not guided by legal considerations.

26. Mr President, in advancing this claim, Venezuela is not naive. Venezuela knows that arbitral tribunals are composed of individuals; that these individuals discuss and seek compromise.

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[81] Reuter, "La motivation et la révision des sentences arbitrales à la Conférence de la paix de La Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Vénézuela", in *Mélanges offerts à Juraj Andrassy*, Springer, 1968, p. 238.

[82] CR 2026/25, p. 58 (Sands).

Of course they do. But equally of course, arbitrators operate within limits. As they strive for consensus, they must respect their mandate. Compromise must be reached within the parameters of the law. It is, as Hersch Lauterpacht put it, "circumscribed by the duty to apply the existing law"[83]. This duty binds every tribunal. And it was absolutely essential for the Paris Tribunal. This was a tribunal — and the statement that you see on the slide bring this out clearly — that had been established to substitute right for might. The parties (and Venezuela in particular) "came to it as a great court". In the final days of the hearings, General Harrison, from whom the words on the slide are, once more emphasized the point, insisting that the parties expected to be judged upon the principles of international law and the rules of the Treaty, and not to be "compounded or compromised upon suggestions of political expediency".

27. Mr President, the Tribunal ignored General Harrison's warning. The evidence shows that it did exactly what General Harrison had feared: it rendered a decision that sacrificed legal considerations on the altar of political expediency. I make three points.

28. The *first* concerns the outcome of the process, the Award. Professor Palchetti has spoken to this just now: this is an Award without a trace of legal reasoning. The boundary is identified. A navigation régime is decreed. But it is impossible to understand what guided the Tribunal in its decision. This lack of reasons is in itself, as we have shown, reason to render the Award invalid. But it is also indicative of the Tribunal's decision-making process. The Tribunal was unable to put on paper any legal considerations that might have guided its decision. This is the first relevant factor.

29. My *second* point, the setting: Under Article X, the Tribunal was to render its Award, if possible, within three months. In the event, the tribunal produced its Award, not in three months, but in six days. Six days. These six days included a weekend during which at least one of the arbitrators, Lord Russell, "was not in Paris"[84]. Six days, Mr President, to assess arguments made in three rounds of written pleadings and 56 sessions of oral hearings. Six days to engage with information contained in 2,600 documents filed by the parties.

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[83] Lauterpacht, *The Development of International Law by the International Court of Justice*, Stevens and Sons, 1958, p. 399.

[84] See references in CMV, para. 5.113.

30. Mr President, allow me to pursue briefly the point made by Professor Palchetti and his comparison. In this case you have scheduled four days of hearings. The transcript and the written record are a fraction of what the Tribunal had before it. Now we can all do our maths: If the Paris Tribunal took six days to decide after 56 days of hearings — how long will you take, after four days? Will you convene for a quick morning session next Tuesday, and we meet again in the afternoon, for the reading of the judgment? Perhaps you will. But the thought that, by then — by next Tuesday — you could have weighed the arguments with the care required of an international court is absurd. Yet this is exactly how the Paris Tribunal approached its task, as it rushed out its Award. Given this haste, we ask, is it at all plausible to say that the Tribunal had weighed the detailed legal arguments advanced by the parties? It is not plausible; there was simply no time. And this is the second relevant factor.

31. Mr President, my *third* point: how, then, was the decision reached? We need not remain focused on the Award, its rushed nature, and its silences. We have multiple accounts that describe how the tribunal identified the boundary line. Accounts that come from key protagonists — from the arbitrators and counsel — their diaries, their letters. And these accounts, of which Venezuela became aware after the publication of the Mallet-Prevost memorandum, converge on the central point: the boundary line described in the Award was put forward by President Martens, without any legal basis. President Martens threatened the British and American arbitrators to accept his line, in separate meetings outside the tribunal's formal deliberations. And I use "threatened" here on purpose, because President Martens made clear that unless the two groups he approached — the British and American arbitrators — came round to his view, he would endorse the respective other side's claims in full.

32. Venezuela has set out the evidence in detail in the written pleadings[85]. Permit me to take you to three documents that present the views of the key protagonists and offer insights into the deliberative process of the tribunal.

33. I begin with the account given by Mr Mallet-Prevost, which Guyana dismissed on Monday as a work of magical realism[86]. In the relevant passage, Mallet-Prevost recounts a meeting with one

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[85] See also the references in CMV, paras. 5.111-5.131.

[86] Memorandum of Mr Severo Mallet-Prevost, reproduced in AJIL 43 1949, pp. 538-540. See CR 2026/25, p. 59 (Sands).

of the US arbitrators, Arbitrator Brewer, in the middle of the tribunal's six-day deliberations, in which Brewer briefs Mallet-Prevost of what has happened during the deliberations. And I will take you to Mallet-Prevost's account first, and then perhaps afterwards, we can see whether Guyana is right to dismiss this as "the stuff of fiction".

34. Now, this is how, according to Mallet-Prevost, Arbitrator Brewer recounts the decision-making process. The key excerpts are on the slide: "Martens has been to see us [Brewer/Fuller]. He informs us that Russell and Collins are ready to decide in favor of the Schomburgk Line"; they are ready to "give Great Britain the control of the main mouth of the Orinoco".

35. Now, Brewer and Fuller obviously considered that the line should be drawn differently. But they were faced with a threat, and you see it on the slide: "If we [Brewer/Fuller] insist on starting the line on the coast at the Moruca River [Martens] will side with the British and approve the Schomburgk Line as the true boundary." So this is the prospect facing the American arbitrators: a 3-2 split decision that gives Great Britain everything. But the President points a way out. If Fuller and Brewer accept his compromise line, "he will secure the acquiescence of Lord Russell and Lord Collins and so make the decision unanimous". And so a deal is taking shape. A deal that gives 90 per cent of the disputed territory to Great Britain, and leaves Venezuela with the rest. A deal in which, if we believe Mallet-Prevost and Brewer, legal considerations play no role.

36. Now, Guyana says this is all a fantasy of a biased old man, written up decades later and "uncorroborated . . . in any other documents"[87]. That is plainly incorrect. As for Mallet-Prevost's position, the memorandum confirms points he made in a private letter written in late October 1899, around three weeks after the award was rendered — in that letter, identified by Venezuelan researchers after the publication of the memorandum, Mallet-Prevost made the same core point, he said: "the decision was forced upon our Arbitrators"[88].

37. But let us look at how other key players described the deliberations. Lord Russell, the British arbitrator, is one of them. On the slide you see his account, drawn up on 7 October 1899, that is four days after the reading of the Award, in a letter to the British Prime Minister, Lord Salisbury.

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[87] CR 2026/25, p. 56 (Sands).

[88] See CMV, para. 5.129.

And again, Venezuelan researchers unearthed this after the publication of the Mallet-Prevost memorandum[89]. In the letter, Lord Russell described the "grievous disappointment" felt by Justice Collins and himself at the attitude adopted by the President. The President, said Lord Russell, "cast about for lines of compromise". So how did this compromise line become the boundary line imposed by the tribunal? This is Lord Russell's account:

> "[President Martens] intimated to L. J. Collins, in a private interview, while urging a reduction of the British claims, that if we did not reduce them he might be obliged in order to secure adhesion of the Venezuelan Arbitrators to agree to a line which might not be just to Great Britain."

38. And Mr President, you will not miss the parallels. The same threat that featured in Mallet-Prevost's account, in this case made against the British arbitrators: unless they reduce their claim to fit President Martens' compromise line, Martens might be "obliged" to agree with the US arbitrators and render an unjust decision. So the British are facing the prospect of a 3-2 split decision for Venezuela unless they come round to Martens' compromise line. But it is not just that for what Russell's letter is helpful: Lord Russell was certain that threats were made in both directions: he had "no doubt [President Martens] spoke in an opposite sense to the Venezuelan arbitrators, and fear of possibly a much worse line was the inducement to them to assent to the Award in its present shape". Which, of course, is exactly what Mallet-Prevost would later recall in his memorandum. "Magical realism"?

39. So how was the deal reached? If the accounts by Russell and Mallet-Prevost left any doubt, such doubt is dispelled by none other than President Martens himself. President Martens recounted what happened in his diary — under the date of 3 October 1899, the very date of the Award[90]. And you have excerpts on the slide and more detail at tab 54 of the folder.

(i) And from the excerpts on the slide, it becomes clear how President Martens seemed to have spent the six days until the Award was rendered. Not, it seems, in tribunal deliberations, but in a series of meetings, private meetings, insisting that the other arbitrators accept his deal. And you see the references to that on the slide: he "persistently urged" Fuller, he "went" to Collins, he "went again" to Brewer, he "went again" see Lord Collins, and so on.

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[89] Letter from Lord Russell to Lord Salisbury, 7 October 1899, CMV, Annex 67.

[90] See Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, CMV, Annex 149.

(ii) But that is not all. The excerpts on the slide confirm that President Martens did make the threats that Lord Russell and Mallet-Prevost had recounted. Martens says so expressly: As Lord Collins resists, "I explained to him that England was not interested in forcing me over to the American side. This made him think." And Martens' approach also gave Lord Russell pause, and it is the quote that I read to you now from the lower end of the slide: "the fear that . . . I would go over to the American side, simply pissed him off." These are President Martens' words, I would want to point out.

(iii) And from the excerpts, it is also clear how seriously Martens' threats were taken. And I quote again from the bottom end of the slide: "It was clear", said Martens, "that if the British had not agreed to my compromise, I would have joined the Americans rather than them". And when the US arbitrators resist, they are told in no unclear terms, and you see it in the middle of the slide, "that if they did not make a concession, then I would be forced *à contrecœur* to side with the English".

40. And I ask again, magical realism — all of this?

41. Mr President, Members of the Court, anyone who cares about international arbitration might wish this was "the stuff of fiction". It is not. The accounts I have taken you to paint a clear picture. They are authoritative: they come from the key actors, including President Martens and Lord Russell who can barely be accused of bias towards Venezuela. They are contemporary: Russell, Martens and Mallet-Prevost all went on record in October 1899. Their accounts completely undermine Guyana's attempt on Monday to dismiss Venezuela's claims as the fantasy of an ageing man, written up decades later. And perhaps most importantly, on the essential question — how did the tribunal reach its decision? — these authoritative, contemporary accounts converge.

42. There is no trace of any legal consideration that could explain where and how President Martens' compromise line was drawn. Arbitrators Collins, Russell, Brewer, Fuller — they did not yield to the force of a stronger or any legal argument, no one even pretended that. They yielded to threats: threats that are described with clarity and with specificity. Threats that forced the

tribunal's members into accepting a deal that had no basis in legal reasoning. Paul Reuter was right: this was horse-trading — this was "un marchandage purement politique"[91].

43. Mr President, Members of the Court, looking at the evidence before you, it is clear that, in rendering the Award of 1899, the tribunal plainly did not "conform to the terms by which the Parties have defined [its] task"[92]. It deviated from these terms in multiple, glaring ways. The tribunal ignored one of the questions put to it. It decided an important matter not submitted to it. It failed in its solemn duty to render a decision based on law. And of course, as Professor Palchetti has shown, its decision was based on an invalid treaty and failed to give reasons. Each of these grounds, looked at in its own right, would be a ground of invalidity. Taken together, they lead to one inescapable conclusion: this Award is invalid.

44. And yet, Mr President, Members of the Court, as I conclude, permit me to return to Venezuela's central contention in this case. Ultimately, we submit, you need not decide between validity and invalidity. While Guyana asks you to declare valid an award that is plainly indefensible, it fails to accept the wisdom of the Geneva Agreement on which this case is based. As my colleagues have shown, with the Geneva Agreement, the parties left behind their debates about an award tainted by glaring defects. An award that was as painful for Venezuela, its victim, as it had become embarrassing for the United Kingdom, its supposed victor. In light of the arguments you heard about the question of invalidity, we ask, is it not plain that the parties wanted to move on? Venezuela's written pleadings in this case, as well as Professor Palchetti's pleading and mine today, show that the Award of 1899 is invalid. But more fundamentally, they help understand why the parties in the Geneva Agreement settled on a framework that would foster a negotiated and equitable settlement of their territorial controversy.

45. This, Mr President, Members of the Court concludes my presentation. I thank you for your kind attention and the extra time you have allocated to me, and I would ask you to give the floor to Professor Jean-Marc Thouvenin, but this will no doubt be after the coffee break. Thank you.

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[91] Reuter, "La motivation et la révision des sentences arbitrales à la Conférence de la paix de La Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Vénézuela", in *Mélanges offerts à Juraj Andrassy*, Springer 1968, p. 238.

[92] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 49 (citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 266, para. 23).

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

The Court adjourned from 4.45 p.m. to 5.05 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. Je donne maintenant la parole au professeur Jean-Marc Thouvenin. Vous avez la parole, Monsieur.

M. THOUVENIN : Merci, Monsieur le président.

LA PRÉTENDUE RENONCIATION PAR LE VENEZUELA À SON DROIT DE SE PRÉVALOIR DE LA NULLITÉ DE LA SENTENCE ARBITRALE DE 1899

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de paraître devant vous pour présenter certaines des vues du Venezuela.

2. Monsieur le président, le Guyana fait valoir en substance que le comportement du Venezuela postérieur à la sentence de 1899 signifierait qu'il aurait renoncé au droit de se prévaloir de sa nullité.

3. Ce faisant il s'obstine à faire comme si l'accord de Genève n'était jamais entré en vigueur. Ou bien comme si ses signataires avaient convenu, en concluant cet accord, que la solution satisfaisante pour la résolution pratique de la controverse, d'une manière acceptable pour les Parties, était d'opposer au Venezuela une prétendue renonciation au droit de se prévaloir de la nullité de la sentence — ce qui est évidemment absurde.

4. L'ennui pour le Guyana, et ce sera mon premier point, est que l'accord de Genève est en vigueur, et que la controverse qui en est la raison d'être n'a jamais porté sur le comportement du Venezuela depuis 1899 et ses éventuelles conséquences juridiques. Et j'ajoute que même si l'accord de Genève n'existait pas, *quod non*, la théorie guyanaise, dont il découlerait que les vices de la sentence arbitrale sont purgés par l'attitude du Venezuela, n'a aucune pertinence. Ce sera mon deuxième point. Enfin, et en tout état de cause, le Venezuela a fait valoir son droit à dénoncer la sentence comme nulle et non avenue lorsqu'il a disposé de preuves à cet égard, ce qui était le seul moment pertinent pour exercer un tel droit.

I. L'accord de Genève ne fait aucune place à l'argument tiré du comportement du Venezuela postérieur à la sentence de 1899

5. Monsieur le président, Mesdames et Messieurs les juges, comme l'a expliqué Michel Virally dans son cours à l'Académie— proche d'ici —, la reconnaissance est un acte juridique spécifique dont les effets de droit se résument à l'idée d'opposabilité du fait juridique en cause[93]. C'est dire que la thèse guyanaise de la reconnaissance revient à soutenir que la sentence de 1899 est opposable au Venezuela indépendamment de sa nullité.

A. La thèse de l'opposabilité de la sentence indépendamment de sa nullité n'a aucune place dans le cadre de l'accord de Genève

6. Or, il suffit de lire les différents comptes rendus des négociations qui ont mené à l'accord de Genève — ce que j'appellerai par facilité le « processus de Genève » —, tout comme l'accord de Genève lui-même, pour voir qu'il n'a jamais été dans la commune intention des Parties de s'inquiéter plus avant de la question de la validité de la sentence de 1899, et encore moins de son éventuelle opposabilité au Venezuela.

7. Car, comme mes collègues et amis vous l'ont amplement expliqué ce matin, l'accord de Genève tient pour acquis que, du point de vue du Venezuela, la sentence arbitrale est nulle et non avenue, tandis que pour le Royaume-Uni elle est parfaite. Ni l'une, ni l'autre Partie n'avait la moindre intention d'en débattre plus avant, et encore moins de faire trancher la question par un tiers. Sinon, pourquoi tant le Royaume-Uni que la Guyane britannique se seraient-ils félicités à l'issue de la négociation de l'accord que, « [l]egally, the Geneva Agreement has not prejudiced the position of either side: we and the Guyanese continue to regard the 1899 Award as valid, while in Venezuelan eyes it is null and void. Politically, it is an honourable compromise »[94] ?

8. Les Parties étaient d'accord sur leur désaccord et n'avaient aucune intention de chercher à le résoudre ; c'est cela qui fonde l'accord de Genève. De là, il engage les Parties à aller de l'avant et à chercher des solutions amiables pour régler le différend territorial qui les oppose, encore une fois d'une manière acceptable par les deux Parties, c'est-à-dire par des solutions satisfaisantes pour son règlement pratique. Ce sont les termes de l'accord de Genève. C'est dire que la question de la

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[93] M. Virally, « Panorama du droit international contemporain. Cours général », *RCADI*, vol. 183, p. 53.

[94] Note verbale n° AV 1081/116 en date du 25 février 1966 adressée à l'ambassadeur du Royaume-Uni au Venezuela par le ministre britannique des affaires étrangères, par. 8 (mémoire du Guyana du 19 novembre 2018 (questions de compétence et/ou de recevabilité), ci-après « MG sur la compétence et la recevabilité (2018) », vol. II, annexe 32).

prétendue reconnaissance de la sentence malgré sa nullité n'a manifestement rien à faire dans cette entreprise.

9. Le Guyana peut feindre la stupéfaction, comme s'il était impensable que tel fût l'objet et le but de l'accord de Genève, en s'appuyant d'ailleurs sur une déclaration politique d'Iribarren Borges, clairement erronée et sans portée juridique, le fait est qu'il y a des précédents. Il suffit de songer à l'affaire du *Canal de Beagle*. Le différend avait été réglé par une sentence arbitrale de 1977. Mais cette dernière avait été unilatéralement déclarée nulle et non avenue au regard du droit international par l'Argentine, prétention catégoriquement rejetée par le Chili[95]. Les positions étaient irréconciliables. Un mois plus tard, les Parties signaient l'acte de Puerto Montt pour : « (A) … la[y] the bases for setting in motion negotiations through which direct understandings could be reached on … matters which in the view of one or the other Government remain pending in the southern region ». L'acte ajoutait : « (B) The above bases of understanding … in no way modify the positions taken by the Parties with respect to the Arbitral Award »[96].

10. L'acte de Puerto Montt posait donc comme acquis le désaccord des Parties et, de là, les engageait à rechercher une résolution directe du différend, via un mécanisme de négociation, en l'occurrence structuré en trois phases, dont deux faisant appel à une commission mixte. Après l'échec du mécanisme, l'affaire s'était finalement réglée, comme chacun sait, grâce à la médiation du pape, lequel, en parfaite cohérence avec l'accord de Puerto Montt, ne s'est à aucun moment préoccupé de la nullité ou de l'opposabilité, ou non, de la sentence arbitrale de 1977. Il n'en était tout simplement pas question.

11. Les parallèles avec l'accord de Genève sautent aux yeux. De la même manière, son article V dispose que rien dans l'accord ne peut être interprété comme une renonciation par aucune des Parties à aucune de ses prétentions — ce qui confirme leur accord sur leur désaccord, tandis que le reste de l'accord de Genève les engage à rechercher une solution mutuellement satisfaisante. Dans ce cadre juridique, tout comme dans celui posé par l'acte de Puerto Montt, ni la question de la validité, ni celle de l'opposabilité de la sentence arbitrale n'ont la moindre pertinence.

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[95] *Affaire concernant un litige entre la République argentine et la République du Chili relatif au canal de Beagle*, *RSA*, vol. XXI, p. 53-261, p. 235.

[96] *Ibid.*, p. 237.

B. Le principe de l'estoppel interdit au Guyana d'opposer au Venezuela sa conduite postérieure à la sentence de 1899

12. J'ajoute, Monsieur le président, Mesdames et Messieurs les juges, que le principe de l'estoppel s'oppose à la prétention du Guyana dans le cadre de la mise en œuvre de l'accord de Genève qui est le guide dans cette procédure.

13. La jurisprudence bien connue pose qu'il y a estoppel lorsque sont mis en lumière à la fois une position prise par une partie envers une autre partie et le fait que cette dernière s'appuie sur cette position à son détriment ou à l'avantage de la partie qui l'a prise[97].

14. La position prise par le Royaume-Uni envers le Venezuela, et sur laquelle le Guyana ne saurait revenir en raison d'un estoppel, ressort clairement des négociations de l'accord de Genève.

15. En 1962, face à l'expression ferme de la revendication territoriale vénézuélienne, appuyée sur le constat par le Venezuela — non sur l'allégation — de la nullité de la sentence arbitrale de 1899, le Royaume-Uni a certes mentionné qu'il considérait cette revendication comme tardive, mais il proposa spontanément que des experts travaillent non pas sur le comportement post 1899 du Venezuela et sur ses conséquences éventuelles, mais sur les archives du XIX^{e} siècle, afin d'éclairer les circonstances de l'adoption de la sentence de 1899[98]. Il espérait, en vain, que de tels travaux convaincraient le Venezuela que ladite sentence ne souffre d'aucun des vices qu'il lui reproche[99]. À aucun moment dans cette discussion, comme dans toutes celles qui l'ont suivie et ont finalement conduit à l'accord de Genève, le comportement du Venezuela postérieur à la sentence ne lui a été opposé comme purgeant la sentence de tous ses vices. Ce sur quoi les parties divergeaient, à l'issue de l'examen du matériau documentaire relatif à la sentence arbitrale, était uniquement l'existence, ou non, de preuves de nullité de la sentence en tant que telle.

16. C'est la divergence sur l'existence de preuves de nullité de la sentence issue du matériau historique, qui est restée centrale tout au long des négociations. Elles ont finalement conduit les signataires de l'accord de Genève à consacrer ce désaccord, tout en ouvrant la voie à la recherche de

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[97] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), arrêt, C.I.J. Recueil 2018 (II)*, p. 558, par. 158.

[98] *Sentence arbitrale du 3 octobre 1899 (Guyana c. Venezuela), compétence de la Cour, arrêt, C.I.J. Recueil 2020*, p. 466, par. 36-38, et p. 490-491, par. 131.

[99] Nations Unies, déclaration du représentant du Royaume-Uni à la 349^{e} séance de la Commission des questions politiques spéciales tenue le 13 novembre 1962, reproduite dans « Question of Boundaries between Venezuela and the Territory of British Guiana », Assemblée générale, dix-septième session, doc. A/SPC/72, p. 2 (MG sur la compétence et la recevabilité (2018), vol. II, annexe 24).

solutions pratiques mutuellement satisfaisantes acceptées par eux. L'accord de Genève fait d'ailleurs mention dans son préambule du processus que l'invitation britannique avait initié. Il souligne en effet que les négociations ont été menées « in accordance with the joint communiqué of 7 November, 1963 ». Ce communiqué se lit ainsi :

> « After the relevant documents have been examined, the experts will meet to discuss their findings. They will then submit reports to their respective Governments. *These reports will form the basis of further discussion between the Governments.* »[100]

17. Or, l'objet des négociations ouvertes par le Royaume-Uni a clairement conditionné le consentement final du Venezuela à l'accord de Genève. Jamais le Venezuela n'aurait accepté de s'y soumettre s'il avait été question d'évaluer les conséquences juridiques de son comportement postérieur à la sentence de 1899.

18. Le ministre britannique des affaires étrangères l'avait d'ailleurs confirmé. Il expliquait à l'ambassadeur britannique au Venezuela, dans une note verbale du 25 février 1966, soit huit jours après la signature de l'accord de Genève, qu'à propos du préambule qu'il avait âprement négocié, il avait : « persuaded the Venezuelan Foreign Minister to accept a compromise wording which reflected the known positions of both sides »[101].

19. La référence, par celui-là même qui négociait avec le Venezuela, aux « known positions of both sides », pour convaincre le ministre vénézuélien, est sans équivoque : c'est bien sur la base de la « known position » du Royaume-Uni au moment de la conclusion de l'accord de Genève, qui ne portait en rien sur le comportement du Venezuela postérieur à la sentence, que le Venezuela en est devenu signataire.

20. Le Venezuela s'est appuyé sur cette position. Ce serait à son détriment si, dans le cadre de la mise en œuvre de l'accord Genève, lui était désormais opposé son comportement postérieur à la sentence. Ce serait à l'inverse à l'avantage du Royaume-Uni et de son successeur le Guyana. Dans la note verbale de février 1966 que je viens de citer, le ministre britannique des affaires étrangères

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[100] Joint Communiqué on the Ministerial Talks held in London on November 5, 6 and 7, 1963 between the minister for foreign affairs of Venezuela, Mr Marcos Falcon Briceño, and the Foreign Secretary of the United Kingdom, Hon. R. A. Butler, in *Claim to Guayana Esequiba — Documents 1962-1981*, Caracas 1981, p. 26 (les italiques sont de nous). Accessible à l'adresse suivante : https://search.archives.un.org/uploads/r/united-nations-archives/d/d/c/ddc37896a5337f2fcfe18c2619ac9ce255b7952eda0b01b3d11e025f65b4419e/S-0884-0009-06-00001.PDF, p. 94.

[101] Note verbale n° AV 1081/116 en date du 25 février 1966 adressée à l'ambassadeur du Royaume-Uni au Venezuela par le ministre britannique des affaires étrangères, par. 6 (MG sur la compétence et la recevabilité (2018), vol. II, annexe 32).

explique lui-même que : « As for the United Kingdom, I trust that the Agreement will have averted the grave damage to which our large interests in Venezuela would have been exposed if the Geneva meeting had ended in deadlock. »[102]

21. Selon la formule consacrée, le principe de l'estoppel interdit de souffler le chaud et le froid. Le Royaume-Uni a soufflé le chaud pour convaincre le Venezuela de conclure l'accord de Genève. Le Guyana, comme successeur du Royaume-Uni, ne peut pas maintenant souffler le froid en prétendant opposer au Venezuela qu'il ne saurait se prévaloir de la nullité de la sentence de 1899 du fait de son comportement postérieur à ladite sentence.

II. La théorie selon laquelle le comportement du Venezuela postérieur à la sentence de 1899 « purgerait » la sentence de ses vices est sans pertinence

22. Mais, Monsieur le président, Mesdames et Messieurs de la Cour, qu'en serait-il si l'accord de Genève n'existait pas ? L'hypothèse est évidemment absurde, mais je vais maintenant l'explorer pour les besoins de la discussion.

A. La théorie invoquée par le Guyana est sans fondement

23. Voyons d'abord la théorie selon laquelle l'absence de contestation formelle d'une sentence arbitrale comme nulle et non avenue pendant des années la purgerait automatiquement de tous ses vices de nullité.

24. La jurisprudence ne lui accorde aucun crédit. C'est ce qu'illustre l'arbitrage dans l'affaire de la *frontière entre le Costa Rica et le Panama*[103]. Cette frontière avait été fixée par une sentence arbitrale du 11 septembre 1900 du président de la République française — Loubet. Les parties en reconnurent la validité, tant dans leurs attitudes respectives que dans leurs prises de position. Si elles rencontraient des difficultés, c'était seulement pour en interpréter les termes. Dans un traité conclu 10 ans plus tard, le 17 mars 1910, les parties s'accordèrent

> « to submit to the decision of the honorable the Chief Justice of the United States, who will determine, in the capacity of arbitrator, the question: What is the boundary between

[102] *Ibid.*, par. 8.

[103] *The Boundary Case between Costa Rica and Panama*, *RSA*, vol. XI, p. 519-547.

Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic »[104].

25. Dans sa sentence arbitrale de 1914, le *Chief Justice* des États-Unis n'a aucunement considéré que la sentence de 1900 était purgée de ses éventuels vices, à raison de l'absence de contestation formelle de sa validité pendant une décade, et pas davantage de sa reconnaissance expresse comme valide par les parties — lesquelles, je le rappelle, se bornaient à lui demander une interprétation. Tout au contraire, il a déterminé qu'une partie de la ligne frontière précédemment arbitrée « was not within the matter in dispute or within the disputed territory » et que « it results that such award was beyond the submission and that the Arbitrator was without power to make it, and it must therefore be set aside and treated as non-existing »[105].

26. Si la théorie guyanaise avait un fondement en droit international, l'arbitre aurait dû considérer la sentence comme valide en tous ses aspects car purgée de tous ses vices par le temps. Mais il n'a même pas envisagé de prendre une telle décision.

27. Il reste bien sûr l'affaire de la *Sentence du roi d'Espagne* sur laquelle le Guyana s'appuie abondamment. Dans l'arrêt de 1960, la Cour internationale de Justice a jugé que le Nicaragua, qui avait soudainement refusé d'exécuter une sentence arbitrale qu'il avait jusque-là accueillie avec satisfaction comme réglant définitivement la question de la frontière, n'était pas en droit de contester cette sentence arbitrale, car son attitude à la suite de son prononcé ne pouvait que signifier qu'il avait renoncé à ce droit.

28. Comme indiqué dans ses écritures, le Venezuela considère que la doctrine de la renonciation tacite au droit de faire valoir la nullité d'une sentence arbitrale ne lui est pas opposable. Lorsque l'idée fut avancée d'en faire un principe coutumier dans le cadre de la codification du droit des traités[106], le Venezuela et d'autres, comme par exemple l'Argentine, s'y sont fermement opposés. Cette opposition n'a pas cessé.

29. Mais même si cette théorie était de nature coutumière et opposable au Venezuela, il resterait, d'une part, que ce dernier n'a aucunement renoncé à se prévaloir de la nullité de la sentence

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[104] Convention between Costa Rica and Panama for the settlement of the boundary controversy, signed at Washington, 17 March 1910, *ibid.*, art. I, p. 525.

[105] *The Boundary Case between Costa Rica and Panama*, *ibid.*, p. 543.

[106] *Annuaire de la Commission du droit international*, 1963, vol. II, A/CN.4/SER.A/1963/Add.1, p. 41, par. 5.

par son attitude, et, d'autre part, qu'il est indéniable qu'il a fait valoir son droit dès qu'il a été en mesure de le faire.

B. Le Venezuela n'a pas renoncé à se prévaloir de la nullité de la sentence de 1899 dans le cadre du processus et de l'accord de Genève

30. Monsieur le président, il résulte d'une jurisprudence constante de la Cour que la renonciation à des prétentions ou à des droits ne se présume pas à la légère. Pour ne prendre qu'un exemple, dans *République démocratique du Congo c. Ouganda*, votre Cour a rappelé que « toute renonciation à des prétentions ou à des droits doit ou bien être expresse, ou bien pouvoir être déduite sans équivoque du comportement de l'État qui aurait renoncé à son droit »[107].

31. Ceci posé, je dois ici ouvrir une parenthèse pour revenir au monde réel, celui dans lequel l'accord de Genève existe car il pose un cadre dans lequel les parties recherchent des solutions à la controverse qui — je cite l'accord — « has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier … is null and void » (article I). Sa raison d'être réside donc dans le fait même que le Venezuela se prévaut de la nullité de la sentence. On voit donc mal comment, sous l'empire de l'accord de Genève, le Venezuela pourrait être réputé y avoir renoncé.

32. Le Guyana essaie d'échapper à cette évidence en prétendant que dans l'affaire de la *Sentence du roi d'Espagne* la saisine de la Cour d'un différend portant sur une sentence arbitrale n'avait pas empêché la Cour de s'appuyer sur les comportements postérieurs à cette sentence imputables au Nicaragua pour juger que ce dernier avait renoncé à son droit d'en invoquer la nullité[108]. Et le Guyana de prétendre qu'il devrait en aller de même ici.

33. Mais il y a des différences fondamentales entre les deux affaires. L'une d'entre elles est que, dans celle de la *Sentence du Roi d'Espagne*, le différend était né du refus tardif du Nicaragua d'exécuter la sentence, en excipant de sa nullité, sans aucunement expliquer son retard à le faire. Le Nicaragua n'a pas du tout fait valoir, contrairement à ce qu'a prétendu le Guyana de manière fallacieuse lundi, que « it had been "unaware" of the award's defects at the time it was issued, *and for six years thereafter* »[109]. Il n'a plaidé l'ignorance que pour la courte période immédiatement après

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[107] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 266, par. 293.

[108] MGM, par. 6.27.

[109] CR 2026/25, p. 42, par. 53 (Oral) (les italiques sont de moi).

le prononcé de la sentence. Puisque la Cour était saisie de cette volte-face aussi surprenante qu'injustifiée, il était normal qu'elle en évalue les conséquences[110]. Par contraste, la controverse au cœur de l'accord de Genève est née du fait que des preuves ont été découvertes tardivement qui démontrent le caractère fondamentalement vicié de la sentence de 1899. Écarter purement et simplement l'allégation de nullité, comme si le Venezuela y avait renoncé, reviendrait à écarter toute pertinence auxdites preuves, ce qui serait manifestement contraire à la raison d'être, l'objet, le but et la lettre de l'accord de Genève.

C. Le Venezuela n'a pas renoncé à se prévaloir de la nullité de la sentence arbitrale par son attitude

34. Mais je ferme la parenthèse et raisonne à nouveau comme si l'accord de Genève n'existait pas, cette fois pour constater qu'il n'y a rien dans l'attitude ou dans la situation du Venezuela qui soit comparable à celle du Nicaragua dans l'affaire de la *Sentence du roi d'Espagne*. Je ferai deux séries d'observations à cet égard.

35. Premièrement, dans cette affaire — celle de la *Sentence du roi d'Espagne* —, la Cour avait forgé son opinion sur des messages clairs de pleine satisfaction adressés par les plus hautes autorités du Nicaragua à celles du Honduras. Le Nicaragua avait, insiste la Cour « exprimé à plusieurs reprises au Honduras sa satisfaction de ce que le différend relatif à la délimitation des frontières entre les deux pays eût été définitivement réglé par voie d'arbitrage »[111].

36. C'était en effet patent. En particulier du fait d'un télégramme explicite du président du Nicaragua à celui du Honduras[112]. Le président du Nicaragua écrit :

> « Par câble d'aujourd'hui j'ai pris connaissance de la sentence arbitrale du roi d'Espagne en matière de délimitation frontière et conformément à cette décision il paraît que vous avez gagné la partie, ce dont je vous félicite. Un bout de terre plus ou moins est sans importance lorsqu'il s'agit de la bonne entente entre deux nations sœurs. La question ennuyeuse de la délimitation des frontières s'étant terminée d'une manière si satisfaisante grâce à l'arbitrage amical, j'espère que dans l'avenir aucun obstacle ne s'opposera aux bonnes relations entre nos pays respectifs. »[113]

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[110] VD, par. 6.39-6.40.

[111] *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua), arrêt, C.I.J. Recueil 1960*, p. 212-213.

[112] *Ibid.*, p. 211 et 213.

[113] *Ibid.*, p. 210.

37. Comment la Cour aurait-elle pu juger autrement ? Mais il n'y a rien qui ressemble à cela ici. Rien.

38. Le Guyana a reproduit lundi les arguments — faibles — de son mémoire à cet égard. Fidèle au Règlement de la Cour, je n'y reviendrai pas car ils ont tous été réfutés, en détail, dans les écritures du Venezuela[114] — en particulier, j'invite la Cour à jeter un œil aux paragraphes 6.41 à 6.52 de la réplique.

39. Je note toutefois que le Guyana fait le plus grand cas de la lettre du 7 octobre 1899 adressée au ministre des affaires étrangères du Venezuela par l'ambassadeur du Venezuela au Royaume-Uni. Elle a été citée deux fois, sans compter les fois où elle a été citée dans les écritures. Mais, elle n'est en rien comparable à ce qui avait emporté la conviction de la Cour en 1960[115]. Car il ne s'agit pas « d[']échanges diplomatiques entre les deux Gouvernements »[116]. La correspondance est purement interne à la diplomatie vénézuélienne, par définition confidentielle. On ne sait d'ailleurs pas quand ce document a pu tomber entre les mains du Royaume-Uni ou du Guyana. Peut-être est-ce à l'occasion de la consultation tardive des archives vénézuéliennes après 1962.

40. On ne peut certainement pas déduire de cette correspondance interne au Venezuela une quelconque « attitude » ou renonciation. Elle éclaire en revanche l'état d'esprit dans lequel se trouvaient les autorités vénézuéliennes au lendemain de la sentence. L'ambassadeur écrivait :

> « [T]he award does not appear to be based on reason and justice, as Mr. de Martens affirmed in his closing speech, and the Venezuelan arbiters only gave their adhesion in order to avoid an even greater flouting of the essential attributes of any faultless judgment »[117].

41. La sentence est « unjust », écrit-il encore, insistant sur le fait que « for us the sentence is hardly satisfactory as regards that to which our right was clear »[118].

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[114] VCM, par. 7.6-7.16, et VD, par. 6.39.

[115] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 October 1899) (MG sur la compétence et la recevabilité (2018), vol. II, annexe 3).

[116] *Minquiers et Écréhous (France/Royaume-Uni), arrêt, C.I.J. Recueil 1953*, p. 71.

[117] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs (7 October 1899) (MG sur la compétence et la recevabilité (2018), vol. II, annexe 3 ; VCM, vol. II, annexe 68).

[118] *Ibid.*

42. L'agent du Venezuela, José Rojas, écrivait au même ministre des affaires étrangères trois jours plus tôt que la sentence « sets a completely biased demarcation line in favour of England »[119]. Il ajoutait :

> « I find Mr. de Martens' conduct inexplicable surprise and, as I am not used to qualify other people's actions without evidence, in line with my belief, I refrain myself from qualifying that of him. Besides, what happened between said Mr. de Martens and the American Arbitrators did not happen in my presence, but I learned about it through truthful channels. »[120]

43. L'arbitre britannique Lord Russell reconnaissait franchement dans une lettre à Lord Salisbury du 7 octobre 1899, dont je rappelle qu'elle a été publiée — donc rendue accessible — en 1979, que « [i]f the Award is to be judged from the standpoint of Venezuelan claims the result would seem to be disastrous to Venezuelans »[121].

44. Contrairement à ce que le Guyana prétend, contre toutes les évidences[122], à savoir que le Venezuela nageait dans le bonheur de la victoire et aurait fait savoir qu'il était satisfait de la sentence[123] au monde entier, le Royaume-Uni ne s'y est pas trompé. Aucun message de satisfaction ne lui a été adressé.

45. Je sais bien que le Guyana a avancé dans ses écritures, si ce n'est à l'oral, sans doute par manque de temps, ce qu'il appelle une « lettre », qu'il datait initialement de 1944, puis qu'il date maintenant de 1941[124], dans laquelle le ministre des affaires étrangères du Venezuela aurait écrit que la sentence de 1899 est « chose jugée »[125]. Mais cette « lettre » n'a jamais existé, ni en 1944, le ministre Gil Borges était décédé à cette date, ni en 1941. Les prétendues preuves apportées par le Guyana sur l'existence de cette *lettre* n'existent pas. Elles se résument à un bref rapport interne au Foreign Office dans lequel l'auteur, anonyme, évoque une sorte de discussion informelle qui serait intervenue entre quelqu'un et le ministre des affaires étrangères du Venezuela, durant laquelle ledit ministre aurait, écrit l'auteur anonyme, parlé de « chose jugée » à propos de la sentence de 1899[126].

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[119] Letter from Rojas to the Foreign Officer Minister of Venezuela, 4 October 1899 (VCM, vol. II, annexe 65).

[120] *Ibid.*

[121] Letter from Lord Russell to Lord Salisbury, 7 October 1899 (VCM, vol. II, annexe 67, p. 505).

[122] VCM, par. 7.6-7.16 et VD, par. 6.41.

[123] CR 2026/25, p. 30-31, par. 5-9 (Oral).

[124] MGM, par. 4 .47.

[125] MGM, par. 4.47.

[126] MGM, vol. III, annexe 56.

46. Il suffit de regarder cette « preuve » pour voir, même de loin, qu'il ne s'agit pas d'une lettre du ministre des affaires étrangères du Venezuela, et pas davantage d'une déclaration officielle du Venezuela. Il n'y a, dans ce que produit le Guyana, que ce que disent des Britanniques à d'autres Britanniques. C'est évidemment sans portée.

47. Ma deuxième observation à propos de ce qui diffère entre l'affaire de la *Sentence du roi d'Espagne* et ce qui est en discussion ici est que, comme la professeure Azaria l'a déjà montré, il est évident que l'attitude d'un État ne peut s'évaluer qu'au regard des circonstances propres à chaque situation.

48. Or, lorsque la *Sentence du roi d'Espagne* fut rendue, en 1960, le Nicaragua pouvait qualifier le Honduras — c'est ce qu'en dit la Cour — de République sœur[127]. Il aurait pu d'emblée, sans risque, critiquer la sentence comme nulle et non avenue si tel avait été son sentiment. Sans risque. Son abstention à le faire, et au contraire ses marques expresses de contentement à la sentence comme portant un terme définitif au différend, a pu valoir renonciation. Par contraste, la situation du Venezuela par rapport à l'Empire britannique était et est demeurée radicalement différente, entre le moment où ce dernier a pris pied en Amérique du Sud jusqu'à ce que la seconde guerre mondiale commence à l'affaiblir.

III. Le Venezuela a fait valoir la nullité de la sentence de 1899 lorsqu'il a disposé de preuves suffisantes pour le faire

49. Monsieur le président, Mesdames et Messieurs les juges, suggérer que le Venezuela se serait réjoui du *vol qualifié* de son territoire par le jeu d'une sentence arbitrale truquée est absurde. Suggérer que son attitude aurait manifesté une renonciation à son droit de se prévaloir de la nullité de la sentence de 1899 ne l'est pas moins.

50. *« [Q]ui tacet consentire videtur si loqui potuisset ac debuisset »*[128]. Autrement dit, « [l]'acquiescement rattache un effet juridique non pas au silence, mais au *silence qualifié*. En effet, il doit s'agir d'un silence de la part de celui qui pouvait et devait parler. »[129] Or, pour pouvoir

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[127] *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua), arrêt, C.I.J. Recueil 1960*, p. 211.

[128] R. Kolb, « Les maximes juridiques en droit international public : questions historiques et théoriques », *Revue belge de droit international*, 1992/2, p. 409, note 9.

[129] *Ibid.*, par. 19.

dénoncer une sentence arbitrale comme nulle et non avenue, encore faut-il disposer de preuves à cet égard.

51. Monsieur le président, Mesdames et Messieurs les juges, on peut sans doute reprocher à un État d'agir sans preuve. Dans l'affaire de *la Sentence du roi d'Espagne*, le Nicaragua alléguait que la procédure de désignation de l'arbitre fixée par le traité d'arbitrage n'avait pas été respectée. La Cour avait fermement rejeté cette thèse en disant qu'une telle allégation « devrait être établie par des preuves positives. Aucune preuve de ce genre n'a été présentée à la Cour. »[130]

52. C'est dire qu'à l'inverse on ne peut pas reprocher à un État de n'avoir agi que preuves à l'appui. Or, le Venezuela n'a pendant longtemps pas disposé de telles preuves. Il ne pouvait alors que se référer à la sentence comme à un bouclier contre les appétits insatiables de l'Empire britannique ou, pour reprendre les termes des experts vénézuéliens, que l'on a déjà cités, « in order to prevent further troubles »[131].

53. C'est évidemment le mémorandum Mallet-Prevost qui a tout changé. Pour le Venezuela, il a été la première — pas la seule ! — preuve positive, le premier témoignage écrit, public, rédigé par un témoin direct de ce que seules des rumeurs colportaient jusque-là, à savoir que la sentence de 1899 était le fruit d'une manœuvre, qui s'est révélée être d'extorsion, comme l'ont écrit avec raison les experts vénézuéliens[132]. Il s'agissait du chaînon manquant. De là, tout s'est emboîté.

54. Je ne m'étendrai pas sur la théorie du complot, longuement suggéré par le Guyana, à propos du mémorandum Mallet-Prevost. Le fait est que c'est à partir de ce mémorandum que le Venezuela a considéré qu'il disposait d'une première preuve directe de ce qui n'était jusque-là que rumeurs, à savoir que l'arbitrage de 1899 était une sordide farce. La question de la solidité de cette preuve est indifférente à cet égard mais, et j'y reviendrai, le témoignage de Mallet-Prevost est inattaquable quant aux faits qu'il décrit, comme le professeur Tams l'a déjà démontré.

55. Chacun sait qui était Severino Mallet-Prevost. Cet homme savait cette vérité qui gêne tant le Guyana. Mais, homme d'honneur, il n'avait pas voulu, de son vivant, rompre publiquement son

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[130] *Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua), arrêt, C.I.J. Recueil 1960*, p. 206.

[131] Hermann González Oropeza, S. J. & Pablo Ojer, *Report submitted by the Venezuelan experts on the issue of the boundaries with British Guiana to the National Government on the Issue of the Boundaries with British Guiana* (18 March 1965), MGM, vol. IV, annexe 74, p. 39, par. 29.

[132] *Ibid.*, p. 36, par. 20.

engagement à maintenir la confidentialité de ce qui lui avait été confié. Il l'a fait à titre posthume, en 1949, cinquante ans après. Jusque-là, chacun pouvait penser que la sentence était le fruit d'un compromis. Mais ce dont Mallet-Prevost témoigne est la manière dont ce compromis a été atteint[133]. Et il révèle que cela n'a rien à voir avec une délibération fondée sur le droit ; c'est le fruit d'un chantage. Mallet-Prevost témoigne — je le redis parce que c'est un élément clé dans l'histoire qui a conduit à l'accord de Genève :

> « When I was shown into the apartment where the two American arbitrators were waiting for me Justice Brewer arose and said quite excitedly:
>
> > "Mallet-Prevost, it is useless any longer to keep up this farce pretending that we are judges and that you are counsel. The Chief and I have decided to disclose to you confidentially just what has passed. Martens has been to see us. He informs us that … if we insist on starting the line on the coast at the Moruca River he will side with the British and approve the Schomburgk Line as the true boundary."
> >
> > "However," he added that, "he, Martens, is anxious to have a unanimous decision; and if we will agree to accept the line which he proposes he will secure the acquiescence of Lord Russell and Lord Collins and so make the decision unanimous." »[134]

56. Ces faits sont décrits par Mallet-Prevost. Ils semblent contestés par le Guyana sur la base de l'âge de Mallet-Prevost au moment de la rédaction du mémorandum, et sur la base d'autres insinuations qui ne valent pas la peine que j'en parle. Car ils sont confirmés par Martens lui-même. Son agenda personnel[135] a été rendu partiellement public à la faveur de la Perestroïka[136]. Or, comme l'a déjà mentionné le professeur Tams, Martens explique dans le détail, tout comme Mallet-Prevost dans son mémorandum, la manière dont il a manipulé les arbitres ; au moyen d'un véritable chantage auprès des deux « camps », les Anglais, d'une part, et les Américains, de l'autre — qu'il voyait clairement comme deux camps homogènes, illustrant au passage le total manque d'indépendance de chacun des arbitres. Il a réclamé de chacun de ces « camps », lors d'entretiens privés, de faire les

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[133] W. Cullen Dennis, « The Venezuela-British Guiana Boundary Arbitration of 1899 », *The American Journal of International Law*, 1950, vol. 44, nº 4, p. 723.

[134] O. Schoenrich, « The Venezuela-British Guiana Boundary Dispute », *The American Journal of International Law*, 1949, vol. 43, n° 3, p. 523-530, p. 529 (MGM, vol. III, annexe 1).

[135] *Private Diary Entries* of Prof Fyodor Fyodorovich Martens (4 June 1899-3 October 1899) (MGM, vol. III, annexe 33).

[136] L. Malksoo, « F.F. Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law », *EJIL*, 2014, vol. 25, n° 3, p. 811-829, p. 818.

concessions qu'il leur proposait, faute de quoi il ferait pencher la balance dans le sens de l'autre camp.

57. La sentence était donc le fruit d'une extorsion faite par le président du Tribunal. On apprend aussi de l'agenda de Martens son motif pour agir de la sorte. Le Guyana affirme que c'est au nom d'un devoir moral. La belle affaire. Pas du tout. Son motif était la recherche d'une gloire personnelle. « I was terribly glad to have such a triumph of mine to obtain a unanimous arbitration award », écrit-il dans son carnet, notant au passage, confirmant la « farce » que fut cet arbitrage, que « the British … should be extremely pleased with the decision by which they got all the gold mines »[137]. Et en effet le vice-ministre des affaires étrangères russe reçut un aimable courrier de la reine d'Angleterre louant la « astute and assiduous manner in which [Martens] has presided over [the Tribunal's] deliberations », et lui demandant de transmettre à Martens « her gratitude »[138].

58. Mais, comme je l'ai dit à l'instant, l'agenda de Martens n'a été rendu public que sur le tard. Je reviens donc au mémorandum Mallet-Prevost. Le professeur William Cullen Dennis, juriste américain très impliqué dans les arbitrages internationaux au début du siècle dernier, notamment comme agent des États-Unis, au contraire de Child qui n'y connaissait rien, en retire les conclusions suivantes en 1950 :

> « First, there is no doubt of the truthfulness and substantial accuracy of Mr. Mallet-Prevost's memorandum so far as it relates to matters of fact within his personal knowledge. Second, the Mallet-Prevost memorandum affords *definite and conclusive evidence* of what practically everyone who had studied the Guiana Boundary Case was already convinced and many had said, namely, that the decision was a diplomatic compromise and not a truly judicial decision. »[139]

59. Le mémorandum a été publié en 1949. Il est, comme l'écrit William Cullen Dennis en 1950, la « definite and conclusive evidence »[140]. Clifton Child, malgré son pamphlet à charge sur lequel se fonde le Guyana, reconnaissait également au mémorandum que « if it were the only evidence upon which the fairness of the arbitration of 1899 could be judged, [it] would bring justice of the award seriously into question ». C'est la survenance de cette « definite and conclusive

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[137] Excerpts of the Private Diary Entries of Professor Fyodor Fyodorovich Martens, 4 June 1899-3 October 1899, p. 396 (MGM, vol. III, annexe 149).

[138] *Ibid.*, p. 398.

[139] W. Cullen Dennis, « The Venezuela-British Guiana Boundary Arbitration of 1899 », 1950, vol. 44, nº 4, p. 720-727, p. 727 (les italiques sont de nous).

[140] *Ibid.*, p. 727.

evidence » qui a conduit le Venezuela à dénoncer la sentence comme nulle et non avenue, ce qu'il n'avait pas les moyens de faire jusque-là, faute de preuve.

60. Comme l'ont expliqué les experts vénézuéliens en 1965, dès la découverte du mémorandum Mallet-Prevost :

> « Venezuelan historians, under the direction of their Foreign Ministry, immediately rushed to search the British archives for new documents that would further clarify the details of that farce. Fifty years had passed and for the first time, it was possible to study those documents in the public archives of Great Britain. This research was carried out between 1950 and 1955.
>
> … The publication of the Mallet-Prevost Memorandum coincides with the opening of the British archives and the private American archives. »[141]

61. Le ministre des affaires étrangères du Venezuela expliquait également dans un aide-mémoire adressé à son homologue britannique le 3 novembre 1963 que

> « [t]he history of the border between Venezuela and British Guyana can only be fully known and understood by researching the papers of the men who intervened in it.
>
> These papers have only been made available to scholars and expert researchers during the last decade: the papers of Benjamin Harrison, Richard Olney, Lord Salisbury, Joseph Chamberlain, David Brewer, Daniel Gilman, Severo Mallet-Prevost, and others.
>
> In light of this recently discovered and compiled evidence, Venezuela has *conclusive proof* that it sustained a non-pecuniary and legal loss when it was deceived and deprived of its legitimate territory by the 1899 Award. »[142]

62. Dès 1951 le Venezuela fit savoir qu'il contestait la sentence de 1899, durant une réunion de l'Organisation des États américains. Le représentant du Venezuela avertit alors solennellement que le Venezuela réclamait la réparation des dommages causés par l'arbitrage de 1899[143]. En 1954, durant la conférence interaméricaine, le représentant de l'État déclara qu'à raison de « special circumstances prevailing at the time » de la sentence de 1899, le Venezuela réservait expressément ses droits auxquels il ne renonçait nullement, à obtenir que la frontière issue de la sentence soit rectifiée[144]. En mars 1960, un membre du Congrès vénézuélien prenait la même position. Enfin, en

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[141] H. González Oropeza, S.J. & P. Ojer, *[Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional] Report submitted by the Venezuelan Experts to the National Government on the Issue of the Boundaries with British Guiana* (18 Mar. 1965), MGM, vol. IV, annexe 74, p. 41, par. 36-37.

[142] *[Aide-Memoire presentado por el Dr. Marcos Falcón Briceño al Hon. R. A. Butler] Aide-Memoire presented by Marcos Falcón Briceño to the Hon. R.A. Butler* (5 Nov. 1963) (les italiques sont de nous) (MGM, vol. IV, annexe 73).

[143] VCM, par. 7.27.

[144] VCM, par. 7.28.

1962, le Venezuela portait sa revendication devant les Nations Unies, ce qui conduisit à l'accord de Genève.

63. Monsieur le président, il est incontestable que c'est bien lorsque le Venezuela a eu entre les mains une preuve positive, une preuve « definite and conclusive », pour reprendre les termes du professeur William Cullen Dennis, que la sentence de 1899 était nulle et non avenue, qu'il put envisager s'en prévaloir, et qu'il s'en est prévalu. C'est seulement à ce moment qu'il était en droit de le faire. Un droit auquel il n'avait jamais pu renoncer.

64. Ceci conclut ma plaidoirie à propos du comportement du Venezuela postérieur à la sentence de 1899. Le temps manquant pour développer davantage, je vais maintenant conclure cette journée.

CONCLUSION

65. Monsieur le président, Mesdames et Messieurs les juges, l'exposé fait par le Venezuela aujourd'hui porte sur l'accord de Genève, signé en février 1966. Cet accord prend acte du désaccord des signataires à propos de la sentence arbitrale et les engage, par la voie d'une obligation conventionnelle nouvelle, à chercher des solutions pratiques et acceptables par ses parties pour résoudre la controverse de manière amiable.

66. Le Venezuela rejette fermement l'affirmation, aux effluves de paternalisme colonial, selon laquelle cet accord serait un « piège » que le Venezuela, soudain pris d'une schizophrénie « instinctive, émotionnelle et irréfléchie », se serait tendu à lui-même[145].

67. C'est pourtant ce qui a été suggéré avec complaisance lundi. Dès 1962, a-t-il encore été dit, le Venezuela savait pertinemment qu'il ne pouvait se prévaloir de la nullité de la sentence de 1899[146]. Dès 1962. Mais alors, pourquoi a-t-il conclu l'accord de Genève quatre ans plus tard ? À en croire le Guyana, l'accord de 1966 n'est rien d'autre qu'une forme de compromis de saisine de la Cour, ce que le Venezuela a toujours dit et maintient fermement qu'il n'est pas. D'ailleurs, si tel était le cas, cela voudrait dire qu'en signant l'accord de Genève le Venezuela aurait eu pour seul objet de soumettre à la Cour une prétention qu'il savait d'emblée vaine et sans espoir. Il aurait, en signant

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[145] CR 2026/24, p. 23, par. 4 et 5 (d'Argent).

[146] CR 2026/25, p. 42, par. 56 (Oral).

l'accord de Genève, volontairement abandonné sa position quant à la nullité de la sentence, tout en faisant semblant de l'affirmer. C'est à la fois absurde et contraire à la réalité.

68. Et si ce n'est par souci de se piéger lui-même, ce que le Guyana suggère est finalement que si, en signant l'accord de Genève, le Venezuela a cru qu'il avait conclu un traité dont l'objet et le but étaient de réparer de manière acceptable l'injustice historique qui en avait motivé la conclusion, en réalité il s'est tout bonnement fait « rouler dans la farine » — c'est une expression française, je ne sais pas s'il y a une traduction anglaise mais j'espère qu'elle sera trouvée. Voilà la petite musique que l'on a entendue, lundi, avec, en voix « off », La Fontaine qui chantonnait : « la ruse la mieux ourdie peut nuire à son inventeur, et souvent la perfidie retourne sur son auteur ».

69. Mais je laisse là La Fontaine et ferai l'impasse sur les comptines enfantines et autres batailles navales, car la controverse dont l'accord de Genève s'est saisi n'a rien d'un gentil vaudeville.

70. Comme on le sait, cette controverse, qui a conduit à l'accord de Genève, puise ses racines dans l'histoire d'une vulgaire escroquerie coloniale maquillée en un arbitrage prétendument fondé en droit.

71. L'histoire est connue, elle est incontestable. Tout au long du XIX^{e} siècle, les Britanniques ont procédé à une colonisation agressive du territoire vénézuélien, férocement convoité à cause de ses richesses aurifères. Schomburgk en a été un instrument docile.

72. Aucun des arguments prétendument juridiques qu'avançait la couronne britannique pour justifier ses annexions successives n'avait le moindre début de commencement de fondement. C'est d'ailleurs pourquoi les Britanniques résistèrent autant qu'ils le purent à l'idée d'un arbitrage fondé sur le droit de l'époque. À ce sujet, lorsqu'il fut appelé en 1886 à évaluer l'éventuel fondement juridique de la thèse britannique, Sir Hertslet, figure du Foreign Office de l'époque, jugea qu'il « is a poor one »[147].

73. Son avis, franc car il était donné à titre confidentiel, était que l'Empire britannique « could not submit the case to arbitration with the slightest hope of success given the contradictory claims

[147] Letter from Sir Hertslet to Mr Jervoise, 14 June 1886, Public Record Office (London) F.O. 80/309, Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts, 1967, p. 35 (VCM, vol. III, annexe 150).

which have been put forward in the English published maps »[148]. Il ajoutait : « the argument [based] on the ground of strict right would be hopeless »[149].

74. Conscients de l'inanité juridique de leurs prétentions, les Britanniques n'acceptèrent dans un premier temps d'aller à l'arbitrage que sous condition. Le Secrétaire d'État Olney, dans un courrier à Bayard daté de juillet 1895, résume ainsi la position britannique telle qu'il la comprenait :

> « You [Venezuela] can get none of the debatable land by force, because you are not strong enough; you [Venezuela] can get nothing by treaty, because I [Great Britain] will not agree; and you can take your chance of getting a portion by arbitration, only if you first agree to abandon to me such other portion as I may designate. »[150]

Olney ajoutait :

> « It seems therefore quite impossible that this position of Great Britain should be assented to by the United States, or that, if such position be adhered to with the result of enlarging the bounds of British Guiana, it should not be regarded as amounting, in substance, to an invasion and conquest of Venezuelan territory. » [151]

75. La « doctrine Olney » était posée : si l'invasion et la conquête britannique du territoire vénézuélien pouvaient être validées par un arbitrage, l'usurpation de territoire serait acceptable par les États-Unis.

76. Pour inciter les Anglais à accepter d'entrer dans ce processus, les Américains fondèrent la United States Venezuelan Boundary Commission, encore dite « President Cleveland Boundary Commission ». Ses travaux avançant, les Britanniques virent l'affaire tourner dans le sens prédit par Hertslet. Comme l'indique Markus Baker, qui avait été le géographe de la Commission, « [i]t came to be seen that a finding adverse to Great Britain would produce an awkward situation »[152].

77. De là la confection d'un traité d'arbitrage négocié dans le dos du Venezuela, le même Olney que celui que je viens de citer à la manœuvre, inventant et consignant, ensemble avec les Britanniques, des règles inexistantes taillées sur mesure pour offrir sur un plateau un semblant de fondement juridique à la thèse anglaise. Y compris dans des notes confidentielles échangées avec le Royaume-Uni visant à réduire d'avance à néant les meilleurs arguments juridiques du Venezuela. Le

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[148] Extract of the Memorandum by Sir E. Hertslet, Foreign Office, 5/VIII/1886 (VCM, vol. II, annexe 27).

[149] *Ibid.*

[150] Letter from Richard Olney to Thomas Bayard, 20 July 1895 (VCM, vol. III, annexe 152).

[151] *Ibid.*

[152] M. Baker, *The Anglo-Venezuelan boundary dispute 1849-1903*, Washington, Judd & Detweiler, 1990 (available at: https://archive.org/details/cu31924021109529).

caractère frauduleux de ce traité d'arbitrage est exemplaire. On ne saurait trouver plus beau spécimen. Il faudrait l'enseigner dans les facultés de droit.

78. L'arbitrage lui-même s'est avéré être une farce de très mauvais goût. À son propos, Olney, dans une lettre à Cleveland du 27 décembre 1899, ne s'alarme en rien, bien sûr, du « loss of territory to Venezuela », dont il avait été l'un des secrets artisans durant la négociation du traité d'arbitrage, mais il s'alarme seulement du « general discrediting of the cause of arbitration ». C'était là son seul souci. Les hommes de droit, eux, en étaient malades. Il écrit : « According to my informant, both the Chief Justice and Brewer are down on arbitration as a mode of settling international disputes … Fuller and Brewer had come home pretty sick of arbitration. »[153]

79. Quant à la sentence arbitrale que le traité d'arbitrage exigeait des arbitres, elle n'en a que le nom. Ce n'est rien moins, comme l'a écrit Harrison, que le vol d'un grand pan de territoire vénézuélien, celui que les Anglais voulaient pour ses mines d'or[154].

80. Face à la mystification qu'a été la sentence arbitrale de 1899, le Venezuela ne pouvait que constater la trahison et le désastre, faute de preuve de sa nullité, ne disposant dans un premier temps que d'un faisceau insuffisant d'indices, à savoir : la brièveté de la délibération, incompatible avec la complexité du dossier ; le texte de la sentence, impénétrable quant aux faits et au droit qu'elle tient pour établissant la frontière ; et des fuites révélées sous le sceau de la confidentialité, pas des preuves, concernant le processus qui mena les arbitres à adopter le texte à l'unanimité. Quant à l'Empire britannique, il demeurait dangereux pour le Venezuela, tout comme il l'avait été tout au long du XIX^{e} siècle. Le blocus du début du siècle suivant ne manqua pas de le rappeler. Dans ce contexte, alors qu'il avait attendu de l'arbitrage justice et protection, il se résigna, à défaut de justice, à faire appliquer la sentence comme un bouclier contre toute nouvelle velléité conquérante de son puissant voisin.

81. N'en déplaise au Guyana, le mémorandum Mallet-Prevost a changé le cours des choses en ouvrant la voie vers la mise à jour d'un ensemble de preuves des malversations dont le Venezuela avait été victime. C'est de là qu'apparut au grand jour la monstruosité de ce prétendu arbitrage. La

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[153] Library of Congress, Richard Olney Papers, vol. 12. p. 455-457 ; quoted in Statement of His Excellency, Dr Marcos Falcon Briceno, Minister for External Relations of Venezuela, at the 348th Meeting of the Special Political Committee on 12 November 1962, p. 20 (VCM, vol. III, annexe 143).

[154] VCM, par. 5.126.

première preuve, largement confirmée par la suite, était apportée, que le défaut de motivation ne cachait pas des motivations non dites, ce à quoi, dans le doute, l'on aurait pu croire ; non, il n'y avait aucune motivation, la sentence était le fruit d'une extorsion pure et simple d'un président de tribunal avide d'une gloire personnelle qu'il plaçait dans l'obtention, à tout prix, et surtout au détriment de tout fondement juridique, d'une décision unanime attribuant les mines d'or aux Anglais.

82. C'est tout cela qui a conduit à l'accord de Genève.

83. Cet accord de Genève, que le Guyana s'amuse à voir comme une manipulation de plus destinée à piéger immanquablement un Venezuela décidément « candide », est au contraire un traité conclu de bonne foi durant une période clé du XX^{e} siècle, sans doute la plus importante, celle de la décolonisation. Et il fut conclu pour mettre un terme à une injustice historique, une monstruosité coloniale, celle qu'avait constituée la mise en place de ce prétendu arbitrage.

84. Par cet accord, les signataires se sont engagés à ce que « any outstanding controversy be amicably resolved in a manner acceptable to both parties », et ils se sont assignés « the task of seeking satisfactory solutions for the practical settlement of the controversy ». La position du Venezuela, faut-il le rappeler, a toujours été qu'à travers cet accord il n'a jamais été dans son intention, ni explicite, ni implicite, de reconnaître d'une quelconque manière la compétence de la Cour internationale de Justice. Ceci demeure sa position, ferme et invariable : la Cour, selon le Venezuela, n'a pas compétence pour traiter la requête du Guyana.

85. C'est pourquoi ce matin il n'a été question que de cet accord. Il est le cadre de droit international dans lequel le Venezuela se place, comme il se doit, dans ses relations avec le Guyana, s'agissant de la controverse que cet accord longuement négocié décrit. C'est lui, l'accord de Genève, qui est proprement historique, en ce qu'il a ouvert un nouveau chapitre dans les relations entre les deux États à propos d'une controverse historique qui opposait le Venezuela au Royaume-Uni depuis le milieu du XIX^{e} siècle, puis que le Guyana a prise à son compte.

86. Je le répète, le Guyana y voit un piège — voudrait que vous y voyiez un piège. Un de plus, dans la droite ligne des manipulations frauduleuses de la fin du XIX^{e} siècle. Le Venezuela y voit un accord historique, qu'il a conclu de bonne foi pour qu'une injustice flagrante, l'usurpation du territoire vénézuélien victime des insatiables convoitises britanniques, trouve des solutions acceptables par ses signataires, le Venezuela d'une part, le Guyana, libéré de la colonisation

britannique, d'autre part. Il est entré en vigueur dès sa signature. Et il cessera de produire ses effets lorsque son objet et but sera atteint, c'est-à-dire lorsque la controverse sera « amicably resolved in a manner acceptable to both parties ».

87. Ceci conclut à temps la présentation du Venezuela de ce jour, et je vous remercie de votre attention.

The PRESIDENT: I thank Professor Thouvenin, whose statement brings the first round of oral argument of Venezuela to a close. The oral proceedings in the case will resume Friday 8 May 2026 at 3 p.m., with Guyana's second round of oral argument.

The sitting is closed.

The Court rose at 6 p.m.

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