Nullity of the Paris Arbitral Award of October 3rd, 1899

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I Paris Arbitral Award of 1899

1. General Considerations

We will refer to the nullity of the Paris Arbitral Award of October 3rd, 1899. The award is null and void for a number of violations of the 1897 Washington Treaty and the then international law. Specifically speaking, the Paris Award is null and void because it violated due process; incurred in the defect of overuse of power and decided beyond what the arbitral tribunal was required to weigh and, consequently, incurred in the defect of *ultra petita*, by lacking grounding in law and violating the arbiters' duty of impartiality.

The dispute with Guyana has been a matter of fundamental importance to the Political and Social Sciences Academy in Venezuela that has dedicated the special attention of its academicians, both prior and current. Let us bear in mind that on October 14th, 1938, academician Carlos Álamo Ibarra took Seat N° 27 of this Corporation with a paper on "Venezuela's Frontiers with British Guiana".

For this study, historic and legal titles were systematically analyzed for the first time, setting the bases of the Venezuelan claim, the vicissitudes of the dispute in the XIX Century, that emerged in times of the Republic of Colombia, the U.S. appeal to the Monroe doctrine, the constitution of the arbitral tribunal, the award we will be examining today, and, also, the execution of its unjust decision.

Subsequently, in 1949, an article was published in Volume 14 of the Corporation's Bulletin under the title: "A matter of exceptional importance to Venezuela's diplomatic history. The dispute on the border between Venezuela and British Guiana" by Otto Schoenrich containing his particular considerations, and the surprising, and later famous, posthumous Memorandum written by Severo Mallet-Prevost.

Adding to this, there are the studies and conferences published in Bulletin N° 91 of 1983, as a part of the conference cycle organized by Tomás Enrique Carillo Batalla, in a joint effort between this Academy and the Academy of History, on the claim of our rights to the territory of the Esequibo. Studies published by academician Isidro Morales Paúl are included under the title: "Critical Analysis of the Venezuela-Great Britain border issue".

Bulletin N° 91 also includes the works of academician Carlos Sosa Rodríguez under the title: "The Washington Act and the Paris Award", and academician René De Sola under the title: "Updated evaluation of the Geneva Agreement".

A study by Hermann González Oropeza, one of the Jesuits who took part in researching English files, under the title: "Two aspects of the claim to the Esequibo territory", was also published in Bulletin N° 91 as was the work of Marcos Falcón Briceño, who had held office as Minister of Foreign Relations of Venezuela, under the title: "Origins of the current claim to Guyana Esequiba".

More recently, the Academy has publically pronounced itself with respect to the events of recent years. The work on "Academic Institutional Doctrine", published in Caracas in 2019, at the behest of the Corporation's President, Humberto Romero-Muci, and edited by the Editorial

Jurídica Venezolana (Venezuelan Juridical Editors) includes the pronouncements made from 2012 to 2019.

Section Six of the work addresses the protection of the territorial integrity of the Republic. Thirty-Five pages tell the different pronouncements, communiqués, declarations, and letters that the Corporation has issued in reference to the situation of the Esequibo territory; to wit:

1. October 1st, 2013: Declaration of the Political and Social Sciences Academy on the new violation of national sovereignty by the Government of the Cooperative Republic of Guyana (violation of maritime space and territorial sovereignty over the continental maritime territory by the Cooperative Republic of Guyana).

2. October 22nd, 2013: Pronouncement of the Academy regarding aggressions by the Cooperative Republic of Guyana, and Venezuela's abandonment of the territorial claim against Guyana and the breach of the Geneva Agreement. (The Teknik Perdana chartered by the Government of the Cooperative Republic of Guyana, active in scientific research tasks without authorization from Venezuela; a violation of the Geneva Agreement).

3. April 21st, 2015: On the Venezuela-Guyana border dispute (The illegal concessions granted by Guyana to transnational companies on claim territory are the result of the cooperation and economic aid policies put forth by the Venezuelan government).

4. July 29th, 2015: The Political and Social Sciences Academy issued a pronouncement regarding the dispute with the Cooperative Republic of Guyana (The Cooperative Republic of Guyana delimited its territory of marine and submarine areas without the participation of Venezuela. Occupation of the claim zone. Granting illegal concessions. Violation of the Geneva agreement).

5. February 7th, 2017: Pronouncement of the Political and Social Sciences Academy regarding the current status of the dispute with the Cooperative Republic of Guyana. (The Academy mentioned that, since the year 2015, the new Government of the Cooperative Republic of Guyana has publicly expressed its intention to have the Venezuelan claim to the Esequibo territory submitted to the International Court of Justice).

6. March 20th, 2017: A letter addressed to Delcy Rodríguez, Minister of the People's Power for Foreign Relations of the Bolivarian Republic of Venezuela. (The Political and Social Sciences Academy is of the opinion that Venezuela should publicly and as soon as possible assert the terms of the Geneva Agreement, both as regards the Government of Guyana and its own activity, with the General Secretary of the United Nations (UN)).

7. October 25th, 2017: A letter addressed to Jorge Arreaza, Minister of the People's Power for Foreign Relations of the Bolivarian Republic of Venezuela regarding the announcement made by the office of the General Secretary of the UN and the Government of the Cooperative Republic of Guyana to submit the territorial dispute between Venezuela and Guyana over the Esequibo territory to the International Court of Justice.

8. February 14th, 2018: A release by National Academies to public opinion regarding the official announcement made by the General Secretary of the UN to submit the dispute with Guyana to the International Court of Justice.

9. April 11th, 2019: Pronouncement of the Political and Social Sciences Academy regarding the rejection of Guyana's claim against Venezuela (A claim that goes against the Geneva Agreement that requires "an amicable resolution that would be acceptable to both parties" and the exhaustion of the pacific means for settlement of conflicts stipulated in the United Nations Charter; to submit the dispute to a judicial procedure would defeat the purpose of the agreement and keep the parties from reaching a practical agreement through negotiation or mediation).

10. After the Sentence of December 18th, 2020, in which the International Court of Justice declared its competence to partially hear the claim brought by the Cooperative Republic of Guyana, the Political and Social Sciences Academy pronounced itself on January 13th of 2021, regarding the necessary defense of Venezuela's interests at this instance.

Other academicians have also dedicated their time to his matter. Allan Brewer-Carías has expressed considerations on several aspects, including the legal titles held by Venezuela. Academicians Luis Cova Arria, Eugenio Hernández-Bretón, Gabriel Ruan Santos, and Humberto Romero-Muci have also made their contribution to this matter from their positions as Presidents of the Corporation and have driven valuable communiqués and pronouncements, while working on their analyses. Along those lines, Academicians Carlos Ayala Corao, Cecilia Sosa Gómez, and Jesús María Casal have also contributed to the study of this matter.

Héctor Faúndez Ledesma not only organized this carefully laid out Cycle of Forums, but has also published a valuable book recently, for which I was honored to write the Prologue, on "Contentious Competence of the International Court of Justice and the Case of Guyana v Venezuela" in which he not only approaches historic events, titles, and intimacies of the Paris arbitral procedure and award, but works his way up to current times by reference to the situation in the International Court of Justice. Academician Ramón Escovar León has also contributed to the study of the matter through several articles published in El Nacional daily newspaper.

Now, within the Cycle of Forums organized by the Political and Social Sciences Academy, coordinated by academician Héctor Faúndez Ledesma, to whom we extend our gratitude for the invitation to participate, we will refer to the nullity of the Paris Arbitral Award of October 3rd, 1899.

The Washington Treaty establishing the rules of arbitration for the settlement of the territorial dispute between Venezuela and Great Britain was signed on February 2nd, 1897, and, in compliance therewith, the Arbitral Tribunal was set up in the City of Paris on January 25th, 1899. This arbitral tribunal held 54 hearings with a duration of four hours each at the Orsay Palace in Paris; and issued the Paris Arbitral Award, at 01:00 pm on October 3rd, 1899. In a mere six paragraphs and only 844 words, with no due grounding in law, the arbitral tribunal unanimously decided to award 159,500 kilometers, more than ninety five percent of the disputed territory, to Great Britain.

The Paris Arbitral Award of October 3rd, 1899 is null and void for a number of violations of the 1897 Washington Treaty and the then international law. The Award is null and void because it violated due process; incurred in the defect of overuse of power and decided beyond what the arbitral tribunal was required to weigh and, consequently, incurred in the defect of *ultra petita*, by lacking grounding in law and violating the arbiters' duty of impartiality.

2. The Arbiters

Five arbiters shaped the arbitral tribunal. The arbiters on the Venezuelan side were David Josiah Brewer and Melvin Weston Fuller, both Justices of the Supreme Court of the United States of America. The arbiters on the British side were Sir Richard Henn Collins and Baron Herschell, although the latter was substituted upon his demise by Charles Russell Baron of Killowen, a member of Queen Victoria's private council. The appointed four arbiters, two on the Venezuelan side and two on the British side, decided to appoint Russian arbiter Federico de Martens to chair the arbitral tribunal.

Attorneys for the defense of Venezuela were U.S. Citizens Severo Mallet-Prevost, Benjamin Harrison (former U.S. President), James Russell Soley, Benjamin F. Tracy (former U.S. Secretary of the Navy), and the only Venezuelan, José María Rojas, as a government agent, accompanied by José Andrade (Venezuelan Ambassador to London and Rome).

Attorneys for the Defense of the British side were English Citizens Sir Richard E. Webster (Attorney General), Sir Robert Reid (former Attorney General), G. R. Askwith, S. A. Rowlatt, and George Buchanan, as a government agent.

II Defects of the Award

We have already mentioned that the arbitral award is null and void for multiple violations of the 1897 Washington Treaty and international law as it stood at the time. Concretely speaking, the Paris Award is null and void for violation of due process; for having incurred in the defect of excessive power; for having decided beyond what was asked of the Arbitral Tribunal and, consequently, having incurred in the defect of *ultra petita*; for the lack of grounding in law and for lack of the arbiters' impartiality.

1. Violation of Due Process

The Paris Arbitral Award is null and void for multiple violations of the 1897 Washington Treaty and international law as it stood at the time. First, it is necessary to emphasize that, according to the terms of the Washington Treaty and particularly to Articles III and IV, this was an arbitration process following the law and, as such, the arbiters were required to adhere to the letter and spirit of the Washington Treaty, study, investigate, and ascertain the legal titles of each of the parties, and apply international law as it stood at the time.

The Paris Arbitral Tribunal did in fact fail to investigate and did not ascertain the legitimacy or legality of the titles held by Venezuela; on the contrary, it dismissed them in violation of Article III of the Arbitration Treaty that established:

> *"**The Tribunal shall investigate and ascertain** the extension of the respective territories, or the territories that could **legally be claimed** by the party(ies) at the time Great Britain acquired the Colony of British Guiana, and shall*

determine the dividing line between the United States of Venezuela and the Colony of British Guiana". [1] (Our Highlighting)

The expression ***legally claimed*** meant that, in order to settle the dispute, the arbiters should rely only on the titles the parties could prove under the law and, in turn, decide according to the principles of international law that were in force at the time.

The arbiters were under the obligation of analyzing the titles of the parties and considering the applicable law at the time of the dispute, while bearing in mind that the scope of the dispute encompassed only the territories ***that could legally be claimed*** by the parties.

On the other hand, the obligation *to investigate and ascertain* meant that the arbiters should have analyzed the legal titles of each party and verified whether they could, in fact, be deemed to be proof for their purposes.

This obligation is also stipulated in Article V of the Treaty according to which, arbiters should *examine and impartially and carefully decide the matters submitted to them*. Article V of the Washington Treaty does, in fact establish that:

The Arbiters shall meet at Paris, within sixty days after the delivery of the printed arguments mentioned in Article VIII, and shall proceed ***impartially and carefully to examine and decide the questions that have been, or shall be, laid before them,*** *as herein provided, on the part of the Governments of Her Britannic Majesty and the United States of Venezuela respectively.*[2] (Our Highlighting)

From the articles quoted above, two obligations of the arbiters are clear. First, to examine the matters laid before them, and, second to decide thereon impartially and carefully. However, that is not what happened.

The arbiters decided with absolute discretion and without taking into account any of Venezuela's valid titles. There are, in fact, several documentary sources making it clear that the Tribunal did not proceed according to law but to political inclinations.

The tribunal breached its obligations when it failed to take Venezuela's most important evidence into account, including the letter of March 4th, 1842, by Henry Light, Governor of the British Guiana Colony, addressed to Lord Stanley, Minister of Colonies.

This was a fundamental piece of evidence to the benefit of Venezuela's requirements, since it was in that letter that the Governor expressed that they had no claim whatsoever over the Amacuro River, West of the Barima River. With this letter, it became clear that even Governor Henry Light had serious doubts about the legitimacy of the second Schomburgk line when he

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1 Héctor FAÚNDEZ LEDESMA, "Contentious Competence of the International Court of Justice and the Case of Guyana v Venezuela". Political and Social Sciences Academy - Editorial Jurídica Venezolana. Caracas, 2020. P. 337.

2 Ibidem, P. 338

wrote: *"I believe Mr. Schomburgk assumes that the Amacuro River is the frontier, just by reason of convenience".*[3]

This document brought to light not only the lack of interest of the English people to occupy the territories encompassed within the second Schomburgk line, but also the unviability of such occupations that, according to the Governor, *"could only be occupied at such a cost in lives and money that would not render it convenient".*[4]

This document was not taken into account by the arbitral tribunal. Venezuela was aware of the existence of the letter, but did not know its contents. At the time, the Venezuelan representatives asked the tribunal to have the British reveal such contents; the answer was, however, negative based on *considerations of high politics.*

The document came to light only after de English confidential files were opened revealing a number of other documents that had high probative value, which the arbiters failed to take into account despite their duty under Article V of the Washington Treaty to *proceed impartially and carefully to examine and decide the questions that have been, or shall be, laid before them.*

Another serious violation of the obligations imposed on the arbiters by the Treaty refers to what is known as the first Schomburgk line of 1835 that was not taken into account by the judges.

This first Schomburgk line *"leaves the aforesaid river only an approximately 45 miles from the coast, at the confluence of the Mazaruni and Cuyuní Rivers with the Esequibo, and, from there, forms a kind of sack west of the Esequibo River up to the river mouth on the coast".*[5]

The arbitral tribunal, on the contrary, took into account the expanded line on the 1842 Herbert map where there are important signs of falsification and alteration; to wit:

> *"Venezuela has evidence that the British Foreign Office did not become aware of this line until June 1886. This is more than a serious sign that we are in the presence of recent debasement of the original map that was kept at the Colonial Office since 1842."*[6]

On the other hand, let us bear in mind Rule "c" of Article IV that also pinpoints the application of international law:

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[3] Quote from Héctor FAÚNDEZ LEDESMA, Ob.Cit. Pes. 166-167. Letter of March 4th, 1842, by Henry Light, Governor of the British Guiana Colony, addressed to Lord Stanley, Minister of British Colonies, Foreign Office, 80/180. Words translated by the quoted author.

[4] Ibidem

[5] Carlos SOSA RODRÍGUEZ, "The Washington Act and the Paris Award", *Political and Social Sciences Academy Bulletin* N° 91, Caracas, 1983. P. 122

[6] Hermann GONZÁLEZ OROPEZA and Pablo OJER *"The Venezuelan Experts' Report to National Government on the Matter of Borders with British Guyiana",* Ministry of Foreign Relations, Caracas, 1967. P. 13.

(c) "The Arbiters may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbiters may deem to be applicable to the case . . ."[7]

As established in the foregoing articles, arbitration would be conducted following the law and, as such, the arbiters were required to adhere to the letter of the Washington Treaty, study, investigate, and ascertain the legal titles of each of the parties, and apply international law as it stood at the time.

Contrary to all that has been explained, the arbiters decided with absolute discretion, without taking into account any of Venezuela's valid titles, and in frank violation of the then applicable law.

That international law as it stood at the time the dispute was to be decided was determined by three greatly important events that established the modality and rules of the international arbitration procedure.

The first such event was the 1871 Washington Treaty that established the rules for the Alabama case and determined the transition from discretional arbitration to arbitration following the law.

The Alabama claims were a series of claims by the United States of America against Great Britain after the U.S. Civil War. Great Britain had declared itself neutral, but had, however broken its neutrality by providing confederates with ships resulting in an array of damages on U.S. raw materials. Later, in May 1871, the parties signed the Washington Treaty that was to settle the dispute between the two countries. Pursuant to this agreement, they drew up a set of rules designed specially to keep the arbitral tribunal neutral. Arbitration took place in 1872 and Great Britain was sentenced to pay indemnification. From there on, the case would serve as reference for future arbitration procedures, and a new stage of evolution began for alternative settlements.[8]

Kings Arbitrations were very common in the Middle Ages. The parties relied on a person's prestige in order to choose the deciding arbiter for their dispute. Commonly, not only monarchs were appointed deciders, but also *"popes and deeply rooted scientific and cultural institutions such as the Universities of Bologna and Pisa"*[9].

It is also true that, historically speaking, arbitration initially worked as a political-diplomatic means to settle disputes. However, arbitration turned into a mechanism much closer to law than to moral or scientific authority that could incidentally accompany the arbiters, and evolved from the political sphere to a juridical instance for settlement of disputes.

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[7] Héctor FAÚNDEZ LEDESMA, Ob.Cit. P. 338

[8] See: the Historical Paragraph on the International Court of Justice's web-page at: https://www.un.org/es/icj/origin.shtml

[9] Daniel GUERRA IÑIGUEZ, Public International Law, Volume II, 2nd Edition, GRAFIUNICA, Caracas, 1976. P. 166.

A person was no longer chosen as an arbiter for his personal moral values or pursuant to the religious conviction of the international community affected by the conflict, deciding on the basis of his own criterion, but, rather, in adherence to evermore demanding legal rules.[10]

The rules established in the 1871 Washington Treaty were the rudimentary principles of international law that were already in force on the matter of arbitration.

Article II of the Treaty is especially important, since it establishes the obligation of the arbiters to impartially and carefully examine and decide the matter laid before them.

The rules of the Alabama case became the general international-arbitration principles and were binding on the parties; but they were, sadly, ignored by the arbitral tribunal of Paris in 1899 when the arbiters set aside the precedent in Article II of the Treaty for the Alabama case which was also present in Article III of the Washington Treaty with the obligation to *investigate and ascertain the extension of the territories.*

The second event that served to shape the international law to be applied by the arbiters was the Project for International Arbitration Procedural Rules drawn up by the International Law Institute in 1875 proposing rules to promote international arbitration, which included the arbitration principles that were valid at the time.

Let us bear in mind, Article 18 of the Project, for example, that established: "The arbitral tribunal shall decide pursuant to the principles of international law, provided the agreement does not impose other rules or leave the decision to the arbiters' discretion"[11], meaning that, save as otherwise agreed, the valid principles of international law, which are binding on the parties, cannot be ignored.

The Washington Treaty did not in any way excuse arbiters from adhering to such principles. Much to the contrary, from the wording of the treaty, it follows that the law – precisely the law that was in force at the time – should be analyzed and, within that law, so should the general principles of international law be analyzed.

The third and last matter of importance for the evolution of arbitration as it stood at the time was The Hague Conference organized by Czar Nicholas II and held from May 15th to July 3rd, 1899. This was the first formal instance at which arbitration rules were discussed. Important aspects of arbitration were discussed at this conference, set forth in the Convention for the Peaceful Settlement of International Disputes, which was the main result of that meeting.[12]

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[10] Ibidem. Ps. 166-167.

[11] International Law Institute. *Projet de RÈGLEMENT pour la Procédure Arbitrale Internationale, Session de La Haye.* 1875, P. 5. Available at: https://www.idi-iil.org/app/uploads/2017/06/1875_haye_01_fr.pdf. Original wording of Project Article 18: *"Le tribunal arbitral juge selon les principes du droit international, à moins que le compromis ne lui impose des règles différentes ou ne remette la décision à la libre appréciation des arbitres."* Free Translation:

[12] A. BASCUÑÁN MONTES, "*Treaties Approved at The Hague International Conference",* Garnier Hermanos, París, 1900, Ps. 11 and 18.

The importance of the convention lies in that it gathers the principles of international law that up to then were diffused, and systematizes the rules to be met in every arbitration procedure. The purpose of the convention was clearly stated in Article I as follows:

> *"With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory Powers agree to use their best efforts to ensure the pacific settlement of international differences."*[13] Free Translation

Thus, the convention approached arbitration considering it a suitable legal means to settle international differences. That was made clear in Article 15:

> *"International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of* ***respect for law"***[14]*.* (Our Highlighting)

Every solution stemming from arbitration should, save as otherwise agreed, be based on the law and not on political considerations. This was upheld in Article 20:

> *"With the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention".*[15]

This provision establishes a clear distinction between differences being settled by way of diplomacy as opposed to arbitration, which constitutes a settlement in law, by saying: *with the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy,* striking a clear difference between the two means: one, political, and, the other, juridical.

2. Excessive Power

The Paris Award is null and void for defect of incurring in excessive power when the rule of prescription was erroneously applied to the benefit of Great Britain, thus violating Article IV of the Arbitration Treaty that established that:

> *"Adverse possession or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district,*

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[13] James BROWN SCOTT (dir.), *The proceedings of the Hague Peace Conference*, prepared by Carnegie Endowment for International Peace in Washington, Oxford University Press, New York, 1920. P. 236. Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/Hague-Peace-Conference_1899.pdf.

[14] Ibidem. P. 238.

[15] Ibidem. P. 239.

as well as actual settlement thereof, sufficient to constitute adverse possession or to make title by prescription".[16]

This rule had been negotiated by Richard Olney and Julián Pauncefote, The Ambassador of England in Washington, behind the back of Minister José Andrade, who was gradually excluded from the Washington Treaty negotiation conversations.

Venezuela had, in fact, been made to believe, through Minister José Andrade by an explanation given by the U.S. Secretary of State, Richard Olney, that the aforesaid rule of prescription would apply only to occupations effective prior to 1814 and referred only to a very small territory between the Pomaron, Moruco, and Esequibo Rivers. If that were so, Great Britain would have had no right whatsoever.

Nonetheless, to the English mind-set, the rule of prescription would be applicable to all occupations occurring 50 years prior to the date on which the Washington Treaty was signed, or backwards from 1897. This construal of the rule of prescription prevailed, and, it did not, as had been said, refer to a small territory.

This construal of the rule of prescription went against what the parties had agreed in the November 1850 Treaty, which intended to keep the parties from expanding their claims by undue usurpation of disputed territories.

It is curious that a fifty-year prescription was established allowing England to acquire many more territories, rather than establishing a one-hundred-year prescription more in line with the principles of international law albeit less favorable, on the other hand, since it would impede England from obtaining such a vast territory.

We also bear in mind that, for this rule to apply, England would have had to prove that it peacefully and permanently occupied those territories. That never happened and the arbitral tribunal said nothing on the matter.

In accordance with this erroneous construal, the principle of *uti possidetis facti* prevailed over the principle of *uti possidetis iuris,* the true axis of the problem.[17] This was done by arguing that *util possidetis iuris* being a principle of American International Law, it would be applicable only to the States of the region under conquest; whereby Great Britain, not being a part of the states under colonial dominion, sustained that this principle was in no way applicable in this case.

Application of *util possidetis iuris* would have benefitted Venezuela since, according to this principle, the country had acquired all the territories under the General Captaincy of Venezuela since 1777.

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[16] Héctor FAÚNDEZ LEDESMA, Ob.Cit. P.337.

[17] See: Isidro MORALES PAÚL. "Critical Analysis of the <<Venezuela-Great Britain>> border issue", *Political and Social Sciences Academy Bulletin* N° 91, Caracas, 1983. P. 192

But, even if we assume this incorrectly applied rule of prescription, there seems no possibility therefrom to grant the enormous territory that was awarded to Great Britain. The map included in the Report drawn up by Jesuits Hermann González and Pablo Ojer does in fact shows that the territory that could be acquired by England under the rule of prescription was much smaller than the final award.

The Award established a border line between the United States of Venezuela and British Guiana, as follows:

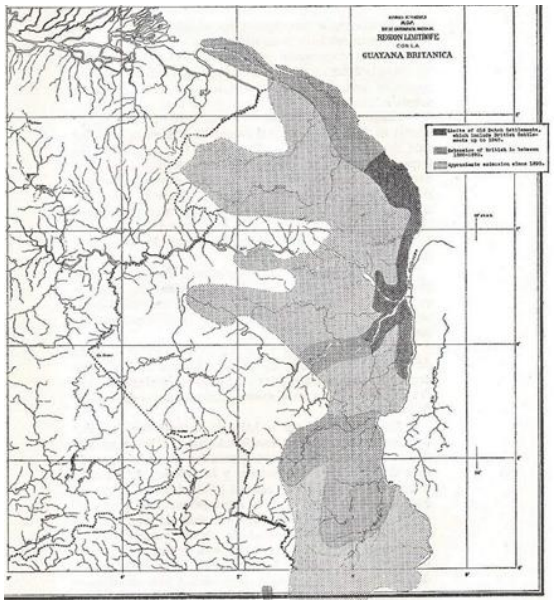
> *"Starting from the coast at Point Playa, the line of boundary shall run in a straight line to the River Barima at its junction with the River Mururuma, and thence along the mid-stream of the latter river to its source, and from that point to the junction of the River Haiowa with the Amakuru, and thence along the mid-stream of the Amakuru to its source in the Imataka Ridge, and thence in a south-westerly direction along the highest ridge of the spur of the Imataka Mountains to the highest point of the main range of such Imataka Mountains opposite to the source of the Barima, and thence along the summit of the main ridge in a south-easterly direction of the Imataka Mountains to the source of the Acarabisi, and thence along the mid-stream of the Acarabisi to the Cuyuni, and thence along the northern bank of the River Cuyuni westward to its junction with the Wenamu, and thence following the mid-stream of the Wenamu to its westernmost source, and thence in a direct line to the summit of Mount Roraima, and from Mount Roraima to the source of the Cotinga, and along the mid-stream of that river to its junction with the Takutú, and thence along the mid-stream of the Takutú to its source, thence in a straight line to the westernmost point of the Akarai Mountains, and thence along the ridge of the Akarai Mountains to the source of the Corentin called the Cutari River. Provided always that the line of delimitation fixed by this Award shall be subject and without prejudice to any questions now existing, or which may arise, to be determined between the Government of Her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela."*[18]

The following map -taken from the Report published by Jesuits Hermann González and Pablo Ojer in 1967- on the basis of British confidential documents, clearly shows which territories were occupied by the English people in 1840 (black), between 1886 and 1890 (dark grey) and after 1890 (light grey).[19]

[18] Héctor FAÚNDEZ LEDESMA, "Contentious Competence of the International Court of Justice and the Case of Guyana v Venezuela". Political and Social Sciences Academy - Editorial Jurídica Venezolana. Caracas, 2020. Ps. 342-343.

[19] Hermann González and Pablo Ojer. Ob.Cit. P. 15.

Border Region with British Guiana



Black: Territories occupied by GB up to 1840.
Dark Grey: Territories occupied by GB in 1886 - 1890.
Light Grey: Territories occupied by GB after 1890.

This map was drawn up on the basis of maps and other British confidential documents.
It is evident that even the 50-year Rule of prescription principle would apply to only a small portion of the Guyana-Esequibo

Note that the territory shown on the map is considerably smaller than the territory awarded to England in arbitration, since, even in the worst case scenario, these were the territories where the rule of prescription would apply. The Paris arbitral award, therefore, applied the rule of prescription erroneously thus benefiting Great Britain in violation of Article IV of the Arbitral Treaty and, consequently, incurred in the defect of excessive power.

3. Ultra Petita

It is clear that, according to Article I of the Washington Treaty, the Arbitral Tribunal had the sole mission of *"determining* the *dividing line between the United States of Venezuela and the Colony of British Guiana"*[20].

Likewise, according to Article III, often quoted above since it was violated in many different ways, the tribunal should *investigate and ascertain* the extension of the respective territories, or the territories that could legally be claimed, and determine the dividing line between the United States of Venezuela and the Colony of British Guiana.

It is pertinent to ratify the very basic and elementary consideration that there are boundaries in international arbitration and arbiters are to abide by such boundaries. The first is to focus on the purpose of the dispute established in the treaty, thus limiting the tribunal's competency; and, second, that the tribunal cannot pronounce itself on aspects that could involve other States who are not signatories to the commitment. The Paris Arbitral Award of 1899 is null and void since it ignored these limitations and, consequently incurred in the defect of *ultra petita*.

In the first place, it incurred in the defect of *ultra petita* by deciding the navigation system on the Barima and Amacuro Rivers that had nothing to do with the delimited dispute in the treaty.

On the other hand, by its decision, it involved and affected States that had not signed the treaty by pronouncing itself on border matters that were under discussion even at the time, such as the border between British Guiana and Brazil.

The tribunal did, in fact, ignore the limitation of purpose when it pronounced itself on the fluvial system and assigned international characteristics to the navigation activities on the Barima and Amacuro Rivers, a matter that had no place whatsoever in the treaty. And it additionally ignored it when pronouncing itself on customs duties between the disputing States. To wit:

> *In fixing the above delimitation, the Arbitrators consider and decide that in times of peace the Rivers Amakuru and Barima shall be open to navigation by the merchant-ships of all nations, subject to all just regulations and to the payment of light or other like dues: Provided that the dues charged by the Republic of Venezuela and the Government of the Colony of British Guiana in respect of the passage of vessels along the portions of such rivers respectively owned by them shall be charged at the same rates upon the vessels of Venezuela and Great Britain, such rates being no higher than those charged to any other nation: Provided also that no customs duties shall be chargeable either by the Republic of Venezuela or by the Colony of British Guiana in respect of goods carried on board ships, vessels, or boats passing*

[20] Héctor FAÚNDEZ LEDESMA Ob.Cit. P. 336

> *along the said rivers; but customs duties shall only be chargeable in respect of goods landed in the territory of Venezuela or Great Britain respectively.*[21]

Thus, the award also violated the subjective limitation when it affected States that had not signed the Arbitral Treaty by demining Guiana's boundaries with respect to Brazil and Surinam.

The Paris Award affected Brazil when it awarded England the Cotinga and Takutú River borders, territories that were in dispute between Great Britain and Brazil. The award did, in fact, state the following when it decided on the border:

> *". . . and from Mount Roraima to the **Source of the Cotinga**, and along the mid-stream of that river to its junction with the **Takutú**, and thence along the mid-stream of the **Takutú** to its source, thence in a straight line to the westernmost point of the Akarai Mountains . . ."*[22] (Our Highlighting)

In fact, when the Washington Treaty was signed in 1897, Brazil anticipated the possible effects of the award. Before the 1899 Paris Award was issued, Brazil submitted an objection to the wording of the 1897 Arbitral Treaty, specifically regarding the general nature of Article III considering that the content of the article could negatively compromise Brazil's rights in its territorial litigation with the British. The Brazilian objection was sent to the Arbitral Tribunal President and also to the British and Venezuelan Governments.

And, so, the Paris Arbitral Award impaired Brazil´s situation by awarding Great Britain the land the two countries were discussing; this caused formal objections by the Brazilian Foreign Ministry.

Brazil's considerations were, in fact, correct. This is confirmed in the content of the Circular letter sent by the Brazilian Foreign Relations Ministry to the Diplomatic Missions on December 7th, 1899, in Rio de Janeiro.

That document clearly laid out the impact and perplexity the award caused in Brazil. The decision established the border between the United States of Venezuela and Great Britain along the Cotingo and Takutú Rivers that were in litigation between England and Brazil.[23]

This violation of the borders in dispute meant that Venezuelan territory would stretch into Brazilian territory, including the southern slopes of the Akaray Mountain Range that were in litigation between Brazil and France.[24]

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[21] Ibidem. P. 343

[22] Ibidem. P. 342

[23] Elbano PROVENZALI HEREDIA. "The Chronology of Solidarity. Brazilian Documents Reveal Venezuela's Rights to the Guiana-Esequibo". Political and Social Sciences Academy Bulletin N° 93-94. Caracas, 1983. Ps. 76-77.

[24] Ibidem

The circular letter sustained that the award violated the international principle under which arbitral sentences can issue decisions only on the basis of the items agreed in the Arbitration Treaty.

It was impossible for either Venezuela or England to agree that the border would pass the Cotingo and Takutú Rivers, much less the Akaray Mountain Range. In fact, *"Venezuela could not because its border with Brazil is stipulated in the Treaty of May 5th, 1859, and excludes those regions; Great Britain could not because that border is under litigation to be submitted by Great Britain to arbitration with Brazil".*[25]

To conclude, the circular letter made it evident that the Paris Arbitral Tribunal's sentence went beyond the Tribunal's jurisdiction established in the Washington Treaty and, therefore, incurred in the defect of *ultra petita* when it pronounced itself on matters *"not claimed by either Venezuela or Great Britain, assigning Venezuela the Amazon Region that was not disputed with Brazil and assigning British Guiana, even going against Venezuela, only the portion of the Schomburgk line claimed against Brazil".*[26]

Likewise on this subject, in 1938 -over 80 years ago- Academician Carlos Álamo Ybarra pointed out that the award impaired "*Brazil's situation by awarding Great Britain lands that were under discussion between the two nations, which gave rise to objections brought in Paris and London by the Foreign Relations Ministry of Rio de Janeiro*".[27]

By affecting non-signatory States through its sentence, the Paris Arbitral Tribunal violated an essential principle of international arbitration law, relativity of the awards. This principle, stemming from the contractual nature of arbitration, constitutes a translation of the principle of contract relativity born under civil law and transposed to international arbitration.

According to this principle, in addition to the objective limits of the dispute -to not go beyond the matter in dispute- there are subjective limits -to not affect subjects not involved in the litigation by the sentence- and the Paris Award transgressed both limitations.

The fact of ignoring the Washington Treaty rules, deciding maters over which the Tribunal had no competency whatsoever, "*in themselves constitute new reasons for nullity of the sentence".*[28] By incurring in the defect of excessive power and, concretely in the defect of *ultra petita,* the arbitral award is, therefore, a null and void order.

4. Lack of Explanation

Both the 1897 Washington Treaty and the general principles of international law required that, for an award to be valid, it be issued in adherence to law. That meant that the decision would include a necessary and sufficient explanation for the parties to understand the arbiters'

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[25] Ibidem
[26] Ibidem
[27] Carlos ÁLAMO YBARRA. "Venezuela's Borders with British Guiana". Political and Social Sciences Academy – Editorial Elite. Caracas. 1938. P. 87
[28] Herman GONZÁLEZ OROPEZA and Pablo OJER. Ob.Cit. P.16

valuation of each of the juridical titles presented to them and have a reasoned explanation of why they decided as they did.

The duty to explain stems, first, from Article III of the Washington Treaty that established that the Tribunal ***shall investigate and ascertain*** *the extension of the respective territories, or the territories that could* ***legally be claimed*** *by the party(ies).*[29] The Tribunal was under the obligation of ascertaining the legal grounding of the titles presented by the parties and, then, explaining how it reached its findings.

Further, at the time the decision was issued, it was already a principle in international law that, in arbitration following the law, arbiters would explain their awards. It was thus the precedent was set in the Alabama case where the arbiters drew up an award explaining in great detail the reasoning behind the decision they reached.

The duty to explain was also included in the 1875 Project for International Arbitration Procedure Rules drawn up by the International Law Institute, specifically under Article 23, according to which:

> *"The award shall be set in writing and* ***shall state the reasons on which it was based****, save as otherwise stipulated in the arbitral agreement. It shall be signed by each member of the arbitral tribunal. Should a minority refuse to sign, the signatures of the majority shall suffice, with a written declaration stating that the minority refused to sign".*[30] (Our highlighting)

This provision expresses the importance of reasoning under the principles of international law at the time of the dispute, that it was dispensable only when the parties had so agreed. But, in the Paris Arbitration, the parties never released the arbiters from their duty to reason their findings.

And, to conclude, it was also clear that, at the time of the dispute, reasoning was a customary demand -a source of international law- when Article 52 of the Convention for the Peaceful Settlement of International Disputes, being the main result of The Hague Conference of 1899, established:

> *"The award, given by a majority of votes,* ***must state the reasons on which it is based****. It is drawn up in writing and signed by each member of the tribunal. Those members who are in the minority may record their dissent when signing".*[31]

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[29] Héctor FAÚNDEZ LEDESMA, Ob.Cit. P.337

[30] International Law Institute. Project for International Arbitration Procedure Rules. Session at The Hague, 1875. P. 5. Original Wording of the Article: *"La sentence arbitrale doit être rédigée par écrit et contenir un exposé des motifs sauf dispense stipulée par le compromis. Elle doit être signée par chacun des membres du tribunal arbitral. Si une minorité refuse de signer, la signature de la majorité suffit, avec déclaration écrite que la minorité a refusé de signer".*

[31] James BROWN SCOTT (dir.) Ob.Cit. P.244

Reasoning was, therefore, natural in Arbitral Awards that, at the time, were considered true settlements following the law. Despite Federico de Martens' -President of the Paris Arbitral Tribunal- repeated attempts at The Hague Convention to impose his thesis that Arbitral Awards should not state the reasons on which they are based, he was not successful.

During the discussions that took place at that Convention, Federico de Martens alleged that one of the reasons to leave reasoning out of Arbitral Awards, was that:

> *"To require arbiters to state the reasons of their decisions would be to impose on them one of the most sensitive obligations, even to the point of seriously embarrassing them, if their judicial consciences were not in agreement with the demands of their governments or the sensitivities of public opinion in their country".*[32]

To Federico de Martens, reasoning, from a juridical standpoint, was a great advantage, but, from a practical standpoint, not so. In this effort, the Russian was seconded only by Mr. Holls, the delegate of the United States of America.

However, other representatives who were in attendance at the meeting, such as Dr. Phillip Zorn, a private judicial advisor, a professor at the Königsberg University, who attended as a scientific delegate for Germany; Chevalier Descamps, a Senator representing Belgium; and the plenipotentiary delegate and member of the Council of State in Holland, Tobias Michael Carel Asser; refuted his arguments and held the position of the majority at the time, according to which, awards should state the reasons on which they were based. This was in fact the prevailing position included in Article 52 of the Convention for the Peaceful Settlement of International Disputes issued at the Convention.

The arbiters, who were all renowned and greatly experienced jurists in matters of international law and, especially so, of arbitration, knew the validity of these principles of international law.

If anyone knew applicable law, that was, in fact, Federico de Martens. Perhaps the most contradictory thing was that he attended The Hague Convention I representing Russia whilst the Paris Arbitration was under way and, for that reason, required suspension of the hearings on three occasions; once at the end of June and twice in July 1899.

As Falcón Briceño pointed out with reference to Federico de Martens "*... while he is the elected President of the Arbitral Tribunal, he is also attending the sessions of the First International Peace Conference as the Russian Delegate. This conference is of paramount importance because it is there that arbitration rules are established*".[33] He, therefore, had first-hand knowledge of all of what was being discussed and the importance of the ideas that were settled at the conference.

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[32] Ibidem. P. 740

[33] Marcos FALCÓN BRICEÑO. "Origins of the Current Claim to Guyana Esequiba", *Political and Social Sciences Academy Bulletin* N° 91, Caracas, 1983. P. 48

Federico de Martens fully knew that the duty of stating the reasons on which an award is based was an obligation that stemmed from the principles of international law. That was made quite clear when he took part as a sole arbiter in a dispute between England and Holland arising from the detention of the Captain of the Whaler *Costa Rica Packet*.

The award adjudicated on February 25th, 1897, was fully reasoned. "*First, Federico de Martens stated the amount of the indemnifications for damages sustained by the whaler's crew. He, then, acknowledged the law that was applicable to the case, the law of nations, ius gentium. He expounded in detail the scope of the State's territorial sovereignty on territorial waters and the legal system for and nature of merchant vessels. And, moreover, evidence was indeed evaluated in this case because the award mentions how the documents that were filed all evidence the lack of a basis for the detention. Federico de Martens acted in completely different ways in this and the Venezuelan cases*".[34]

Added to this, is the fact that the tribunal's arbiters knew they were under the obligation to examine each of the titles in detail but, despite this, they did not do so. Graver yet is the fact that they did not do so when it was obvious they knew what the applicable law was.

For all these reasons, the award is null and void since it does not comply with the applicable law stemming from the general principles of international law. These principles were binding for the parties and gave rise to the arbiters' obligation to decide the dispute following the law and not by discretion.

Today, the representatives of Guyana at the International Court of Justice are attempting to justify the absence of a statement on the reasoning leading up to the award and express that: *"In light of the publication of voluminous records of the arguments of the parties and the copious evidence presented to the Arbitral Tribunal, and in line with practice at the time, the Award itself was succinct".*[35]

But, the fact of having published *voluminous records* does not release the judges from their obligation to state the reasons for the basis of their decision in a matter of such transcendence, or from the obligation stemming from the aforementioned Article III of the Washington Treaty implying that all evidence on the record is to be taken into account.

If the Arbitral Tribunal considered Holland's cession to England through the 1814 London Treaty a title, it had to explain how it reached that conclusion and expound its evaluation of the evidence.

In the words of Faúndez Ledesma, in accordance with Article IV of the Treaty *"there were three options to award all or part of the disputed territory to one of the litigating parties, it was natural and obvious to indicate through which of such rules the decision was reached, and why".*[36]

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[34] Héctor FAÚNDEZ LEDESMA, Ob.Cit. Ps. 123-124.

[35] International Court of Justice, Memorial of Guyana, Volume I, in the case concerning the Arbitral Award of October 3rd, 1899, November 19th, 2018. P. 9.

[36] Héctor FAÚNDEZ LEDESMA, Ob.Cit. Ps. 123-124.

The first option was to apply the rule in Article IV that established the adverse possession or prescription that we analyzed above; the second possibility was to apply Rule "b" in Article IV pursuant to which, arbiters could *"recognize and give effect to rights and claims resting on any other ground whatever valid according to international law"*[37] or principles of international law provided they do not counter the prescription rule; the third and last option could only arise out of occupation by subjects in the territory of the other party, and, in this case, such occupations would be given *"the effect that, to the Tribunal's mind, required by reason, justice, principles of international law, and equity in the case"*.[38]

Although these rules should, however, be expounded in the award for the parties to know the true reasons for the decision, the arbiters ignored this duty and pronounced an insufficient sentence establishing the boundary between two States with no legal justification whatsoever; a matter that makes the decision defective and, thus, null and void.

In this respect, we bear in mind the article published in *La Voce della Veritá* on October 29th, 1899, a little after the content of the award was revealed:

> *"The Commission did not, in fact, take the arguments of both parties into consideration. It did not judge on the basis of rights, but arbitrarily laid out what was to be a commitment, which, however, grants the greater portion to the strongest party. England was, in fact, awarded five sixths (5/6) while Venezuela was awarded but one sixth (1/6), but the Tribunal did not bother to explain what legal grounds the partition was based on."*[39]

5. Violation of the Duty of Impartiality

The Paris Arbitral Award is null and void because it also violated principles of international law when the arbiters failed in their duty to be neutral and impartial, since at least the President of the Arbitral Tribunal, Federico de Martens, acted in an openly partial manner.

There is a lot of evidence determining that Federico de Martens manipulated and coerced the other arbiters in order to obtain a unanimous decision, turning the award in law into a political arrangement. It is a self-evident fact that the Russian exerted undue pressure on the other arbiters.

The principles of International Law in the matter of arbitration, all being binding, required that an indispensable element be taken into account for the composition of the arbitral tribunals, that of the arbiters' neutrality.

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[37] Ibidem. P. 337.
[38] Ibidem. P. 338.
[39] See: Hermann GONZÁLEZ OROPEZA and Pablo OJER. Ob.Cit. P. 52.

In this sense, the 1897 Washington Treaty, Article II, established how arbiters would be appointed. The tribunal would have a total of five jurists, two chosen "by Venezuela" whom the treaty established would be named:

> *"... one by the President of the United States of Venezuela, to wit: the Honourable Melvin Weston Fuller, High Justice of the United States of America; and one by the Justices of the Supreme Court of Justice of the United States of America, to wit: the Honourable David Josiah Brewer, Justice of the Supreme Court of Justice of the United States of America"-*[40]

And another two chosen by the judicial commission of Queen Victoria's private council who ended up being Lord Russell of Killowen and Sir Richard Henn Collins. Finally, the President of the Arbitral Tribunal would be a jurist chosen by the other four arbiters.[41]

According to this provision of the treaty, the President of the Arbitral Tribunal chosen by the English and U.S. arbiters, was Russian Federico de Martens, a renowned jurist with extensive experience in the matter of arbitration.

On the other hand, we must reiterate the provisions in Article V of the Washington Treaty, since impartiality stems from that article, according to which, arbiters shall *"proceed* ***impartially and carefully*** *to examine and decide the questions that have been, or shall be, laid before them".*[42] (Our Highlighting)

This was also the understanding in Article I of the 1871 Washington Treaty relative to the Alabama case, according to which, the parties would each choose one arbiter while the other three would be arbiters outside the dispute and would presumably offer greater guaranty of impartiality. Further, Article II of the 1871 Treaty established the obligation that arbiters *impartially and carefully* examine and decide the matter of the dispute.

Contrary, however, to what was established in the 1871 Washington Treaty and the valid principles in the matter of international arbitration, the Russian Federico de Martens' impartiality was doubtful from the onset. He was, in fact, an active public officer in his country, which was telling of a possibility that he was influenced more by the interests of his nation than by the idea of impartiality as indicated by Falcón Briceño:

> *"... while being elected President of the Arbitral Tribunal, he is attending the sessions of the First International Peace Conference as the Russian Delegate. This conference is of paramount importance because it is there that arbitration rules are established."*[43]

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[40] Ibidem. Ps. 336-337.
[41] Ibidem.
[42] Ibidem. P. 338.
[43] Ibidem.

This quote evidences two things. On the one hand, that Federico de Martens was a Russian Representative and acted moved by political interests. And, on the other, it is clear that he had participated at The Hague Conference of 1899 and knew all that was discussed there.

In this regard, Falcón Briceño also points out that *"inside De Martens lived a practical man, as he himself said, a politician, so, naturally, being a public officer of the Russian Empire, his political thinking was, of course, linked to the thinking and political interests of Russia"*[44]

Note should be taken that, by being such an important figure at the international arbitration forum, not only were his political views known but so were his criteria on controversial matters regarding arbitration, and this could have inclined the English to choose him for his political view of arbitration and also because he sustained the idea that the reasons for the awards did not have to be explained.

This view with respect to arbitral awards not having to be reasoned, was reflected in the 1899 Paris Award unanimously issued, lacking such reasoning.

As if that did not suffice, Federico de Martens also had a colonialist view of international relations. In his mind, World Powers were superior to savage or barbarian peoples, as he liked to call the less developed countries. This view of his was what drove him to favor England in the Paris Arbitration. This supremacist position was clearly expressed in one of his works:

> *"Nonetheless, one should ask oneself which of these two opinions, so divergent at their points of departure and so coherent in their final conclusions, is the true one. Is it really true that a battle between Russia and England on the banks of the Indo is an absolute necessity and a relentless fatality? Are these two great civilized powers really and inevitably under obligation by immutable law to give the savage peoples of Asia this sad spectacle of a bitter and merciless battle? Is it appropriate for Europe, represented solely by England and Russia in Central Asia, to evoke the perverted instinct of the Asian hordes and take advantage of the savage hatred these barbarians feel towards all Christian and civilized nations? Has this matter been seriously pondered?: who would ultimately benefit from this fight between England and Russia; which of these two Powers, victorious on battle fields, will be in a position to keep its dominion over all of the Asian nations and all of the savage, ravaging tribes to whose help they owe their success?"*[45]

It is also a known fact that Federico de Martens had certain affinities with Great Britain, other than his view of international relations. Among his credentials, he certainly had been a Professor Emeritus of Law at a Doctorate Level at the Universities of Cambridge and Edinburgh and practiced teaching for 30 years at the St. Petersburg University.[46] These credentials appear

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[44] Marcos FALCÓN BRICEÑO. Ob.Cit. P.48.

[45] See: Federico DE MARTENS. "La Russie et l'Angleterre dans l'Asie Centrale", *International Law and Comparative Legislation Review,* International Law Institute, 1879.

[46] See: Héctor FAÚNDEZ LEDESMA, Ob.Cit. P. 97.

not only in the initial part of the Paris Arbitral Award, emphatically referred to herein, but also in the Preamble to the *Costa Rica Packet* case, mentioned above.[47]

When the arbitration took place Federico de Martens, did not act as an impartial and independent arbiter; much to the contrary, the Russian jurist acted as a public officer at that arbitration. It is a known fact that the Russian worked as a legal advisor at the Russian Ministry of Foreign Affairs; he could hardly meet his duty of impartiality and independence in the international arbitration, while holding such a position.

This is not said lightly; it is thanks to the investigation conducted by Jesuits Hermann González and Pablo Ojer, in fact, that Venezuela has documents, letters and press releases that prove that it was all a trick. See below for some extracts of these documents:

1. Mrs. Caroline Harrison, the wife of President Benjamin Harrison, affirmed in her diary on October 3rd, 1899, in reference to England:

   "Some of what was taken was conceded but it was evident in the allegations that much was not in legal possession. We were all most furious. Russia was the fifth one in the Tribunal and it is their diplomacy to side with England: the balance of power, etc. ..."[48]

2. In a letter by Lord Russell, England's principal arbiter, to Lord Salisbury, dated October 7th, 1899, in reference to Federico de Martens, the President of the Arbitral Tribunal:

   "... he seemed to be looking for the means to come to lines of commitment, and thought his duty was to, at any cost, if at all possible, reach a unanimous decision. Moreover, I am sorry to find myself in the obligation to say that, in a private interview, he told Lord Justice Collins, since he was in a hurry to end the British claim, that, if we failed to do so, he could, in order to achieve the adhesion of the Venezuelan arbiters, find himself under the obligation to agree to a line that might not be fair with Great Britain. I have no doubt that he spoke to the contrary with the Venezuelan arbiters, and I fear that the means to incite them to accept the award as it stood was possibly much worse. Be it as it may, it is needless to say that Mr. de Martens revealed a very worrisome state of spirit."[49]

3. Memorandum of Severo Mallet-Prevost dated October 26th, 1899, 13 days after the award was issued, addressed to Professor George L. Burr:

   "Our arbiters were forced to accept a decision and, in strict confidence, I have no doubt in assuring you that the British Arbiters were not guided by any consideration of Law or Justice whatsoever, and that the Russian Arbiter was probably induced to adopt the position he took for reasons completely foreign to the matter. I know that

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47 Ibidem. P. 342. "His Excellency Frederic de Martens. Private Advisor. Permanent Member of the Council of the Foreign Relations Ministry of Russia, LLD at the University of Cambridge and Edinburgh.

48 Hermann GONZÁLEZ and Pablo OJER. Ob.Cit. P. 42.

49 Ibidem.

this will merely whet your appetite, but I cannot do otherwise at this time. The result, in my judgement, is a slap to Arbitration."[50]

4. Richard Olney to President Grover Cleveland on December 27th, 1899:

> *"I have not seen you since the sentence in the Venezuelan border case. By reason of his return to New York, Mr. Mallet-Prevost the youngest attorney for Venezuela, was anxious to tell me about how it was that things had occurred and why they did so. On one of my visits to New York, I invited him to dinner where the result was that he spoke more and ate less, and the duration of the meal was, more than eating and drinking refreshments, about of intense ire and bitterness of the spirit regarding the procedure and decision of the Arbitral Tribunal. I shall abstain from going into details that I have no doubt you have heard from other sources. The worst of it all, apparently, is not so much Venezuela's loss of the territory, but the general discredit of the arbitration. According to my informer, both the President of the Court and Brewer appear to be against arbitration as a formula for the resolution of international disputes in absence of a procedure that would guarantee the Parties' rights. Former Secretary John W. Foster, with whom I dined the other day, said that Fuller and Brewer returned to the country quite sick of arbitration."*[51]

It is clear from this letter that what happened at the arbitration and what the 1899 Paris Arbitral Reward reflected made the means for resolution of disputes lose credit; we are aware that one of the main strengths of this mechanism is the assurance and confidence felt by the parties; that was put at risk by this award.

The risk was such that the arbiters who participated in the procedure developed a certain aversion to arbitration, a matter that leaves a lot to ponder as to the true magnitude of the problem and the need for it to be resolved following the law.

5. The diary of the Lord Russell's Private Secretary, J.R. Block, contains a categorical entry dated October 2nd, 1899, one day before the award: *"Venezuela. De Martens' trickery gave us victory. Private Files".*[52]

Today, therefore, with this information and that gathered through the investigation conducted by Jesuits Hermann González and Pablo Ojer:

> *"... it is clearer to see that the 1899 Award was not really based on a juridical analysis in presence of a unanimous criterion but was, rather, the consequence of a deal between the constituents of the tribunal who were true to their interests."*[53]

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[50] Ibidem.
[51] Ibidem. P.44.
[52] Ibidem.
[53] William DÁVILA BARRIOS (Ed.) *White Book: The Venezuelan Claim to the Esequibo.* National Assembly, Caracas, 2020. P. 14.

5.1 Memorandum of Severo Mallet-Prevost

All of this was made clear with the posthumous Memorandum written by Severo Mallet-Prevost who died in New York on December 10th, 1948. Severo Mallet-Prevost had appointed Otto Schoenrich, a partner with the law firm he was a member of (*Curtis, Mallet-Prevost, Colt & Mosle*), his executor and instructed him to have the document published after his death.

The memorandum was finally published in July 1949 in the *American Journal of International Law,* and again that same year in the Bulletin of the Political and Social Sciences Academy, specifically in Volume 14, under the title: "A Matter of Exceptional Importance for Venezuela's Diplomatic History. The Dispute over the Border between Venezuela and British Guiana".

According to the memorandum, Mallet-Prevost acknowledges that both he and President Benjamin Harrison knew of the conspiracy between the President of the Arbitral Tribunal, Federico de Martens, and the British arbiters, Lord Russell and Lord Collins, appointed by England.

Mallet-Prevost goes on to say that Russell was always reticent in attitude and inclined towards benefiting England, he believed arbiters have a political bond and considered it unnecessary for international arbitration to adhere solely to legal bases.

Lord Russell, Justice Josiah Brewer, and Severo Mallet-Prevost coincided in the city of London at an intimate dinner organized by Henry White, who held the office of Charge de Affairs of the United States of America. With reference to Lord Russell, Mallet-Prevost writes in his memorandum:

> *"I was seated next to him and, during the conversation, I ventured to express the opinion that international arbitrations should ground their decision on legal bases only. Lord Russell immediately replied: "I disagree with you completely. I believe international arbitration should be conducted in broader ways and take matters of international policy into consideration". From there on, I understood that we could not count on Lord Russell to decide the matter of the border strictly on the basis of law."*[54]

Mallet-Prevost's perception of Lord Collins, whom he first met in 1899, was completely different. Collins was much more excited, willing to investigate and, most of all, to understand and analyze the dispute and the titles on which the parties' claims were based. With reference to Lord Collins, Mallet-Prevost wrote:

> *"In the conversations of the Attorney General, Sir Richard E. Webster, with me (that lasted 26 days) it was quite obvious that Lord Collins was sincerely*

[54] See the Memorandum by Severo Mallet-Prevost in Otto Schoenrich "A matter of exceptional importance to Venezuela's diplomatic history. The dispute on the border between Venezuela and British Guiana" *Political and Social Sciences Academy Bulletin*, Volume 14, Nos. 1-2-3-4, Political and Social Sciences Academy. Caracas, 1949. P. 32.

interested in being fully aware of the facts of the matter and determining the applicable law to such facts. He, of course, gave no indication of how he would vote on the matter; but his whole attitude and numerous questions he posed were critical of the British allegations and gave the impression that was becoming more inclined towards Venezuela's side."[55]

However, these impressions changed radically after a two-week recess that took place once the aforementioned conversations concluded. At that moment, the English arbiters travelled to London together with the President of the Arbitral Tribunal, Federico de Martens.

The memorandum affirms that, when Lord Collins returned from England to Paris after the vacations, he was not the same as when he left. It was evident that a number of things occurred in England, which we do not know but probably obeyed the political interests of the two powers: Russia and England.

This, of course, is not a supposition of ours; Severo Mallet-Prevost himself was convinced that something had happened:

"Mr. Mallet-Prevost said that he was sure that the attitude of the British members and the Russian member of the Arbitral Tribunal was the result of a negotiation between Great Britain and Russia whereby they induced their representatives in the Tribunal to vote as they did, and Great Britain probably gave Russia advantages in other parts of the globe."[56]

Curiously, on August 31st, 1907, a couple of years after the coerced execution of the Paris Award, something happened that increases the possibility of Mallet-Prevost's suspicions being true. The Anglo-Russian Entente of Mutual Cordiality was signed on that date alleviating tensions between Russia and England in Central Asia and enhancing the relationship between the two countries; with the convention came the independence of Afghanistan, Persia, and Tibet.

Going back to the contents of the memorandum, the scheme Mallet-Prevost was suspicious of becomes evident when Federico de Martens met with the American arbiters – Brewer and Fuller – to propose that, if they reached a unanimous decision, Venezuela would keep the Orinoco Mouths, but that, if they did not, the Russian would align himself with the British arbiters, a matter that would imply a worse situation for the Venezuelan State.

Guiana has sustained before the International Court of Justice that Severo Mallet-Prevost's memorandum was revealed many years after the award was issued and is, also, doubtful given the close relationship of the attorney with the Venezuelan State that even awarded him the "Order of the Liberator".[57] All this, with the sole purpose of undermining the value and credibility of the document.

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[55] Ibidem .

[56] Ibidem. P. 30

[57] *International Court of Justice*, *"Memorial of Guyana"*, *Volume* I, p. 13. *"In the pursuit of this objective, Venezuela decided to impugn the validity of the Award it had up to then observed, affirmed, and sustained for over six decades. For this purpose, Venezuela invoked a secret memorandum supposedly written in 1944 by*

The memorandum, is not, however, the only document that denounces the defects of the Paris Arbitral Award and the abuses that occurred during arbitration. On the contrary, most objections to the award – as we have seen – were brought before Severo Mallet-Prevost's memorandum came to light.

In the *Revue d'Europe,* Volume III, N° 3, published in March 1900, L. de la Chanonie mentioned the same events that Severo Mallet-Prevost's memorandum contains. The Frenchman did, in fact, point out that:

> *"... Mr. de Martens then proposed to the American arbiters that Venezuela, as compensation for the Schomburgk line territories, be granted absolute possession of the Orinoco, pushing back the English border to about 20 leagues from the river; he added that, if the Venezuelan arbiters did not accept this arrangement, he would vote with the English arbiters thus putting an end to the matter once and for all, which would ensure England's possession of one side of the Orinoco delta. The perplexity of the American arbiters was great, and their disturbance, profound; after reflecting for a few hours, they deemed it necessary to, above all, get this great river out of England's clutches; they preferred to accept an annoying arrangement instead of obtaining naught, and, finally, compelled by a pressing need, they adhered to the arbitral sentence; here we have the judges' unanimity so loudly crowed about in the English press that made it out to be irrefutable proof of Great Britain's undoubtable rights. Publishing the secret debates here, puts things in perspective.*
>
> *A simple question: If, instead of occurring between a small State and a great Power, the dispute pitted England, Russia, France or Germany against each other, would a conflict that would, if necessary, find its legitimate source in force, have concluded in three days and with such ease? But Venezuela does not have the naval and military power to allow it to speak forcefully; it has not been able to back, with weapons, its rejection of a not so much arbitral but arbitrary decision, the injustice of which resulted notorious. International law opened the door for its platonic appeal, wounded in advance by sterility ... But, that, was hushed."*[58]

This comment in the French press affirmed -49 years before the publication of Severo Mallet-Prevost's memorandum- that the President of the Arbitral Tribunal failed his duty of impartiality and was the director of a conspiracy that hurt the weakest party, in this case, Venezuela.

Severo Mallet-Prevost, a less prominent member of Venezuela's legal team for the 1899 Arbitration, with supposed instructions that it should not be published until after his death (which occurred in 1949). it is said that the memorandum was drafted over 45 years after the events it supposedly describes and in the same year Venezuela awarded Mr. Mallet-Prevost the 'Order of the Liberator' in testimony of the high esteem the Venezuelan people always had and will have of him."

[58] Hermann GONZÁLEZ OROPEZA and Pablo OJER. Ob.Cit. Ps. 50-51.

The matter was so evident that the political arrangement of the arbitral award was denounced by the press in England. On October 11th, 1899, the British magazine *Punch, or the London Charivari,* published an illustration of Lord Salisbury. This occurred a mere eight days after the award was known. The caricature depicts Lord Salisbury, whose aversion to arbitration was well known, escaping with several documents, including the Schomburgk line and some other maps of mines and forests that had been obtained thanks to the award.

The caption reads:

"*Lord Salisbury (chuckling) "I like arbitration – in the Proper Place!"*[59]

Thereafter, in the *Idaho Daily Statesman,* a U.S. journal strongly criticized the arbitration on October 18th, 1899, affirming that it had been a plan:

> *"The plan consisted of ensuring the support of Mr. de Martens, President of the Tribunal. This was done with the intervention of the Russians who wanted*

[59] Anonymous Author in "Peace and Plenty" in *Punch, or the London Charivari,* on October 11th, 1899. Illustration taken from Andrés Eloy BURGOS GUTIÉRREZ (Ed.) *Memories of Venezuela,* N° 34 January-February 2016, Ministry of the People's Power for Culture – National History Center, Caracas, 2016. P. 22.

> *him to align himself with the side of Great Britain in order to obtain English support for the Russian plans in China. All of this was done in utter secrecy; the American members of the Tribunal were told only when the Arbiters met for the award. They came to know that the majority had agreed on what was to be done: grant Great Britain all its claims".*[60]

This was followed by the letter written by César ZUMETA, published in a Caracas journal, *El Tiempo,* on October 17th, 1899, making it quite clear that the negative impact of the award on the international arbitration forum created a kind of aversion to the mechanism:

> *"The Paris Tribunal's decision of which you sadly had to inform your readers, appears to have surprised Venezuelan friends abroad as if it were an unexpected novelty. The former President of the United States of America, Mr. Harrison, Justice Brewer, one of the arbiters appointed by Venezuela, attorney Mr. Mallet-Prevost, the diplomatic world, and even the English press declare that, from here on, nations would take great care to not entrust the defense of their rights to courts such as this one that just condemned us".*[61]

The position of the Cooperative Republic of Guyana before the International Court of Justice is, therefore, unsustainable since, in addition to Severo Mallet-Prevost's memorandum, there are many other documents in which people involved in the arbitral procedure brought the connivance to light, together with the overwhelming reaction of the international press after the award was pronounced.

III Closing Remarks

The Paris Arbitral Award of October 3rd, 1899 is null and void for a number of violations of the 1897 Washington Treaty and the then international law. Specifically speaking, the Paris Award is null and void because it violated due process; incurred in the defect of overuse of power and decided beyond what the arbitral tribunal was required to weigh and, consequently, incurred in the defect of *ultra petita*, by lacking grounding in law and violating the arbiters' duty of impartiality.

There are sufficient motives to declare, in good law, the nullity of the Paris Arbitral Award issued on October 3rd, 1899. Venezuela has sufficient evidence to uphold the reasons for the nullification. The International Court of Justice is, now, the only instance where to do so. By Order of March 8th, 2021, this High Court set the date of March 8th, 2022, for the Cooperative Republic of Guyana to file its Memorial, and the date of March 8th, 2023, for Venezuela to file its Counter-Memorial. Thus, there lies a lot of work before us if we are to reverse the grave dispossession sustained by the country.

[60] Ibidem.
[61] Ibidem.

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