THE VENEZUELA-GUYANA BOUNDARY DISPUTE

AND

THE VALIDITY OF THE 1899 ARBITRAL AWARD

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
Am. His. R.	American Historical Review
Am.U. Int .L. R.	American University International Law Review
Anglo-Am L. R.	Anglo–American Law Review
Arab.L.Q.	Arab Law Quarterly
Aus. YBIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
Cal. L.R.	California Law Review
Cambr. L.J.	Cambridge Law Review
Colum.L.R.	Columbia Law Review
EPIL	Encyclopedia of Public International Law
EJIL	European Journal of International Law
Fordh. Int. L.J.	Fordham International Law Journal
GJ. Int. & Comp. L.	Georgia Journal of International and Comparative Law
Hisp. Am. His. R.	The Hispanic American Historical Review
How. L.J.	Howard Law Journal
Ind. L.J.	Indiana Law Journal
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILC	International Law Commission
ILR	International Law Reports

Int. Lawyer	International Lawyer
Isr. L.R.	Israel Law Review
J. Int. Arb.	Journal of International Arbitration
J. Int. L & Prac.	Journal of International Law and Practice (Michigan State Journal of International Law)
LJIL	Leiden Journal of International Law
Neth. Int. L.R.	Netherlands International Law Review (Nederlands Tijdschrift voor Internationaal Recht)
Nord. Tidsskr. Int. R.	Nordisk Tidsskrift for International Ret (Nordic Journal of International Law)
North. KY L. R.	Northern Kentucky Law Review
P.C.I. J.	Permanent Court of International Justice
Rev. de Droit. Int & Dipl.& Pol.	Revue de Droit International de Sciences Diplomatiques et Politiques (The International Law Review)
South Afr. L.J.	South African Law Journal
Tex. Int. L.J.	Texas International Law Journal
U. Miami Inter-Am. L. Rev.	University of Miami Inter- American Law Review (Lawyer of the Americas)
U.N.R.I.A.A.	United Nations Reports of International Arbitral Awards
Un. Pennsylv. L.R.	University of Pennsylvania Law Review (American Law Register)
VCLT	Vienna Convention on the Law of Treaties 1969
YB ILC	The Yearbook of the International Law Commission

INTRODUCTION

> There are only two ways of telling the complete truth--anonymously and posthumously.
>
> Thomas Sowell

Border disputes are among the most dangerous and explosive disputes in international relations. Border disputes tend to linger on, though at times they may appear to lie dormant. Conflicts concerning national boundaries are often inflamed upon the slightest provocation. One example of such lingering tension is the ongoing Venezuela-Guyana Boundary Dispute.

Caribbean News Net reported in February of 2004 that President Chavez with his first official visit to Guyana had triggered a wave of political opposition in his country. "Traitor" exclaimed former Venezuelan Attorney General Da Costa claiming that Chavez was possibly 'surrendering the south-eastern Essequibo region'.[1] More recently on Monday the 2nd of October 2006 upon rumors that Venezuela might become the next candidate of CARICOM to fill the temporarily vacant seat of Argentina in the UN Security Council the following statement was released by the Guyanese President Mr. Jagdeo.

> We had a private and a public declaration from Venezuela that they will not use the Security Council seat for the two years they will be there if they were to win the seat, to advance their claim on the border issue. [2]

Indeed the Venezuela-Guyana Boundary Dispute over the Essequibo region has plagued both nations in their bilateral as well as their international relations.[3]

The dispute over the current border originated at the turn of last century as the new successors to the Dutch and the Spanish possessions found themselves without a mutually defined boundary in the Guiana region. Consequently the British Empire claimed the title to the Essequibo region upon Dutch rights by occupancy; conversely Venezuela pressed her title to the area as the successor to the Spanish

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[1] Caribbean News Net, 'Venezuelan opposition claims Chavez surrendered Essequibo to Guyana' Monday, February 23, 2004 available at the website of Caribbean News Net at http://www.caribbeannetnews.com/2004/02/23/chavez.htm (last visited 29 June, 2007).

[2] Caribbean News Net, 'Venezuela promises not to use UN seat to advance border claim against Guyana' by G. French, Monday, October 2, 2006 available at the website of Caribbean News Net at http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000035/003517.htm (last visited 29 June, 2007).

[3] E.g. Venezuela initially voted against the admission of Guyana as a member of the OAS (Organization of American States) since a provision in its statute provides that no new member can be admitted that has outstanding territorial disputes with any other member state. In 1990 due to better understanding between the two Venezuela decided to not object to the amendment of the latter provision (provided it was not interpreted as a 'waiver' of its rights to the Essequibo) and so Guyana became a member of the OAS. Similarly Venezuela prevented Guyana from becoming a member to the Latin American Treaty of Denuclearization (Tratado de Tlatelolco). Centre for International Development and Conflict Management University of Maryland, J. Davies, "Guyana-Venezuela Border Conflict" (Preliminary concept paper 2002), p. 6 (hereinafter cited as 'CIDCM, "Guyana-Venezuela Border Conflict"(2002)).

Crown upon discovery and occupancy. As both nations asserted their historic rights no agreements were reached. Political relations worsened further after economic interests in the jungle region were discovered. Matters ultimately culminated via the intercession of the US Government into an international arbitration over the disputed tract of land in 1898. The following year the unanimous Award of 1899 at Paris was rendered and the matter was considered to be closed. Yet in 1949 some fifty years after the final Award had been given a posthumous memorandum from the last surviving member of the arbitration was released in which it was suggested that foul play had induced the arbitrators into their final decision.
The Venezuelan Government subsequently denounced the status of the 1899 Award in 1962 when the territory of Guyana gained her independence from the British Crown. There was from that moment a formal dispute over Guyana's borders. Under the watchful eye of the international community both nations have generally managed to keep their dispute within the confines of the political arena and so both parties have over the several years been engaged in substantive talks on the matter. However a substantial breakthrough has yet to be established as both the contenders have fervently held to their respective positions. Venezuela still demands a nullification of the 1899 Award and seeks a political solution to the matter, while Guyana considers the 1899 Award to be final and is more inclined to let the public forum of the UN decide upon the question.

The present thesis will discuss the boundary dispute and the validity of the 1899 Paris Award from a standpoint of international law. I will address the central question of whether the Venezuelan Government was legally entitled to claim the nullity of the 1899 Award. In order to answer this question I will need to determine whether the Venezuelan claim has any substantive merit in international law. In my analysis I have chosen to divide the thesis into the three following chapters.

Chapter one is written to present the reader with a clear overview of the facts of the case. In this chapter I attempt to reconstruct the relevant historical and legal events that led up to the present impasse. The chapter commences with a short introduction to the region and describes the history of the dispute evolving from the early colonial settlements in the 17th century till its arbitration in 1898. Special emphasis is given to the terms of the arbitration agreement and the posthumously published memorandum. The chapter ends with a description of the legal dealings and agreements of the two parties in more recent years.

In the second chapter I examine the international law on nullity. The chapter starts with an exposition on the principle and scope of nullity after which the legal consequences flowing from the doctrine of nullity are analyzed. Thus the principle is tracked back to its source and briefly compared to schemes of domestic arbitration law as well to the system of treaty law. In the last part of the chapter I will compare the legal support in international law for the two different concepts of nullity.

In the final and third chapter I will examine the merits of the Venezuelan claim. Each of the five different grounds of nullity will be separately evaluated upon the facts and the law involved. In the discussion on the second and third ground of nullity I have attempted to postulate my own view on nullity by analyzing a leading case on nullity. Similarly in the evaluation of Venezuela's fifth ground of nullity a supposition on the law of corruption is advanced.

Finally in the overall conclusion of the thesis the different inferences drawn from the examination will be briefly summarized. The authors' personal views are ventilated in the appended epilogue.

CHAPTER I:

THE FACTS OF THE CASE

A. INTRODUCTION

SHORT DESCRIPTION OF GUYANA AND ITS HISTORY

British Guiana gained her independence from the British on 26th of May in 1966 and in 1970 Guyana formally transformed her nation into a republic. Today it is properly called the 'Co-operative Republic of Guyana'. The country is situated in the north-east shoulder of the South American Continent; it is bordered by the Atlantic Ocean on its north, on its east by Surinam, on its south-southeast by Brazil and on its west by Venezuela.

Figure I[4]

[4] Source: Guyana complete network available at the website of the Guyana government at http://www.guyana.ro/guyana/guyanamap.php (last visited 28 June, 2007).

The border of Guyana is of a fairly recent creation and is believed at the time of its independence to 'represent the limit of British power and influence in the area'.[5] As a result modern Guyana has inherited two unresolved border disputes with its neighbors; one with Venezuela and the other, a border and maritime dispute[6], with Surinam. The country is inhabited by approximately 750,000 Guyanese and its territory, although officially still under dispute, is an estimated 83,000 square miles (215,000 sq. km.) [7]. Guyana is the only nation-state on the mainland of South America whose official language is English[8] and it is also the only country on the mainland to belong to the Commonwealth of Nations.[9] Its ethnically diverse population is approximately made up of 51% East Indians, 43% Afro-Guyanese, 4% Amerindian and 2% European and Chinese decedents.[10] More than half of the people are Christians, one-third are Hindus, and nearly one-tenth are Muslims. The population of Guyana, which is predominantly concentrated along the Atlantic Coast and around its capital Georgetown, is believed to be largely rural.[11]

Guyana's name is said to have been derived from the early American Indians, who referred to the region as '*guiana'* meaning 'Land of Waters'.[12]
The region itself was probably first sighted by Columbus in 1498, but explored by his two admirals Ojeda and la Cosa in 1499. Although both men claimed the area for the Spanish, no true Spanish settlement was constructed till the first official town of Santo Tomé de la Guyana in 1595. Despite the interests that other European powers harvested in the Guyana region, most notably Sir Walter Raleigh who believed the El Dorado, the mythical city of gold, was to be found in the region, no other European settlements were constructed till the beginning of the 17th century.

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[5] P.K. Menon, "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl.& Pol.* 166 at 167
[6] The Surinam-Guyana dispute involves three contested areas; the maritime delimitation dispute concerning its maritime boundary offshore of the Corentyne River, the sovereignty over the Corentyne River itself and finally the sovereignty over the so-called 'New River Triangle' area. At this moment the maritime delimitation issue lies before an ad hoc Arbitration Tribunal, see the statement of the Attorney General of the Republic of Guyana, D. Singh, "Comment on the Guyana-Suriname Boundary Dispute" (2004) 32 *GJ Int & Comp. L*. 657. For a legal discussion of the sovereignty over the 'New River Triangle' and the Corentyne River see P.K. Menon, "International Boundaries: A Case Study of the Guyana-Surinam Boundary" (1978) 27 *ICLQ* 738 and also D.E. Pollard, "The Guyana/Surinam Boundary Dispute in International Law" (1976) *Caribbean Yearbook of International Relations* 217.
[7] Bureau of Statistics of Guyana, available at the website of the Guyana government at http://www.statisticsguyana.gov.gy/ (last visited 28 June, 2007).
[8] Next to English also Hindu, Urdu and 'creole patois' are spoken, *The New Encyclopedia Britannica* (1991), 15th ed., vol.5, p 585
[9] *Wikipedia, Online Encyclopedia*, available at http://en.wikipedia.org/wiki/Guyana (last visited 28 June, 2007).
[10] The Guyana World Wide Web Handbook available at the website of the Guyana government at http://www.guyana.org/Handbook/handbook.html (lat visited 28 June, 2007).
[11] *The New Encyclopedia Britannica* 1991, 15th ed., vol. 5, p 585
[12] Ibid.

By this time Spanish monopoly was no longer validly accepted and the French, Dutch and British encroached on the Spanish claims to the entire known area of the 'Wild Coast'.[13] It were the Dutch, however, who first succeeded in maintaining any permanent settlements in the area of present day Guyana. They were able to built several settlements along the Demerara and Essequibo river streams and by the 1620's had erected a fortified depot at Fort Kijkoveral[14].

The Dutch West India Company, having been granted the official powers of trade and colonization in 1621, managed to establish the three distinct colonies of Essequibo, Berbice and Demerara. Two decades later in 1648 the Spanish even officially recognized the Dutch possessions along the 'Wild Coast' in the Treaty of Münster. Though the political control of the Guyana colonies remained to be contested by other European powers and would even shortly swap hands in the late 18th and beginning of the 19th century, the Dutch in overall managed to retain the control of the three provinces until the outbreak of the Napoleonic Wars in Europe. After the Wars had ended on the European continent the three colonies were eventually ceded to the British in the Treaty of London in 1814. In 1831 the British decided to unite the three provinces of Essequibo, Berbice and Demerara into the single colony of 'British Guiana'.[15]

Even though the slave trade had been formally abolished in 1807, at which time an estimated 100,000 slaves had been imported, its full emancipation was not complete until 1838. At this time the freed Negro slaves refused to work on the lands and East Indian and Chinese indentured servants were needed to run the sugar estates and by 1917 almost 240,000 East Indians had migrated to British Guiana.

In 1953 British Guiana was granted a constitution and gradually political parties began to emerge, splitting the country into two political factions. On the one hand there appeared the largely black orientated 'People's National Congress' (PNC) and on the other the largely East Indian 'People's Progressive Party' (PPP). In spite of a quick political success of the leftist PPP in the early 1960's,[16] it was the PNC that was actually able to grasp the real political power in the country. Although the 60's had been a turmoil era that had seen racial tensions and riots between the two main political parties and ethnicities, the PNC nevertheless

[13] The early European settlers often referred to the Guiana area as the 'Wild Coast'.
[14] P.K. Menon, "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl.& Pol.* 166 at 168
[15] *The Columbia Encyclopedia* 2001-05, Sixth Edition made available by bartleby.com at http://www.bartleby.com/65/gu/Guyana.html (last visited 28 June, 2007).
[16] It is believed that the CIA and the Kennedy Administration precipitated or financed the political unrest in the early 1960's (being opposed to the leftist/Marxist orientated PPP) which eventually led to the new elections won by opposition party PNC, ibid.

managed to head the country into independence in 1966 as well as change the nation into a republic in 1970.

During the 70's and 80's the PNC, although encountering some heavy opposition from its rival,[17] remained to dominate political life till the death of its strongman Burnham in 1985.[18] The latter was subsequently succeeded by Desmond Hoyte who began some liberalization programs and invited foreign aid and investment. In the late 1980's, austerity policies implemented by the government caused considerable unrest and ethnic tensions once again rose, as opposition parties called for new elections.
In 1992 Hoyte lost the presidency to its chief opponent the PPP. The PPP, after some successions, has managed to run the country under elected President Jagdeo into the new millennium.[19]

SHORT DESCRIPTION OF VENEZUELA AND ITS HISTORY

The country of Venezuela gained her independence from the Spanish Crown in 1821, at which time she formed the Republic of Gran Colombia together with Colombia and Ecuador. In 1830 Venezuela seceded from Gran Colombia and became an independent republic. Today Venezuela is properly called the 'Bolivarian Republic of Venezuela' or in Spanish 'Republica Bolivariana de Venezuela'.
Venezuela fronts the Caribbean Sea on the north and the Atlantic Ocean on the north-east. It is bordered on the east by Guyana, on the south by Brazil, and on the west by Colombia.

[17] Especially after the establishment of the new constitution of 1980, at which the new elections were boycotted by the opposition parties that would make the PNC victorious once more. Although the PPP managed to organize formidable foreign support against the alleged falsified elections, Burnham remained in office until his death in 1985.
[18] *The New Encyclopedia Britannica* (1991),15th ed.,vol.5, p 585
[19] *The Columbia Encyclopedia* (2001-05), 6th ed. made available by bartleby.com at http://www.bartleby.com/65/gu/Guyana.html (last visited 28 June, 2007).

Figure II[20]

Venezuela as a successor to the Spanish possessions has inherited two unresolved border disputes with its neighbors; one with Guyana and the other, a maritime delimitation dispute,[21] with Colombia over the Gulf of Venezuela.

Venezuela's population counts an estimated 27, 264,000 inhabitants [22] and its land encompasses an area of approximately 352,144 sq. miles (or 912,050 sq. km). Nearly 70% of Venezuela's population is of mulatto-mestizo ancestry, followed by whites about 20%, blacks 9% and the remainder is of American Indian descent.[23] Spanish is officially the chief language[24] and Roman Catholism its main religion.Venezuela is among the most urbanized countries in Latin America, the vast majority of Venezuelans live in the cities of the north, especially in the largest metropolis, Caracas and Venezuela today is well known for her petroleum industry.

[20] Source: Worldpress agency available at http://www.worldpress.org/maps/maps/venezuela.gif (last visited 28 June, 2007).

[21] While the king of Spain in an arbitration award of 1891 had assigned the whole of the peninsula to Colombia, the two countries nevertheless signed the treaty of Bogotá three years later in 1894, in which Colombia ceded certain territories, including the settlements on the east coast of Guajira Peninsula (the west coast of the Gulf of Venezuela) to Venezuela. But the treaty was not subsequently ratified and in the 1920's, after the discovery of oil deposits in the area, the question of sovereignty over the waters and resources began to emerge. Also the sovereignty over the islands of los Monjes (located in the Gulf of Venezuela) became contested; these islands were afterwards occupied by Venezuela in 1953. Political talks concerning the matter have thus far, except for a promising looking draft treaty in 1980 (that was never ratified), been deadlocked, A.J. Day (ed.), *Border and Territorial Disputes* (1982), pp. 361-2. For a general discussion on the legal merits of the case see M.J.R. Reid, "Delimitation of Marine and Submarine Areas: The Gulf of Venezuela" (1977) 9 *U. Miami Inter-Am. L. Rev.* (Lawyer of the Americas) 301 and R.D. Klock, "Gulf of Venezuela: A proposed Delimitation" (1980) 12 *U. Miami Inter-Am. L. Rev*. (Lawyer of the Americas) 93.

[22] Instituto Nacional de Estadistica, Ministerio de Planificacion y Desarrollo (Bureau of Statistics of Venezuela) available at the website of the Venezuelan government at http://www.ine.gov.ve/ (last visited 28 June, 2007).

[23] *The New Encyclopedia Britannica* 1991, 15th edition, vol. 12, p 305

[24] Although all other Indigenous languages are officially recognized by the Venezuelan constitution of 1999 see *Wikipedia, Online Encyclopedia* at http://en.wikipedia.org/wiki/Venezuela (last visited 28 June, 2007).

The Venezuelan coast[25] was first penetrated by Columbus' two admirals Ojeda and Vespucci in 1499. Both men sailed along the swampy shores of Lake Maracaibo and so saw typical native villages built on stilts in the water (so-called '*palafitos*') that reminded them of Venice, hence its name Venezuela ('Little Venice').
First Spanish settlement on the mainland was commenced in Cumana in 1520 and Venezuela would be run as a Spanish colony for the next three centuries to come. During the larger part of this colonial era Venezuela was part of the Vice-Royalty of New Granada and her population was dominated by the creoles (native-born whites), who owned the colony's wealth. Eventually Venezuelan creoles led by Simon Bolivar and Francisco de Miranda spearheaded the South American independence movement of about 1810-1825. After the defeat of the Spanish Crown in 1821 at Carabodo, Venezuela, together with Colombia and Ecuador formed a part of Gran Colombia, but in 1830 Venezuela became an independent state.

Although conservative and liberal parties appeared, the actual control of Venezuela's political life was held mainly by caudillos[26] from the landholding class. After Páez, the demise of Venezuela's first strongman, the Monagas brothers (1846) managed to manouver themselves into power. The Monagas brothers, on their turn, were eventually overthrown in 1858, and civil war among caudillos became a recurrent theme. In the period of the 19th till the mid 20th century Venezuela has gone through an extreme turmoil era, as it has experienced coups, uprising, civil wars, and even blockades of its ports by foreign countries in 1902. In fact between 1830 and 1958 Venezuela was intermittently plagued by dominant caudillos and generally ruled by a series of military dictators including generals Blanco (1870-1888), Castro (1899-1908), Gomez (1909-1935) and Jimenez (1952-1958). It was not until Romulo Betancourt, the first democratically elected President to actually serve his full term (1959-1964), that Venezuela became a truly functioning democracy.

In the meanwhile the country had managed to create, under the tyrannical rule of Gomez, political order and liberal concessions (including the building of roads and schools), which in turn had attracted British, Dutch, and American petroleum interests shortly before and after WW I. And so by the late 1920's Venezuela had become one of the world's leading

[25] On the subject of the history of Venezuela, heavy reliance has been placed on *The New Encyclopedia Britannica* (1991), 15th ed., vol. 12, pp. 304-5; *The Columbia Encyclopedia* (2001-05),6th ed., made available by bartleby.com at http://www.bartleby.com/65/ (last visited 28 June, 2007) and *Wikipedia, Online Encyclopedia* available at http://en.wikipedia.org/wiki/Venezuela (last visited 28 June, 2007).
[26] Caudillo is a Spanish (caudilho in Portuguese) word designating "a political-military leader at the head of an authoritative power." It is usually translated into English as "leader" or "chief," or, more pejoratively, "dictator" or "strongman." *Wikipedia, Online Encyclopedia* at http://en.wikipedia.org/wiki/Caudillo (last visited 28 June, 2007).

exporters of oil. Moreover the oil boom of the 1940's and 50's paid the Venezuelan Government huge royalties as some of these funds were used for public works, most notably in modernizing Caracas.

In the 1960's the programs of democratically elected President Betancourt led to social and economic advancement and the beginnings of political and economic stability. In the two decades following Betancourt, Venezuela changed presidents five times by democratic process.

But in the early 1980's the Venezuelan economy was shocked due to a decrease in world oil prices, which subsequently massively increased Venezuela's foreign debt. Instability and tensions once again re-emerged on the political scene of Venezuela as oil prices again dropped in the early 1990's. The growing social unrest and popular disappointment over Venezuela's politics and economy eventually led to the so-called 'Caracazo' riots.[27] The following mounting political instability in turn triggered the failed coup attempts of 1992.

In 1998 however, Hugo Chávez, a leader of the February 1992 coup attempt, was elected President. He immediately called for a halt to privatization of state assets and cut Venezuela's oil production to force up prices (and so pushed for other OPEC members to do the same). Chavez introduced a new constitution in 1999, replacing the earlier 1961 document, which sets out to reform the structure of Venezuela's government and responsibilities and expands its list of socioeconomic- and human rights.[28]

In 2000 Chavez got re-elected and, although Chavez has encountered some heavy resistance from the opposition (including a failed coup d'etat and a general work stoppage in 2002), he nevertheless enjoys the popular support of the Venezuelans as he got re-elected yet again in 2006.

DESCRIPTION OF THE ESSEQUIBO REGION

Now we come the bone of contention between the two parties, i.e. the Essequibo region, or 'Guyana Esequiba' as the Venezuelans refer to. The region, which is currently under dispute, comprises approximately two-thirds of the territory of present Guyana. Roughly described the Venezuelan government claims the area *west* of the Essequibo River up till its own border with Guyana on the east.

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[27] The 'caracazo' or sacudón is the name given to the wave of protests, riots and looting that occurred on 27 February 1989 in the Venezuelan capital Caracas and surrounding towns. The riots — the worst in Venezuelan history — resulted in over 3000 deaths, mostly at the hands of security forces; *Wikipedia, Online Encyclopedia* at http://en.wikipedia.org/wiki/Caracazo (last visited 28 June, 2007).

[28] *Wikipedia, Online Encyclopedia* at http://en.wikipedia.org/wiki/1999_Venezuela_Constitution (last visited 28 June, 2007).

Figure III[29]

The Essequibo region encompasses nearly 50,000 sq. miles (130,000 sq. km.) and is crisscrossed by numerous rivers and streams, probably the reason the region earned the Indian name '*guiana*' or 'Land of Waters'. The territory contains a dense tropical rainforest, which, according to Day, 'had discouraged early colonization and development'.[30]
The Essequibo region today is sparsely populated and its population is believed to count around an estimated 100,000 inhabitants.[31] The primary inhabitants of the Essequibo province are the native Indian-Amerindians, who, although only constituting 4% of the Guyanese population, are the vast majority of the thinly populated inland areas of Guyana.[32] Other inhabitants of the Essequibo region are mostly small-scale gold and diamond miners.[33]
Although the region is believed to be rich in minerals, most notably in bauxite, gold, diamonds, mangese, copper, oil and possibly uranium, it has yet been fully extracted.[34]
One of the reasons for the underdeveloped stage of the region is found in the fact that, although the area has an abundant supply of natural water, there is still a lack of a

[29]Source: RIGZONE, Gateway to the oil and gas industry available at http://www.rigzone.com/news/image_detail.asp?img_id=291 (last visited 28 June, 2007).
[30]A.J. Day (ed.), *Border and Territorial Disputes* (1982), p. 381
[31]Although the number of inhabitants have not been accurately verified, T.M. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis" (2004) 32 *GJ Int & Comp. L.* 661 at 667
[32]Centre for International Development and Conflict Management University of Maryland, J. Davies, "Guyana-Venezuela Border Conflict" (Preliminary concept paper 2002), p. 13 (hereinafter cited as 'CIDCM, "Guyana-Venezuela Border Conflict"(2002)).
[33] T.M. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis" (2004) 32 *GJ Int & Comp. L.* 661 at 667
[34] R.T. Smith, *British Guiana* (1962), p 3; also P.K. Menon, "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl .& Pol.* 166 at 170.

comprehensive system of water control.[35] In addition the access to the interior of the region via the Essequibo River has on occasion been 'hampered by cataracts near its mouth' and thus in overall the 'inaccessibility of the region' seems to be the mean reason for the limited exploration of the province thus far.[36]

Another explanation why the region has not been developed to its full economic potential may very well be the Venezuela-Guyana Boundary Dispute. As political tensions between the two nations rose in the 1960's (e.g. UN involvement in 1962, the Ankoko Island affair in 1966) Venezuela in 1968 declared that she would not recognize any contracts or economic concessions made by the Guyanese government in the Essequibo province, since she did not 'want to inherit any "spurious" obligations'.[37] Venezuela, for her part, reasoned that this statement was the result of the Geneva Agreement of 1966 (in which, according to Article V, all existing claims to the region are frozen). Guyana, on the other hand, has disputed this and asserts that the position taken by Venezuela severely constrains its economic self determination as well as constitutes a violation of the same Geneva Agreement.[38] Venezuela, in the matter, has even gone as far as to publish its statement in the London Times of 1968 upon the visit of the Guyanese Prime Minister to England in her hope to discourage potential foreign investors.[39]

Regardless of the merits of the arguments put forward by both parties, it has certainly been a factor in the economically underdeveloped stage of the region today, especially since this type of behavior has repeated itself over the years.[40] Its most recent episode is found in the withdrawal of a satellite launch pad by the American company Beal Aerospace Technologies in 2000.[41]

[35] B.J. Kissler, *Venezuela-Guyana Boundary Dispute: 1899-1966* (unpublished doctoral dissertation, the University of Texas at Austin, 1971), p. 4 (hereinafter cited as B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971)).
[36] Ibid.
[37] CIDCM, "Guyana-Venezuela Border Conflict"(2002), p. 5
[38] For the legal aspects of the Geneva Agreement of 1966 see *infra* p. 28-9.
[39] CIDCM, "Guyana-Venezuela Border Conflict"(2002), p. 6 at n.5.
[40] E.g. the strained relations is the failed joint Upper Mazaruni Hydro-Electric Project in the 1970's; ibid. at 7.
[41] Ibid. at 8.

B. ORIGIN AND BACKGROUND OF THE TERRITORIAL CLAIM[42]

SPANISH DISCOVERY AND SETTLEMENT OF COLONIES IN THE 16th AND MID 17th CENTURY

As stated the 'Guiana' region[43] had most likely first been discovered by Columbus in 1498, who sailed along its shores. But it was Captain Alonso de Ojeda one year later in 1499, who landed near the mouth of the Orinoco River and started to explore the mainland.[44]

Consequently both these men claimed the area for the Spanish Crown and numerous commercial- and missionary expeditions followed. Although no permanent colonies were actually constructed in the early 16th century by the Spanish, there were numerous Spanish attempts along the Cuyuni, Mazaruni, and Essequibo Rivers and there has even been a reported temporary settlement along the Barima River by Pedro de Acosta in 1530.
Yet the hostility of the region, the absence of adequate governmental support, and the inhospitable nature proved a formidable chore in constructing any permanent settlements along the Wild Coast, as other European powers would soon learn.
Another reported Spanish settlement in the Essequibo region was a temporally fortification in 1591 at the confluence of the Cuyuni and Essequibo Rivers, but it was not until 1595 that officially the first permanent Spanish colony, the town of Santo Tomé de la Guyana, was founded on the Orinoco River.[45]

At the end of the 16th and the beginning of the 17th century absolute Spanish and Portuguese monopoly in the New World, which had previously been recognized by other European powers, began to diminish. No longer did European powers feel restricted by the Papal Grant of 1493, and thus, as imperial rivalries grew in the 17th century, the British, French and Dutch started to encroach on the Spanish claims to the Guiana.[46]

The British commenced with, initially a series of voyages in search of the mythical city of El Dorado, by Sir Walter Raleigh in 1595, Captain Keymis in 1596, and Captain Berrie in 1597.[47] Subsequent efforts by the English to colonize the coast in the 17th century were

[42] At this point, it must be stressed that this section merely aims at describing the historical events, in order to enhance and give a clear overview of the historic facts from a legal standpoint, and by no means is an attempt to hand a comprehensive historical deduction.
[43] The region referred to is today comprised out of French Guiana, Surinam, Guyana, and the west of Venezuela.
[44] L.B. Rout, *Which Way Out ?: An Analysis of the Venezuela-Guyana Boundary Dispute* (1971), p. 1
[45] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p. 11, 50
[46] Ibid. at 11; also P.K. Menon, "Guyana-Venezuela Boundary Dispute" (1995) 2 *EPIL* 656, 656.
[47] R.T. Smith, *British Guiana* (1962), p. 13

attempted but all failed, e.g. the attempted settlement at the Oyapock first by Captain Leigh and later by Robert Harcourt in 1613 and again in 1627. The British finally managed to settle a colony at Tararica on Marshall's creek in Surinam in 1630 but were eventually forced to abandon these in 1645.[48]
The French had also developed an interest in the region. They had sent a reconnoitering expedition in 1604 to Guiana, in the neighborhood of the Cayenne and so started their settlement in 1613 in Cayenne and Sinamary.[49]

But it were the Dutch, after the making of a survey in 1597 by Cabeliau, who succeeded in settling in the Essequibo region and by 1626 had developed trading posts on the Essequibo River, including its fortified depot at an island in the Essequibo, named 'Kijkoveral'.

In short all three European powers were settling in the Guiana but only the Dutch had established themselves in the Essequibo region, the area between the Orinoco River on the *west* and Essequibo River on the *east*.

TREATY OF MÜNSTER OF 1648

Not only had the first half of the 17th century been marked by European competition over colonies in the New World, it had also witnessed a Dutch struggle for independence from the Spanish Crown.[50] With the Thirty Years' War in Europe now drawing to a final close an accord at the Peace of Westphalia was reached. A component of this peace settlement was the Treaty of Münster of 1648, in which Spain was ultimately forced to recognize the independence of the Dutch United Provinces.
Although the Treaty of Münster[51] mentions each nation's territorial rights to the New World, it nowhere specifies what or where these holdings were. Thus Article V states;

> And each party [..] shall continue to possess and enjoy such lordships, towns, castles, fortresses, commerce, and lands in the East and West Indies, as also in Brazil, and on the coasts of Asia, Africa, and America respectively, as the same Lords, the King [of Spain] and States [of the Netherlands] do respectively hold and possess, amongst which are specially included the places which the Portuguese have since the year 1641 taken from the Lords States

[48] G. Ireland, *Boundaries, Possessions, and Conflicts in South America* (1971), p. 230-1.
[49] Smith op. cit. n. 47 at 14.
[50] The Dutch had started their struggle for independence from the Spanish Crown as early as 1581.
[51] Reprinted on the website of the Guyanese government available at http://www.guyana.org/Western/1648%20to%201669.htm (last visited 28 June, 2007), also printed in J.L. Joseph, "The Venezuela-Guyana Boundary Arbitration of 1899: An Appraisal, Part I" (1970) 10 *Carib. Std.* ,No 2, 56 at 75.

> and occupied, or the places which they shall hereafter come to acquire and possess without infraction of the present Treaty… [52]

The importance of this very clause, however, would be revived by the successors of the Dutch and Spanish properties as both parties based a great part of their territorial claim upon the clause. The British saw in this document an express admission of a right of the Dutch to all that they could conquer in America as long as it was not occupied by the Spaniards themselves (consequently new or potential new posts on the *west* of the Essequibo River). The Venezuelans, on the opposite extreme, have interpreted these provisions as an express grant by the Spanish Crown to the Dutch of the holdings they possessed or may come to conquer from the Portuguese alone (therefore Holland was limited only to possessions *east* of the Essequibo River).[53]

COLONIAL EFFORTS IN THE LATE 17th AND 18th CENTURY[54]

From a period of 1658 till approximately 1700 Dutch traders gradually began to move *west* of the Essequibo River. The Dutch merchants, usually representatives of the Dutch West India Company, constructed trading posts on the upper Cuyuni, Pomeroon and Morucca Rivers. Conversely during this same period the Dutch also, on certain occasions, shortly lost control of one or several of their colonies, such as the 1665 destruction of the Dutch settlements on the Essequibo and the newly settled Pomeroon Rivers by the British Major John Scott. On another occasion outposts would be destroyed by hostile Indians and yet on another occasion they would try to sack the Spanish town of Santo Tomé de la Guyana. At this same period of time the Dutch also gained substantial territory in the *eastern* part of the Essequibo River, as they acquired from the British the new colony of Surinam by the terms of the 1667 Treaty of Breda. Thus in 1682, when the Zeeland chamber in Holland sold the colonies to the newly formed Dutch West India Company, the States General of the Netherlands is 'supposed'[55] to have granted the company a charter running from Maroni in the east (i.e. west of French Guiana) up to the Orinoco River on the west.

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[52] Ibid.

[53] G.L. Burr, "The Guiana Boundary: A Postscript to the Work of the American Commission" (1900) 6 *Am. His. R.* 49 at 55-6. As to which view is more cogent it seems hard to tell; according to Burr (p. 56) neither sides' interpretation seems to hold up and according to Rout the King of Spain was, at that time, probably unaware where the Dutch settlements were at the time and thus the Treaty appeared to be no more than a reflection of the 'modus vivendi' or status quo of the nations at the time; see Rout op. cit. n. 44 at 3, 7.

[54] On the subject of the colonial efforts of both Holland and Spain in the second half of the 17th and 18th centuries, heavy reliance has been placed on, Ireland op. cit. n. 48 at 230-234; Rout op. cit. n. 44 at 1-7; and B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), pp. 11-13, 50-52.

[55] This contention has been made by the British side, but Professor Burr, an historian and expert in Dutch, rejects such an assertion. Burr, who was appointed by the American Commission of 1895 to investigate the Dutch Archives and the legislation of the Dutch States General contends nowhere to have found evidence to back these statements; see G.L. Burr, "The Search for the Venezuela-Guiana Boundary" (1899) 3 *Am. Hist. R.* 470 at 472-3.

Meanwhile the Spanish in the early period of the 18th century (around 1724) equally started to penetrate the axis of the region. Spain began sending missionaries, further *east* of their Orinoco possessions, who managed to pierce deep into the interior and established several settlements along the Cuyuni River and some of its tributaries. The Spanish side at this point likewise asserted its royal claims and in 1734 Don Carlos de Sucre reiterated Spain's historic right to the entire Wild Coast.

Although the Capuchin fathers had been able to occupy a vast territory of land, much of it was destroyed by an upraise of hostile Indians in 1750, but the Spanish fort on the Cuyuni River remained. The Spanish, nevertheless, upon their turn persisted in their attempts to control the interior and in 1758 destroyed the Dutch post on the Cuyuni River and again in this very year the Governor of Cumana (present Venezuela), administrator for Guiana at the time, reaffirmed the 'royal' Spanish claims to the Wild Coast. Periodic incursions into the area (and accompanying destructions of Dutch settlements) would now occasionally reoccur.

At this stage the uncertainty over the precise holdings of the respective nations in the Essequibo jungle and their coterminous border (if there ever had been one) clearly began to emerge. Interestingly enough evidence has been found of sporadic diplomatic exchange between the two nations on the matter.

The Dutch, one year after the destruction of their post in 1758, did propose to His Most Catholic Majesty to settle the 'boundary between the "County of Essequibo" and "the Orinoco"'.[56] The Spanish, however, disregarded the Dutch offer and so they made a second attempt ten years later in 1769, but this time, the Dutch, besides the Essequibo, asserted '"those sundry rivers and creeks on that coast which flow into the sea".[57] But again the offer was ignored. What might possibly account for the Spanish indifference at the time was their ignorance of the Dutch possessions. For instance Rout describes an event, in which the Spanish officer Iniciarte is sent to the Pomeroon River in 1779 (thus 10 years after the second proposal) to determine the feasibility of building a fort on the Pomeroon River. However the fact that the Dutch had already established a fort on the banks on this stream was, according to Rout, 'apparently unknown to the Spaniards'.[58]

That the Spanish administrators of Guiana became to terms with these new events, or that they were finally willing to admit and thus relinquish their formal 'royal' claim to the entire 'Wild Coast', might be deduced from the following statement.

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[56] Rout op. cit. n. 44 at 4

[57] Rout citing 'Senate Document #91, 55th Congress, 2nd Session, 'Report of the Special Commission Appointed by the President January 4, 1896, to Examine and Report upon the True Division Line between the Republic of Venezuela and British Guiana', (Washington, 1898), vol. I, 371; see Rout ibid. at 4.

[58] Ibid. at 3

As Ireland notes, Governor Miguel Marmion wrote (in a 'more realistic description' according to Ireland) on July 10, 1788, that his province bounded 'on the east by the Dutch colonies of Essequibo, Demerara, Berbice, and Surinam and the French colony of Cayenne'.[59]
A third effort by Holland to negotiate a border was planned by the Dutch authorities at the treaty of Amiens in 1804, in which they had hoped to determine a borderline in the vicinity of the Barima River (i.e. west of the Essequibo and near the mouth of the Orinoco) and in which they had already authorized their diplomats to propose money as a persuasive method. The diplomatic proposal was however hindered by British interference.[60]
At any rate no formal negotiation or actual delimitation discussions took place and by this time the Napoleonic Wars in Europe would definitely swift the balance of power in the region. At the end of the Napoleonic Wars the Dutch were finally forced to give up her colonies in the Guiana and Spain, conversely, would lose most of her overseas possessions to the new South American independence movement. Thus the new heirs to the former Spanish and Dutch possessions, respectively Gran Colombia/Venezuela and Great Britain, would now accede to the discord.

THE TREATY OF LONDON & THE SCHOMBURGK SURVEY'S

When the Dutch ceded their three colonies of Essequibo, Demerara, and Berbice to the British in the treaty of London in 1814, both nations made no provisions concerning the actual delimitation of its western border.
Almost immediately after the proclamation of Gran Colombia in 1811, the new Republic manifested its claims to the Essequibo region. In 1821 its Minister Zea officially informed the British Government that the Republic's eastern frontier was considered to be the Essequibo River and protested against any settlements *west* of this line and again in 1824 its Minister Hurtado repeated these claims. Upon silence from the British Crown the new Gran Colombian Minister Gual for a third time reiterated the statement in 1925, but England did not respond to any of these claims.[61]

[59] Ireland op. cit. n. 48 at 233
[60] Rout op. cit. n. 44 at 4-5. In a bizarre tale, the British had obtained information about the Dutch proposal after which they had indicated that Albion would not welcome such developments. The suggestion of the Dutch diplomat subsequently to his government to further discuss the matter with the Spanish Ambassador in Holland had, probably, not been taken up.
[61] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 13. Also in this same decade the Gran Colombian Minister Ravenga in London was also charged by his government to point out to the British that some of its colonists of Demerara and Berbice had usurped pieces of land to the west of the Essequibo line and was consequently instructed to explain that these subjects should either submit to Colombian law or leave the area.

Things remained quiet however until the British Colonial Office and the Royal Geographical Society in 1935 commissioned the Prussian naturalist Robert Schomburgk to conduct an exploration and seek convenient boundaries between the two respective nations. Schomburgk, who had previously in part explored the boundary of British Guiana with Brazil,[62] made a report in 1839 of his findings and maps. Thereafter Schomburgk recommended to the Governor of British Guiana that he himself should make the demarcations of the frontiers of the colony, in which he proposed some alternative lines.[63] In his survey Schomburgk had suggested a rather tentative frontier of British Guiana to include Point Barima (next to the mouth of the Orinoco River) which he deemed of great military importance.[64]

Thus in November 1840 Schomburgk was officially designated to survey and mark out the boundaries of British Guiana. The Venezuelan Government, who had previously protested on publication of these maps by the Colonial Office of England and who was uninformed about the new survey, promptly objected upon discovery of these new facts as it proposed a boundary convention to be completed prior to the commencement of Schomburgk's survey. But again Great Britain chose to ignore the protests and it was not until Venezuela vehemently complained about Schomburgk, who had, by now, also started to plant actual boundary posts in the disputed area itself that Great Brittan finally reacted.
Lord Aberdeen in 1842 publicly disavowed any border markings etc. and consequently ordered their removal. He explained to his counterpart that these lines had been tentative and were in no way considered to be final; however Aberdeen added that this did not imply that the British Empire relinquished her claims over the country in dispute.[65]
Venezuela, upon her turn, felt strengthened in her assertions over the Essequibo region, as the Spanish officially designated the Venezuelan Republic in 1845 as the successor to its Guiana possessions by the Treaty of Recognition, and so Venezuela upon her part initiated a diplomatic offensive.[66] Venezuela charged her minister in London, Dr. A. Fortique, to negotiate a border. Dr. Fortique's instructions by his government read the following:

> Although our rights extend to the Essequibo, we are anxious to remove all obstacles to a speedy adjustment and we are not disposed to insist upon our rights to that extent, it being manifest that England will not consent to surrender her establishments on the

[62] Ireland op. cit. n. 48 at 235
[63] Menon op. cit. n. 14 at 171
[64] O. Schoenrich, "The Venezuela-British Guiana Boundary Dispute" (1949) 43 *AJIL* 523 at 524, Rout op. cit. n. 44 at 8
[65] P.R. Fossum, "The Anglo-Venezuelan Boundary Controversy" (1928) 8 *Hisp. Am.His.R,* 299 at 302-3
[66] It should be noted though that the latter Treaty of Recognition, much like the 1814 Treaty between Great Britain and The Netherlands, did not make any mention of the specific borders of that nation; see Rout op. cit. n. 44 at 41.

> Pumeron and Morocco Rivers. You may therefore direct the course of your negotiations accordingly, making gradual concessions until an agreement can be had on... the Morrocco..[67]

The experienced Venezuelan minister and shrewd diplomat acted accordingly, slowly decreasing his demands and by March 1844 Lord Aberdeen had made a formal counter proposal, in which he offered a compromise line based on the Morucca River. But, due to Dr. Fortique's sudden death and the outburst of internal civil strife in Venezuela, the Republic's foreign policy was paralyzed. At any rate the Venezuelans never formally replied to the counter offer and it was in 1850 withdrawn by the British.

THE 1850 AGREEMENT

Because the Venezuelan Republic, on one the hand, had been crippled by revolutionary events at home and since the British Crown, on the other, had been cautious to arbitrate the matter,[68] both parties agreed to uphold a status quo and so both nations declared in June and December of 1850 *not* to violate the disputed zone.[69] Hence the so called 1850 Agreement was created, but the Accord would soon prove problematic due to the discovery of gold deposits in the Cuyuni Valley in the early 1860's.

Silently as time went by some inadequately supervised local policymakers on British side, upon reported rumors of gold, started to encourage its subjects to settle into the disputed zone (even handing grants of newly claimed land outside the disputed Schomburgk Lines).[70] When Her Majesty's Government later became aware of these events it remained tacit and it was not until actual gold strikes were made on the Tupuquen River in 1863 and later on the Cuyuni River (both deep in the disputed area) that the English Government was 'forced to modify its position publicly'.[71]

A rush of new fortune seekers to the disputed zone was the result and Venezuela now profoundly started to protest. Diplomatic relations even further heated three years after these events (in 1867), when the English formally consented on forming the British Guiana Mining Company. But, caused by heavy objections of Venezuela and with the 1850 Agreement in the back of her mind, the British Crown publicly announced that same year that all citizens

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[67] Ibid.; also Rout op. cit. n. 44 at 8

[68] The policymakers of the British Foreign Office had discussed the scenario of arbitration and had decided that 'if the territory in dispute was of any value to England, it would not be expedient to adopt the suggestion' in Rout op. cit. n. 44 at 11.

[69] Although the boundaries of this area were not specified, the British letter did mention that both sides claimed the Barima; B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 15

[70] Rout op. cit. n. 44 at 11.

[71] Ibid. at 12

entering the status quo area would forfeit government protection. Venezuela, for its part, began to realize that the situation was precarious. By now an estimated 40,000 English men had established themselves within parts of the Schomburgk Line[72], and thus the Venezuelan Government, although still plagued by domestic unrest, decided to chance its status quo course in the direction of arbitration.

ADJUSTMENT OF THE SCHOMBURGK LINES & DISCOVERY OF NEW GOLD

A formal Venezuelan call in 1875 to settle the dispute through arbitration was set aside by Her Majesty's Government and in 1876 Venezuela tried to enlist the good offices of the United States but was kindly declined.[73]

A new and large discovery of gold deposits on the Cuyuni River almost two years later in 1877 doubled the stakes to the ownership of the disputed zone and so later that same year the British Colonial Office released a new map depicting the 'original' Schomburgk Line, but purportedly by now England had 'moved the proposed frontier farther westward'.[74]

Venezuela yet again took recourse to protest, but it also in reaction issued mining and settlement permits of its own in the disputed territory, however, relatively few Venezuelan subjects took advantage of these grants.

Subsequent diplomatic negotiations between the two nations followed, in short Venezuela offered (to accept) the Morucca line but by now England refused. Lord Salisbury exaggerated events in 1880 when he formulated a new territorial claim (representing the official extreme British claim) running up to and including part of the Orinoco River (previously undisputed Venezuelan territory).

Matters gradually intensified in the late 1880's and early 1890's as yet again gold deposits were found, this time in the Barima basin. The Barima area, which had reportedly been uninhabited in 1883, would now within a decade (as reported in 1896) harbor some fifty English settlements.[75] The Venezuelan Government in 1886, though, acting upon 'new' rumors of gold decided to sent a fact-finding expedition into the Barima to investigate the situation on the ground. When the mission indeed confirmed the sudden existence of new English settlements in the Barima basin, the Venezuelan Republic immediately ordered the evacuation of the whole Barima region. When Her Majesty's Government disregarded the Venezuelans pleads, Venezuela decided in 1887 to cut off all diplomatic relations with Great

[72] Ibid.
[73] M. Blakeney, "The Olney-Pauncefote Treaty of 1897- The Failure of Anglo-American General Arbitration" (1979) 8 *Anglo-Am L. R.* 175 at 177
[74] Rout op. cit. n. 44 at 13; see also Donovan op. cit. n. 33 at 673.
[75] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 17

Britain. The British Crown quickly reacted and again issued another map, still officially dated 1875, but this time it is alleged to have pictured the Schomburgk Line to incorporate the 'entirety of known gold fields'.[76]

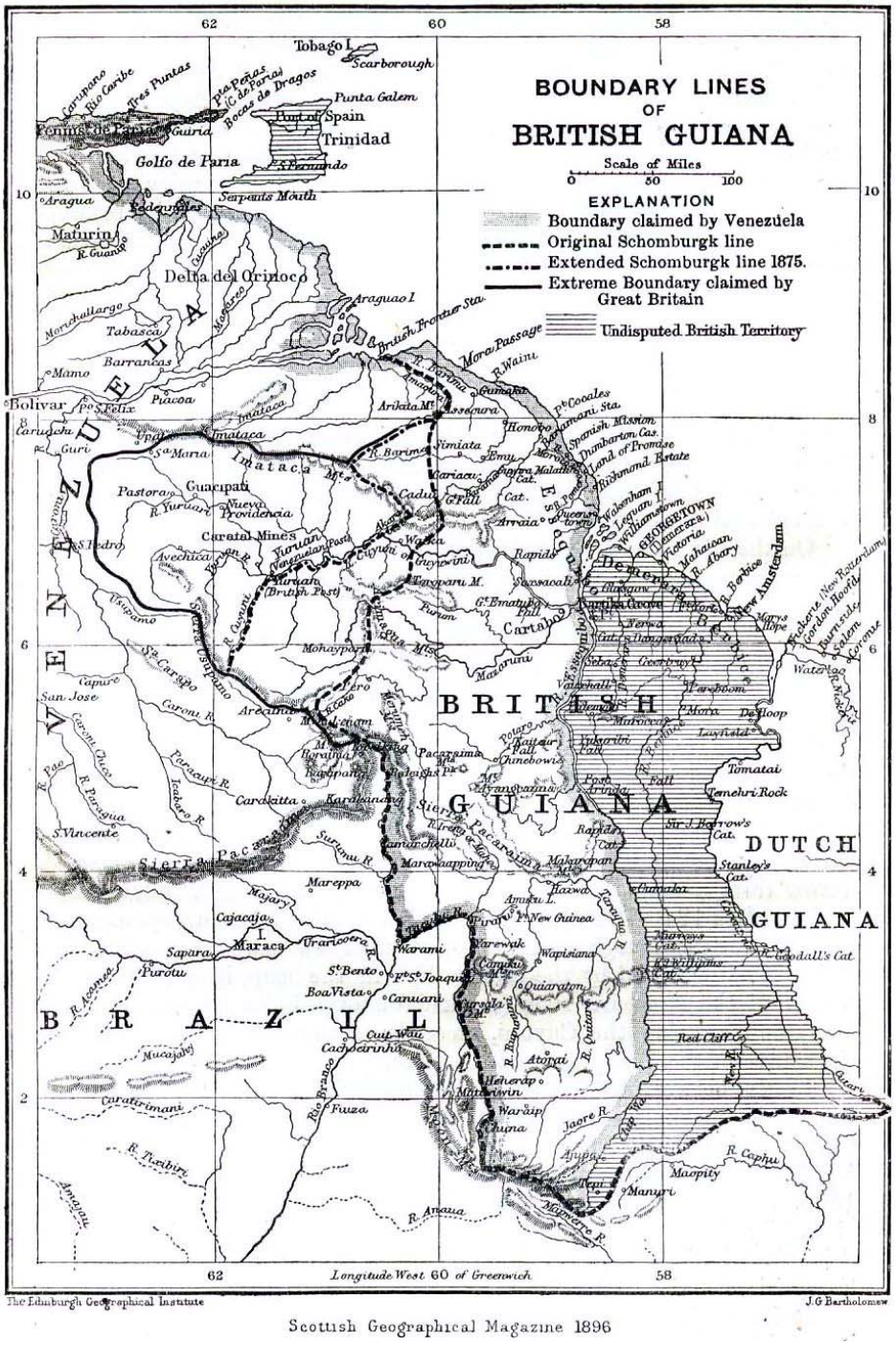

Figure IV[77]

[76] Rout, op cit n. 44 at 15

[77] Source: *Wikipedia, Online Encyclopedia*, originally published in the Scottish Geographical Magazine of 1896, available at http://upload.wikimedia.org/wikipedia/commons/d/db/Boundary_lines_of_British_Guiana_1896.jpg (last visited 28 June, 2007).

Once more Venezuela attempted to involve the United States into the discord and asserted that the Monroe Doctrine was being violated, and although America suggested arbitration to Great Britain both nations lapsed into silence. Yet again a feeble Venezuela tried to negotiate with Her Majesty's Government via confidential emissaries, but to no avail. Great Britain proved only willing to arbitrate the land beyond the Schomburgk Line, pointing to the, by now almost 40,000 settled British subjects in that area.[78]

U.S. INTERFERENCE & APPOINTMENT OF THE AMERICAN COMMISSION

Due to the stalemated position that Venezuela found herself in with the British Government, she decided to gradually embark upon her goal of arbitration via third party intervention. Initially in 1893 Venezuela managed to persuade Brazil and Peru to request Her Majesty's Government to adjudge the matter before arbitration, both nations were however kindly turned down by England. In that same year the conciliatory efforts of the Pope were appealed to but stumbled upon the same fate.[79] In 1894 Venezuela hired the legal and propagandist services of the American attorney W.L. Scruggs (who, after the publication of his book 'British Aggression in Venezuela', managed to trigger a new wave of jingoism in Congress) and after no time the United Sates officially invoked the Monroe Doctrine.[80] America started to demand the matter before arbitration and after inadequate and evasive responses from the British Government President Cleveland delivered his famous speech to Congress in 1895, demanding a 100,000 US $ to appoint a Commission to determine 'the true divisional line' between the two nations. Thus the American Commission of 1895 was established and commenced upon the massive task of evaluating each party's claim to the Essequibo region (indeed a valuable source of information was gathered by the American Commission). However before the Commission could finish its final report, England receded from its former stand and so in 1897 (two years after the installment of the Commission) a compromise treaty was negotiated by the American State Department and the British Foreign Office which resulted in the signing of the Washington Treaty of Arbitration.

[78] P.R. Fossum, "The Anglo-Venezuelan Boundary Controversy" (1979) 8 *Hisp. Am. His.R.* 299 at 319
[79] Ireland op. cit. n. 48 at 235-6.
[80] C.C. Hyde, *International Law: Chiefly Interpreted and Applied by the United States* (1945) Vol.I, p. 294.

C. THE WASHINGTON TREATY OF ARBITRATION OF 1897

The compromise treaty known as the Washington Treaty of 1897 [81] contains a total of fourteen Articles. Article I of the Treaty provides for the immediate appointment of a Tribunal and its Article II deals with the composition of such a Tribunal. So Article II stipulates that Great Britain has a right to choose the first two arbitrators of the Tribunal and subsequently that Venezuela may appoint one, the third arbitrator (a point of later protest by Venezuela). The Treaty also notes that the fourth member is to be named by the Justices of the Supreme Court of the United States of America. Finally its fifth member, the Umpire, is to be chosen by the four previously nominated.
The task of the five arbitrators was clearly spelled out in *Article III* and reads the following;

> The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary-line between the Colony of British Guiana and the United States of Venezuela. [82]

Accordingly Article IV of the treaty stipulated which applicable rules of international law would govern the Tribunal. So *Article IV* enumerates the following three rules;

> (a) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement there of, sufficient to constitute adverse holding or to make title by prescription.
>
> (b) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.
>
> (c) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require. [83]

Article V stipulated that 'All questions considered by the Tribunal, including its final decision, shall be determined by a *majority* of all Arbitrators' and the remainder of the Articles of the Treaty were mostly concerned with the procedural requirements. Of special importance though was *Article XIII* which read;

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[81] Reprinted in R. Preiswerk, *Documents on International Relations* (1970), p. 700-4.
[82] Ibid. at 701.
[83] Ibid.

> The High Contracting Parties engage to consider the result of the proceeds of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators. [84]

D. THE ARBITRAL AWARD OF 1899

Thus in 1899 the Tribunal at Paris, when it was ready to pronounce on the final outcome of the case, had the following assembly: Two British Arbitrators, Lord Chief Justice Russel and Lord Justice Collins, and two American Arbitrators, Chief Justice Fuller and Justice Brewer and lastly its Russian Umpire, Professor de Martens.

The case had received a lot of media attention at the time (no wonder given America's firm statement and the following tensions between the two North Atlantic Superpowers) and was supervised by the most competent man of their time.

Thus Venezuela had in March, 1898, submitted its case; three volumes and an accompanying atlas; Great Britain respectively seven volumes and an atlas. Each party had in June filled its counter case; Venezuela three volumes and an atlas; Great Britain two volumes and maps. In November, 1898, the parties submitted printed arguments; Venezuela, two volumes, Great Britain one volume. The formal sessions for argument began in Paris in June 1899, and lasted for fifty-four sessions of four hours each, ending September 27, 1899. The proceedings were subsequently printed and issued in eleven volumes.[85]

After this rich flow of legal arguments the 'unanimous' and final Award of the Arbitrators (see Appendix) [86] was the mere geographical description of the new boundary line between the two respective nations (the appointed line almost exactly corresponding to the current borderline between Venezuela and Guyana).

In short the newly determined line allotted about 'ninety percent' of the disputed Essequibo region to the British Empire (approximately 45,000 sq. miles) and the remainder 'ten percent' went to the Venezuelan Republic (around 5,000 sq. miles). In addition the final text of the Award 'purported' to delimit a 'new' boundary between the colony of British Guiana and the Republic of Brazil as well as between the former and the Dutch colony of Surinam. Finally the Award also contained a provision, not the matter of sovereignty, but on the free navigation of the Amakura and Barima Rivers, both located in the disputed territory on the Venezuelan side.

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[84] Ibid. at 703.
[85] O. Schoenrich, "The Venezuela-British Guiana Boundary Dispute" (1949) 43 *AJIL* 523 at 525-6.
[86] Reprinted in R. Preiswerk, *Documents on International Relations* (1970), p. 704

The 1899 Paris Award itself, comprising scarcely two papers, would become renowned for its brevity;[87] not only did the Award fail to touch upon any of the international law principles involved (Article *IV* of the 1897 Treaty), it also fell short of its prime task, which was to determine the British title after the English acquisition of the territories from the Dutch in 1814 (*Article III* of the 1897 Treaty).

E. POST-ARBITRATION DEVELOPMENTS

THE BOUNDARY COMMISSION OF 1905

In order to properly execute the 1899 Paris Award a boundary commission had to be established and though Venezuela in 1899 initially asked for a postponement (due to internal upheaval), it nevertheless appointed one in 1900 after the British had threatened to demarcate the boundary unilaterally.
The Boundary Commission went to work in a cordial fashion and issued its report in 1905 and while Venezuela attempted to relocate some sectors of the frontier line from 1915 to 1917, the validity or status of the 1899 Award was never invoked by either party.[88]

In the following decades, except for some dissatisfied utterances by Venezuela over the 1899 Award (e.g. the statement of its agent at the Permanent Court of Arbitration in 1903, the Venezuelan Ambassador at the UN in 1945,[89] and its President Betancourt at the Ninth Inter-American Conference), Venezuela did not push for a 'formal' demand[90] of the 'nullity' of the 1899 Paris Award until the posthumously published memorandum of Mr. Mallet-Prevost appeared in 1949.

THE MALLET-PREVOST MEMORANDUM OF 1949

Severo Mallet-Prevost is a distinguished international lawyer and had originally acted as the Secretary for the American Commission of 1895 appointed by President Cleveland. Afterwards Mr. Mallet-Prevost had been employed by Venezuela to act as her agent before the Paris Tribunal.

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[87] "Perhaps the classic case of a complete lack of reasoning is the *Venezuela-British Guiana* arbitral award..." K.H. Kaikobad, "The Court, the Council and Interim Protection: A Commentary on the *Lockerbie* Order of 14 April 1992" (1996) 17 *Aus. YBIL* 87 at 96
[88] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 19; Menon op. cit. n. 14 at 176
[89] At this point in time Venezuela did 'protest' and state that it wished a friendly reparation for the injustice of the 1899 Award, but an elaborate claim to 'nullity' was only voiced at a later date (when all official documents were released); see *infra* p. 100, 105 and accompanying text n. 442, 464.
[90] See text above.

Mr. Mallet-Prevost who had died on December 10 of 1948 had left his memorandum with his trusting law firm partner, Judge Otto Schoenrich, who he had instructed to post the document only after his death. Mallet-Prevost's account tells of his personal experience as to the outcome of the final Award and how the so-called 'unanimous' decision of the Tribunal had been forced upon the American Judges by its Russian Umpire Dr. de Martens. So he writes:

> Several days passed while we anxiously waited [for the outcome of the Award] but one afternoon I received a message from Justice Brewer saying that he and Chief Justice Fuller [the two American Judges] would like to speak with me and asking me to meet them at once at their hotel. I immediately went there.
> When I was shown 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 this farce pretending that we are judges and you are counsel. The Chief and I have decided to enclose to you confidentially just what has passed. Martens [the Russian Umpire] has been to see us. He informs us that Russel and Collins [the two British Judges] are ready to decide in favor of the Schomburgk Line which starting from Point Barima on the coast would give Great Britain the control of the main mouth of the Orinoco; 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 "he, de 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 Russel and Lord Collins and so make the decision unanimous".
>
> What de Martens then proposed was that the line on the coast should start at some distance southeast of Point Barima so as to give Venezuela control of the Orinoco mouth; and then the line should connect with the Schomburgk Line at some distance in the interior leaving to Venezuela the control of the Orinoco mouth and some 5,000 square miles of territory around the mouth.
>
> "That is what de Martens has proposed. The Chief and I are of the opinion that the boundary on the coast should start at the Moruca River. The question for us to decide is as to whether we shall file dissenting opinions. Under these circumstances the Chief and I have decided that we must consult you, and I now state to you that we are prepared to follow whichever of the two courses you wish us to do"…[91]

Mallet-Prevost in his account further explains that ex-President Harrison (the Chief Counsel for Venezuela) had been consulted and that he too, after initial indignation, acquiesced in the offer of the Umpire, de Martens. Both men were convinced that the command over the delta of the Orinoco River was vital to Venezuela's interests and so agreed to accept the proposal.

The memorandum of Mallet-Prevost had thereafter immediately been attacked by the British civil servant C.J Child in the upcoming volume of the American Journal of International Law.

[91] Schoenrich op. cit. n. 85 at 529-30

Child cunningly charged Mallet-Prevost's allegation of a possible political deal between Great Britain and Russia and he also rightly pointed to some technical inaccuracy of Mallet-Prevost's account of the facts.[92] But the overall content of Mr. Mallet-Prevost's statement has been corroborated in that same issue by another renowned international lawyer; W.C. Dennis, who stated:

> In view of Mr. Child's suggestion that Mallet-Prevost's story may have grown with the years, the present writer ventures to adduce his own testimony that Mallet-Prevost told him this same inside story as to how the Guiana Arbitration Boundary Line was arrived at in all its essential details, thirty years before he told it to Judge Otto Schoenrich and made it of record in his memorandum... [93]

Dennis in his argumentation also convincingly distinguished between Mallet-Prevost's 'opinions of belief' (a possible political deal) and the 'essential facts' of the case (Martens immoral conduct in order to achieve a unanimous decision).[94]

After these events, Venezuela in the 1950's stepped up to protest and question the validity of the 1899 Paris Award (e.g. The Fourth Meeting of Consultation of Ministers of Foreign Affairs of the American Continent in 1951, and at the Tenth Inter-American Conference in 1954). In this same decade Venezuela also proceeded on commissioning her Agents to study the national archives of England in order to scrutinize the freshly released personal letters and notes of the individuals that at the time had been involved in the boundary question. However it would come to take the Venezuelan Government till February 1962 before she presented her official claim at the public forum of the United Nations.

UNITED NATIONS INVOLVEMENT

Induced by the likely forthcoming independence of British Guiana in the early 60s, the Venezuelan Government decided to stress its official claim at the international arena.[95] Its ambassador explained Venezuela's position in 1962 before the Fourth (Trusteeship) Committee of the General Assembly and subsequently the 'Question of Boundaries between Venezuela and the Territory of British Guiana' was included in the agenda of the 17th session of the General Assembly.

[92] C.J. Child, "The Venezuela-British Guiana Boundary Arbitration of 1899" (1950) 44 *AJIL* 682
[93] W.C. Dennis, "The Venezuela-British Guiana Boundary Arbitration of 1899" (1950) 44 *AJIL* 720
[94] Ibid. at 724
[95] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p. 24-5.

At the General Assembly[96] Venezuela presented its historical and legal arguments, mainly pointing to the 'invalidity' of the 1899 Award and its '*recent* discovery of important documents'[97] (which will be discussed in chapter III), and British Guiana for its part, basically reiterated its position that it considered the matter to be a *chose jugeé* or 'a full, perfect and final settlement'.[98]

Great Britain and the representatives of British Guiana were however willing to agree to a 'tripartite examination' of the relevant materials, but the officials added that this offer was 'in no sense a proposal to engage in substantive talks about the revision of the frontier; for which there was no justification'[99].

The three-nation dialogue was later supported by a delegation of 19 Latin American countries, most notably by Argentina and Guatemala, who both still claimed land under the colonial rule of the United Kingdom at that time.

THE GENEVA AGREEMENT OF 1966

The tri-partite arrangements had been held between 1963 and 1965 but were ultimately deadlocked since neither party was willing to make any concessions. Eventually, and almost on the eve of Guiana's independence, on February 17, 1966, all governments involved (including the representatives of British Guiana) concluded the Geneva Agreement.[100] The first Article of this document sets out to establish a Mixed Commission and reads;

> A Mixed Commission shall be established with the task of seeking satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is *null and void.*[101]

Article II of the agreement stated that the Mixed Commission was to be composed of two representatives appointed by the Government of British Guiana and two by the Government of Venezuela.

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[96] 'Statements by the Representatives of Venezuela, of the United Kingdom and of the United States, to the Special Political Committee of the General Assembly, 12th and 13th November 1962'. (Extracts from the *Official Records* of the General Assembly) reprinted in R. Preiswerk, *Documents on International Relations in the Caribbean* (1970), p. 706-14.
[97] Ibid. point 5 at 706
[98] Ibid. point 11&1 at 709
[99] Ibid. point 16 at 713
[100] 'Agreement Between Great Britain and Venezuela Concerning the Procedure for Resolving the Boundary Dispute over Guyana, Geneva, 17th February 1966' reprinted in R. Preiswerk, *Documents on International Relations in the Caribbean* (1970), p. 714-6
[101] Ibid at 714 (Italics added).

The next important Article was the fourth, in which the *steps* were described that the parties would subsequently have to take in the *possible* event of a non accord on the issues concerned (this proved to be a wise Article indeed). Thus *Article IV* [102]forces the two parties to take recourse to the scheme of the 'peaceful settlement of disputes' (as embodied in Article 33 of the UN Charter) if they should fail to reach any agreement on the matter.

But the crucial Article of this document is contained in *Article V*. This Article sets out to freeze each contender's claims to the disputed territory while the Mixed Commission is in operation and has as such been compared to the Antarctica Treaty of 1959.[103] The Article notes;

> (1) [..] nothing contained in this Agreement shall be interpreted as renunciation or diminution [..] of any basis of claim to territorial sovereignty in the territories of Venezuela or British Guiana, or of any previously asserted rights of or claims to such territorial sovereignty, or as prejudicing their position as regards their recognition or non-recognition of a right of, claim or basis of claim by any of them to such territorial sovereignty.
>
> (2) No acts or activities taking place while this Agreement is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the territories of Venezuela or British Guiana or create any rights of sovereignty in those territories [..] No new claim or enlargement of an existing claim to territorial sovereignty in those territories shall be asserted...[104]

The Mixed Commission held seventeen sessions and submitted its final report on June 18, 1970.[105]

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[102] Article IV of the 1966 Geneva Agreement reads in full:
(1) If, within a period of four years from the date of this Agreement, the Mixed Commission should not have arrived at a full agreement for the solution of the controversy it shall, in its final report, refer to the Government of Guyana and the Government of Venezuela any outstanding questions. Those Governments shall without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations.
(2) If, within three months of receiving the final report, the Government of Guyana and the Government of Venezuela should not have reached agreement regarding the choice of one of the means of settlement provided by Article 33 of the Charter of the United nations, they shall refer the decision as to the means of settlement to an appropriate international organ upon which they both agree or, failing agreement on this point, to the Secretary-General of the United Nations. If the means so chosen do not lead to a solution of the controversy, the said organ, or as the case may be, the Secretary-General of the United Nations shall choose another of the means stipulated in Article 33 of the Charter of the United Nations, and so on until the controversy has been resolved or until all the means of peaceful settlement there contemplated have been exhausted.
[103] Menon op. cit. n. 14 at 180
[104] Preiswerk op. cit. n. 86 at 715.
[105] Menon ibid.

THE PORT-OF-SPAIN PROTOCOL OF 1970

Again due to the inability to reach any compromises during the meetings of the Geneva Agreement and moreover due to the mounting political escalation and hostility between the nations in the late 1960's, e.g. Ankoko Island affair,[106] other concerned neighboring countries stepped in and managed to reconcile both parties. Thus, under the diplomacy of the Prime Minister of Trinidad and Tobago, Dr. Eric Williams, the Port-of-Spain Protocol[107] was concluded in 1970. This Protocol, which is actually a protocol to the Geneva Agreement as stated by *Article VI* of the Protocol, more or less reaffirms the principles that had already been laid down at the Geneva Agreement of 1966. The key difference between the two documents was that the Protocol was set for an initial twelve years period and would, unless a 6 months prior notice was given, be renewed for an additional twelve years (*Article V* of the Protocol).

Article *III*[108] notes that Art. IV of the Geneva Agreement of 1966 [109](the obligation to settle the discord via the 'peaceful dispute settlement procedure' compare art. 33 UN Charter) is temporally suspended at least as long as the Protocol is in operation. Article *IV* is of special importance as it reiterates Art. V of the Geneva Agreement (i.e. the preservation of the *status quo* of each contender's claim to the region) and so it states the following:

> (1) So long as this Protocol remains in force Article V of the Geneva Agreement (without prejudice to its further operation after this Protocol ceases to be in force) shall have effect in relation to this Protocol as it has effect in relation to that Agreement….
>
> (2) The signing and continuance of this Protocol shall not be interpreted in any way as a renunciation or diminution of any rights which any of the parties may have on the date on which this Protocol

[106] In October 1966, Guyana protested to Venezuela's construction of an airstrip on Ankoko Island (Isla Anacoco), located in a junction of the Cuyuni River forming part of the border agreed in 1899. Guyana claimed half of the island was hers and subsequently that Venezuela's actions constituted an annexation. In reaction there were violent demonstrations near the Venezuelan Embassy in Georgetown. Venezuela though has maintained that it had always had full possession of the island and consequently that there was nothing unusual about her actions. Later in 1970 there were reported incidents near the island. CIDCM, "Guyana-Venezuela Border Conflict"(2002), p. 5

[107] Reprinted in Rout op. cit. n. 44 in Appendix III, p. 121-3.

[108] Article III reads in full:
So long as this Protocol remains in force the operation of Article IV of the Geneva Agreement shall be suspended. On the date when this Protocol ceases to be in force the functioning of that Article shall be resumed at the point at which it has been suspended, that is to say, as if the Final Report of the Mixed Commission had been submitted on that date, unless the Government of Guyana and the Government of Venezuela have first jointly declared in writing that they have reached full agreement for the solution of the controversy referred to in the Geneva Agreement or that they have agreed upon one of the means of peaceful settlement provided for in Article 33 of the Charter of the United Nations.

[109] See accompanying text *supra* n. 102.

> is signed or a recognition of any situation, practice or claim existing at that date. [110]

THE MEDIATION EFFORTS BY THE SECRETARY GENERAL UP TO PRESENT

Despite the good intentions manifested in the Protocol no substantive breakthrough had been reached and thus Venezuela decided not to renew the Protocol in 1982 and as such it expired in June that year. Therefore legally the Geneva Agreement again entered into force and in July 1982 Venezuela proposed to hold 'direct negotiations' between the two nations (which is the first means of peaceful settlement of dispute provided for in Article 33 of the UN Charter as is stated in Article IV of the Geneva Agreement).[111] Guyana, on the other hand, wanted to submit the discord to the International Court of Justice (ICJ) at The Hague (another mode of peaceful dispute settlement according to Art. 33 of the UN Charter). Thus both parties once again disagreed and eventually requested the Secretary General (S-G) to intervene in 1984.[112]

The S-G launched a number of conciliation efforts and in 1990 named a Good Officer to the dispute. Alister McIntyre, the Good Officer, proposed to enroll a mechanism of discreet, unofficial exploration by 'facilitators' (unofficial envoys acting on behalf of each country).[113] In 1996 a statement was released by the UN stressing the continuing progress and efforts made by the mediation program[114] and in 1998 both countries agreed to create a High Level Bilateral Commission (Comisión Bilateral de Alto Nivel- COBAN) in order to explore systematically for opportunities for cooperation in different areas. Another declaration was published by the UN in 1999, again emphasizing the ongoing efforts of the mediation scheme[115] and that same year the UN appointed a new Personal Representative to the 'Border Controversy Between Guyana and Venezuela', Oliver Jackman.[116]
Thus the situation is currently still under revision of the good offices program of the UN and periodic consultation and mediation appears to be the 'modus vivendi' of both states for the time being.

[110] Rout op. cit. n. 44 in Appendix III, p. 121-3.
[111] See also *supra* n. 102.
[112] W. Hummer, "Boundary Disputes in Latin America" (1992) 1 *EPIL* 472
[113] CIDCM, "Guyana-Venezuela Border Conflict"(2002), p 6-7.
[114]UN Press Release SG/2027 available at the website of the UN at http://www.un.org/News/Press/docs/1996/19961004.sg2027.html (last visited 28 June, 2007).
[115] UN Press Release SG/2026 available at the website of the UN at http://www.un.org/News/Press/docs/1999/19990922.sg2060.doc.html (last visited 28 June, 2007).
[116] UN Press Release SG/A/709 available at the website of the UN at http://www.un.org/News/Press/docs/1999/19991026.sga709.doc.html (last visited 28 June, 2007).

CHAPTER II:

THE LAW ON NULLITY

Now that we have had the opportunity to form a bit of a picture in our mind of the background of the dispute we can begin to analyze the Venezuelan Claim. As indicated Venezuela's prime argument has rested on her assertion of the 'invalidity' of the 1899 Paris Award. E.g. Mr. Falcon Briceno, when expounding the Venezuelan case before the UN General Assembly, made the closing comment that 'in view of those facts no one could claim that Venezuela was compelled to regard the findings of the arbitral tribunal as a full, final, and definitive settlement'.[117]
But as a preliminary question we should ask ourselves: Is Venezuela legally entitled to invoke the 'nullity' of the 1899 Paris Award? In other words; does international law in fact permit a state to contest and consequently set aside a rendered award of an international arbitral tribunal?

Before we proceed our examination, it might be useful, if not necessary, to point out at the outset that Venezuela possesses an inherent right to request a judicial organ to adjudge upon the scope and validity of the 1899 Paris Award.[118] At the same time, however, it should be equally stated that a claim to nullity shifts the burden of proof towards the claimant party, [119] and so Venezuela, in order to warrant any serious examination, needs to properly substantiate her contention.

Since the present thesis is aimed at evaluating the Venezuelan position from a standpoint of international law, it is submitted that we first examine 'the law on nullity' before we proceed to analyze the substantive arguments on nullity.

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[117]'Statements by the Representatives of Venezuela, of the United Kingdom and of the United States, to the Special Political Committee of the General Assembly, 12th and 13th November 1962'. (Extracts from the *Official Records* of the General Assembly) reprinted in R. Preiswerk, *Documents on International Relations in the Caribbean* (1970), p. 706-14, statement by Mr. Falcon Briceno at p. 709, point 27.
[118] E.g. compare Article 60 of the ICJ Statute which reads: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party".
[119]See Dissenting Opinion of Judge Weeramantry *Case concerning the Arbitral Award of 31 July 1989* [1991] ICJ Rep. 53 at 152; L.D.M. Nelson, "The Arbitration of Boundary Disputes in Latin America" (1973) 20 *Neth. Int. L.R.* 267 at 291-2; W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971), p. 504-5.

A. THE PRINCIPLE OF NULLITY IN INTERNATIONAL LAW

The doctrine of nullity is a much debated subject in legal literature and has often led to conflicting views;[120] this is so because the concept of nullity underlines the tension that is embedded in the system of international adjudication. The notion of nullity conflicts with the two most important principles that underlay the system of international adjudication. On the one hand the system rests on the well documented principle of finality[121], or its classic maxim *res adjudicata ius facit inter pares* or *chose jugeé* (i.e. the rule that the decision should be final and binding and the desire to permanently settle the dispute), and, on the other hand, the scheme is enclosed by the principle of justice or its maxim *ex iniuria non oritur ius*. Or as the latter argument was once voiced by the British Lord Atkin 'Finality is a good thing but justice is better'.[122] Moreover it has been argued that international decisions are sometimes deficient and consequently to uphold imperfect decisions would damage the authority of international adjudication itself.[123] Hence the notion of 'nullity' appears to delicately balance between these two interests.

DOCUMENTS & TREATIES ON NULLITY

The birth of the concept of nullity can in fact be traced back to the Justinian Code. Although the Romans in principle adhered to the doctrine of finality or *res judicata*, Roman law nevertheless granted its citizens the possibility of an *exceptio doli* to set aside and challenge the validity of a rendered judgment.[124]A case in point is the often cited classic maxim [125] of;

> arbiter nihil extra compromissum facere potest.....
>
> Justinian, *Digest* 4.8.32.21

[120] E.g.; "After centuries of discussion, the problems surrounding the nullity of judicial decisions and arbitral awards in international law still remain unsettled". J.P. Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System" (1998-99) 14 *Am.U. Int .L.R.* 1173 at 1214-5; see also Reisman, who asserts; " The long and exhaustive study of arbitral procedure by the International Law Commission [i.e. Model Rules on Arbitral Procedure of 1958 covering the nullity of an award] has, if anything, put matters formerly of general consensus into the continuing debate once again'. W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971), p. 21.

[121] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion of July 13, 1954), [1954] ICJ Rep. 47 at 53; see also Article 54 Hague Convention for Pacific Settlement of International Disputes, Article 81 of the 1907 Convention, and Article 59 ICJ Statute.

[122] *Ras Bilhari v. The King-Emperor*, (1933) 50 T.L.B. 1 quoted by S. Zaiwalla, "Challenging Arbitral Awards: Finality is Good but Justice is Better" (2003) 20 *J. Int. Arb.* 199, 199.

[123] K. Oellers-Frahm, "Judicial Decisions: Validity and Nullity" (1997) 3 *EPIL* 38, 38; Dissenting Opinion of Judge Thierry *Case concerning the Arbitral Award of 31 July 1989* [1991] I.C.J. Rep. 53 at 179-80; see also Dissenting Opinion of Judge Weeramantry; ibid. at 173.

[124]H.W. Baade, "Nullity and Avoidance in Public International Law: A Preliminary Survey and a Theoretical Orientation" (1964) 39 *Ind. L.J.* 497 at 548; H. Lauterpacht, "The Legal Remedy in Case of Excess of Jurisdiction" (1928) 9 *BYIL* 117 at 119.

[125] Quoted by W.M. Reisman, "Has the International Court Exceeded its Jurisdiction?" (1986) 80 *AJIL* 128, 128.

As modern international arbitration was introduced by the Anglo-American Jay Treaty in 1794, the idea of the nullity of a rendered judgment began to increase on an inter-state level.[126] While state practice in the early 19th century exhibits several claims of nullity (e.g. compare the statement of the American arbitrator Gore in the *Betsey* case of 1797[127] and the contention of the US Government in the *Northeastern Boundary Dispute* of 1831[128]) the concept had never been officially documented till 1875.

In 1875 the Institute of International Law (*Institut de Droit international*) adopted a *règlement* of which Article 27 of this '1875 *Projet*' read the following:

> An arbitral award is void when the *compromis* is void, or when the Tribunal has exceeded its jurisdiction, or in case of proved corruption of one of the arbitrators, or in case of essential error. [129]

The first record of 'nullity' in a multilateral treaty context, although technically still phrased in private law terms, is contained in Article 65 of the General Act of the Brussels Anti-Slavery Conference of 1890, which reads:

> Any transaction or sale to which the slaves referred to [..] may have been subjected through circumstances of any kind whatsoever, shall be considered as *null and void.*[130]

At the early beginnings of the 20th century the notion of nullity or rather the right to a revision of an arbitral award can be found in several bilateral arbitration treaties among mostly Latin American states[131]. For instance the General Treaty of Arbitration between Chile and the Argentine Republic of 1902 stated in its Article XIII:

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[126] W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971), p. 29-30; see also J. O'Brien, *International Law* (2001), p. 641

[127] Arbitrator Gore in that case spoke of an 'excess of power', he reasoned that: "The answer is obvious, it is that of the law of nations, of the common law of England and of common sense- a party is not bound by the decision of arbitrators in a case not within the submission- such decision would be a dead letter- it would be as no decision'. (1931) 4 Moore, *International Adjudication* 179 at 194 quoted by B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 277; see also J.W. Garner, "Appeal in Cases of Alleged Invalid Arbitral Awards" (1932) 26 *AJIL* 126 at 128; K.S. Carlston, *The Process of International Arbitration* (1946) p.75-6.

[128] In the this dispute the US Government opposed the Award of the King of The Netherlands on the ground that the King had 'exceeded his powers' by rendering a 'compromise line'; 22 British Foreign State Papers 772 at 775; Carlston ibid. at p. 88-90; for more details on the case see *infra* p. 77.

[129] Annuaire de l'Institut de Droit International (1877), Vol. I, pp. 126-133 cited in *YB ILC* (1953), Vol. I, p. 45; see also O. Schachter, "The Enforcement of International Judicial and Arbitral Decisions" (1960) 54 *AJIL* 1 at 3, n. 8

[130] W.M. Malloy (Res. No.252, Sixtieth Congress, Second Session), *Treaties, Conventions, International Acts, Protocols and Agreements between The United States of America and Other Powers 1776-1909, Volume II* (Washington, 1910) at p. 1983 (Italics added).

[131] See the thesis of Judge Urrutia Holguin who asserts that there are different concepts for challenging an arbitral award on the American continent than opposed to the European continent, Dissenting Opinion Judge Urrutia Holguin, *Arbitral Award by the King of Spain of 1906* [1960] I.C.J. Rep. at 223; *contra* see L.D.M. Nelson, "The Arbitration of Boundary Disputes in Latin America" (1973) 20 *Neth. Int. L.R.* 267 at 283-4.

> There is no appeal against the Award, and its fulfillment is entrusted to the honor of the nations who have signed this Agreement. Nevertheless, recourse to revision shall be allowed [..] in the following cases...[132]

Six similar clauses are documented in the following arbitration treaties: Article XIII of the 1898 treaty between Italy and Argentina[133], Article XVI of the 1899 treaty between Argentina and Uruguay[134], Article XVI of the 1899 treaty between Paraguay and Argentina[135], Article XIII of the 1901 arbitration treaty between Bolivia and Peru[136], Article XVI of the 1902 arbitration treaty between Argentina and Bolivia[137], and finally Article XVII of the arbitration treaty of 1905 between Brazil and Argentina.[138]

By contrast the principle of nullity was not specifically recorded at the famous Hague Peace Conferences of 1899 and 1907. The silence of the final text of these Conventions on the subject matter of the nullity of an arbitral award has in fact been interpreted by some as a rejection of the concept of nullity and has subsequently ignited a fervent discussion among international lawyers and publicists.[139]
Thus Article 81 of the Second Hague Convention of 1907 states that an arbitral award 'settles the dispute definitively and without appeal'.[140] Nevertheless recourse to the revision of a final award remained possible *if* 'The parties [..] reserve in the *compromis* the right to demand the revision of the award' (Article 83).[141]

Although the bilateral arbitration agreement of 1912 between Colombia and Argentina contains an article on revision;[142] it appears to form an exception rather than a rule in arbitration treaties concluded just after the Hague Peace Conferences. In addition the famous peace Treaty of Versailles of 1919 does not specifically mention a right to the revision of an

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[132] General Treaty of Arbitration between Chile and the Argentine Republic, signed May, 28, 1902; (1907) 1 *AJIL Supplement* 292 at 293
[133]Permanent Treaty of Arbitration between Italy and the Argentine Republic of July 23, 1898 cited by K.S. Carlston, *The Process of International Arbitration* (1946) at p. 233
[134] 94 British Foreign State Papers 527 quoted in L.D.M. Nelson, "The Arbitration of Boundary Disputes in Latin America" (1973) 20 *Neth. Int. L.R.* 267 at 283
[135] 92 British Foreign State Papers 485 cited by Nelson ibid at 283, n. 94
[136](1909) 3 *AJIL Supplement* 378 at 380
[137] W.R. Manning, *Arbitration Treaties among the American Nations* (New York, 1924) p. 316 cited by Nelson ibid. at 283, n. 94
[138] (1909) 3 *AJIL Supplement* 1 at 4
[139] *Infra* p. 39
[140] Carlston op. cit. n. 133 at 214
[141] Article 83 of the Pacific Settlement Convention of October 18, 1907 cited by K. Strupp, "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles" (1923) 17 *AJIL* 661 at 684
[142] Article VI of the General Arbitration Treaty between the Republic of Columbia and the Argentine Republic of 1912; 8 *AJIL Supplement* (1914) 86 at 87

award; instead its Article 304 (g) states that the decision is 'final and conclusive'[143]. Yet the Annex to Article 304 does contain a provision on the revision of the final decision in the event that 'new facts' are found. Thus articles on revision, in the event if a 'new fact' was discovered, were subsequently adopted by almost all of the established Mixed Arbitral Tribunals.[144] Moreover the case law of the Mixed Arbitral Tribunals confirms the possibility of revision; e.g. the *Gunn* v. *Gunz* case[145] before the Anglo-German arbitral court.[146]

One decade later, in the 1920's, the concept of nullity and revision would, however, reappear in treaty law. The most elaborate article on nullity can be found in the 'Convention for the Establishment of an International Central American Tribunal'. The second paragraph of Article XIX[147] of this Convention deals with the possibility of 'complaints' and accordingly declares that the rules of Annex B are applicable. Article 63 of Annex B unequivocally states that after the Tribunal has rendered its final award 'the Parties may petition the Tribunal for its revision on the ground of nullity', but the same article adds that this party has the obligation to 'state to them the specific form [of] the grounds of the alleged nullity'.[148]
In spite of these clear provisions already laid down in paragraph one and two of Article XIX, its fourth and final paragraph still stresses that:

> The silence of the parties in the drafting of the protocol of arbitration does not imply the renunciation of the right of recourse to revision..[149]

In Article 65 of the Statute of the Permanent Court of International Justice (PCIJ), that was erected in 1920,[150]a right to revision was included in the event of the 'discovery of a new fact' and this Article has later been copied *in verbatim* by the Statute of the ICJ in its Article 61 in 1945. Moreover in 1927 the Institute of International Law adopted a draft on arbitration procedure, in which Article 23 enumerates several grounds for the rescinding of an award.[151]

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[143] K. Strupp, "The Competence of the Mixed Arbitral Courts of the Treaty of Versailles" (1923) 17 *AJIL* 661 at 684
[144]E.g. Franco-German Mixed Tribunal (Articles 79-81), Belgo-German Mixed Tribunal (Article 76), British-Austrian Tribunal (Article 91), Italo-German Tribunal (Article 68) etc. for references see B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 364, n. 99.
[145](1923) 2 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 202; Carlston op. cit. n. 133 at 229-30.
[146] Strupp op. cit. n. 43 at 648, 690; also H. Lauterpacht, "The Legal Remedy in Case of Excess of Jurisdiction" (1928) 9 *BYIL* 117 at 119
[147] Convention for the Establishment of an International Central American Tribunal; (1923) 17 *AJIL Supplement* 83 at 90-91
[148] Ibid at 105
[149] Ibid. at 90
[150] (1923) 17 *AJIL Supplement* 55 at 68
[151] Annuaire de l'Institut de droit international, (1927) vol. 33, t. II, pp. 634-641 cited by the Colombian member Mr. Ypes in *YB ILC* (1952) Vol. I at p. 86

Equally a committee of legal experts to the League of Nations adopted a proposal in 1930 in which three grounds of nullity were suggested.[152]

The principle of 'nullity', though, is undeniably best reflected in the work of the International Law Commission (ILC). In its elaborate study on the 'Model Rules on Arbitral Procedure', which was adopted by the General Assembly in Resolution 1262 (XIII) in 1958,[153] the subject matter of the nullity of an arbitral award was discussed in length and subsequently included in its *key Article 35*, which reads as follows;

> The validity of an award may be challenged by either party on one or more of the following grounds:
> (a.) That the tribunal has exceeded its powers;
> (b) That there was corruption on the part of a member of the tribunal;
> (c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
> (d.) That the undertaking to arbitrate or the *compromis* is a nullity.[154]

In addition to the above cited documents there have also been clauses of 'nullity' incorporated into multilateral treaties outside the direct scope of traditional inter-state arbitration. For instance Article 52 of the 'Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' enumerates *mutatis mutandis* the same grounds for nullity as Article 35 of the ILC 'Model Rules'.[155] But also Article VI of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 reserves the right of a party to an 'application for the setting aside or suspension of the award'[156], likewise Article IX of the European Convention on International Commercial Arbitration makes a mention of the right to revision.[157]

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[152] J.W. Garner, "Appeal in Cases of Alleged Invalid Arbitral Awards" (1932) 26 *AJIL* 126 at 127

[153] H.J. Schlochauer, "Arbitration" (1992) 1 *EPIL* 215 at 227; M.N. Shaw, *International Law* (2003) 5th ed., p. 954, n.27

[154] *YB ILC* (1958) Vol. II, Report of the Commission to the General Assembly, Doc. A/3859, at p. 86; also (1959) 53 *AJIL* 230 at 247

[155] B. Pirrwitz, "Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1988) 23 *Tex. Int. L.J.* 73 at 83. Under Article 52, a party may request the annulment of the award on the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

[156] *United States Treaties and Other International Agreements (U.S.T.)*, 1970, Vol. 21, Part III, at p. 2520

[157] P.I. Benjamin, "The European Convention on International Commercial Arbitration" (1961) 37 *BYIL* 478 at 479

Moreover the concept of nullity has also been employed by states in a number of conventional treaties.[158]

THE VIEW OF WRITERS & PUBLICISTS ON NULLITY

The early scholars on international law endorsed the view of an absolute rule of *res judicata*.[159] Grotius, by many considered as 'the father of international law', sums up his position on the final character of an award as follows:

> Although [..] Civil Law may direct and does in some places direct that it shall be lawful to appeal from them [i.e. the award of an arbiter] and to complain of their wrong; this cannot have place between kings and peoples. For, in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.[160]

While Pufendorf in general concurs with Grotius's views, he asserts on the latter point that:

> the statement that one has to abide by the decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.[161]

Thus Pufendorf was among the first classical authorities to question the absolute character of a judgment. Likewise the scholar Vattel believes that an award cannot be binding when it is 'evidently unjust' or when the arbitrator has ruled beyond the points submitted to him.[162]

Gradually as international law developed in the later part of the 19th century the adherence to an absolute rule of finality ebbed away and accordingly the majority of publicists all admitted

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[158] E.g. the concluded Munich Agreement of 1938 (concerning Germany's Sudetenland) between Great Britain, Italy, France and Germany was declared '*null and void*' in several treaties; see Treaty of Peace With Romania, Feb. 10, 1947, Article 2, Treaty of Peace With Hungary, Feb. 10, 1945, Articles 1(2), 1(4) (b), 61 all cited by H.W. Baade, "Nullity and Avoidance in Public International Law: A Preliminary Survey and a Theoretical Orientation" (1964) 39 *Ind. L.J.* 497 at 510; The latter Treaty (i.e. Munich Agreement of 1938) was more recently again declared '*null and void*' in the Treaty of Prague between the Federal Republic of Germany and Czechoslovakia in 1973 see J.A. Frowein, "Nullity in International Law" (1997) 3 *EPIL* 743 at 744. Similar proclamations on nullity were made with regard to the Austrian 'Anschluss' of 1938; see Baade; ibid. at 503-8.

[159] W.P. Gormley, "The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement (Part I: Decisions and Sanctions)" (1964) 10 *How. L.J.* 33 at 41

[160] Grotius, *De Jure Belli et Pacis* (Whewell trans. 1853) p. 351-2 quoted by W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971) at p. 22

[161] Pufendorf, *De Jure Naturae et Gentium* (Oldfather trans. 1934) Vol. II, Chapter XIII, Sec. 4, p. 827 at p. 829 quoted by Mr. Ypes at the 191st meeting of the ILC in 1953, *YB ILC* (1953) Vol. I, p. 45

[162] Vattel, *Le Droit de Gens* (ed. 1758, Fenwick trans. 1916) sec. 329, p. 223-24 quoted by Carlston op. cit. n. 133 at 188-9.

(on slightly different grounds) the possibility of the nullity of a judgment; e.g. Phillimore because of 'glaring partiality', Twiss when 'in absolute conflict with the rules of justice', Blumerincq if it is 'unjust', Ferguson thinks if it is 'manifestly contrary to all reasonable justice', Fiore and Bluntschli simply state that if the award is 'contrary to international law'.[163]

As previously indicated a real fierce discussion among practitioners of international law erupted after the final findings of the Hague Peace Conferences of 1899 and 1907. This debate flared up again in the 1920's when proponents and opponents of nullity discussed the legitimacy of the claim of the Rumanian Government in the *Hungarian Optants* case[164]. Basically the thoughts of the law scholars are divided into the two following camps.

The first camp consists of those writers who, in the absence of international machinery with the power to review a judgment, reject the option that an international award can be set aside unilaterally by a state. This group is represented by distinguished writers as Castberg, Nippold, Fauchile, Dupuis, Garner, Bustamente, and Guermanoff. [165]
The basic premise of their thesis was first put forward by the scholar Lammasch. He reasoned that since the Russian Proposal (that mirrored the four grounds of nullity of the 1875 *Projet*, see above)[166] had been rejected at the Hague Peace Conferences; it could be inferred that the privilege of a state to unilaterally disregard an award on the grounds of nullity had been abandoned.
Therefore Article 83 of the 1907 Convention (i.e. the article that gives the parties a possibility of the inclusion of 'revision' in the compromise itself; see section above)[167] confirmed that states could *only* by special agreement provide for the revision of an award.[168]

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[163] Phillimore, *Commentaries on International Law* (1857) Vol. III, p.5; Twiss, *The Law of Nations* (2 ed., 1875) Vol. II, p. 8; Blumerinq, *Völkerrecht* (1887) p. 352; Ferguson, *Manual of International Law* (1884), p. 207; Fiore, *Nouveau Droit International Public* (Antoine trans., 1885) p. 643 all cited by Carlston op. cit. n. 133 at 189; Bluntschli, *Le Droit International Codifié* (1886) sec. 495, p.289 cited in the *YB ILC* (1953) Vol. I, p. 45.
[164](1928) 7 *Recueil des Décisions des Tribunaux Arbitraux Mixtes* 138-62; The Mixed Arbitral Tribunal constituted in pursuance of the Peace Treaty of Trianon declared itself competent to decide certain claims of Hungarian land-owners in respect of lands which it was alleged had been confiscated by the Rumanian Government, a decision the validity of which the Government of Rumania refused to recognize on the grounds that it was in 'excess of the jurisdiction' of the arbitral tribunal; Garner op. cit. n. 152 at 126; see also C. von Katte, who asserts that the majority view believes that the jurisdiction of a tribunal should be interpreted *'strictissimae'* and thus it follows that the Tribunal 'exceeded its powers'. C. von Katte, "Hungarian-Romanian Land Reform Dispute" (1995) 2 *EPIL* 936; for more details on the case see also *infra* p. 77-8.
[165] Castberg, " La Compétence des Tribunaux Internationaux" (1925) *Revue de Droit International et de Législation Comparée*, T. VII, 346-7; Nipplod, *Die Rechtskraft internationaler Schiedssprüche* , p. 162; Fauchille, *Traite de Droit International Public* T. I, pt. III, p. 565; Dupuis, *La Réforme Agraire en Transylvanie*, Vol. I, p. 460 all cited by Garner op. cit. n. 152 at 130-1; Garner, ibid; Bustamente, *Panama – Costa Rica Boundary Controversy, Opinion Given by Dr. Antonio Bustamente* (1921) p. 13; Guermanoff, *L'Excès de Pouvoir de L'Arbitre* (1929) p.23-4 both cited by Carlston op. cit. n. 133 at 217-8
[166] *Supra* p. 37.
[167] S*upra* p. 35.

Professor de Lapradelle theoretically elaborated the thesis by distinguishing between 'causes of nullity' and the legal 'inexistence' of an award. Basically he asserts that an award is final, and that the 'excess of jurisdiction' is a *cause* for nullity, but not of the *nonexistence* of the legal character of an arbitral award. Therefore a state that wants to revise or annul a judgment has the duty to persuade the other state to adjudge the question before a Tribunal.[169]

The writers in the second camp, though, believed that the Hague Peace Conferences 'left things entirely as they were before'[170] and consequently deem the right of a state to contest and set aside a judgment to be inherent to the system of the law of nations. This second group is made up of eminent scholars like Mérignhac, Oppenheim, Nys, Hall, Meurer, Strupp, Hyde, Dennis and Lauterpacht.[171]

This school of thought is headed by Professor Brierly who points out that the discussions during the Hague Peace Conferences merely show that the 'Russian Project of nullity' was not included because the Project in fact provided nowhere for a proposal as to how to ascertain this alleged nullity and therefore Asser[172] and others decided not to incorporate the matter in the final texts. In other words Brierly believes that the discussions concerned the 'procedural' problems of nullity and consequently left the 'substantive' law on nullity in the same state as it was before. He concludes that 'international conferences pass *sub silentio* over matters on which they are unable to agree far too commonly for it to be permissible to deduce positive, and in this case revolutionary, innovations from the omission'.[173]

Doctor Carlston scrutinizes one of the arguments of Professor Lapradelle, in which the Professor contends that an award 'duly pronounced' (the finality rule Art. 81 of the 1907 Convention) is final and so entails that the award rendered must be 'within the competence' of the arbitrator (since it is 'duly pronounce[d]', hence no certified 'excess of jurisdiction', no 'legal inexistence' of an award, but a mere 'cause' of nullity). Dr. Carlston, however, stresses that the latter article has been misconstrued by the proponents of this very thesis, since the negotiating history of the finality rule and its antecedent (Art. 25 of the 1875 *Projet*) had

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[168] Lammasch, *Die Rechtskraft Internationaler Schiedssprüche* (1913) at p. 161-63 cited by Carlston op. cit. n. 133 at 216

[169] Lapradelle, "L'Excès de Pouvoir de L'Arbitre*"* (1928) 2 *Revue de Droit International* 5 at 31-9 cited by Carlston op. cit. n. 133 at 217

[170] Mérignhac, *Traité de droit public international* (1905),Vol. I, p. 539 cited by Strupp op. cit. n. 143 at 686, n.43

[171] Mérignhac ibid.; Oppenheim, *International Law* (4th ed.) Vol. II, p. 27; Nys, "La Revision de la Sentence Arbitrale" (1910) 12 *Revue de Droit International et de Législation Comparée* 595 at 600; Hall, *International Law* (8th ed. by P. Higgins) p. 420 all cited by J.L. Brierly, "The Hague Conventions and the Nullity of Arbitral Awards" (1928) 9 *BYIL* 114 at 115; Meurer, *Das Friedensrecht der Haager Konferenz,* Vol. I, p. 349 cited by Garner op. cit. n. 152 at 130; Strupp op. cit. n. 143 at 686; W.C. Dennis, "Compromise – The Great Defect of Arbitration" (1911) 11 *Colum.L.R.* 493 at 512; Hyde, *International Law: Chiefly Interpreted and Applied by the United States* (1945), Vol. II, p. 1611, n. 26; Lauterpacht op. cit. n. 146 at 119-20

[172] Scott, *Reports to the Hague Conferences of 1899 and 1907*, p. 86 cited by Garner op. cit. n. 152 at 129

[173] J.L. Brierly, "The Hague Conventions and the Nullity of Arbitral Awards" (1928) 9 *BYIL* 114 at 116

revealed something different. The words 'duly pronounced' pertained to the 'form and procedure' of the award and the verb 'decide' had been the outcome of an earlier theoretical discussion on whether an arbitral award created a 'moral' as opposed to a 'legal' obligation. Thus it can be inferred, according to Carlston, that the inclusion of the words 'duly pronounced' in Art. 81 had simply related to the 'form and procedure of the award' and were certainly *not* 'intended to cover cases [on the merit of the claim] of nullity'. Therefore Carlston asserts that these two words have been placed outside its context by Professor Lapradelle when he used these same words as a *substantive* argument on the relativity of a nullity.[174]

As the matter might have been unresolved at that time, the issue would, however, positively be decided by the ILC in the 1950's as the Commission picked up the subject matter once again. [175] When it formulated its 'Model Rules on Arbitral Procedure' its negotiating history distinctly illustrates that one of the first and most intense discussions of the Commission was whether the issue of the 'nullity' of arbitral awards had to be included in its draft or not.
On June 27 of 1952 its meeting had been kicked off by a fierce speech of the Penamese Chairman, Mr. Alfaro. He was of the opinion that 'national sentiment' often prevailed in disputes over nullity and consequently feared that loosing states would 'resort to any allegations and any means of invalidating, evading, or rendering inoperative the adverse decision'; therefore he wished to discuss 'in principle the question whether it was desirable to include a special chapter on legal remedies'[176]. The Brazilian member, Mr. Amado, agreed with the chairman that a 'system of remedies would undermine international arbitration'[177]. Mr. Lauterpacht, however, disagreed and felt that 'an issue which had done so much to bring discredit upon international law' had to be dealt with. Moreover he felt that the 'matter was particularly crucial, in so far [that].. if [nullity were] proved, meant that there was no legal obligation on the parties to comply with the award'[178]. The Colombian member, Mr. Ypes, even thought that a 'draft without a chapter on remedies would be incomplete and virtually void of meaning'.[179]
A passionate debate among the several members followed and the final views of the Commission were probably best summed up by the single statement of the Chinese member, Mr. Hsu, who observed that:

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[174] Carlston op. cit. n. 133 at 214 - 9
[175] Joint Dissenting Opinion Judge Aguilar Mawdsley and Ranjeva, *Case concerning the Arbitral Award of 31 July 1989* [1991] I.C.J. Rep. 53 at 128; *contra* see the comments of some General Assembly members; M.C.W. Pinto, "Structure, Process, Outcome: Thoughts on the 'Essence' of International Arbitration" (1993) 6 *LJIL* 241 at 253; also Reisman op. cit. n. 126 at 21.
[176] *YB ILC* (1952) Vol. I, 152nd meeting, statement of the Chairman Mr. Alfaro, point 8, 10, p. 83-4.
[177] Ibid.; statement by Mr. Amado, point 22 at 85.
[178] Ibid.; statement by Mr. Lauterpacht point 14, 15 at 84.
[179] Ibid.; statement by Mr. Ypes, point 33 at 85.

> The Commission had in fact to make a choice between two evils; the possible prolongation of litigation, and a bad settlement. Surely the former was the lesser of the two? [180]

So when the principle of nullity was finally put to a formal vote the Commission decided in favor of the inclusion of legal remedies by 10 votes to 2.[181]

The issue of the nullity of awards, however, was raised for a second time by the Commission one year later in 1953. Several governments had given their comments upon the first drafts and most notably the Governments of the United Kingdom and India had proposed to delete the article on the nullity of awards.[182] So its Special Repporteur, Mr. Scelle, suggested that the Commission once more 'pronounce itself on the issue of principle'[183].But this time the various members all 'accepted the principle' straight away and instead decided to examine the technical character of the articles itself.[184]

So it would seem that the Commission finally balanced the scale and so managed to anchor the principle of nullity into the law of international adjudication. In its final conclusions on the topic the Commission noted that, although many authorities slightly differ as to what precise grounds exactly amount to a nullity, the principle itself has been instituted into the law of international adjudication. It first stated that;

> while the jurists agree in principle that they do not agree on the cases in which the award is null and void or on the grounds of annulment.[185]

The Commission nevertheless concluded that:

> Neither the Special Repporteur nor the Commission itself has accepted the categorical theory that an arbitral award should be treated as final even if found to be morally unacceptable or practically unenforceable. *Summum jus summa injuria.* Arbitration practice, moreover, has always conflicted with that principle.[186]

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[180] Ibid.; statement by Mr. Hsu, point 24 at 85
[181] Ibid., point 42 at 86.
[182] *YB ILC* (1953) Vol. I, 191st meeting, point 35, p.42.
[183] Ibid. point 36 at 42.
[184] Ibid. point 40 at 42.
[185] See also P.K. Menon, "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl.& Pol.* 166 at 183; Reisman op. cit. n. 126 at 140-1; K. Oellers-Frahm, "Judicial and Arbitral Decisions: Validity and Nullity" (1997) 3 *EPIL* 40, 40; M.N. Shaw, *International Law* (2003) 5th ed., p. 956; Garner op. cit. n. 152 at 127
[186] *YB ILC* (1958), Vol. II, 'Documents of the Tenth Session, including the Report of the Commission to the General Assembly', point 26 at p. 11 (Italics in original).

The view of the more modern law scholars concurs with the findings of the Commission. E.g Munkman believes that nullity is 'generally accepted', Schachter asserts that the principle is 'universally recognized', Gormley even thinks that 'a customary international law standard has been developed'.[187] Shaw considers nullity to be 'fairly generally accepted', and Frowein thinks that the notion is 'established in public international law'.[188]
But it can safely be concluded that the prevailing view of legal scholars today is that an established nullity constitutes a recognized exception to the rule of finality, to name just but a few examples Jennings, Cheng, Reisman, Wetter, Nantwi, Nelson, Menon, and Oellers-Frahm all adhere to this view.[189]

THE CASE LAW ON NULLITY

State practice evidences numerous instances, in which the 'nullity' of an award was asserted by one party and later accepted or acquiesced in by the other party,[190] or instances in which the final award was for political/legal reasons set aside by a political branch of one of the parties.[191] I will confine my study, however, to the cases in which the award was actually adjudged upon by an independent *legal* organ.

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[187] A.L.W. Munkman, "Adjudication and Adjustment: International Judicial Decision and The Settlement of Territorial and Boundary Disputes" (1973) 46 *BYIL* 1 at 3; O. Schachter, "The Enforcement of International Judicial and Arbitral Decisions" (1960) 54 *AJIL* 1 at 3: W.P. Gormley, "The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement (Part I: Decisions and Sanctions)" (1964) 10 *How. L.J.* 33 at 43, 96.
[188] M.N. Shaw, *International Law* (2003) 5th ed., p. 956-7; J.A. Frowein, "Nullity in International Law" (1997) 3 *EPIL* 743 at 744.
[189] R.Y. Jennings, "Nullity and Effectiveness in International Law" in *Cambridge Essays in International Law: Essays in Honor of Lord McNair* (1965), p. 83 *et seq*.; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 357-72; W.M. Reisman, "Has the International Court Exceeded its Jurisdiction?" (1986) 80 *AJIL* 128, also *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971); J.G. Wetter, *The International Arbitral Process: Public and Private* (1979), Vol. III, p.333 *et seq*. ; E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1967); Nelson op. cit. n. 134 at 290-2; P.K. Menon, "International Boundaries: A Case Study of the Guyana-Surinam Boundary" (1978) 27 *ICLQ* 738 at 764; K. Oellers-Frahm, "Judicial and Arbitral Decisions: Validity and Nullity" (1997) 3 *EPIL* 40.
[190] E.g. in the *Northeastern Boundary* Dispute (1831) the American contention that the King of The Netherlands had 'exceeded his powers' was later acquiesced in by Great Britain; see *infra* p. 77. Likewise in the dispute concerning the *Chamizal Tract* (1911) the US Government opposed the rendered award on 'insufficient reasons' and on an 'excess of power' and Mexico eventually agreed to sign a 'Convention for the Solution of the Problem of the Chamizal on August 29, 1963; see Nelson op. cit. n. 134 at 287. In a similar vain was *Colombia-Venezuela Boundary Dispute* in which Venezuela proved reluctant to execute the 1891 Award on the ground of an insufficient reasoning. Venezuela contended that the latter award was too vague and therefore 'inexécutable', Colombia ultimately accepted the situation and both parties put the matter before the Swiss Federal Council in 1922; Nelson; ibid. Similar examples can be found in the *Bolivia-Peru* Arbitration, *Argentina-Chile* Boundary Dispute, and the *Colombia-Costa Rica* Boundary Arbitration.
[191] See e.g. the political/legal decisions made by U.S. Secretary of State, Mr. Bayard, to nullify and set aside the Haitian arbitral awards made in the *Pelletier*- and *Lazare* cases; R.F. Clarke, "A Permanent Tribunal of International Arbitration: Its Necessity and Value" (1907) 1 *AJIL* 342 at 366-8; see also the political annulment of the two rendered Vienna Awards in the Hungarian Peace Treaty of 1947 and the Rumanian Peace Treaty of 1947; Baade op. cit. n. 124 at 508-11.

Thus three early examples of setting aside an international award can be found in the *Gardiner* case[192], in the *Caracas* claims[193] in the 'Venezuelan Claims Commission of 1868', and lastly in the *Schreck* case[194].

In the first case the US and Mexico had signed the Treaty of Guadeloupe Hidalgo in 1848 in which a Commission was established to examine claims of American citizens against Mexico. The Treaty provided in Article XV that the awards made by the Commissioners would be 'final and conclusive'. Accordingly the Commission had made a large award in favor of Mr. Gardiner, who had claimed to have lost substantial financial interests in a silver mine in Mexico. This decision was nevertheless upturned after rumors of fraud reached the Secretary of the Treasury. In a subsequent Senate Investigation Gardiner's claim was proven to be vitiated by perjury and fraud and so the New York Circuit Court in June 1859 decreed that; "said award [..] in all things [be] reversed and annulled".[195]

In a comparable case the US-Venezuela Mixed Claims Commission of 1868 had decided several awards in favor of US claimants. However one year after the awards had been rendered Venezuela disputed the validity of these awards; claiming that irregularity in the appointment of the Umpire and fraudulent conduct by the members of the Commission and the American Ambassador at Caracas had taken place. In a second investigation it was confirmed that the awards had indeed been obtained by fraudulent and corrupt behavior. In 1888 a second Commission was established that declared the former awards to be 'void' of any legal meaning.[196]

Finally in the *Schreck* case the Umpire of the US-Mexican Claims Commission of 1868 decided to set aside an earlier award on the ground of an 'error of law'; apparently the Commission had overlooked an important Mexican Law in its judgment.[197]

The leading case on nullity is undoubtedly the *Orinoco Steamship Co*. case of 1910 [198] before the Permanent Court of Arbitration (PCA).[199] In 1903 Venezuela and the US had erected a Mixed Claims Commission to investigate the claim of the American owned Orinoco

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[192] (1898) 2 Moore, *International Arbitrations* 1255
[193] Ibid. at 1658
[194] Ibid. at 1357
[195] G. White, "The Foreign Compensation Act 1969 and A Nineteenth-Century Precursor" (1972) 35 *Modern Law Review* 584 at 591-2; see also the statement of Judge Ralston quoted by Hyde op. cit. n. 171 at 1641.
[196] Carlston op. cit n. 133 at 57; Reisman op. cit. n. 126 at 493-6
[197]In fact the Commission had assumed that the claimant was a Mexican citizen because he had been born in Mexico. The Mexican Law, that had been overlooked by the Commission, clearly contradicted this previous assumption. Carlston ibid. at 230-1; Reisman ibid. at 440
[198] (1961) 11 *U.N.R.I.A.A* 227
[199] M. Höpfner, "Orinoco Steamship Co. Arbitration" (1997) 3 *EPIL* 834.

Steamship Company[200]. Its Dutch Umpire Barge rendered the final award[201], in which he ruled in favor of the company. America still disagreed with the award, however, and claimed it to be a 'nullity'. The matter was finally submitted by special agreement to the Permanent Court in 1910. Both parties agreed that the Tribunal would firstly determine whether Barge's decision was 'void' or whether it should be considered 'final'; if the matter was deemed final by the Tribunal the US would abide to it, if not the Tribunal was to determine the issue for itself.[202] Dr. Lammasch, the President of the Tribunal, in his opening address clearly indicated the importance of the case for the doctrine on 'nullity', as he stated;

> And yet besides the material interests involved, a principle of grave importance is to be decided, to wit, whether an arbitral decision can be submitted to a revision, and, if so, on what conditions this revision can take place; in other words, the question is whether and to what extent, the principle "*non bis in eadem re*" is applicable to international law. [203]

The Permanent Court of Arbitration first ruled that 'the nullity of one is without influence on any of the others'; this splitting of the award was a precedent at the time and consequently decided that some aspects of a judgment could be null, while the remaining part would be binding.[204] The Tribunal ultimately held that several elements of the award of Umpire Barge had in fact been *void*, i.e. a partial nullity.[205]

Basically the Tribunal concluded that the Umpire had, in some parts of its judgment, made an 'excess of jurisdiction' by 'misinterpreting the express provisions'[206] (i.e. the Tribunal found that the Umpire had attached too much importance to Venezuelan contract law; art. 14 of the Grell contract, instead of applying the prescribed 'equity, without regard to objections of technical [domestic] nature'[207]).

It was for the first time in international law that an established international body of high standing, and one that was specialized in arbitration, had pronounced itself, outside the scope

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[200] Initially the company had been owned by the British under the name of the Orinoco Trading and Shipping co., but England had declined to afford diplomatic protection to the company. Great Britain asserted that Art. 14 of the so-called Grell contract, which the company had signed with the Venezuelan Government, forced the company to first pursue its claims through the domestic Venezuelan Courts. Its predominantly American owners thereafter decided to transform the company to an American New Jersey based company; Höpfner ibid.

[201](1903) 9 *U.N.R.I.A.A* 194

[202] Hyde op. cit. n. 171 at 1637

[203] 'Address of Dr. H. Lammasch On Opening The Arbitration Between The United States And Venezuela In The Matter Of The Orinoco Steamship Company's Claim, September 28, 1910'; (1911) 5 *AJIL* 32, 32-3 (Italics in original).

[204] M. Höpfner, "Orinoco Steamship Co. Arbitration"(1997) 3 *EPIL* 834 at 835; see also Hyde op. cit. n. 171 at 1637

[205] "Award of the Tribunal of Arbitration constituted under an Agreement Signed at Caracas, February 13, 1909, between the United States of America and the United States of Venezuela" reprinted in J.G.Wetter, *The International Arbitral Process: Public and Private* (1979) Vol. III, p. 178-84 at 180, 183; see also Hyde op. cit. n. 171 at 1594.

[206] Höpfner ibid; Carlston op. cit. n. 133 at 145

[207] Reisman op. cit. n. 126 at 433-5

of the Mixed Claims Commissions, on the matter of nullity. This precedent in the context of nullity had not gone unnoticed as Prof. Nys (himself a member of the Hague Tribunal), for example, wrote:

> Le tribunal d'arbitrage admet comme vices entraînant la nullité quelques-unes des décisions du sur-arbitre l'excès de pouvoir, et l'erreur essentielle dans le jugement..[208]

Another illustrious example of the setting aside of an international arbitral award occurred in the Costa Rica-Panama boundary controversy. In 1914 Chief Justice White annulled the 1900 *Loubet* award [209] and substituted the judgment for his own *White* award[210].
Initially Costa Rica had refused to accept the Atlantic portion of the boundary line designated by the 1900 *Loubet* award[211] and so the dispute was brought before the American arbitrator White in 1910. Both parties had requested him to interpret the precise line of the 1900 *Loubet* award, but instead Chief Justice White concluded that the French President Loubet had in fact 'exceeded his powers' by determining a boundary line 'outside the disputed territory'.[212] By this time Panama, however, refused to accept the validity of the White award. It contented that 'where an arbitrator, only asked to interpret the description of a boundary', and instead decides this boundary line to be "non-existent" clearly must be deemed to be 'a decision beyond his powers'.[213]

Two other examples of subsequent nullities can be found in the rendered awards of the Mixed Claims Commissions between the US and Germany in 1936 and between France and Germany in 1925.
The first instance took place in the so-called *Sabotage* cases before the Mixed Claims Commission between the US and Germany. The issue at hand was whether the German Government had ordered its agents during WW I to sabotage the Black Tom Terminal and the Kingsland Plant, both located in the US. On October 16, 1930 the Commission dismissed all

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[208] Nys, "La Revision de la Sentence Arbitrale" (1910) 12 *Revue Droit International et de Legislation Comparée* 595 at 632 quoted by Dennis op. cit. n. 171 at 500, n.14.
[209] 93 British Foreign State Papers 1038
[210] (1914) 8 *AJIL* 913
[211] Panama, at the time of its succession from Colombia, had inherited an outstanding border dispute with Costa Rica that had been adjudged by French President Loubet in 1900. Though initially the award had been accepted by Costa Rica, objections were later made to the Atlantic portion of the award on the ground of an 'excess of jurisdiction'; Costa Rica claimed that certain portions of land, which had undisputedly been Costa Rican, were now unjustly given to Panama. Both parties though had accepted the award as to its Pacific portion, which had actually given territories claimed by Panama to Costa Rica; Gromley op. cit. n. 159 at 52-3; Carlston op. cit. n. 133 at 101-11
[212] L.H. Woolsey, "Boundary Disputes in Latin America" (1931) 25 *AJIL* 324 at 329
[213]Carlston op. cit. n. 133 at 108; Consequently after an imminent threat of war had been diverted, America forced Panama to execute the award and although the Penamese army vacated the disputed territory, it still officially challenges the validity of this award; ibid.

claims and decided that a German responsibility could not be sufficiently proven.[214] The Commission did, however, find that the German Government had organized a general campaign of sabotage during the period of neutrality. Thereafter the American Agent filed a number of petitions for the revision of the cases. He first filed a petition for the revision on the ground of 'misapprehension of the facts and the law', and then on the 'irregularity of the deliberations of the Commission', since it was argued that the Umpire had been present at the discussions between the two Commissioners; ultimately both requests were however denied.[215] Finally the American Agent's appeal on the ground of 'fraud, collusion and suppression in the German evidence' was upheld and consequently in 1936 the Commission decided to 'set aside' its earlier decision of 1932, in which it had ruled not to reopen any of the cases.[216]
A similar instance took place before the Franco-German Mixed Arbitral Tribunal in 1925, when it was discovered that a certain Mr. *Rietsch* had been awarded two 'identical claims' and so the Tribunal decided to nullify its second decision.[217]

But in more recent times the ICJ got the opportunity twice to rule on the nullity of an arbitral award, first in the so-called *Arbitral Award by the King of Spain* case[218] and later in the *Case concerning the Arbitral Award of July 31, 1989*.[219] Both cases will be dealt with in depth in another section, but as far as is relevant for this section its highlights will be discussed here.

In the *Arbitral Award by the King of Spain* case a dispute between Honduras and Nicaragua was brought before the Court on November 18, 1960. Honduras had asked the Court to adjudge and declare that the 1906 award by the King of Spain[220] was valid and that Nicaragua was under the legal obligation to give effect to it.

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[214] *Lehigh Valley R. Co. et al. (US)* v. *Germany*; (1931) 25 *AJIL* 147
[215] L.H. Woolsey, "The Sabotage Claims Against Germany" (1940) 34 *AJIL* 23, 23-30.
[216] Ibid. at 30, 33-4; Before the Commission, however, was to decide on the 'responsibility' of the German Government in 1939, its Commissioner and Agent withdrew from the tribunal and the American Umpire and Commissioner thereafter rendered a judgment finding Germany to be liable; Carlston op. cit. n. 133 at 49-50
[217] Carlston ibid. at 229
[218] [1960] I.C.J. Rep. 192; see also in general D.H.N. Johnson, "Case concerning the Arbitral Award made by the King of Spain on December 23, 1906" (1961) 10 *ICLQ* 328; N. Wühler, "Arbitral Award of 1906 case (Honduras v. Nicaragua)" (1993) 1 *EPIL* 210.
[219][1991] I.C.J. Rep. 53; see also in general A.V. Lowe, "Review of Arbitral Awards by the International Court" (1992) 51 *Cambr. L.J.* 1; C.A. Hartzenbusch, "Arbitral Award of 31 July 1989(Guinea-Bissau v. Senegal)" (1992) 86 *AJIL* 553; F. Beveridge, "Case Concerning the Arbitral Award of 31 July 1989 (*Guinea-Bissau* v. *Senegal*): Provisional Measures, Merits" (1992) 41 *ICLQ* 891; A. Zimmermann, "Maritime Boundary between Guinea-Bissau and Senegal Arbitration and Case" (1997) 3 *EPIL* 310; P.M. Munya, "The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects" (1998) 7 *J. Int. L & Prac.* 159 at 210-5; S. Rosenne, "The International Court of Justice and International Arbitration" (1993) 6 *LJIL* 297 at 308-12.
[220] (1906) 12 *U.N.R.I.A.A.* 111; 100 British Foreign State Papers 1096

Nicaragua had contested roughly on two positions that the 1906 Award had any binding force; firstly it had disputed the proper designation of the King of Spain as arbitrator (improper procedure to his appointment and the expiration of the treaty (i.e. Gámez-Bonilla Treaty of 1894) designating him as arbitrator), secondly Nicaragua had contended that the award's nullity was derived from an 'excess of jurisdiction' and 'essential error'(the King's failure to take into account the relevant Royal Warrants and Laws to determine the '*uti possidetis iuris*' and instead determining a "natural" boundary). Thus in overall Nicaragua contended that the award lacked the 'adequate reasons' to support its final findings.

The Court, on the other hand, did not agree with Nicaragua and found that the arbitrator had correctly been designated; it reasoned that the imperfect procedure had in part been initiated by Nicaragua herself and additionally came, by use of treaty interpretation, to the conclusion that the Gámez-Bonilla Treaty had not lapsed at the time of the King's appointment.
With regard to Nicaragua's second assertion the Court first felt the need to stress that 'the Award is not subject to appeal and that the Court cannot approach the consideration of the objections [..] as a Court of Appeal'[221] and thereafter it proceeded with care not to review the merits of the award. Thus it concluded that 'an examination of the Award shows that it deals in logical order and in some detail with all the relevant considerations and that it contains ample reasoning and explanations in support of the conclusions arrived at by the arbitrators'[222]. On the whole the Court decided that the Nicaraguan grounds for nullity were unfounded and moreover that Nicaragua had acquiesced in the award by its express declarations and conduct.
Of importance for this section, though, is that, even if the Court did not support Nicaragua's final conclusions, it did reaffirm the principle of nullity by stating that:

> The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate questions have no relevance to the function that the Court is called upon to discharge [..] which is to decide whether the Award is proved to *be a nullity having no effect.*[223]

In a second instance in the *Case concerning the Arbitral Award of July 31, 1989* the Court adopted a similar approach. Guinea-Bissau and Senegal had been in discord over the validity of an arbitral award that had been rendered by an ad hoc Arbitral Tribunal in 1989. This 1989 Award[224] had been made pursuant to the parties' disagreement over the binding nature of a

[221] [1960] I.C.J. Rep. 192 at 214
[222] Ibid. at 216
[223] Ibid. at 214 (Italics added)
[224] 83 *ILR* 1

1960 agreement, which had purported to delimit their maritime boundary and which, at the time, had been concluded between the two countries by their colonial rulers. As a result two questions in the Arbitration Agreement of 1985 had been put forward to the ad hoc Tribunal; the first question had related to the legal force of the pre-decolonization agreement of 1960, and the second question, that had to be answered, '[i]n *the event of a negative answer to the first*', was the task to then delimit the remaining maritime boundary between the two nations.[225] The ad hoc Tribunal ruled that the pre-decolonization agreement of 1960 had in fact binding force between the two litigants, but it added that, since the maritime law in force at 1960 had been applicable, this agreement consequently did not delimit the maritime areas that at that time did not exist, such as the exclusive economic zone or the fishery zone. Upon these findings Guinea-Bissau challenged the validity of the award before the ICJ.

Essentially Guinea-Bissau argued the nullity of the 1989 Award on the six following grounds; firstly an arbitrator had been absent when the final verdict was read, secondly the vague and contradictory separate declaration of the Tribunal's President[226], which had been 'partly affirmative and partly negative' of the final decision, subtracted a real majority for its final (two to one) decision, thereby rendering the award non-existent. Thirdly the Tribunal had not yet made a decision on the second question, fourthly even if the Tribunal had decided not to do so, it still would have been necessary to 'reason' why it had not answered this second question. Fifthly the Tribunal had committed an '*excess de pouvoir*' since it was under the obligation to assume its jurisdiction and to decide the matter on the second question, and sixthly the award lacked a mandatory map.

Again the Court did not follow this line of argument; it believed that an arbitrator did not need to be present at the formal reading since he had fully participated in the deliberations. Also the Court found, as a matter of principle, that it was not necessary to scrutinize the separate declaration of the President; 'such contradiction could not prevail' over his final voting.[227] Moreover the Court did not think that his declaration was contradictory; the President had merely indicated a preferred approach but he had clearly endorsed the final view of the ad hoc Tribunal.
As to the absence of an answer to the second question the Court acknowledged that the structure of the award was 'open to criticism', it stated that it was 'normal to include in the operative part [..] both the answer to the first question and the decision not to answer the

[225]Ibid. at 10 (Italics added); see also S. Rosenne, "The International Court of Justice and International Arbitration" (1993) 6 *LJIL* 297 at 309
[226] 83 *ILR* 1 at 48-9
[227][1991] I.C.J. Rep. 53, par. 33

second'[228]. However it found that this 'decision', not to answer the second question, could be inferred from its overall conclusion and, remarkably enough, from this same separate declaration of the President of the ad hoc Tribunal.

Accordingly the Court concluded that, although 'this reasoning [not to answer] is brief', it still considered it to be 'clear and precise'.[229]

On the final assertion (i.e. that it was invalid not to answer the second question) the Court held that it was firstly up to the Tribunal how to interpret its own competence, and secondly that Guinea-Bissau was, by asserting a mandatory answer to the second question, in fact proposing another interpretation of the 1985 Agreement. At this point the Court picked up its strategy from the *Arbitral Award by the King of Spain* case and consequently refrained from examining any merits. It reiterated that the Court was solely in the position to check the overall validity of the Award and not to act as a Court of Appeal. It stated:

> The Court does not have to enquire whether or not the Arbitration Agreement [of 1985] could, with regard to the tribunal's competence, be interpreted in a number of ways, and if so to consider which is preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*. The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.[230]

Needless to say the Court was of the opinion that the failure to settle the entire dispute was due to the wording of the Arbitration Agreement of 1985 and not so much the failure of the ad hoc Tribunal to discharge its duty.[231] It thereafter concluded that the 1989 Award was binding on both the parties.

Once more it should be stressed that, while Guinea-Bissau was not dismissed of its obligation to carry out the award in good faith, it does not subtract from the recognized exception to the rule of finality.

In fact the principle of nullity was in overall sustained, as can be inferred from the several concurring opinions appended to the Award. Judge Shahabuddeen, for instance, subscribing to the final views of the Court, concludes that the competence of a tribunal to interpret its own competence (i.e. the rule of *la compétence de la compétence*) is '*not absolute* but

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[228] Ibid at par. 41

[229] Ibid. at par. 43; see also C.A. Hartzenbusch, "Arbitral Award of 31 July 1989(Guinea-Bissau v. Senegal)" (1992) 86 *AJIL* 553 at 555

[230] Ibid at par. 47 (Italics in original).

[231] F. Beveridge, "Case Concerning the Arbitral Award of 31 July 1989 (*Guinea-Bissau* v. *Senegal*): Provisional Measures, Merits" (1992) 41 *ICLQ* 891 at 894

qualified'.[232] Judge Lachs, for one, maintains that a successful claim to nullity can '*only* be directed at [..] flaws of a *vital* character'[233]. Equally in the concurring declarations of Judges Ni and Tarassov it can be inferred that they too adhere to the principle of nullity, however, both believe that the procedural irregularities of the case were not serious enough to warrant a nullity.[234]

In fact the present case merely exemplifies that the particular circumstances of this case did not, in the eyes of the Court, pass the threshold of an accepted nullity, and even this finding was certainly not unchallenged as four of its judges; Aguilar Mawdsley, Ranjeva, Weeramantry, and *ad hoc* judge Thierry, all found that the failure to answer the second question *did* amount to an '*excess de pouvoir'*.[235] So rather the question of the case seems to have centered on the problem when, or to what extent, do procedural irregularities amount to a lawful nullity.

Outside the direct scope of inter-state arbitration there have been two recent cases, within the system of the International Centre for the Settlement of Investment Disputes (ICSID), in which an arbitral award has been annulled and nullified. Not only is the international investment scheme of importance because the system works with a similar clause of nullity as the inter-state scheme (Art. 52 of the ICSID *mutatis mutandis* enumerates the same grounds for nullity as Art. 35 of the Model Rules of the ILC, see section above)[236] but also the increasing financial and global relations in our modern world have put the system of international investment disputes high on the map of international law. As a result the case load of the ICSID has expanded in recent years and so has state practice with regard to claims of nullity.

In the *Klöckner* v. *Cameroon* case[237] in 1986 the ad hoc Committee found that the award had been made in clear 'excess of power'[238], and in the *AMCO Asia Corporation et al.* v. *Indonesia* case[239] the Committee even held that several parts of the rendered award had 'failed to state its reasons' properly and was therefore null.[240]

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[232] Separate Opinion of Judge Shahabuddeen [1991] I.C.J. Rep. 53 at 108-9 (Italics added).
[233] Separate Opinion of Judge Lachs ibid. at 92 (Italics added).
[234] Separate Opinion of Judge Ni at 99 *et seq*.; Declaration of Judge Tarassov at 77 *et seq*.
[235] Joint Dissenting Opinion of Judges Aguilar Mawdsley and Ranjeva at 128-9; Dissenting Opinion of Judge Weeramantry at 174, and Dissenting Opinion of Judge Thierry at 179.
[236] See *supra* p. 37 and accompanying text n. 155.
[237] (1986) 1 *Foreign Investment Law Journal* 89
[238] B. Pirrwitz, "Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1988) 23 *Tex. Int. L.J.* 73 at 94 *et seq*
[239] (1986) 25 *ILM* 1439
[240] Pirrwitz ibid. at 94 *et seq*

As a provisional observation we can deduce from above that the principle of nullity is an established notion within the corpus of public international law (even outside the scope of traditional inter-state arbitration) as has positively been demonstrated by the numerous treaty texts and documents, the majority position of writers in the legal literature on the subject, and the recorded judgments of the various international bodies.
Consequently a state can be deemed, under certain cirrumstances, to have the right to invoke the nullity of an award. We can therefore conclude, for present purposes, that Venezuela did possess a legal right to claim the nullity of the 1899 Arbitral Award (as will be elaborated later on its assertions clearly follow the general line as set out by the various documents on the subject matter (corruption, excess of jurisdiction, and nullity of the *compromis* etc.)).

A logical follow-up now is to ascertain what legal effect can be derived from a claim to nullity, and ultimately of course what effect can be inferred from Venezuela's claim to nullify the Paris Award of 1899.

B. THE LEGAL EFFECTS OF NULLITY: VOID vs VOIDABLE

In general it has been argued in legal literature that there are various degrees in the validity or invalidity of a legal act.[241] Basically the category of the 'invalid acts', which is of our concern, can be subdivided into two groups; *void* and *voidable* acts[242].

A 'void act' has been defined as an act of which the invalidity can be asserted by any party at any time, and which is, by definition, invalid *ipso iure* and *ab initio*; in other words the act is invalidated *ex tunc*. Thus the subsequent removal of the cause of invalidity will not retroactively validate the void act. This category of void acts has been labeled in German as *nichtigkeit*, in French as *nullité absolue* or *nullité plein droit* and in Dutch as *nietig*.[243]

The invalidity of a 'voidable act', on the other hand, can only be claimed by a limited group of parties. Moreover the right to invalidate the act has been deemed to have an 'independent existence', and thus can be destroyed by later 'renunciation or extinction'. In other words a 'voidable act' produces its intended result unless, and until, it is avoided by the party entitled to do so (*ex nunc*) in a manner prescribed by law. These types of voidable acts have been

[241] A.M. Honoré, " Degrees of Invalidity" (1958) 75 *South Afr. L.J.* 32 *et seq*; Separate Opinion of Judge Morelli, *Certain Expenses of the United Nations* (*Art. 17, para. 2, of the Charter*), [1962] ICJ Rep. 151 at 216 *et seq*; "Ipso Jure Null and Void" (1943) 60 *South Afr.L.J.* 331 at 335.
[242] Baade op. cit. n. 124 at 527-30; also Frowein op. cit. n. 188 at 743-4
[243] Ibid.

labeled in German as *anfechtbarkeit*, in French as *nullité relative* or *annulabilité*, and in Dutch as *vernietigbaar*. [244]

These varying scales in the legal character of an invalid act can be found in many private law systems over the world.[245] These same varying degrees are more or less also found in relation to the nullity of an internationally rendered award, albeit that the 'void' standpoint is commonly labeled as an 'absolute' nullity and a voidable award is generally referred to as a 'relative' nullity.
E.g. Strupp holds that the effect of a nullity is absolute and thus categorizes its result as an act that is void *ab initio* (or an 'absolute nullity'), Baade, for one, thinks that the effect of nullity is circumscribed by the conduct and recognition on the part of a state and so asserts that the outcome of a nullity is merely voidable (or a 'relative nullity'), Wetter, on the other hand, believes that only certain types of nullity produce its absolute effect (absolute nullities) and that other forms of nullity are dependent upon the action or inaction of a state (relative nullities), and yet Brierly thinks that the entire distinction does not apply to international law.[246]

Although at first glance these divergences appear to be of a mere academic importance its implications on Venezuela's claim to nullity are not be underestimated. As will be elaborated later on if Venezuela's claim is judged from a voidable standpoint its outcome might be entirely different (given its subsequent conduct) than if it were assessed from a void position or even a mixture of both conceptions would make a difference. In order to accurately evaluate the various propositions that have been made in relation to the claim of Venezuela, it is necessary to make a brief inquiry into the background and scope of these concepts and to ascertain to what extent they are applicable to the law of international adjudication.

BACKGROUND OF THE CONCEPTS OF 'VOID' AND 'VOIDABILLITY'

As can be recalled the birth of the concept of nullity can be traced back to the Roman times. The same can be said of the origins of one of the most confusing international law notions: the legal effect of the nullity of a judgment. This confusion started with the Roman Law system, which made a distinction between *ius civile* and *ius gentium*. Simplistically described

[244] Ibid.
[245] See *e.g.* the Italian administrative law system; Baade op. cit. n. 124 at 523, n. 105; but also Islamic, Russian, South African and American law adhere to these principles; Baade ibid. at 532, n. 134; "Ipso Jure Null and Void" (1943) 60 *South Afr.L.J.* 331, 331; B.C. Janin, "The Validity of Arbitration Provisions in Trust Instruments" (1967) 55 *Cal. L.R.* 521 at 526, n. 41.
[246] Strupp op. cit. n. 143 at 685; Baade op. cit. n. 124 at 555-6; Wetter op. cit. n. 189 at 334-42; Brierly op. cit. n. 173 at 116

the Civil Law system rendered defective transactions (such as lack of capacity, lack of prescribed form etc.) incurably and absolutely void.[247] By contrast the Roman Praetor, as the custodian of all legal relief, provided in the Praetorian Law system for certain *ope exceptions*, in order to alleviate the harsh effects of Civil Law and so granted the plaintiff the possibility in case of duress and fraud to intervene; making an act not void *ipso facto* but 'voidable' through his intercession.[248]

If we compare the differences in legal effect of rendered judgments and awards in the Roman era we see that implemented awards were in fact regarded *void*, if they were pronounced, for example, by an incompetent judge or tribunal, or on behalf of or against a party lacking the required capacity, or given in violation of the prescribed procedure.[249] Judgments, on the other hand, that were vitiated by a 'defective intent' (such as duress or fraud) were deemed merely 'voidable' and consequently had to be challenged via an independent action[250]. This early distinction, which had resulted from the separation of the two law systems (i.e. the Civil and Praetorian Law), has been the cause and origin of a lot of legal confusion; especially since both systems have been merged into one legal conception from time immemorial. The legal effect of the nullity of a rendered judgment, however, would become even more complicated when the notion was carved up in the Middle Ages.
When Roman sources were rediscovered by jurists in the Middle Ages the notion of nullity was refined and ultimately absorbed into the legislation of the Holy Roman Empire in the 17th century. Not before long two groups of nullity were created.
The first type of nullity pertained to infractions of technical rules of procedure and was considered to be a 'curable' nullity (*nulitates sanibiles*), while the second type of nullity, that was created, touched upon the 'essentials' of the proceedings itself and was therefore regarded as an 'incurable' nullity (*nulitatis insanabilis*).[251]

Although many of these classic distinctions left their marks in different law systems over the world,[252] my goal is to demonstrate that this distinction has also found its recognition in the law of international adjudication. Therefore a brief analogy to municipal arbitration law and to the Vienna Convention on the Law of Treaties (VCLT) will be drawn.

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[247] *E.g.* D. 50,17,29 (Paulus): "Quod initio vitiosum est, non potest tractu temporis convalescere."
There were, however, some exceptions to the rigid classification of absolutely void transactions; Baade op. cit. n. 124 at 533-34, n.139+140; "Ipso Jure Null and Void" (1943) 60 *South Afr.L.J.* 331 at 335.
[248] "Ipso Jure Null and Void" (1943) 60 *South Afr.L.J.* 331 at 332-3; Baade op. cit. n. 124 at 533-4
[249] Baade, op. cit. n. 124 at 548. It must be noted, however, that Baade stresses that his exposition of this "basic scheme" of Roman law is described in "somewhat more précis terms than seems justified by the sources".
[250] Ibid.
[251] Ibid at 549. In fact this latter distinction is still used in the Canon law system today; ibid. at 549-50.
[252] See accompanying text *supra* n. 245.

MUNICIPAL LAW ANALOGY[253]

It should be stressed, at the outset, that only a brief comparison to municipal arbitration law and to the VCLT will be presented, since the subject matter of both institutions is far too vast and complex for the present thesis. The object of this section is therefore merely to highlight some similarities in the arbitration scheme of the various countries, although the importance of a municipal law comparison should not be disregarded all together, or to draw on the words of Lauterpacht:

> It has been mentioned that international publicists [..] have been in the habit of drawing [..] on municipal jurisprudence. This they were perfectly justified in doing. For, not withstanding minor differences, international arbitration and arbitration in municipal law are essentially equivalent legal institutions.[254]

A good example of a distinction between void and voidable awards in municipal arbitration law can be found in Scandinavian arbitration law; most notably in Sweden. The Swedish Arbitration Act of 1929 clearly separates void from voidable judgments. Thus section 20 of the Swedish act lists five consecutive points which render an award intrinsically and absolutely 'void' (such as an invalid arbitration agreement, or when the award has not been put in writing or signed by the arbitrators etc). By contrast its section 21 enumerates four grounds that merely execute the award as 'voidable'; that is to say if the aggrieved party does not challenge the judgment on one of these four grounds within 60 days the award becomes automatically valid (unless it was a 'void' decision ex section 20).[255] Danish Arbitration law applies a similar division in the legal character of rendered awards in its section 7 on nullity.[256]

The English common law system also makes a distinction between void and voidable awards, as is described in Halsbury's Laws of England:

> An award may be wholly or partially a nullity because an arbitrator has wholly or partially exceeded his jurisdiction. [..]
>
> In all cases where the proceedings are a nullity it is not possible to set the award aside, for there is nothing to set aside.[..]

[253] It must be stressed that this section, by no means, offers a comprehensive law comparison. It does not perform an in depth study into the various municipal law systems, it merely sets out to quickly highlight some similarities in the arbitration law of several countries.
[254] Lauterpacht op. cit. n. 146 at 119; see also Wetter op. cit. n. 189 at 334-5
[255] D.M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations" (1988) 22 *Int. Lawyer* 693 at 708-10; K.P. Berger, "The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective" (1988-89) 12 *Fordh. Int. L.J.* 605 at 621-2
[256] Wetter op. cit. n. 189 at 337-8

> On the other hand, where the arbitration is not a nullity, though there may be defects in the award which can be relied on in application to have it set aside or remitted [..][257]

The void versus voidable discussion has also found its recognizance in American arbitration law. The Federal Arbitration Act has applied the distinction in its so-called 'severability doctrine' (i.e. a notion employed in the American arbitration system according to which a party is granted the possibility to dispute the application of the arbitration clause by arguing the alleged invalidity of the underlying contract).[258]

Likewise the European continental law system still works with these same differences. The Finish Arbitration Act of 1992, for example, states in its section 40, under the heading 'nullity', that awards given in violation of the Finish *ordre public* are to be classified as absolutely void. Conversely its section 41 states several grounds according to which a party may proceed to attack the award. Such grounds are the failure to appoint the arbitrators in due course, or the violation of applicable arbitration rules etc..[259] The Hungarian Arbitration Act of 1994, on the other hand, strictly holds on to the sole possibility of challenging an award (ex Art. 55 of the Hungarian Act). However its Supreme Court in its case law has applied the doctrine of absolute nullity to moderate some of the strict procedural grounds that are set for challenging the award.[260] Likewise the novel Spanish Arbitration Act of 2003 has abandoned its previous notion of *recurso* or appeal and thus operates with a system of separate 'actions' to set aside the award (ex Art. 40). Unlike the notion of *recurso* its adagio of 'plazo para laudar' or 'deadline for ruling' has been maintained and consequently any award that is rendered outside the prescribed time limit is considered to be legally 'inexistent' or void *ab initio*.[261]

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[257] Lord Hailsham (ed.), *Halsbury's Laws of England* (1973) 4th ed. § 626, at 337 reprinted in Wetter op. cit. n. 189 at 335-6

[258] B.H. Sheppard Jr., "The Moth, the Light and the United States' Severability Doctrine" (2006) 23 *J. Int. Arb.* 479 at 481 *et seq*.

[259] M. Kurkela, "Due Process in Arbitration: A Finnish Perspective" (2004) 21 *J. Int. Arb.* 221 at 223-4

[260] The Supreme Court ruled that the applicants' admission to invalidate a negative decision was admissible, this in spite of the expiration of the prescribed 30 days rule. The Court reasoned that failure to submit the dispute within the prescribed time limit could not be upheld because the prior 'negative' decision was deemed to be legally inexistent and 'void' since it had been given in an irregular / void meeting. E. Horvath, "The Practical Application of the Hungarian Arbitration Act" (2001) 18 *J. Int. Arb.* 371 at 378-9

[261] F. Mantilla-Serrano, "The New Spanish Arbitration Act" (2004) 21 *J. Int. Arb.* 367 at 378-80

Islamic arbitration law also seems to employ the different notions of void and voidable defects in a rendered award. In Egypt, in the recently adopted arbitration law (Law No. 27 of 1994)[262], it is stated, for example, in art. 19 paragraph 4 that:

> If the arbitrator is recused, whether by a decision of the Arbitral Tribunal or of the court reviewing the challenge, this shall entail considering the arbitral proceedings already conducted, including the Arbitral Award, *null and void.*[263]

Yet its voidable character is expressed in art. 51 paragraph 2 of the Egyptian law, which reads:

> The decision of correction shall be issued in writing by the Arbitral Tribunal and notified [..].
> If the Arbitral Tribunal oversteps its powers of correction, the nullity of the decision may be invoked by means of an action for nullity, which shall be subject to the provisions of Articles 53 and 54 of this Law.[264]

To exemplify the commonly used differences in the binding character of a legal instrument, part of art. 53 has also been included, which reads;

> (1)The action to procure the nullity of an arbitral award is admissible only in the following cases;
> (a) If no arbitral agreement exists, or if it is void, voidable or expired….[265]

Moroccan arbitration law similarly retains a distinction between void and voidable defects of an award. Thus in Moroccan law the Islamic tradition of handwritten arbitrations is considered to from an 'absolute' requirement and consequently any failure thereof automatically renders the award null and void. Likewise the failure to agree on the appointment of the arbitrators designates the arbitral award as an absolute nullity. Yet Moroccan arbitration law too distinctly stipulates a number of grounds according to which a party can request the Tribunal to annul the final decision.[266]

Based on this brief comparison of municipal arbitration law it can be concluded, for present purposes at least, that a substantial number of domestic arbitration systems still employ the described distinction and it therefore seems justifiable to subscribe to the view of the Finish author Kurkela, who concludes:

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[262] (1995) 10 *Arab.L.Q.* 34
[263] Ibid. at 40 (Italics added). To a similar effect see Articles 12 and 15.
[264] Ibid at 49
[265] Ibid.
[266] M. El Mernissi, "Arbitration in Morocco: Realities and Perspectives" (2002) 19 *J. Int. Arb.* 179 at 181-2

> National laws often make a distinction between awards which are null and void, and awards which require an action to be declared unenforceable. [267]

At this point it must be emphasized that while there might be a trend in a lot of industrial countries to adopt innovative arbitration rules, in which the normal procedure for recourse is circumscribed to a strict limited number of 'challengeable' actions, the outset here is merely to illustrate that the distinction still exists within these systems. Although these distinctions are now being removed or perhaps better coped with (a logical consequence given the recent trend in arbitration law to harmonize as far as possible the arbitration rules, in order to provide international business with a more efficient and predictable global arbitration scheme) it nevertheless cannot be expected that the international system between nations can incorporate as easily and as flexibly such strict procedural rules (being far more horizontal and having no supervisory judicial machinery). Thus it would certainly be reasonable to assume that these early distinctions that to a certain extent still subsist in the domestic atmosphere would be more dominantly present in the scheme of (traditional) inter-state adjudication today.

AN ANALOGY WITH THE VIENNA CONVENTION ON THE LAW OF TREATIES

In order to demonstrate that this distinction has also found recognizance within the corpus of the rules on public international law, and due to the extremely meager record of this subject in the case law on international arbitration, a quick comparison to the articles of the 1969 Vienna Convention on the Law of Treaties (VCLT) [268] will be drawn. Although strictly speaking the convention only operates in the context of treaty law[269] its dealings on the subject matter of the 'invalidity of a treaty' likewise exemplify the workings of the legal effect of a nullity.

As indicated VCLT' Part V section 2 on the 'Invalidity of Treaties' stipulates several grounds upon which a party may invoke the invalidity of the treaty or rather its consent to be bound. This second section makes a noticeable distinction in the legal effect of the different grounds on nullity[270]. Thus its articles on error, fraud, and corruption (Art. 48-50) are categorized as 'voidable', while its articles on coercion, use of force, and *jus cogens* (Art. 51-53) are classified as 'void'. E.g. Art. 49 on 'fraud' and Art. 52 on 'the use of force' state the following:

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[267] M. Kurkela, "Due Process in Arbitration: A Finnish Perspective" (2004) 21 *J. Int. Arb.* 221 at 223.
[268] (1969) 8 *ILM* 679
[269] Compare Art. 1 VCLT; ibid at 680
[270] Frowein op. cit. n. 188 at 747

Article 49

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State *may invoke* the fraud as *invalidating* its consent to be bound by the treaty.

Article 52

A treaty is *void* if its conclusion has been procured by the threat or use of force…[271]

The dissimilar nature in the effect of the above cited nullities is confirmed by their negotiating history. In the commentary upon the VCLT draft articles[272] Article 49 on 'fraud' clearly mentions that: 'The effect of fraud [..] is not to render the treaty *ipso facto* void, but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent'[273]. Its Article 52 on the 'use of force', on the other hand, was specifically phrased differently as the Commission (ILC) felt that the gravity of this particular violation should have a different impact on the working of the treaty. The Commission stated that:

> a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as *void,* rather than as *voidable* at the instances of the injured party.[274]

THE LEGAL SUPPORT OF A DOCTRINE ON ABSOLUTE NULLITY

In the context of public international law judicial endorsement of a doctrine on absolute nullity can be found in the individual opinions of a number of ICJ judges. Although the ICJ has yet to formally pronounce itself on the actual effect of an established nullity, several of its judges have given their thoughts on the subject matter in their separate declarations. These somewhat abstract opinions on the topic of nullity can generally be analyzed along two lines: a procedural and a substantive line.

For example the first line of argument that has been put forward to support a concept on absolute nullity seems to primarily analyze the problem from a *procedural* angle; that is to say if the basic proposition is accepted that a state, in the horizontal structure of international adjudication, possesses a right to invoke the nullity of an award 'unilaterally' the concept so employed automatically entails that a judgment rendered can, under the stringent requisites of nullity, be considered to be void *ipso facto* and *ab initio*.

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[271](1969) 8 *ILM* 679 at 698 (Italics added)

[272] 'Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session, Monaco, January 3-28, 1966'; (1967) 61 *AJIL* 248

[273] Ibid. at 404, point 4 (Art. 49 corresponds to Draft Art. 46). Statements to a similar effect were made with regard to the articles pertaining to error and corruption; ibid at 402.

[274] Ibid. at 408, point 6 (Italics added). (Art. 52 corresponds to Draft Art. 49).

A second line of reasoning in support of a doctrine on absolute nullity, though, puts more emphasis on the dilemma from a *substantive* prospective. In other words this second point of view seems to attach more importance to the practical implications of an 'invalid act'. The supporters of this view reason that the functioning of any legal system depends on its ability to conform to the practical requirements and needs of its subjects and so they come to the overall conclusion that, by comparing the scheme of international adjudication to the more sophisticated domestic law systems, a category of absolutely void judgments is imperative for the proper functioning of an internationally orientated system.

A good example of the legal dealings on nullity by two ICJ judges can be found in the *Certain Expenses of the United Nations* case.[275] When the Court was faced with the question whether the General Assembly (GA), as opposed to the Security Council (SC), possessed the power to assign certain expenses (borne out of the ONUC operations in the Congo and the UNEF operations in the Near East), it decided, in an often quoted passage, that acts adopted for the 'fulfillment of one of the stated purposes' have a 'presumption [.] that such action is not *ultra vires* the Organization'[276]. Ultimately the Court held that the S-G and the GA had not overstepped their respective competences by allocating these funds. Although it briefly alluded, in the cited passage, to the validity/invalidity of judicial acts, the Court did not elaborate on the subject matter.

President Winiarski, in his dissenting opinion, however, stated his thoughts on the topic and formulated one of the basic premises of the thesis on absolute nullity:

> It has been said that the nullity of a legal instrument can be relied upon only when there has been a finding of nullity by a competent tribunal [..] In the international legal system, however, there is, in the absence of agreement to the contrary, no international tribunal competent to make a finding on nullity. It is the State which regards itself the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity. Such decision is obviously a grave one [..] but one which is nevertheless sometimes inevitable and which is recognized as such by general international law. [277]

This same 'procedural' argument was voiced by Judge Weeramantry in a more recent exposition on the subject in the earlier cited *Case concerning the Arbitral Award of 31 July 1989*. [278] In his dissenting opinion Weeramantry posed the question 'whether the nullity of an international arbitral award takes effect of its own force or depends on the existence of a

[275] [1962] ICJ Rep. 151 at 156
[276] Ibid. at 168
[277] Ibid. at 232
[278][1991] ICJ Rep. 53; see *supra* p. 48-51.

Tribunal competent so to declare?'.[279] Firstly he observes the complexity of his question; on the hand it brings into play the often debated dilemma of '*iudex in sua causa*' and, on the other hand, the question underlines the danger of an absolute adherence to the rule of finality. However, after analyzing the legal literature on the subject, Weeramantry asserts that the 'weight of juristic authority' accepts the possibility that a State may *unilaterally* set aside an award[280] and thus he concludes that:

> Although inconveniences and practical difficulties can result from the principle of *absolute nullity* there can thus be no difficulty in accepting the concept, even in the absence of a tribunal with competence to make the requisite declaration.[281]

Professor Carlston basically holds a similar opinion, he asserts that if a state makes a claim to nullity based on no or insufficient evidence 'it would do so at its own risk' but if the award is truly null in 'fact and law' it was 'void *ab initio*'. He therefore concludes that:

> whether the claim of nullity be admitted or denied by the other State, in contemplation of law the award remains without legal effect and meaning. [282]

Judge Morelli, who also thoroughly explored the subject matter on the validity and invalidity of legal acts (in his concurring opinion in the above cited *Certain Expenses of the United Nations* case), voices the second, and more *substantive*, line of argument in the following way.

In his exposition on the subject matter Morelli compares the differences in the legal effects of invalid acts in several municipal law systems and so concludes that only the most serious infractions within these systems are categorized as void *ab initio*. Consequently all other breaches in between this vast array of invalid acts are deemed merely voidable. However, Morelli asserts that the international system of the UN, missing a domestic based vertical structure, can only render decisions that are either entirely valid or absolutely void (for the international system lacks the machinery to execute or prescribe the stringent requirements needed to render 'voidable' acts). Morelli thereafter contends that, in order to preserve the stability in the UN system, the category of valid acts needs to be broadened, by assuming the supposition that such acts are rendered *intra vires*. At the same time he still believes that a small category of absolutely void acts are necessary in the event of;

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[279] Ibid. at 151, 158
[280] Ibid. at 159
[281] Ibid. at 160 (Italics added).
[282] Carlston op. cit. n. 133 at 222-3.

> especially serious cases that an act of the Organization could be regarded as invalid, and hence an *absolute nullity*. Examples might be [..] a resolution vitiated by a manifest *excès de pouvoir*. [283]

One of the most apparent examples of an 'absolute' nullity in state practice would be the admission of the Paris Tribunal in 1899 (when it 'purported' to delimit a borderline between British Guiana and her two neighbors; i.e. Brazil, and the Dutch colony of Surinam). In a subsequent border dispute between British Guiana and Brazil (over the territory that been appointed to Great Britain in the 1899 Award) Great Britain, inter alia, made the contention that the territory had been acknowledged (by the 1899 Award) to be British. The King of Italy, in ruling upon the validity of the latter point as arbitrator, unequivocally stated in his final Award of 1904 that the admission of the 1899 Paris Award 'cannot be cited against Brazil, which was unaffected by that Judgment'.[284] Clearly the admission has been acknowledged in legal literature to have been intolerable and thus *void ab initio*.[285]

Wetter too believes that the practical realities of international adjudication warrant the admission of absolute nullity in public international law. In his study he compares several cases of international arbitration and approaches the problem from an even more 'practical' angle. He asserts that a concept of absolute nullity must exist within the law of nations, because;

> How else could the ruling of an arbitral tribunal which was not properly constituted, or *ultra vires* by, e.g., adjudicating upon a claim not submitted to it, or whose award affected a State not a party to the arbitration, be [effectively] dealt with? [286]

Although the earlier mentioned doctrinal distinction between procedural and substantive arguments has been made to help label and explain the different standpoints on absolute nullity (and also hereafter on the relative or voidable nullity), and although it seems to hold true to a certain extent, we should not forget that the theoretical basis of the thesis on absolute nullity remains one and the same as it derives its intellectual authority from the (il)legal force of judicial acts. This basic premise is perhaps best demonstrated by the statement of Judge Winiarski (indeed a fervent supporter of a concept on absolute nullity) in his individual opinion in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* case.[287] He stated that:

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[283] [1962] ICJ Rep. 151 at 223 (Italics added).
[284] XI U.N.R.I.A.A. II reprinted in Wetter op. cit. n. 189 at 174.
[285] E.g. *YB ILC* (1950) Vol. II, p. 168; I.C. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 *BYIL* 143 at 156-7; Hyde op. cit. n. 171 at 1634, n.5.
[286] Wetter op. cit. n. 189 at 339
[287] [1954] ICJ Rep. 47

> An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void.[288]

THE LEGAL SUPPORT OF A DOCTRINE ON RELATIVE NULLITY

One of the first and most notorious scholars to submit a doctrine on the relativity of a nullity or rather of the challengeabillity of an international arbitral award was professor Lapradelle, who, as indicated before, believed that a serious vice in an award (such as an *excess de pouvoir*) was a mere 'cause' for nullity, but not for the legal 'inexistence' of an award. [289] As a result Lapradelle adhered to an absolute rule on the finality of awards and thus contended that within the system of inter-state arbitration there was solely a place for 'voidable' awards and not for absolute ones. According to the view adopted by him a winning state is even permitted to go as far as to 'refuse all manner of discussion upon the question, entrenching itself behind the definitive character of an award'.[290] This is not to say that Lapradelle did not conceive it theoretically impossible to establish a certified 'nullity', but rather that, once an award had been rendered, the contending state had an automatic duty to sway its counterpart before a court or tribunal to adjudge upon the matter of 'nullity'. This type of argument, which concentrates on the '*procedural*' requirements of a nullity, can ultimately (as it has in fact been voiced by its proponent Garner) lead to the inescapable conclusion that 'an award which may be legally null is nevertheless binding upon the parties because no procedure has been provided for determining the fact of nullity'.[291]

This procedural argument comes to the opposite conclusion of the procedural argument on absolute nullity (which conversely believed that, in the absence of mandatory supervisory machinery, a state had a right to unilaterally ignore the award). Here too a second line of argument has been advanced, which attaches more importance to the practical implications of a nullity and thus approaches the subject of relative nullity from a *substantive* point of view.

This second argument is basically founded on the proposition that the concept of nullity is circumscribed by the subsequent conduct and recognition on the part of a state. In other

[288] Ibid. at 55-6
[289] *Supra* p. 40.
[290] Lapradelle, "L'Excès de Pouvoir de L'Arbitre*"* (1928) 2 *Revue de Droit International* 5 at 35 quoted by Carlston op. cit. n. 133 at 217
[291] Garner op. cit. n. 152 at 131

words it is advanced that the concept of nullity is confined by a mixture of the doctrines on acquiescence, acceptance, recognition, and estoppel. This conclusion has chiefly been drawn from state practice, i.e. from the statement of the ICJ in the above discussed *Arbitral Award by the King of Spain* case.[292] The Court decided in the latter case that Nicaragua's contentions on nullity (i.e. an *excess de pouvoir*) were not admissible because of Nicaragua's own initial recognition on the validity of the Award. The Court ruled that:

> In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived.[293]

Accordingly it has been argued that the Court, in the above case, clearly intended to deny an absolute effect to the rule of nullity. The scholar Jennings, for instance, commented on the latter passage of the Court, that:

> it would seem to follow that the nullity of an award where there has been an *excess de pouvoir* is not [..] an absolute nullity in the sense of non-existence; for it is illogical to hold that an estoppel or waiver can lend validity to an act which is in law non-existent. That which, with an added ingredient, becomes legally effective cannot without obtuseness be called non-existent.[294]

This second type of argument (with concentrates on the subsequent conduct and recognition of a state) has in fact been put forward by the authors Menon, Nelson and Donovan to question the validity of Venezuela's claim to nullity.[295]

Professor Baade has also, from yet another procedural angle, advanced a concept on relative nullity. He asserts that a scheme of 'voidable acts' conforms best to the needs and realities of public international law. Interestingly enough Baade shares the same view as President Winarski; he too believes that, 'in the absence of agreement to the contrary', no international tribunal is competent to make a finding on nullity and that it is ultimately up to a state to asses the matter. Yet Baade draws the opposite conclusion and thinks that, founding his opinion on state practice, the international system can only recognize voidable judgments. He reasons that if the dissenters of the UNEF and ONUC resolutions (in the earlier cited *Certain*

[292] [1960] I.C.J. Rep. 192; See *supra* p. 47-8.
[293] Ibid. at 213
[294] R.Y. Jennings, "Nullity and Effectiveness in International Law" in *Cambridge Essays in International Law: Essays in Honor of Lord McNair* (1965), p. 84-5 reprinted in Wetter op. cit. n. 189 at 312
[295] P.K. Menon, "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl.& Pol.* 166 at 183; Nelson op. cit. n. 134 at 291-2; T.W. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis" (2004) 32 *GJ. Int. & Comp. L.* 661 at 715.

Expenses Case) had paid their assessments, there would be 'no question of the validity of the expenses incurred'.[296] Likewise if Germany had not decided to invade the remaining part of Czechoslovakia later in the spring of 1939, the rendered Vienna Award and the concluded treaty on Germany's Sudetenland would still stand in international law today. In other words he thinks that any legal act rendered within the decentralized state of the international law system produces its result, *unless*, and *until*, it is timely avoided by the party entitled to do so[297]. He believes that this state of affairs is evidenced in state practice and is ultimately borne out of the rule of finality, or as Baade puts it:

> After all, it can be said with but little exaggeration that res judicata is intended to protect *wrong* decisions; correct decisions will stand on their own feet.[298]

PROVISIONAL OBSERVATIONS

As a provisional observation we can conclude that both concepts of nullity have found their recognition within the corpus of public international law. So the 'law on nullity' in fact appears to admit two concepts of nullity; i.e. an absolute nullity and a relative nullity.
To illustrate that such a conclusion seems more than warranted the negotiating history of the ILC 'Model Rules on Arbitral Procedure' will be briefly compared.

What will immediately strike any reader of the Commissions' records is that it nowhere specifically mentions or takes up the subject of the legal effect of the much debated nullity. In fact throughout its successive meetings in the 1950's reference to this subject is only found in the slimiest remarks of its members. E.g. from the statements of Mr. Ypes and Mr. Lauterpacht it can be inferred that both subscribe to a view of absolute nullity, while the statements Mr. Matine-Deftary and Mr. Scelle speak of a 'voidable' effect.[299]
On the whole, though, mere terminology as 'nullifying an award' is used. The only patent reference to the distinction between the two concepts was made by the Czechoslovakian member of the Commission, Mr. Zourek. When draft article 30 (the predecessor of the key Art. 35) was discussed the question of the 'statement of reasons' and the 'invalid *compromis*' were evaluated, on the latter subject, Mr. Zourek, sharply noted that he would like to;

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[296] Baade op. cit. n. 124 at 555.
[297] Ibid. at 555-6. Baade does, however, believe that there is an exception to his scheme of voidable acts. Thus an act that contradicts with a preemptory norm of public international law is rendered automatically 'void' instead of 'voidable'; ibid. at 557-8..
[298] Ibid. at 555 (Italics in original).
[299] *YB ILC* (1952) Vol. I, p. 84, 86. 152nd meeting, statement by Mr. Ypes, point 35 at 86; statement by Mr. Lauterpacht point 15 at 84. *YB ILC* (1958) Vol. I, p.96. 450th meeting, statement by Mr. Scelle point 7 at 96; statement by Mr. Matine-Deftary point 4 at 96.

> draw the attention of the Drafting Committee to the fact that the introductory phrase to article 30 was unsatisfactory, since both in practice and in jurisprudence an award in the cases covered by article 30 was considered as null and void and not merely voidable. It appeared to confuse the principle...[300]

However Mr. Zourek's ultimate proposal, which related to the inclusion of the words 'that the *compromis* is void' and not so much on the theoretical distinction of the latter issue, was rejected by 6 votes to 4, with 2 abstentions.[301] The latter rejection appears to tantamount to the law on nullity. It seems to follow that even in an international body of high standing such as the ILC its thoughts on which exact concept of nullity applies to an award remains to be somewhat ambivalent. This is exactly the overall conclusion that could be drawn from above.

It has rightly been advanced that the controversy on this matter has yet to be decided,[302]although it seems clear that general confusion and disagreement on the working of a nullity still persist. As we can deduce from our examination the principle of nullity constitutes beyond any doubt a recognized exception to the rule of finality.[303] Although there may still subsist minor differences as to what exact grounds encompass a nullity, and what is more, what legal effect can be derived from each different ground of nullity these questions will be addressed in our analysis on the merits of the case. As no cogent or general answer to such question seems feasible I will treat each ground of Venezuela's nullity separate and so form my personal views on the matter.

[300] *YB ILC* (1953) Vol. I, 191st meeting, statement by Mr. Zourek point 102 at p.46
[301] Ibid.
[302] Oellers-Frahm op. cit. n. 123 at 40.
[303] *Supra* p. 51-2.

CHAPTER III:

AN EXAMINATION OF THE MERITS OF VENEZUELA'S CLAIM OF NULLIY

A. CLASSIFICATION OF VENEZUELA'S DIFFERENT CLAIMS OF NULLITY AND (NEW) EVIDENCE THEREOF

In order to present a clear overview of the different arguments that Venezuela has used to nullify 1899 Paris Award[304] a schematic summary is set out below. It should be noted that the following five grounds of nullity are merely presented in this order for the sake of convenience.

A. Coercion to the Washington Treaty of 1897

The first contention that is advanced by Venezuela sets out to prove that 'the undertaking to arbitrate or the *compromis* is a nullity' (Art. 35 sub d of the ILC 'Model Rules'). In other words Venezuela asserts that the Washington Treaty of 1897 is invalid and therefore the outcome of the later rendered Award is also automatically invalid.
Venezuela contends that during the course of the negotiations and contrary to its accord with the US, she was continuously sidetracked und uninformed, and, what is more, Venezuela claims that 'undue pressure' had been exerted upon her to accept various provisions of the 1897 Washington Treaty (most notably the '50-year prescription clause' ex. Art. IV (a), as well as the absence of a Venezuelan Judge to the Tribunal ex Art II). Basically under the threat of the American Secretary of State, Richard Olney, it was made clear to Venezuela that if she not consented to the terms of the 1897 Treaty, she would 'be left alone to the mercy of Great Britain' and so Venezuela argues that she was 'coerced' into signing the 1897 Washington Treaty.[305]

Evidence to back these accusations have been supported by a few personal letters, in which, admittedly, some diplomatic correspondence between the American and British State

[304]Ministerio de Relaciones Exteriores: Republica de Venezuela, *Report on the Boundary Question with British Guiana submitted to the National Government by the Venezuelan Experts*, (Caracas 1967). (hereinafter cited as 'Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967)')
[305] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 12, 26

Secretaries seems to have been withheld from Venezuela[306], but other than that, no direct evidence of any sort of political pressure has been substantiated.

B. Lack of Reasons in the 1899 Paris Award

Secondly Venezuela has claimed that the Award had made a 'failure to give a reasoned decision' (Art. 35 sub c 'Models Rules'). According to the Venezuelan experts the Tribunal had been under the obligation to do so, since the compromise Treaty of 1897 had instructed the Tribunal to determine a boundary line in accordance with the principle of '*uti posseditis iuris'*. Hence some sort of reasoning for its final findings would have been mandatory.[307]

C. Excess of Power & Jurisdiction

The third contention of Venezuela is the most commonly invoked ground of nullity; namely the plea of '*exces de pouvoir*'. At this point it should be noted that in legal literature one can sporadically find a doctrinal distinction between 'excess of power' and the 'excess of jurisdiction'; the prevailing majority view, however, believes that both contentions amount to one and the same vice, i.e. an '*exces de pouvoir*'. As Garner comments on this subject:

> The distinction between incompetence and excess of power [..] would seem, as unsound. [..]
> If an arbitrator takes jurisdiction of a dispute which is not within his legal competence, he is certainly guilty of an excess of power quite as much as if his award on the merits of the dispute is in contravention of international law when by the terms of the *compromis* he is required to decide in accordance with this law.[308]

Basically Venezuela has advanced three separate grounds, upon which the 1899 Paris Award would be invalidated by an 'excess of power';

- Firstly it has been contended by the Venezuelan Government that there were two apparent transgressions from the terms of the *compromis*. She asserts that the Washington Treaty of 1897 had clearly instructed the arbitrators at Paris to adjudge upon, on the one hand, a final boundary line between the two nations according to the principle of '*uti possedetis iuris*', and, on the other hand, the Tribunal was required, by the terms of the *compromis* (see Art. III of 1897 Washington Treaty) to assess an 1814 boundary line in conformity with the possessions

[306] Ibid at 36-7
[307] Ibid. at 14
[308] Garner op. cit. n. 152 at 129-30, n. 11

that each nation enjoyed at that particular time. According to Venezuela the Tribunal failed to comply with both these two requirements and thus made an 'excess de pouvoir'.[309]

-Secondly Venezuela asserts that the arbitrators at Paris had patently surpassed their authority by deciding on a provision on the free navigation of the Barima and Amakuro Rivers. Nowhere had this issue been submitted to them, nor was there any such question ever raised by either of the two parties during the course of the proceedings.[310]

-A third ground of 'excess de pouvoir' (and one that has already been discussed above) is the fact that the Tribunal, without being empowered to do so, delimited the boundaries of the colony of British Guiana with its neighbor Brazil and with the Dutch colony of Surinam. Both these nations, however, had never been a party to the Treaty or to the proceedings of the Paris Tribunal.

D. Fraud

The fourth ground put forward to invalidate the 1899 Award can be categorized under the heading of 'fraud'. Venezuela has transmitted evidence that would imply fraudulent conduct by the British side.

Venezuela argues that Great Britain has presented 'false evidence to the Tribunal'; several maps were transmitted to the arbitrators that either did not depict the 'Schomburgk Line' correctly, or its appended qualifying notes were deleted on purpose. Basically Venezuela claims that the British Foreign Office herself was unaware of the different maps until 1886, when she thereafter tempered with the evidence and 'purported to attribute legal value to [..] the so-called "expanded line" of the Herbert map'. [311]

Admittedly Venezuela has produced several British maps, which depict different officially sanctioned boundary lines. In addition she has also retrieved some personal correspondence suggesting the aforementioned falsifications.[312]

[309]Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 14-6, 26
[310] Ibid at 16, 26-7; also Wetter op. cit. n. 189 at 345
[311] Ibid. at 13
[312] Ibid. at 8, 15, and 35

E. Corruption of the Tribunal

The last contention raised by Venezuela is her claim that the Paris Tribunal had in fact been 'corrupted'. According to Venezuela the immoral conduct of its Umpire De Martens and the subsequent acquiescence of its four Judges into a 'compromise' have rendered the Paris Award an absolute nullity.

This last allegation, which had initially been based on the memorandum of Mallet-Prevost in 1949 (and the international lawyer Mr. Denis' testimony on the accuracy of the latter's account), has now been substantiated by more recent evidence. New evidence has been collected from the official files of the British Government and the personal archives of American personnel that were released in the 1950's. Several letters have been put forward to illustrate that many involved in the final proceedings of the Tribunal felt a substantial indignity over its final readings. Other letters have been transmitted that testify to the suspicious circumstances of the case. In all, however, there is one particular letter of interest; namely the personal letter from Lord Russell (the chief British Judge) to Lord Salisbury (acting Prime Minister of England).
The letter, which is dated the 7th of October 1899, reads in part the following:

> I must say here that in one important respect L.J. Collins and I were grievously disappointed by the attitude assumed by Mr. de Martens.[..]
>
> He (de Martens) instead of applying that principle rigidly and fearlessly *seemed to cast about for lines of compromise* and to think that it was his duty *above all else*, to secure, if he could a unanimous award. I am sorry to be obliged further to say that he intimated to L.J. Collins (the second British Judge) 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 the adhesion of the Venezuelan Arbitrators to agree to a line which might not be just to Great Britain. I have no doubt he spoke in an opposite sense to the Venezuelan Arbitrators and fear of possibly a much worse line was the inducement to them to assent to the award in its present shape. However, this may be, *I need not say the revelation of Mr. Martens' state of mind was most disquieting.* [313]

The aforementioned grounds of nullity will now each be examined separately.

[313] Ibid at 41 (Italics in original); reprinted in full in Wetter op. cit. n. 189 at 126-9, 127.

B. COERCION TO THE WASHINGTON TREATY OF 1897

A rule of public international law today is that a treaty is absolutely void if it has been procured by way of coercion (Art. 51 VCLT). Likewise if an underlying *compromis* were void a subsequent rendered award or judgment is believed to be a nullity (e.g. Art. 35 sub d of the ILC 'Model Rules'). Thus it follows logically that *if* the Washington Treaty of 1897 were in fact void the Paris Award of 1899 can be regarded to be a nullity.

At the outset it should be mentioned though that from a standpoint of intertemporal law[314] one could pose the question whether at the beginning of the 20th century a treaty could already be rendered void by way of coercion?[315] But sidestepping this issue for a moment and assuming for argument's sake that the rule of 'coercion' *did* reflect a rule of positive international law *then* there are still two *procedural* arguments why Venezuela would be disallowed from raising the objection at this point of the proceedings (although one could effectively argue that a part of her substantive claim has a merit)[316].

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[314] "..a juridical fact must be appreciated in light of the law contemporary with it, and not with the law in force at the time when a dispute with regard to it arises or falls to be settled." Judge Huber, *Island of Palmas* case; (1928) 22 *AJIL* 867 at 883. Sir Gerald Fitzmaurice stated that: "It can now be regarded as an established principle of international law that [..] the situation in question must be appraised [..] in light of the rules of international law as they existed at the time, and not as they exist today". G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law" (1953) 30 *BYIL* 1 at 5.

[315] E.g. Kaikobad has asserted that the rule that establishes that a treaty is absolutely void by way of coercion has been accepted only quite recently by the international community; K.H. Kaikobad, "Some Observations on the Doctrine of Continuity and Finality of Boundaries" (1983) 54 *BYIL* 119 at 134-5. On the other hand one could argue that the invalidity of a coerced agreement was in fact already recognized in international law by the Mixed Claims Commission of 1886. In the *Cuculla* case the argument was advanced that the constitutional government of Mexico had accepted responsibility for the acts of the rebel Zuloaga Government as this could be inferred from its signed treaty of Puebla with Great Britain. The Tribunal, upon assessing the latter contention, stated that: "These concessions, extorted by a duress as actual and relentless as ever pressed upon an embarrassed and exhausted government, were made to buy its peace and, rejected by its powerful adversaries, can not now furnish any assistance to this commission in determining the interesting question presented in this case". Moore, 3 *International Arbitrations* 2873 at 2879 quoted by D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 34 *BYIL* 176 at 190.

[316] Venezuela has essentially raised the complaint that is was 'forced' to accept two unfavorable provisions in the Washington Treaty; one being the absence of a Venezuelan Judge on the Paris Tribunal, and the other the incorporation of the 50-year prescription clause; see *supra* p. 67.
According to Article 15 of the 1899 Hague Convention, which is seen as the "accepted definition of arbitration in international law", it is stated that the object of adjudication is: "the settlement of differences between states *by judges of their own choice* and on the basis of respect for law" (emphasis added) M.N. Shaw, *International Law* (2003) 5th ed., p. 952. Clearly the normal rule or procedure in a five-member tribunal is that each party will appoint "an equal number of arbitrators"; M. Dixon, *Textbook on International Law* (2005) 5th ed., p. 266; see also H.J. Schlochauer, "Arbitration" (1992) 1 *EPIL* 215 at 222. We can therefore safely subscribe to Mr. Menon's statement, who observed in the context of the Venezuela Guyana boundary dispute, that: "The absence of Venezuelan national participation has been conspicuous and this has been a matter of criticism"; P.K. Menon "The Guyana-Venezuela Boundary Dispute" (1979) 57 *Rev. de Droit. Int & Dipl.& Pol.* 166 at 172.
As to the merit of Venezuela's second assertion, i.e. the so-called 'unfavorable' 50-year prescription clause; see accompanying text *infra* n. 330.

The Waiver Argument in International Arbitration

First and foremost it is advanced that Venezuela has implicitly given up its right to challenge the validity of the underlying *compromis*. One can arrive at this conclusion by drawing on the so-called doctrine of 'waiver', i.e. the notion in (international) arbitration law according to which a party has either expressly or impliedly waived its right, during the course of the arbitral proceedings, to challenge procedural irregularities.[317] In other words if Venezuela had wished to contest the validity of the *compromis*, it would have been obliged to challenge the validity of the 1897 Washington Treaty before the Paris Tribunal in 1898. However, none of the arguments raised by Venezuela before the Tribunal even remotely point to any form of contest of the validity of the latter Treaty, or of the Tribunal, or of its composition, nor did Venezuela express any sort of dissatisfaction which she might have had with the rules of the compromise agreement. Hence it is submitted that since Venezuela possessed the opportunity, at a preliminary point of the proceedings, to challenge the validity of the *compromis* she forfeited or 'waived' her right when she made a choice not to do so.

Moreover arbitration practice supports the supposition that a state, under certain circumstances, can be inferred to have waived its right to challenge certain procedural irregularities. In fact the use of this type of waiver is rather common in municipal arbitration law,[318] but has also been employed in international arbitration. In fact international tribunals, without specifically using the term 'waiver', have been rather reluctant to allow claims which are aimed at invalidating (from a retrospective angle) parts of the preceding phase of the arbitral proceedings. The argument of Venezuela (i.e. of an invalid *compromise*) is even harder to validate because it is raised to subtract the free will of a party which itself has argued its case (without any reservations) before a (freely consented) *ad hoc* Tribunal.

For example in the *Costa Rica- Nicaragua* Boundary Dispute[319] Nicaragua argued before the Arbitrator that an 1858 treaty defining the mutual boundary between herself and Costa Rica

[317] Wetter op. cit. n. 189 at 335; Judge Alfaro speaks in this context of a "failure to reserve rights of which a State is legally possessed and which it is entitled to claim or exercise in due course. Such failure may be and has been interpreted as a waiver of such rights"; Separate Opinion of Judge Alfaro in the *Temple of Preah Vihear* case[1962] I.C.J. Rep. 6 at 41. A similar concept is referred to as 'waiver of errors' by Carlston; Carlston op. cit. n. 133 at 170.

[318] E.g. the right to challenge an award owing to procedural irregularities may be waived in Swedish arbitration law, that is, if the party, while aware of the irregularities, took part in the proceedings without objection. D.M. Kolkey, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations" (1988) 22 *Int. Lawyer* 693 at 710. But see also the Spanish and Finish arbitration schemes; F. Mantilla-Serrano, "The New Spanish Arbitration Act" (2004) 21 *J. Int. Arb.* 367 at 380; M. Kurkela, "Due Process in Arbitration: A Finnish Perspective" (2004) 21 *J. Int. Arb.* 221 at 223, n. 7.

[319] Moore, 2 *International Arbitrations* 1945

was not legally binding. Nicaragua based her argument on the contention that the third state to this treaty, El Salvador, having the capacity as guarantor, had not yet ratified the treaty. Costa Rica asserted, on the other hand, that Nicaragua had never contested the matter before, nor had it paid any attention to the non-ratification of El Salvador at the time of the completion of the treaty with Costa Rica and that, as a result, Nicaragua could not after the initial failure to protest on its part bring the matter up after twelve years. The Arbitrator held that:

> the Government of Nicaragua [..] waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for El Salvador [...]. Neither may now be heard to allege, as reasons for rescinding this completed treaty, any facts which existed and were known at the time of its consummation.[320]

In the *Pious Fund of California* arbitration case[321] of 1902 it was contented by the US Government that Mexico had impliedly accepted, by uniform conduct, that the Mixed Claims Commission of 1868 possessed the power to adjudicate upon the entire, and *not* merely a part, of the dispute concerning the California Fund. The US asserted that this conduct was exhibited by Mexico by its ratification, in 1872 and later in 1874, of the conventions extending the time limit of the Mixed Commission and by various acts of its agent before the Commission itself.[322] Consequently the US Government asserted that Mexico's position with regard to the competence of the Mixed Claims Commission could not be modified or altered 'after' the final decision had been rendered. As Lauterpacht observed in his work:

> In this case [i.e. *Pious Fund of California*] the US pointed out that Mexico, embarking, in 1868 and in the subsequent conventions, upon the litigation, *took the risk of success or failure*, and that she could not now, after having lost, question the jurisdiction of the tribunal.[323]

A fortiori in the *Arbitral Award by the King of Spain* case[324] Nicaragua contended before the World Court at The Hague, in its first line of argument, that the King of Spain did not legally posses the quality of Arbitrator. In short she first asserted that the King should not have been elected as the Arbitrator because the provisions of the underlying Gámez-Bonilla Treaty of 1894 (i.e. the *compromis*) had not been correctly followed up. The latter Treaty had clearly stipulated that the Arbitrator *had* to be chosen first from one of the members of the foreign Diplomatic Corps accredited to Guatemala and that, only after this selection procedure had been fully

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[320] Ibid. at 1959 quoted by D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 34 *BYIL* 176 at 198.
[321](1959) 9 *U.N.R.I.A.A.* 1; (1908) 2 *AJIL* 893.
[322] Separate Opinion of Judge Alfaro in the *Temple of Preah Vihear* case; [1962] I.C.J. Rep. 6 at 44-5.
[323] Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 248 quoted by Judge Alfaro in his Separate Opinion; ibid. at 48.
[324] [1960] I.C.J. Rep. 192; see *supra* p. 47-8.

'exhausted', could 'any other foreign or Central American public figure' be elected, which in the present situation had not been the case.[325] Secondly, by the time the King accepted the task of sole Arbitrator the compromise agreement, investing him with the necessary powers, had in fact lapsed.

Thus it was concluded by Nicaragua that, due to the illegal character of these proceedings, the final outcome of the King's Award in 1906 was also automatically invalid. The Court, however, on the latter point unequivocally stated that:

> having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the grounds of irregularity in his designation as arbitrator or on the ground that the Gámez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions...[326]

Professor Verzijl, without labeling it a 'waiver', clearly endorsed such a doctrine with regard to the argument that a judgment could be vacated on the ground of an 'invalid' compromise. He thought that :

> Il n'est pas correct, en effet, de contester après coup la validité d'une sentence pour cause de nullité du compromise, lorsque les parties en ont reconnu la validité explicitement ou implicitement, en soumettant leur litige au tribunal et en plaidant devant lui sur cette base même.[327]

Mrs. Oellers-Frahm, when discussing the several grounds of nullity, even went as far as to disqualify the 'invalidity of a treaty' as a proper ground of nullity. She stated that:

> This [i.e. the invalidity of a treaty] no longer seems to be acceptable as a ground for nullity, for if it is advanced by a party and accepted by the tribunal before the beginning of the tribunal's proceedings, there will be no award, and if it is advanced after the proceedings have taken place and the award has been given, the *compromis* will be regarded as being binding on both parties. [328]

[325] Compare Articles 3 and 5 of the Gámez-Bonilla Treaty of 1894; see D.H.N. Johnson, "Case concerning the Arbitral Award made by the King of Spain on December 23, 1906" (1961) 10 *ICLQ* 328 at 329.
[326] [1960] I.C.J. Rep. 192 at 209
[327] J.H.W. Verzijl, "La Cour Internationale de Justice en 1960 (III. Affaire de la sentence arbitrale rendue par le Roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua))" (1961) 8 *Neth. Int. L.R.* 113 at 126.
[328] Oellers-Frahm op. cit. n. 123 at 39

Insufficient Evidence

The second reason why Venezuela's contention should not be upheld by any tribunal is the simple fact that Venezuela lacks sufficient evidence to support her allegation. As previously indicated any party wishing to invoke a ground of nullity (especially such a serious one as 'coercion' to a treaty by its negotiating partner) places a heavy 'burden of proof' upon it.[329] It is submitted that Venezuela does not pass the threshold.

Venezuela has basically used a two-folded argument to contend the invalidity of the *compromis*. On the one hand Venezuela claims that she was 'coerced' into signing unfavorable provisions by the threat of the American State Secretary. On the other hand she asserts that 'important' correspondence has been withheld from her.

The soundness of the first argument (i.e. the 'pressure' exerted upon Venezuela which, in turn, persuaded her to accept 'unfavorable' provisions) should be questioned or at least be put in its proper context. Certainly not all of the 14 provisions of the compromise treaty were in Venezuela's advantage (although the so-called 'unfavorable' status of the 50-year prescription clause could certainly be questioned).[330] Of course Venezuela had to rely on information from her negotiating partner, the US.
These circumstances however do not subtract from the basic fact that Venezuela was fully aware of her position when she made a calculated decision on her part to proceed and argue her case under the full terms of the Treaty before the ad hoc Paris Tribunal.

As a matter of fact it is not unlikely that the Venezuelan Government would have considered the inclusion of the (South American) principle of '*uti possidetis iuris*' (which she deemed to

[329] *Supra* p. 32 see also accompanying text n. 119.
[330] Venezuela has essentially raised the complaint that it was 'forced' to accept two unfavorable provisions in the Washington Treaty; one being the incorporation of the 50-year prescription clause. Although this point of the so-called 'unfavorable' 50-year prescription clause seems harmful to Venezuela's case *at first sight*, it was probably already foreseen by Venezuela that this particular clause would be rendered ineffective by the status of the so-called "Agreement of 1850". Clearly the very nature of the concluded agreement and the official standpoint of Her Majesty's Government on this point barred the British party (and Guyana now) from relying on any 50 year prescriptive term; see Chapter I *supra* p. 19-20. In fact, in his concluding argument, before the Paris Tribunal Sir Richard Webster (chief British Counsel) expressly waived reliance on the rule of prescription; Verbatim records, 1753-4 reprinted in Wetter op. cit. n. 189 at 30, 345. In addition evidence suggests that the Venezuelan Counsel had already foreseen such a scenario. See letter from State Secretary Olney to Benjamin Harrison, Chief Venezuelan Counsel printed in Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 40. As to Venezuela's second contention i.e. the absence of a Venezuelan Judge on the Paris Tribunal; see accompanying text *supra* n. 316.

be of great importance) as a diplomatic success, which in turn explains why other *at first sight*[331] less favorable provisions would have been assented to.
Thus the argument that 'actual force' had been exerted upon her seems hard to conceive. It rather appears that Venezuela, although still hoping for better terms, was in agreement with the provisions. Venezuela might have given the US Government more or less 'carte blanch' in the negotiating process; she ultimately remained in control whether or not she wanted to accept the 'final' terms of any treaty. Even if (for argument's sake) Venezuela was in fact threatened to be 'left alone to the mercy of Great Britain' she, as a result, would have had to negotiate her own terms. This in itself does not constitute a situation in which Venezuela was 'actually' coerced by a real 'use of force' other than a trivial form of diplomatic pressure to sign a compromise agreement.

As to her second argument; Venezuela has transmitted evidence enclosing information that, at the time of the meetings between the two State Secretaries of the US and Great Britain, she had not been properly updated. Though from a moral or political standpoint one could debate whether such conduct is proper, from a legal point of view such contentions are irrelevant. They do not surpass the threshold of the juridical act of 'coercion'.

In conclusion Venezuela has, by arguing her case without any reservations before the Paris Tribunal, forfeited her 'procedural' right to challenge the validity of the 1897 Washington Treaty. In addition Venezuela lacks sufficient evidence to support her contention. Her first argument falls short because pure 'coercion' presupposes an absolute lack of free will which Venezuela, albeit impaired, still possessed. Her second assertion is unsuccessful because it contests a political, and not a juridical, fact.

B. EXCÈS DE POUVOIR AND LACK OF REASONS

With regard to Venezuela's second and third argument I have chosen, for purposes of convenience, to review the strength of the both contentions together.

The Admission of Both Grounds in International Law

The concept of *excès de pouvoir* is believed to have been formulated for the first time by the scholar Vattel.[332]

[331] See text above.
[332] Carlston op. cit. n. 133 at 83

He was of the opinion that 'in the case of a vague and indefinite agreement' it may happen 'that the arbitrators will exceed their powers and decide points which have not really been submitted to them'.[333] Since then there has been some discussion in legal literature as to what exactly amounts to the 'excess of power' or an *excès de pouvoir*.[334] As previously demonstrated some authors have drawn a doctrinal distinction between a proper 'excess of jurisdiction' and 'excess of power', however it is commonly accepted that any transgression of the terms of a compromise agreement constitutes the vice of an *excès de pouvoir* (or 'excess of power').[335] As the Permanent Court of Arbitration noted in the leading case on nullity (i.e. the above discussed *Orinoco Steamship Company Case*):[336]

> Excessive exercise of powers may consist, not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied.[337]

It can be inferred from the passage of above that the scope of *excès de pouvoir* or 'excess of power' is often construed rather wide. The scholar Politis, for instance, once stated that 'taken in its largest sense, the term *excès de pouvoir* implies every violation of law'.[338]

In the area of state practice the most commonly invoked vice has been the ground of *excès de pouvoir*. The most famous and earliest example[339] of an *excès de pouvoir* is to be found in the *Northeastern Boundary Dispute* between Great Britain and the US in 1831. In this case The King of The Netherlands, as Arbitrator, was invited to draw the Maine-Nova Soctia boundary along one of two lines designated by the Treaty of 1783. When the King, instead, decided to choose a third compromise line the award was subsequently disputed by the US (and later acquiesced in by Great Britain) on the ground of an *excès de pouvoir*.[340] To the same effect was the American claim in the *Chamizal Tract* case of 1911, in which it was contended by the US Government that the Boundary Commission had 'exceeded its jurisdiction'. The US raised the complaint that the Commission had decided a 'compromise' line instead of appointing the full

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[333] Vattel, *Le Droit de Gens* (ed. 1758, Fenwick trans. 1916) sec. 329, p. 224 quoted by Carlston op. cit. n. 133 at 83.
[334] Reisman op. cit. n. 126 at 140-1.
[335] Carlston op. cit. n. 133 at 84-5 see also Garner as cited *supra* p. 68 I will therefore use the term 'excess of power' and 'exces de pouvoir' interchangeably.
[336] (1911) 5 *AJIL* 230; for more details see *supra* p. 44-6.
[337] Ibid. at 233.
[338] Politis, 'Le Problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux' (1925) 6 *Recueil des cours* 5, 84 quoted by Carlston op. cit. n. 133 at 87.
[339] Schachter refers to the case as the "earliest leading case", Shaw as the "main example", and Gormley thinks the case is the "best known instance"; Schachter op. cit. n. 187 at 3, n.9; Shaw op. cit. n. 188 at 957; Gormley op. cit. n. 159 at 52.
[340] The matter would eventually be settled by the parties in a new arrangement in the Webster-Ashburton Treaty of 1842; see Hyde op. cit. n. 171 at 1587-8; Carlston op. cit. n. 133 at 88-90.

portion of the Chamizal tract to either Mexico or the US.[341] Rumania in the *Hungarian Optants* case contended that the Mixed Arbitral Tribunal had, by declaring itself competent to adjudicate upon the claims of Hungarian land owners of Rumanian nationality, made an *excès de pouvoir*. The majority of legal writers subsequently supported the claim of the Rumanian Government and in fact believed that the Mixed Arbitral Tribunal had 'exceeded its jurisdiction' by taking cognizance of the dispute.[342] *Excès de pouvoir* or 'excess of power' has been invoked as recently as, e.g., the *Military and Paramilitary Activities in and against Nicaragua* case,[343] and off course in the above discussed *Case concerning the Arbitral Award of 31 July 1989*.[344]

It is submitted that in the present dispute the Paris Tribunal has likewise 'exceeded its powers'. The Paris Tribunal has clearly overstepped its entrusted authority by deciding, out of the blue, to pronounce itself upon the free navigation of the Amakura and Barima Rivers. To rule upon a point that was evidently not submitted to the arbitrators is held to be inadmissible in international law. The invalidity of such an admission has also been acknowledged by legal literature in the analogous case of the *Aves Island* dispute. In this particular dispute The Netherlands and Venezuela had invited the Queen of Spain as Arbitrator to establish the sovereignty over the Aves Island. Instead of discharging her duty and solely establishing the sovereignty over the island, the Queen of Spain additionally decided to rule upon the right of a purportedly existing servitude of The Netherlands (i.e. certain fishing rights).[345] Although both parties were content to abide by the final terms of the Award the event has, nevertheless, commonly been described in legal literature as a patent case of *excès de pouvoir.* [346] E.g. Politis and Lapradelle commented on the latter arbitration that:

> Reconnaître au Vénézuéla la souveraineté de l'île, c'était lui permettre non seulement de s'approprier le guano, mais aussi de s'opposer désormais à l'industrie séculaire des Hollandais. Cette conséquence était inadmissible. A défaut de la souveraineté, les Pays-Bas avaient acquis, pour leurs sujets des Antilles, le droit de pêche.

[341] Gormley op. cit. n. 159 at 53-4; see also Hyde op. cit. n. 171 at 1590-1; Carlston op. cit. n. 133 at 151-5.
[342]Mr. von Katte asserts that the majority view of legal writers believes that the jurisdiction of a tribunal should be interpreted *'strictissimae'* and thus they conclude that the Tribunal in the *Hungarian Optants* case 'exceeded its powers'. C. von Katte, "Hungarian-Romanian Land Reform Dispute"(1995) 2 *EPIL* 936. For more details on the case; see accompanying text *supra* n. 164.
[343] Reisman asserts that the Court had exceeded its powers in deciding to take cognizance of the dispute in the *Military and Paramilitary Activities in and against Nicaragua (Nicar. V. US), Jurisdiction and Admissibility*, 1984 I.C.J. Rep. 392 (judgment of Nov. 26); W.M. Reisman, "Has the International Court Exceeded Its Jurisdiction?" (1986) 80 *AJIL* 128 at 132.
[344] See *supra* p. 48-51.
[345] Carlston op. cit. n. 133 at 90.
[346] Ibid.; see also the comments of the ILC who speak of an "extraneous requirement as to fishing privileges" ; *YB ILC* (1950) Vol. II, Memorandum of the Secretariat (Doc. A/CN.4/35), p. 168 at point 57a.

And therefore both authors conclude that:

> Il ne soumettait à son jugement que la question de la souveraineté. Il ne lui donnait pas le droit de statuer sur les conséquences qui devait comporter sa décision [i.e. possible servitude]. S'octroyant ce droit, c'était commettre un *excès de pouvoir* qui rendait *nulle et non avenue* la partie de sa sentence qui en était entachée.

With regard to the fact that both The Netherlands and Venezuela decided to abide by the terms of the Award, both authors remark that such practice does not cure the substantive vice with which the award is tainted:

> Leur adhésion a couvert l'excès de pouvoir et transformé en accord ce qui, juridiquement, n'était, de la part de l'arbitre, qu'une proposition. Mais elle n'efface ni l'incorrection du procédé ni les vices de la sentence. [347]

Likewise in the present dispute the incidental decision to adjudge upon the free navigation of the Amakura and Barima Rivers, both accidentally located on the Venezuelan side, was uncalled for and consequently unjustifiable. Therefore the exceptional admission[348] should be regarded to constitute an *excès de pouvoir*.

Next to the latter defect the Tribunal also separately 'exceeded its powers' by its failure to designate the 1814 boundary line. As can be recalled the scope of the concept of 'excess of power' is construed rather widely. Admittedly the contention is often advanced that the arbitrators have surpassed their authority or acted *ultra petita* by deciding *outside* the provisions of the underlying *compromis*. A same vice is nevertheless present when a tribunal has failed to properly discharge its 'internal' duty.[349] Judge Weeramantry sharply noted that 'the *infra petita* doctrine encapsulates the relevant principle even more neatly, for the Tribunal has fallen short of performing that which it should have performed and in this way acted as it was not entitled to act'.[350]

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[347] Lapradelle and Politis, *Receuil des Arbitrages Internationales* (1932) Vol. II, p. 420-1 reprinted in Wetter op. cit. n. 189 at 167.

[348] E.g. Grant and Baker, when referring to the British Guiana Boundary Case, remarked that the award had been notable for the 50 year prescription clause as well as the fact that: "The award is equally notable for its incidental decision that, in times of peace, the rivers Amakura and Barima should be open to navigation". J.P. Grant & J.C. Baker (ed.), *Parry and Grant: Encyclopaedic Dictionary of International Law* (2004) 2nd ed., p. 63-4.

[349] This view was already expressed by Arbitrator Gore in one of the first instances of nullity in international law, i.e. *Betsey* Case (1797). He stated: "To refrain from acting, when our duty calls us to act, is as wrong as to act where we have no authority. We owe it to the respective governments to refuse a decision in cases not submitted to us – we are under equal obligation to decide on those cases that are within the submission" (1931) 4 Moore, *International Adjudication* 179 at 193 quoted by B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 261-2.

[350] Dissenting Opinion of Judge Weeramantry *Case concerning the Arbitral Award of 31 July 1989* [1991] I.C.J. Rep. 53 at 158.

Art. III of the Washington Treaty of 1897 unequivocally stipulates that the Tribunal is under the duty to determine the respective boundaries of both nations 'at the time of the acquisition of Great Britain of the colony of British Guiana'.[351] The shortcoming to decide on the 1814 boundary alone constitutes such a grave breach of the key third provision of the *compromis* that it leads to the inescapable conclusion that the Paris Tribunal has in fact made an *excès de pouvoir*.

In conclusion the 1899 Paris Award can be regarded to have been tainted by at least two separate accounts of *excès de pouvoir*.

With regard to Venezuela's third contention on the 'lack of reasons' to support the 1899 Award, it should be noted that the ground or rather the duty of a tribunal to state its 'full reasons' has been well documented in international law (e.g. Art. 52 of the Hague Convention of 1899, Art. 56(1) of Statute of the Permanent Court, Art. 95(1) ICJ Statute, and Art. 35 sub c 'ILC Model Rules'). Professor Carlston has noted on the subject that:

> The practice of tribunals to support their decisions by reasons has been so crystallized in thousands of cases, the views of writers are in such harmony upon this point, and its importance to the parties is so grave that the inclusion of reasons in support of the judgment has in international arbitral practice assumed the status of a fundamental rule of procedure the violation of which will lead to nullity.[352]

Judge Lachs, for one, not only believes that a lack of reasons vitiates a judgment but even submits that an *apparent shortness* of reasons could, under certain circumstances, amount to a nullity. In his separate opinion in the *Case concerning the Arbitral Award of 31 July 1989*, he stated that:

> while brevity is a virtue, excessive brevity may suggest lack of adequate consideration, hence the *imperative need* to explain the decision: it is not a flood of words which is called for but convincing reasoning and adequate explanations. A clear exposition of the grounds of the decision constitutes an indispensable part of any judgment or award.[353]

State practice exhibits many examples in which a 'lack of reasons' was put forward to justify the setting aside of an award. Thus the American Commissioner in the *Chamizal Tract* case asserted, next to an *excès de pouvoir*, that the final award of the Boundary Commission was in overall 'vague, indeterminate and uncertain in its terms' and could, on these grounds, not be properly executed.[354] In the *Norwegian Shipowners Claims*[355] a similar line of argument was

[351] *Supra* p. 23.
[352] Carlston op. cit. n. 133 at 50.
[353] Separate Opinion of Judge Lachs [1991] I.C.J. Rep. 53 at 94 (Italics added).
[354] Dissenting Opinion of the American Commissioner; (1911) 5 *AJIL* 782 at 813.

voiced by the US when it disagreed with the amounts of compensation it had to pay for the requisition of Norwegian property during WWI. It stressed that the award did not contain a 'satisfactory explanation of the manner in which the Permanent Court of Arbitration had arrived at the amounts awarded to the Parties; nor had it discussed the particular circumstances of the different claims or the reasons for determining the awards made in each case'.[356] In fact international law has witnessed many instances in which an award was opposed on the ground of a 'lack of reasons', e.g.: the *Cerruti* case, the *Bolivia-Peru Boundary* arbitration, the *Gayuga Indians* case, the *I'm Alone* case[357] and the more recent examples of the earlier discussed *Arbitral Award by the King of Spain* case, and the *Case concerning the Arbitral Award of 31 July 1989*.

Here too the Paris Tribunal failed to comply with the stringent requirements of international law[358] and so vitiated its judgment by declining to properly state its reasons for the final conclusions of the 1899 Paris Award. This shortcoming in the 1899 Award has been so apparent that it will suffice to quote Professor Kaikobad, who observed that:

> Perhaps the classic case of a complete lack of reasoning is the *Venezuela-British Guiana* arbitral award [..] of 1899.[359]

The Admission of a Concept of Relative Nullity and Personal Views

As has been demonstrated above the 1899 Paris Award has been tainted by at least two different grounds of nullity (two accounts of 'exces de pouvoir' and one of the 'lack of reasons'). Based on the law of nullity two conclusions can now be drawn.
Firstly it could be argued that nullity automatically entails the legal inexistence of the Award, or in other words the Award is invalidated *ex tunc*. Any subsequent conduct on the part of

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[355] (1911) 5 *AJIL* 898.
[356] Kaikobad ibid. at 97; see also Carlston who asserts that the mere 'failure to show the manner in which the damages were computed' is insufficient to claim a 'nullity' but rather warrants a request for rectification. Carlston op. cit. n. 133 at 169.
[357] *YB ILC* (1950) Vol. II, Memorandum of the Secretariat (Doc. A/CN.4/35), p. 176.
[358] One could debate, however, whether these stringent requirements were already considered legally binding at the beginning of the 20th century. As one can infer from the following statement of Mr. Kaikobad: "It is beyond doubt that all judgments and awards must be accompanied by reasons. A rule of this kind is axiomatic, and no one would take seriously today the views of umpires of international commissions who *in the middle of the last century* believed that "they were not under the slightest obligation to furnish the reasons of their actions, relying, as we think, upon the fact that their judgments would have the same authority without reasoning, and that no power existed to compel the detailing of the 'motifs' actuating them"". (footnotes omitted) (Italics added) K.H. Kaikobad, "The Court, the Council and Interim Protection: A Commentary on the *Lockerbie* Order of 14 April 1992" (1996) 17 *Aus. YBIL* 87 at 95. Although, on the other hand, one could also argue that the vice of 'lack of reasons' was already officially adopted as a rule in Art. 52 of the first Hague Convention of 1899 (the year of the rendered Paris Award).
[359] K.H. Kaikobad, "The Court, the Council and Interim Protection: A Commentary on the *Lockerbie* Order of 14 April 1992" (1996) 17 *Aus. YBIL* 87 at 96 (Italics in original).

Venezuela after the Award is now irrelevant and both parties find themselves in the legal situation of before the Award or the *status quo ante*. Hence some kind of negotiation between the two parties or a retrial on the merits of both parties' title to the territory would be required. A second option, however, is to reason that subsequent recognition and acquiescence can bind a party to the full (or defective) terms of the rendered Award. In other words Venezuela had the obligation to challenge these two shortcomings in the Award since the two defects were merely voidable.

I will proceed on the latter assumption and examine Venezuela's claim of nullity based on a doctrine of voidabillity or 'relative nullity'. Before I will do so, however, I find it necessary to stress my personal views on the following two points.
First of all I want to question the notion of 'relative nullity' by underscoring the ambiguity in the final readings of the *Arbitral Award by the King of Spain* case, and secondly I want to make a reservation with regard to the scope of such a doctrine of 'relative nullity'.

To begin with there is still formidable legal authority that advocates that the flaw of an *excès de pouvoir* renders an award or judgment absolutely void and not merely voidable.
To quote Arbitrator Gore's vision on 'excess of power' back in 1797 in one of the very first known instances of nullity, i.e. *Betsey* Case:

> The answer is obvious, it is that of the law of nations, of the common law of England and of common sense- a party is not bound by the decision of arbitrators in a case not within the submission- such decision would be a dead letter- it would be as no decision.[360]

The majority of scholars at the beginning of the 20th century clearly carried this legal conviction.[361] Professor Bidau probably best captured this point of view in his statement that 'the arbitrators may not, *without executing a void act*, exceed the limits indicated by the parties'.[362] Moreover a substantial part of international legal opinion has determinedly held on to this 'absolute' view on nullity despite the Courts' contrasting passage in the *Arbitral Award*

[360] (1931) 4 Moore, *International Adjudication* 179 at 194 quoted by B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 277. Judge Moore made a similar statement in his dissenting opinion in the *Mavrommatis Palestine Concessions* Case (1924 PCIJ Ser. A, No. 2, p. 60) in which he stated: "Ever mindful of the fact that their judgments, if rendered in excess of power, may be treated as null..".
[361] Carlston poses the question whether "such acts [i.e. affected with an *excès de pouvoir*] be null and void?" and subsequently gives an affirmative answer citing over two dozen different authors among which are the more classical authorities as Bonfils, Blumerinq, Calvo, Carnazza-Amari, Fiori, Hefter, Rivier, Rouard de Card,etc. for references see Carlston op. cit. n. 133 at 81-8.
[362] Bidau, *Derecho Internacional Público* (4th ed., 1924), p.21 (Italics added) quoted by Carlston op. cit. n. 133 at 81.

by the King of Spain case in 1960 (in which it precluded Nicaragua from raising the objection of nullity and so seemed to have accepted a conception of 'voidabillity').[363]
To date the *Arbitral Award by the King of Spain* case is the *only* case in public international law in which the ICJ precluded a party from raising the plea of nullity. As such the case should be (or is) regarded to form the prime example of, and the main justification for, a doctrine of a *relative working* of nullity (as can be recalled in the previously discussed *Case concerning the Arbitral Award of 31 July 1989* the Court did not reject Guinea Bissau's contention on a finding of acquiescence, recognition etc. but merely on the failure to substantiate the ground of nullity itself).[364]

Professor Wetter, for example, has most sharply criticized the passage and judgment of the Court in the *Arbitral Award by the King of Spain* case as 'being markedly *obiter* in character' and certainly 'untenable as a general proposition' on the law of nullity.[365] He is of the opinion that the many technical rules implanted in the arbitral process; especially the complex rules regulating the different procedural and substantive irregularities of an arbitral process (such as revision, re-opening, rectification, nullity *ex nunc*, nullity *ex tunc*, appeal, challengebillity, etc.) have confused the Court. This apparent confusion became even more acute when these complicated arbitral concepts got 'intermingled' with international law notions as acquiescence, recognition, protest and estoppel. According to Wetter the Courts' focus has been shifted from these 'arbitral' rules by the brilliant speeches of the Honduran advocate, Mr. Guggenheim, who managed to 'reverse the normal order of judicial analysis' by focusing on the sole point of acceptance or acquiescence.[366]

I personally tend to agree with Professor Wetter in the sense that I too, albeit from a slightly different angle, believe that *the normal order of judicial analysis* got *reversed* in the *Arbitral Award by the King of Spain* case.

The Courts' line of reasoning in that case was as follows; it commenced its judgment by noting that the finality of an award is the normal order of things and subsequently found that Nicaragua had, by express declarations and conduct (statements in national parliament, diplomatic letters etc.), accepted and acquiesced to the final terms of the Award. The Court then ended its judgment by briefly observing that the Nicaraguan grounds of nullity were all unfounded *even if* they had been raised in time.

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[363] *Supra* p. 64
[364] See *supra* p. 48-51 and *infra* p. 102-3.
[365] Wetter op. cit. n. 189 at 340
[366] Ibid. at 335, 339-42.

If, as the Court in fact does, we proceed on the assumption that the finality of an award is the normal rule and that, in the event of voidable defects, a party can still acquiesce in the final terms of an award and be legally bound by it; why would it then still be necessary at the end to briefly examine the reasons as to why the different grounds of nullity would have failed? *A fortiori* why would the Court take it upon itself to fully examine the possibilities of acquiescence and acceptance if all Nicaragua's grounds of nullity were unwarranted to begin with?

In my eyes there are two different ways how one can examine the Courts' theoretical line of thought and both these views warrant the same conclusion, i.e. the normal and logical order of judicial review got inversed.

Firstly as I understand it the rule of the finality of an award is the normal rule within the system of international adjudication. Accordingly in international law the plea of nullity is considered to form the exception to the 'normal rule' of finality. With this in the back of my mind I have great difficulty in reading and ascertaining the logic structure of the Courts' judgment in the *Arbitral Award by the King of Spain* case. I mean, as indicated, the Court proceeds on the premise that the award is final and that the exception to this rule, i.e. nullity, is not applicable because it is excluded by the acceptance and acquiescence of Nicaragua. In other words acquiescence and acceptance seem to form the exception to the application of the exception to the rule of finality or in short: the exception *to* the exception of the rule.

If this is the case then a logical judicial examination on the subject would have warranted an exhibition in the same order of these rules. That is to say: first confirm or establish the common rule, then to examine the plea of exception, and ultimately to proceed on ascertaining whether in the circumstances of the specific case the plea of exception fails because of the existence of a possible exemption to the plea of exception.

That this is in fact the common and 'normal order of judicial analysis' can perhaps best be demonstrated by drawing a simple comparison to Dutch criminal law (although the logic structure of judicial review displayed by this example is universal).
Suppose a defendant in case of a murder or grave assault charge submits the plea of self defense or temporary insanity. What now if the circumstances were such that the defendant, a known drug addict, in course of stealing a bike had actually (or supposedly under a justified impression of being) been physically attacked by four armed bystanders, had taken out his pistol to shot one of them?

The accurate and careful course of judicial review in such an instance (in Dutch law at least) is that a court first establishes the (broken) rule or in this case its counterpart; what exact crime has been committed by the defendant? After ascertaining whether the charge or act of murder or grave assault can *actually* be proven, will a Court proceed on examining the second step whether there were mitigating or exculpatory circumstances present that would warrant a plea of exception. Was it indeed a sufficiently treating situation that would justify the use of self defense or temporary insanity? As a third and final step the Court will review the circumstances that could minimize or warrant the exclusion to the plea of exception and in terms of Dutch criminal law examine the scenario that the defendant had 'culpably' or 'purposely' put himself in a situation in which the subsequent result, i.e. the crime, was a logical and inescapable consequence of his previous actions; the so-called *culpa in causa* or *dolus in causa* doctrine.[367] The fact that the defendant is a known drug addict and the fact that a person, as a byproduct of drugs, more often than not tends to misjudge and misinterpret his surroundings does not automatically lead the Court to disregard the order of judicial review or persuade the Court to jump to the conclusion that the defendant cannot raise his plea of self defense or temporary insanity.

If the ICJ in the *Arbitral Award by the King of Spain* case had in fact followed the logical and sound course of judicial review, the Court would have been able to conclude, at the second step of its exhibition, that there existed no *valid* exception to the rule of finality and accordingly the Court could have dismissed itself of the task of examining in great detail all possible acts of acquiescence, recognition, etc..
Unless of course, as Wetter suggests, the Court was a bit confused by the different workings of nullity *ex tunc*, *ex nunc* etc. perhaps the Court was not entirely certain of an absolute conclusion on nullity that it chose *not* to make a final ruling at the second step and instead decided to base its final conclusions on the third rule; i.e. acquiescence, acceptance etc..
Or there is always the other possibility that the Court got in fact sidetracked by its sheer focus to Mr. Guggenheim's points of acquiescence, acceptance etc. This in turn would explain why the Court made, from a theoretical point of view, such a third, and by definition, *superfluous* finding on 'nullity'.

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[367] For an exposition on the doctrine; see C. Kelk, *Studieboek Materieel Strafrecht* (2005, Deventer) 3rd ed., p. 281-3. It has sometimes been advanced in Dutch criminal literature that the 'culpa/dolus in causa' should be examined prior or concurrently to the plea of exception, but the prevailing view believes that such an examination should be executed as a last step or 'check'; see C. Bronkhorst, *Overmacht in het Strafrecht* (1952, Nijmegen), p. 229-30; see also the author 't Hart who theoretically defended the prevailing view in his appended note on the *Doodslag te Baarn* Case; HR 13 juni 1989, NJ 1990,48. E.g. Kelk concluded on the latter matter that the Dutch Supreme Court (Hoge Raad) clearly adheres to the majority view: '[de] door de Hoge Raad gehuldigde, opvatting [is] dat *eerst* de aanwezigheid van de strafuitsluitingsgrond moet worden vastgesteld, *waarna* eventueel de daaruit voortvloeiende straffeloosheid in voorkomende gevallen weer teniet gedaan kan worden op grond van dolus in causa of culpa in causa.'; Kelk ibid. at 282 (Italics added).

Either way around the Court does not display a consistent line of thought; if there was true acquiescence there had be to some form of nullity otherwise the rule of finality would have stood by itself. On the other hand if there was no real flaw of nullity there was automatically no real necessity to examine the doctrine of acquiescence.
Even if we leave these two points aside for a moment there was yet a third flaw in the process of thought that has been pointed out earlier by Jennings. The Court noted in its judgment that Court's task was merely to ascertain "whether the Award is proved to *be a nullity having no effect*."[368] If the award is indeed a nullity, then, according to the Court, it automatically has no effect; how is it possible then that the working of an 'absolute' nullity can later nevertheless be legally accepted and recognized by a party? Or maybe the Court did not mean that a nullity automatically has no effect, but then it should have chosen its words more wisely.

The same incongruity in legal analysis is exhibited if we chose to analyze the problem from a slightly different theoretical angle. If one is inclined to look at the doctrines of acquiescence, recognition etc. as independent law notions operating completely autonomous (i.e. outside the specific context of the rules of finality and nullity and thus not as a sequence of applicable rules). One could argue that the internal strength of the concepts of acquiescence, recognition etc. overrides or sidesteps the application of the plea of nullity. Although the rightness of this point of view sounds even more commendable, a rigid transposition of this rationale to the findings of the Court in the *Arbitral Award by the King of Spain* case equally leaves us with these same exact question marks. Because once, as the Court does, the doctrine of acquiescence or acceptance has been established and proven; the Award is *consequently* binding and thus that is the end of the matter. By still examining in the final paragraphs the reasons why nullity would have failed undermines the authority of the previous finding and, in my eyes, reveals a certain hesitation or confusion. I mean does the finding of acquiescence not amount to enough authority to conclude the matter? Or put even more accurately; does the finding of mere acquiescence not weigh enough to totally set aside every single ground of nullity? Or once more; why would such a doctrine, which can sidestep or override nullity, be invoked by the Court in a dispute where there was no nullity to begin with?

As said irrespective from the angle of examination something in the theoretical reasoning of the Court just does not add up and thus, as a minimum, we can conclude that the 'normal order of judicial review' got 'reversed' in the present case.

[368] *Supra* p. 64

Next to the sharp critique of Professor Wetter to the latter finding of the Court, Professor Reisman, who has also written one of the leading works on the subject of nullity, [369] rejects a relative view on *excès de pouvoir*. He clearly stated in a more recent article that:

> When an international tribunal purports to act beyond the authority granted to it, its acts, like those of any other entity that exceeds its authority, are *null and void.*[370]

A similar view on an 'excess of power' is adopted by the legal scholar Hyde.[371]

The reason therefore to examine Venezuela's claim of 'excess of power' from a relative or voidable standpoint is to explore the problem in its totality and not to subscribe to this particular point of view. On the contrary; it seems to me to be warranted to caution or even exclude the acceptance of a 'relative nullity'. As indicated above I believe, on two different grounds, that the sole judgment of the ICJ in the *Arbitral Award by the King of Spain* case is far too ambiguous to warrant the admittance of a 'relative' nullity.

First of all, as demonstrated above, the Courts' process of thought appeared to have been tainted with too many inconsistencies and likely confusion to declare the case to be a clear cut proposition on the law of nullity. Despite the fact that it was a virtually unanimous finding it carries insufficient intellectual weight to justify the final readings as an admission of 'relative' nullity.

Secondly from a strict formal point of view the case did not admit to a concept of relative nullity. The Court in the *Arbitral Award by the King of Spain* case did *not* find that acquiescence precluded a ground of nullity; in strict legal terms the Court held and emphasized that were *no valid grounds of nullity*. Thus the Court nowhere directly stated that an *established* ground of nullity was excluded by the workings of acquiescence, recognition etc. *A fortiori* if we strictly read the judgment it merely reaffirmed the theory of *absolute* nullity because the judgment literally stated that an established nullity would be 'having no effect'.

Moreover in the absence of any other judgments supporting 'relative' nullity insufficient prove for such an admission exists. To reason on the precedent of the singular case of the *Arbitral Award by the King of Spain* that a concept of relative nullity has been admitted in international public law sounds to me as a legal reasoning in which 'the wish is father to the thought'.

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[369] W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971)

[370] W.M. Reisman, "Has the International Court Exceeded its Jurisdiction?" (1986) 80 *AJIL* 128, 128 (Italics added).

[371] Hyde states: "An Award outside of or departing from the limits of submission is *not binding*, for in such case the tribunal acts in excess of its powers" (Italics added) Hyde op. cit. n. 171 at 1636.

This is not to say that it is impossible to accept the admittance of such a doctrine in the future, but to declare one at present would be to read too much into the single finding of the Court. At the most one could infer that 'relative' nullity can be accepted in *some* circumstances but not as a general statement on all different accounts of nullity. I personally believe that a doctrine of relative nullity, even if admitted in international law, should apply to some accounts of nullity but certainly not to every single one (see part E). In this context it will suffice to point to the previously discussed account of 'excess of power' committed by the Paris Tribunal (when it purported to appoint a boundary line between British Guiana and its two neighbors). I strongly believe that even if the Italian Arbitrator had not ruled upon the invalidity of the latter point in his Award[372]; the evident void nature of such a flagrant transgression could never be cured by any lapse of time.

As a second reservation I want to make the supposition already stated above that even if we admit to a concept of relative nullity, we ought to be careful not to construe the scope of such a doctrine too wide. If we take a closer look at the work of Professor Jennings, whose work on occasions has been used to advocate 'relative nullity', a certain amount of reservation seems warranted.

As can be recalled the Court stated in the *Arbitral Award by the King of Spain* case that it was not in a position to judge whether the decision of the King of Spain was 'right or wrong' but solely to establish whether there was a nullity '*having no effect*'.[373] As Professor Jennings so eloquently put it; it would seem to be 'illogical' to say that 'an estoppel or waiver can lend validity to an act which is in law non-existent'.[374] Jennings therefore rightfully concluded that, in the context of an *excès de pouvoir*, such vice should not properly be titled as an 'absolute' nullity. In his analysis, however, Jennings appeared rather watchful not to draw such a conclusion *outside* the specific field of 'exces de pouvoir'.[375] He concludes in his final analysis that a vast interplay or interactions of *different forms* of nullity and effectiveness are present in the international legal system. Accordingly he advocates in his conclusion that a 'description *seriatim* is almost the *necessary* form of exposition' on nullity and effectiveness.[376]

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[372] *Supra* p. 62
[373] [1960] I.C.J. Rep. 192 at 214 (Italics added).
[374] R.Y. Jennings, "Nullity and Effectiveness in International Law" in *Cambridge Essays in International Law: Essays in Honor of Lord McNair* (1965), p. 84-5 reprinted in Wetter op. cit. n. 189 at 312; see *supra* p. 64.
[375] Jennings, after noting the Court's decision in the *Arbitral Award by the King of Spain* case, remarked that: "it would seem to follow that the nullity of an award where there has been an *excès de pouvoir* is not, *in suchlike cases at least*, an absolute nullity in the sense of non-existence..".(Italics added); R.Y. Jennings, "Nullity and Effectiveness in International Law" in *Cambridge Essays in International Law: Essays in Honor of Lord McNair* (1965), p. 84-5 reprinted in Wetter op. cit. n. 189 at 312.
[376] R.Y. Jennings, "Nullity and Effectiveness in International Law" in *Cambridge Essays in International Law: Essays in Honor of Lord McNair* (1965), p. 87 (Italics added) reprinted in Wetter op. cit. n. 189 at 315.

In other words it is submitted not to employ the concept of voidabillity to every single ground of nullity, but rather proceed on the supposition that a concept of relative nullity applies to the specific ground or vice of an 'excess of power' (and perhaps, in the present case, also to a 'lack of reasons') but not automatically beyond.

The Role of Subsequent Conduct: Recognition, Acquiescence, Estoppel and Protest

If we proceed our examination on the premise of relative nullity we accordingly have to evaluate Venezuela's subsequent conduct by the workings of recognition, acquiescence, estoppel, and protest.

The four doctrines enumerated above all flow to some extent from the fundamental principles of 'good faith' and 'equity' and frequently form an interrelated subject-matter and, as such, are often hard to distinguish in practice.[377] In general terms the four doctrines are best described as follows.

Recognition is 'a positive act by a state accepting a particular situation and… an affirmation of the existence of a specific factual state of affairs, even if that accepted situation is inconsistent with the terms of a treaty'.[378] In other words recognition is a positive concept and so requires some formal act of government. Recognition normally plays an important role in the acknowledgement or emergence of a new government or a new state and is used, in a secondary sense, to denote the acknowledgement of any specific right or quality of another state.[379]

Acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.[380] It is based on the assumption that 'states will not look on idly and without any reaction whilst their alleged rights are being infringed and violated'[381]

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[377] I. Brownlie, *Principles of Public International Law* (2003) 6th ed., p. 152; Shaw op. cit. n. 188 at 437; Dissenting Opinion of Judge Spender in *Temple of Preah Vihear* [1962] I.C.J. Rep. 6 at 131; Separate Opinion of Judge Alfaro; ibid. at 39.
[378] Shaw op. cit. n. 188 at 437 [footnotes omitted].
[379] J.P. Grant & J.C. Baker (ed.), *Parry and Grant: Encyclopaedic Dictionary of International Law* (2004) 2nd ed., p. 417-8. The concept of recognition, in its second sense, was discussed by the Permanent Court of Justice in the *Legal Status of the Eastern Greenland* case ([1933] PCIJ, Ser. A/B, No. 53). Denmark contented that, in effect, Norway was precluded from contesting Danish sovereignty over the whole of Greenland by the Ihlen declaration. The Court ultimately found that although the declaration of the Norwegian Minister of Foreign Affairs could not be interpreted as a 'definitive *recognition* of Danish sovereignty', but his statement ('not to make any difficulties in the settlement of the question') *did* entail a legally binding obligation upon Norway, which now prevented her from contesting Danish sovereignty over the disputed territory (ibid. at 69-70).
[380] *The Gulf of Maine* case [1984] I.C.J. Rep. 246 at 305.
[381] Y.Z. Blum, *Historic Titles in International Law* (1965), sec. 39, p. 133 reprinted in Wetter op. cit. n. 189 at 287.

and thus represents the problem as to what point do silence and toleration become 'law-making' acquiescence.[382]

The rationale behind the doctrine is to promote stability in international relations, and to prevent states from playing 'fast and loose' with situations affecting other states.[383]

Although the doctrine has been described by some as a positive concept,[384] the prevailing view today is that acquiescence constitutes a negative or passive concept.[385] The doctrine normally comes into play with the formation of the rules of customary law,[386] or with the acquisition of prescriptive rights.[387]

Estoppel is understood to 'operate so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement to his benefit'.[388] The typical effect of estoppel is to bar a party from changing its subsequent conduct or statement, regardless of the truth or accuracy of the statement or conduct of the latter party.[389]

The primary justification of the doctrine is to prevent states from benefiting from their own inconsistency or to phrase McNair 'a state cannot blow hot and cold'. [390] Although the doctrine of estoppel is interpreted by some as an extensive concept, the general belief is that the notion should be construed rather restrictively. [391] The doctrine has most often been invoked in disputes respecting the nationality of claims, or the acquisition of territorial sovereignty.[392]

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[382] J.P. Müller & T. Cottier, "Acquiescence" (1995) 1 *EPIL* 14 at 15.
[383] H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 *BYIL* 376 at 396.
[384] Dissenting Opinion of Judge Urrutia Holguin *Arbitral Award by the King of Spain of 1906* [1960] I.C.J. Rep. 192 at 222, 237; see also the statements of Fauchille, Ross, and the Opinion of the Queens Advocate Harding all cited by I.C. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 *BYIL* 143 at 144.
[385] See the statement of the Court in the *The Gulf of Maine* case quoted above; [1984] I.C.J. Rep. 246 at 305; see also MacGibbon; ibid at 143; Blum as reprinted by Wetter op. cit. n. 189 at 286-7.
[386] E.g. Shaw op. cit. n. 188 at 84-8.
[387] E.g. Blum, *Historic Titles in International Law* (1965), sec. 39, p. 133-9.
[388] D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 34 *BYIL* 176, 176.
[389] E.g. Judge Spencer argued in his separate opinion in the *Arbitral Award by the King of Spain of 1906* case that: "Although I incline strongly to the view of that the appointment [of the King of Spain as sole Arbitrator] was irregular, this contention of Nicaragua fails because that state is precluded by its conduct..". Separate Opinion of Judge Percy Spencer [1960] I.C.J. Rep. 192 at 219.
[390] A.D. McNair, "The Legality of the Occupation of the Ruhr" (1924) 5 *BYIL* 17 at 35. The justification is also often expressed in the classic maxim of *allegans contraria non adiendus est* ; ibid.
[391] Authors as MacGibbon, Schwarzenberger, and Guggenheim have adopted such extensive views, while restrictive views are adhered to by writers as Bowett, Jenks, Martin, and Müller & Cottier ; see references in J.P. Müller & T. Cottier, "Estoppel" (1995) 1 *EPIL* 116 at 117. For an application of the restrictive view see the judgment of the ICJ in *The Gulf of Maine* case; [1984] I.C.J. Rep. 246 at 308.
[392] J.P. Grant & J.C. Baker (ed.), *Parry and Grant: Encyclopaedic Dictionary of International Law* (2004) 2nd ed., p.154-5.

Protest has been described as 'a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter'.[393] The doctrine is regularly presented as the negative counterpart of acquiescence, in the sense that is constructed to prevent silence or inaction from being interpreted as consent.[394] Consequently protest is a positive concept and in order to be effective a protest (orally or written) needs to be directed at a governmental level and in clear terminology.[395] The doctrine is used in all types of contexts: ranging from emerging rules of customary law to anticipatory protest to a state's conduct or legislation.

Thus in schematic order: recognition and protest are active concepts and require a formal act at governmental level, while acquiescence is a negative concept and its application needs to be deduced from the facts of the case. The doctrine of estoppel operates in junction with the notion of acquiescence; in that sense that it constitutes a possible consequence in law of a bar if it were found that a party has committed itself to follow a specific course of action and if its counterpart has, in good faith, relied upon this conduct not to change.
As previously indicated the four different doctrines are rather difficult to distinguish in practice. As a consequence international courts and tribunals have seldom termed the specific concepts by their name; the ICJ, for example, has generally refrained from employing specific terminology in its case law but rather justified its final findings by references to broader principles as good faith, consistency, or intent to be bound etc.[396]

If we take a look at the facts of the present dispute formal acts at governmental level are meager and relatively easy to interpret. The crux of the case centers on the possible acquiescence of Venezuela in the two grounds of nullity and whether she is so precluded from now raising these objections.

We are thus primarily concerned with the concepts of acquiescence and estoppel, and I will therefore shift my focus to the workings of both these doctrines. Although officially the prime difference between the two concepts lays in the requirement of showing a 'prejudice' or 'detriment' by the party invoking the doctrine of estoppel,[397] both concepts nevertheless exhibit

[393] Oppenheim, *International Law* (1948) 7th ed. by Lauterpacht, vol. I, p. 789 quoted by I.C. MacGibbon, "Some Observations on the Part of Protest in International Law' (1953) 30 *BYIL* 293 at 294.
[394] W. Karl, "Protest" (1997) 3 *EPIL* 1157 at 1158.
[395] I.C MacGibbon, "Some Observations on the Part of Protest in International Law' (1953) 30 *BYIL* 293 *et seq.*
[396] M.L. Wagner, "Jurisdiction by Estoppel in the International Court of Justice" (1986) 74 *Cal. L.R.* 1777 at 1784.
[397] E.g. the Court stated in the *Gulf of Maine* case that: "the element of detriment or prejudice caused by a State's change of attitude, [..] distinguishes estoppel *stricto sensu* from acquiescence". [1984] I.C.J. Rep. 246 at 309. Another key difference would be the requirement of a 'clear and unambiguous statement' for an estoppel, which would from a formidable obstacle for determining acquiescence, since acquiescence by its very nature does not

many similarities and so, in my eyes, warrant a combined exposition. E.g. the ICJ in the *Gulf of Maine* case[398] equally choose to examine both concepts at once when it was confronted with the question whether there had by conduct emerged a certain delimitation practice between Canada and the US in the Georges Bank sector. Canada had contended before the Court that by certain conduct (a number of issued permits, seismic research, and most notably the 'Hoffman letter') the US had acquiesced in and was now estopped from claiming anything else than the application of the 'median line' in delimiting the Georges Bank sector. The Court in this situation noted the following:

> In the Canadian argument the terms "acquiescence" and "estoppel" are used together and practically for the same purposes. [..] Canada stated in the oral proceedings that estoppel is "the *alter ego* of acquiescence", though it added that even if it were to be held that the conditions for the recognition of an estoppel were more stringent than those for acquiescence [...] it must be regarded as satisfied in the present case.
>
> The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity.[...] the Chamber merely notes that, since the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, it is able to take the two concepts into consideration as different aspects of one and the same institution.[399]

Likewise in the present dispute the same facts and circumstances apply to both the doctrines of acquiescence and estoppel, and, what is more, the application of either doctrine would have the same effect on the Venezuelan case. E.g. in the *Arbitral Award of the King of Spain* case Nicaragua was formally found to have 'acquiesced' in the terms of the Award and she was thus officially not found to have been 'estopped' from raising nullity.[400] Nevertheless the overall effect for Nicaragua was the same since the Award had become 'binding' upon it; Nicaragua could no longer raise these objections much like the effect of estoppel would have been. It is therefore necessary to briefly examine the mutual and essential elements of the two doctrines.

First of all (as indicated by the Court in the *Gulf of Maine* case) both doctrines emanate from the principles of 'good faith' and 'equity'. In fact both concepts' raison d'être is to ensure that states operate, for international law purposes, as predictable and consistent as possible in order

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involve any 'statement'. M.L. Wagner, "Jurisdiction by Estoppel in the International Court of Justice" (1986) 74 *Cal. L.R.* 1777 at 1783.

[398] [1984] I.C.J. Rep. 246

[399] Ibid. at 304-5.

[400] There was no evidence of specific detriment to Honduras in the event of nullification of the Award. J.P. Müller & T. Cottier, "Acquiescence" (1995) 1 *EPIL* 14 at 15. See also the statement of the ICJ in the *Gulf of Maine* case, ascribing the effect of 'acquiescence' to the *Arbitral Award of the King of Spain* case; [1984] I.C.J. Rep. 246 at 310.

to minimalize tensions and promote smooth inter state relations. Whether this justification, embodied by the principles of good faith and equity, is termed in words of 'acquiescence' in order to prevent states from playing 'fast and lose' with other states,[401] or in 'estoppel' so as to avert states from blowing 'hot and cold' at each other [402] does not matter. I think that the essence of the two principles of 'good faith' and 'equity' boils down to the fundamental norm to 'do unto others as you would they should do unto you'. The importance of the rule is apparent and any tribunal, under the obligation to evaluate the different circumstances and facts of a case to review the possible application of either acquiescence or estoppel, needs to use these two principles as guidelines to make sure that it takes a fair and well balanced decision.

A prerequisite and second element is the element of knowledge. A rule of this kind is axiomatic; for how can one tacitly consent to something one does not know of? Or in terms of estoppel; how can one party rely in good faith upon the silence and inaction of the other party if that party is unaware of a situation that would oblige him to speak? The plain logic behind this requisite has been noted as early as the 17th century by Grotius.[403] Dr. Johnson has even stated that 'without knowledge there can be no acquiescence at all'.[404]
International tribunals and courts have also rigidly applied the requirement of knowledge in their awards. E.g. is the *Landreau* case arbitration of 1922. Theodille Landreau had granted a release to the Peruvian Government of his rights of payment. However before Landreau had signed the release he had first notified the Peruvian Government that 30 percent of his claim had been assigned to his brother, Célestin, who himself was not a direct party to this release. The Peruvian Government, after a failure of Célestin to immediately claim his share, tried thereafter to bar him from collecting his 30 percent. The Commission in deciding the matter stressed the importance of the requirement of knowledge in the application of the concepts of estoppel and acquiescence and so noted the following:

> Of course if there was anything to show that Célestin *knew* of this release at the time of its execution and abstained from putting forward his claim, he and his representatives would be estopped from making any claim against the Peruvian Government, but there is nothing to show that there was any such acquiescence in this transaction by Célestin. [405]

[401] H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 *BYIL* 376 at 396.
[402] A.D. McNair, "The Legality of the Occupation of the Ruhr" (1924) 5 *BYIL* 17 at 35.
[403] Grotius stipulated that, to be effective, the silence must be that of a party *knowing* and freely willing; Grotius, *De Jure Belli et Pacis* (Whewell trans.) Vol. I, sec. 3, p. 281-2 cited by MacGibbon op. cit. n. 384 at 173, n.3.
[404] D.H.N. Johnson, "Acquisitive Prescription in International Law" (1950) 27 *BYIL* 332 at 347.
[405](1922) U.N.R.I.A.A. vol. i, p. 365-6 (Italics added) quoted by D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 34 *BYIL* 176 at 199.

An extreme example of the stringent requirements imposed on the element of knowledge is exhibited in the *Pensions of Officials of the Saar Territory* case (1934).[406]

The feature of knowledge also runs as a read thread trough the case law of the ICJ. In the *Fisheries* case[407] the ICJ justified its final findings, i.e. that the Norwegian system of delimitation was opposable to the UK, on the premise that Great Britain possessed or must have possessed knowledge of the latter system. It found that 'the notoriety of the facts', and 'Great Britain's position in the North Sea' as well as 'her own interest in the question' were all important elements in reaching this conclusion.[408] In fact the majority of the dissenting Judges in this case all disagreed with the final finding of the Court because they were of the opinion that the Norwegian system could not be imputed to the UK since the UK lacked to some degree or another sufficient knowledge on the matter.[409] E.g. Judge Read held that the burden of proof rested on Norway to prove that its system became part of 'special or regional law' and especially to substantiate, inter alia, that the system 'was made known to the world in such a manner that other nations, including the United Kingdom, knew about it or must be presumed to have had knowledge'.[410] In the *Arbitral Award made by the King of Spain* case one of the Courts' motivating reasons for precluding Nicaragua was based upon the finding that Nicaragua's 'failure to raise any question with regard to the validity of the Award for several years' was inexcusable since after these years 'the full terms of the Award *had become known to it*'.[411]

Finally in the *Gulf of Maine* case[412] the core argument of the US centered on the requisite of knowledge. The US line of argument to counter the Canadian contention (i.e. that the US had by conduct acquiesced in and was estopped from claiming anything else but the 'median line') concentrated on the assertion that Canada had failed to make the existence or use of this 'median line' sufficiently known to the US. The US Government stressed that the offshore exploration permits were 'not common knowledge' since these issuances constituted an 'internal administrative activity' and as such they were 'incapable of forming the basis of

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[406] The German Government had contended before the Arbitrator that the Commission governing the Saar Territory was bound to refrain from withdrawing money from the Pensions Reserve Fund. The Principle Reports on the Pension Fund however were transmitted directly to the League of Nations of which Germany was a member. These reports showed frequent withdrawals from the Fund to which Germany never officially protested. Despite these circumstances the Arbitrator held that "at that time, these officials had knowledge of the withdrawals, if at all, only as officials of the League and not as plenipotentiary representatives of the German Government. The right of that Government to protest was acquired *only at the moment when it knew of the facts*" ([1934] U.N.R.I.A.A. vol. 3, p. 1567 (Italics added) quoted by MacGibbon op. cit. n. 384 at 175). Accordingly the Arbitrator found that the Committee of the Fund was not necessarily the organ to 'act for the German Government' and so upheld the German contention (MacGibbon ibid.).

[407] [1951] I.C.J. Rep. 116

[408] Ibid. at 139

[409] Judge McNair concluded that the UK was not 'aware, or ought but for default on her part to have become aware, of the existence of a Norwegian system'. Dissenting Opinion of Judge McNair; ibid. at 180.

[410] Ibid. at 194

[411] [1960] I.C.J. Rep. 192 at 213 (Italics added).

[412] [1984] I.C.J. Rep. 246.

acquiescence or estoppel at the international level'.[413] Moreover the US asserted that Canada 'never issued an official proclamation or any other publication for the purpose of making its claim *known* internationally; the United States could not, therefore infer the existence of such claims by such indirect means'.[414]

We can conclude from the findings above that the element of knowledge is a vital and indeed absolute element in the application of the doctrines of both 'acquiescence' and 'estoppel'.[415]

A third element is the requirement that a statement of or the conduct by a party must be 'clear' and 'consistent'. In the *North Sea Continental Shelf* cases[416] Denmark and The Netherlands asserted before the Court that Germany had by conduct accepted the equidistance method and was therefore estopped from the application of any other delimitation method. The Court however observed that 'only *clearly* and *consistently* evinced acceptance of that régime' would bind Germany but found that, in the present dispute, its conduct could be interpreted in both a positive as well as a negative acceptance of that regime and thus the Court disallowed the Dutch-Danish contention.[417] Likewise in the *Serbian Loans* case[418] the Serbian Government reasoned that the French bondholders, in accepting payments in French francs as opposed to 'gold francs', were now estopped from claiming payment according to the strict rules (i.e. gold francs) of the various issued loans. The Permanent Court in that case concluded that no right to estoppel could be invoked by the Serbian Government, because:

> when the requirements of the principle of estoppel to establish a loss of right are considered, it is clear that no sufficient basis has been shown for applying the principle in this case. There was no *clear and unequivocal* representation by the bondholders upon which the debtor State was entitled to rely and has relied.[419]

[413] Ibid. at 305. The US second line of argument disputed the importance that could be attached to the so-called 'Hofmann letter', since Hofmann had been nothing more than an official at an intermediary level of government and had himself indicated that he 'had no authority to commit the United States as to the position of a median line'; ibid. at 306.
[414] Ibid at 306 (Italics added). The US also argued that, by use of the Truman Proclamation on the continental shelf, it had opposed to the use of the median line in the now disputed Georges Bank sector (since the famous Proclamation had also applied in its entirety to the Georges Bank sector at least according to the US); ibid.
[415] The prerequisite of knowledge in ascertaining acquiescence has been commonly accepted; e.g. see MacGibbon op. cit. n. 384 at 173-6. Likewise the important requirement of knowledge has been acknowledged in the application of an estoppel (especially in its relation to acquiescence); e.g. Bowett in his conclusion on the subject enumerates four necessary grounds for finding an 'estoppel' of which his second ground states that 'actual or constructive knowledge by state B that state A purports to be acquiring some right or interest in conflict with his own right or interest' (footnotes omitted); D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 34 *BYIL* 176 at 200.
[416] [1969] I.C.J. Rep. 3
[417] Ibid. at 26-7 (Italics added).
[418] P.C.I.J., Ser. A, Nos. 20/21
[419] Ibid. at 39 (Italics added).

Clear and consistent conduct also played a role in the delimitation of fishing grounds between Norway and Sweden in the *Grisbardana* case[420] and was a significant reason for the ICJ to reject the Canadian contention in the *Gulf of Maine* case.[421] In fact Canada's assertion of US acquiescence was partially based upon the findings of the *Grisbardana* case. The Court, in reviewing the argument, first noted that the circumstances of the two cases differed so much that it found it difficult to draw a parallel[422] but proceeded on the premise that:

> Even if these differences are minimized, it is not possible to conclude, on the basis of the *Grisbardana* precedent, from a comparison of the conduct of Sweden and Norway [..] that the conduct of the United States was sufficiently clear, sustained and consistent to constitute acquiescence. [423]

A fourth feature that is employed in the application of acquiescence and estoppel (and one that has primarily been found and developed in the case law of the ICJ) is the element of time. The element of time is not of a determinative nature per se but seems rather to be applied as an assistor of the other constituent elements. Thus the passage of time is often interpreted as evidence of the failure or the accomplishment to establish one of the other requirements (e.g. a long period of time proves insufficient or sufficient knowledge of a situation or a long passage of time establishes (un)clear and (in)consistent behavior of a state).

The ICJ held in the *Fisheries* case[424] that the Norwegian system of delimitation in the North Sea had been conducted by Norway for a long period of time (almost 70 years) and that on this ground the Norwegian practice must have been known to Great Britain.[425] Likewise the long passage of time (combined with no objection from British side) had given the Portuguese possessions in India the status of 'enclaves' and so played a substantive role in the establishment of the Portuguese territorial title in the *Right of Passage over the Indian Territory* case.[426] Once more in the *Arbitral Award made by the King of Spain* case the Court justified its conclusion of Nicaraguan acquiescence, inter alia, on the ground that the Nicaraguan 'conduct had continued over a very long period'.[427] The passage of time also played a role in the famous

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[420] (1909) U.N.R.I.A.A. vol. ii, p. 147; (1910) 4 *AJIL* 226.
[421] [1984] I.C.J. Rep. 246.
[422] The Court held that 'the problems of rights over maritime areas differed in many respects from those of the present day. That case [i.e. *Grisbardana* case] concerned territorial waters, whereas the present one concerns vast areas of sea'; ibid. at 309.
[423] Ibid. at 309. The court had noted earlier that the conduct of the US was indeed inconsistent, unclear and perhaps ambiguous. Firstly it found that the US standpoint on the different issuances of the offshore exploration permits and seismic research between 1960 and 1970 'revealed uncertainties' and, secondly, the time of silence after these permits was 'perhaps ambiguous' but, in both instances, the Court concluded that the conduct had not been consistently silent enough to warrant the application of either acquiescence or estoppel.; ibid. at 307-8.
[424] [1951] I.C.J. Rep. 116
[425] See the passage of the Court in the *Gulf of Maine* case; [1984] I.C.J. Rep. 246 at 309.
[426] [1960] I.C.J. Rep. 6 at 39.
[427] [1984] I.C.J. Rep. 246; the *Gulf of Maine* case at 310.

Temple of Preah Vihear case[428]. When the Court was faced with the question whether Thailand had, by lack of reaction, acquiesced in the publication by the French authorities of various maps depicting the disputed temple area within French Indo-China, it noted in a famous passage that:

> It is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they had wished to disagree with the map [..]. They did not do so, either then or *for many years*, and thereby must be held to have acquiesced. [429]

'Silence' and possible 'consent' are the last two features that need be at hand in order to employ acquiescence or to apply the doctrine of estoppel in its relation to acquiescence. [430] Indeed these two ingredients form the backbone of the doctrines and immediately present the crux of the matter as they pose the question; when or in what circumstances can silence be interpreted as consent? It will come to no surprise to any legal scholar that the general and, indeed only, logical answer to this question is that it 'depends primarily on the circumstances in which silence is observed'.[431] Professor Blum, in the context of the formation of historic rights, sharply observed that:

> There may arise circumstances in which silence will have to be constructed as indicating objection to a given state of things. (*Qui tacet – negat*). In different circumstances silence will indicate neither consent nor objection, but merely indifference towards a newly-arisen situation. (*Qui tacet neque negat neque utique fatetur*). All the same, it is still true to say that in the majority of cases silence must be regarded as a tacit acceptance of a new practice by a State… [*Qui tacet consentire videtur*] [432]

Normally silence will be construed as tacit recognition, because a state, for international law purposes, is understood to have a duty to speak if its alleged rights are being infringed. The latter obligation is perhaps best expressed in the full classic maxim of *Qui tacet consentire videtur 'si loqui debuisset ac potuisset'*.[433] An exception to the latter rule seems to be validated only when one of the other elements previously enumerated blocks the application of silence.

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[428] [1962] I.C.J. Rep. 6
[429] Ibid. at 23.
[430] It should be noted that theoretically the features of 'silence' and 'consent' are not an absolute requisite for the application of estoppel, since this doctrine is invoked by definition on the ground of inconsistency in the representations of the other party. Obviously these representations need not occur in silence or inaction but also on official statements and actions that debar the other party from invoking these representations to the detriment of its counterpart or to the benefit of his own. In other words the features of 'silence' and 'consent' are absolute prerequisites for the doctrine of 'acquiescence' and not estoppel per se, but rather as an 'estoppel *in relation to acquiescence*'.
[431] MacGibbon op. cit. n. 384 at 170.
[432] Y.Z. Blum, *Historic Titles in International Law* (1965), sec. 39, p. 133-4 reprinted in Wetter op. cit. n. 189 at 287-8.
[433] *The Temple of Preah Vihear* case [1962] I.C.J. Rep. 6 at 23.

E.g. the ICJ held in the *Gulf of Maine* case that, although the US had during 1960's exhibited silence on some points, its overall conduct and attitude towards Canada had been far too inconsistent to 'attribute to such silence' the 'legal consequences' of an estoppel.[434]
Likewise silence does not entail consent if a state can manage to 'plea excusable ignorance' of the facts.[435]
In conclusion the passage of silence will place a formidable burden of proof upon the party who wishes to preserve its rights. Moreover a party's plea to dismiss its silence as tacit consent appears, in my eyes, to be validated only when its arguments can somehow be reduced to the failure to establish (or an incomplete establishment of) one the other constituent elements. E.g. if a state had no or limited knowledge of the relevant facts its silence on the matter will be exempted. This conclusion can be drawn from the findings of the ICJ in the above mentioned *Fisheries* case.[436] Likewise one cannot interpret a state's silence as consent if a state has made inconsistent statements or exhibited unclear conduct; e.g. the inconsistent conduct of the US in the *Gulf of Maine* case above. In the latter case the Court also held that the silence of the US, next to being inconsistent, had been far too short to justify the invocation of either doctrine.[437]
Finally it has been noted in legal literature that a party cannot rely on silence for the invocation of estoppel if that party has not really acted in 'good faith'; a visible example, as noted by Vattel, would be silence emanating from a threat of (an)other State.[438]

Thus we can observe from above that the two notions of acquiescence and estoppel share a substantial number of mutual core elements. We can conclude, in reviewing the different elements, that the principles of 'good faith' and 'equity' seem to function as overall guiding and regulating values, and that the element of knowledge forms an absolute feature in the chain of elements. We can also deduce from above that the element of 'silence/consent' is often reviewed or judged in junction with the elements 'consistency' and 'time', which appear to be

[434] [1984] I.C.J. Rep. 246 at 308. The Court stated that: "while it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration in the Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far". It reiterated the same standpoint in the next paragraph by stating: "Once again the United States attitude towards Canada was unclear and perhaps ambiguous, but not to the point of entitling Canada to invoke the doctrine of estoppel".
[435] MacGibbon op. cit. n. 384 at 178-82.
[436][1951] I.C.J. Rep. 116. In that case the final ratio decidendi of the Court centered on the British knowledge of the Norwegian delimitation system and the conclusion can be inferred (see the dissenting opinions *supra* n. 409) that if the UK had not possessed sufficient knowledge of the Norwegian practice, its system of delimitation could not be imputed to the UK
[437] The Court noted that: "while it may be conceded that the United States showed a certain imprudence in maintaining silence [..] any attempt to attribute to such silence, *a brief silence at that*, legal consequences taking the concrete form of an estoppel, seems to be going too far"; ibid. at 308 (Italics added).
[438] Vattel speaks in this instance, i.e. the failure to speak under threat, of "a well founded fear". Vattel stated " de justes raisons de son silence, comme l'impossibilité de parler, une crainte bien fondée" quoted by Blum op. cit. n. 432 at 138. However if the argument, not to speak, is based on the will not to prejudice the 'good inter-governmental relations' such excuse would not likely be validated; see MacGibbon op. cit. n. 384 at 171, n. 3.

of a more evidential nature. The latter two elements seem to be applied by international courts more as supportive tools in the ultimate establishment of the application of either doctrine. As a last and final observation it should be noted that both doctrines are, in practice, employed rather restrictively.[439]

Application to the Facts of the Case

Before we examine the merits of the contentions of both parties I quickly want to point out one erroneous legal assertion that has been advanced by the author Donovan. Given the now approximately 50 years of Venezuelan silence Donovan has asserted that Venezuela has by definition of the 50 year prescription clause (of the 1897 Treaty) automatically and absolutely 'acquiesced' in the Award. He states:

> This clause [i.e. 50 year prescription clause] in the compromise was never objected to by Venezuela, and therefore creates acquiescence between the two parties.[440]

The unsound legal reasoning of such a point of view is so apparent that it will suffice to briefly observe the following. Not only does it sound illogical to assume that the legal relations between two states today are still governed by the mere terms of a *compromis* dated over an hundred years ago, but also the admission of such a contention seems improbable. Sidestepping the issue whether the *compromis* could still be regarded as valid today (no expiration date etc.), the rules of such a treaty should be interpreted according to the rules of customary international law, i.e. in accordance with the intentions of its drafters at the time.[441] Clearly the rules embodied in the 1897 Washington Treaty were established for the specific purpose of arbitration and especially the 50 year prescription rule was set up for the sole purpose of

[439] This conclusion can be drawn from the *Gulf of Maine* case; the Court, in reviewing the Canadian contention that the US had acquiesced into and was estopped by its conduct, first stated that imprudence and inconsistent conduct had indeed been displayed by the US Government. It stated in paragraph 142 the following reasons for finding this type of conduct to be at hand: "When Canada at the level of its Department of External Affairs and of the United States Embassy in Ottawa, clearly stated its claims for the first time (letter of 30 August 1966), it might admittedly have expected a reaction on the part of the United States [..] In waiting until 10 May 1968 before suggesting, through diplomatic channels, the opening of discussions, while the question was pending, and then waiting a further year and a half, until November 1969, before [..] having endeavored to keep Canada sufficiently informed of its policy". After having observed the imprudent behavior the Court stressed the restrictive application of both doctrines in its conclusion at the end of the same paragraph when it noted: "It is even possible that Canada was reasonably justified in hoping that the United States would ultimately come round to this view. To conclude from this, however, in legal terms, that by its delay the United States had tacitly consented to the Canadian contentions, or had forfeited its rights is, in the Chamber's opinion, overstepping the conditions required for invoking acquiescence or estoppel". [1984] I.C.J. Rep. 246 at 308. The restrictive nature of both doctrines has also been noted in legal literature; e.g. see MacGibbon op. cit. n. 384 at 168-70 and authors quoted in accompanying text *supra* n. 391.

[440] T.W. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis" (2004) 32 *GJ. Int. & Comp. L.* 661 at 723.

[441] Art. 31 and art. 32 VCLT.

ascertaining which of the two parties, in the absence of a clear legal title to the territory, had a better right to the Essequibo valley in the period before 1897. Never was it imagined that such a rule would regulate the legal relations between the two parties *after* the date of arbitration and *outside* this specific context. Moreover to apply such a rule today would also go against the basic principle of 'good faith'.

So the question at hand is whether Venezuela between the period of 1899 till it made its first official protest or objection in 1945[442] has 'acquiesced in', or is 'estopped from' invoking the two grounds of nullity.

Venezuela, in her defense, has basically advanced that she had already 'protested' to the terms of the Award before the Permanent Court of Arbitration in 1903,[443] and so Venezuela has argued that she thus had notified her counterpart of the defective nature of the terms of the 1899 Award. Venezuela moreover contends that only after the ending of an era, in which she feared real political threat of her mighty counterpart, could she finally voice her dissent and so Venezuela's silence should not be interpreted as consent. [444]
Great Britain and Guyana, on the other hand, have asserted that no 'threat' or 'use of force' or any kind of 'coercion' have been exerted by it, nor could any such circumstances of threat justify the prolonged period of silence and inaction on the part of Venezuela. In addition to this the argument has been advanced by Donovan that Venezuela has actively participated in surveying the line of the Award in the appointed Boundary Commission of 1905 and so, in overall, she recognized the line and is now estopped from claiming any such grounds of nullity.[445]

As said the Venezuelan experts have implicitly claimed that the statement of its agent before The Hague Tribunal in 1903 (claiming that "the memory of it [i.e. 1899 Award] would be

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[442] In 1945 Venezuela contends that it felt confident that after WW II the era of colonialism had ended and thus openly demanded at the signing of the UN Charter an 'amicable reparation' on the question; Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 22. It should be noted however that this form of 'protest' pertains to the *known* grounds of nullity and from a legal point of view differs from its first official claim to nullity appertaining to both fraud and corruption in 1962; see *supra* p. 105 and accompanying text n. 464

[443] The Award referred to was rendered on February 1904 before the PCA (U.N.R.I.A.A. vol. 9, p. 107-110) aka 'Preferential Claims against Venezuela Arbitration'. The dispute had originated after Great Britain, Italy and Germany had blockaded the coast of Venezuela in 1902/3 and had forced Venezuela to sign a compromise which provided for the judicial submission to the PCA of the outstanding dispute concerning unpaid debts. Afterwards the non-blockading Creditor States (Belgium, France, Mexico, the Netherlands, Sweden, Norway, and the US) all intervened before the Tribunal and advanced their claims against Venezuela; M. Silagi, "Preferential Claims against Venezuela Arbitration" (1997) 3 *EPIL* 1098, 1098-9.

[444] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 20-2.

[445] T.W. Donovan, "Challenges to the Territorial Integrity of Guyana: A Legal Analysis" (2004) 32 *GJ. Int. & Comp. L.* 661 at 715.

embittered with a sense of injustice")[446] was one of protest against the terms of the 1899 Paris Award. This contention however should not be upheld because it simply does not pass the threshold of the requirements set out by the doctrine of protest (see above)[447]. Firstly and obviously its terminology is far too vague, and secondly one can question whether it is openly directed at Great Britain, and therefore the statement cannot be held to have been an official protest.

On the other hand the British-Guyanese contention that Venezuela has 'recognized' the full terms of the Award by participating in the Boundary Commission would also seem as unsound. First of all, admittedly, Venezuela seems to have been rather pushed to participate in the Commission by the threat of unilateral demarcation by Great Britain,[448] but more importantly the way of thinking behind the contention errs. In my view a country that demarcates a boundary line in the execution of the terms of an Award recognizes or accepts the accurateness of the line delineated, and does not by definition accept all possible defects with which the underlying Award itself may be affected.

E.g. in the Argentina-Chile Frontier Case of 1965[449] a problem concerning the competence of a Mixed Boundary Commission arose. In accordance with the terms of a rendered Award of 1902 a Mixed Boundary Commission had been assigned to delimit the boundary line described therein, which followed, inter alia, the course of the River Encuentro. However due to the minimum knowledge of the area at the time a geographical error had occurred in the Award.[450] Chile consequently argued before the Arbitral Tribunal in The Hague that the subsequent decisions made by the Boundary Commission were not binding since the Commission possessed mere technical powers. Argentina however advanced that the 'unanimous decision' of the Commission was a 'matter of law' and that the 'subsequent practice' of the Commission and the parties themselves now bound both litigants to these decisions.[451] The Arbitral Tribunal ultimately ruled that the findings of the Commission were in fact binding, but noted that the decision of the Commission could not be upheld to the part were the error had occurred (i.e. the part appertaining to the Encuentro River).

In other words a Boundary Commission is believed to bind the parties only to the terms of an Award falling 'within its competence'[452] and as a result not to errors affecting the Award itself or by logical deduction to any other vices with which the Award itself might be tainted.

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[446] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 22.
[447] *Supra* p. 91
[448] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p.170 [footnotes omitted]; also Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p.21.
[449] (1967) 16 U.N.R.I.A.A. 109.
[450] K. Oellers-Frahm, "Argentina-Chile Frontier Case" (1992) 1 *EPIL* 247, 248.
[451] Nelson op. cit. n. 134 at 280-2.
[452] Ibid. at 282.

Therefore we can exclude these official acts of above from our present examination and concentrate on the silence and inaction of Venezuela. As often indicated it is hard to tell when silence and inaction amount to consent and normally the specific circumstances of the case are of a determinative nature. Lets us first examine the possibility if we can use the conclusions of the ICJ in two closely related cases to help interpret Venezuela's silence. In both the *Arbitral Award made by the King of Spain* case, and the *Case concerning the Arbitral Award of 31 July 1989* the circumstances were such that a ground of nullity was raised after a certain lapse of time and in both cases the defendant party put forward the plea of acceptance or acquiescence.

In the *Arbitral Award made by the King of Spain* case Nicaragua attempted to invoke nullity after a lapse of six years but the Court concluded that Nicaragua had acquiesced in the final terms of the Award. The Court's principal justification of Nicaragua's acquiescence was based on the fact that Nicaragua had 'by *express* declarations and conduct recognized the Award'.[453] To support the latter statement the Court examined in detail a number of official acts; most notably two diplomatic letters (one telegram sent immediately after the rendered Award from the Nicaraguan President to congratulate his Honduran counterpart, and the other was a note sent a year after the arbitration to the Spanish Chargé d'affaires in Central America thanking the Spanish King for his mediation). Thirdly a publication of the 1906 Award in the official Nicaraguan Gazette was examined, and, last but not least, the various statements of the members of the Nicaraguan Government made in national parliament, in which they considered the boundary question either 'settled' or 'terminated'.[454]
If we compare these facts to the Venezuelan case we can conclude that Venezuela cannot be held to have 'expressly recognized' the Award. On the contrary the Venezuelan ministers and members of government have consistently and on many occasions rejected the Award in national discussions and parliament.[455] Neither can it be said that Venezuela sent official diplomatic notes to her counterpart expressing any joy over the terms of the rendered Award. At most Venezuela might have publicized the Award in an official magazine somewhere but the binding nature of such an act has been sharply criticized for having any probative value of recognition whatsoever.[456]

In the second case, the previously discussed *Case concerning the Arbitral Award of 31 July 1989*,[457]the plea of recognition or acceptance was raised at a preliminary stage of the conflict by

[453] [1960] I.C.J. Rep. 192 at 213 (Italics added).
[454] D.H.N. Johnson, "Case concerning the Arbitral Award made by the King of Spain on December 23, 1906" (1961) 10 *ICLQ* 328 at 333-4.
[455] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 22.
[456] Johnson; ibid. at 336-7.
[457] See *supra* p. 48-51.

Senegal. During the proceeding before the ad hoc Tribunal in 1989 Senegal had put forward, inter alia, the contention that Guinea-Bissau had 'tacitly recognized' the validity of the contested 1960 Agreement, since this Agreement had been 'confirmed by the subsequent conduct' of both parties over a long period (almost 18 years).[458] The Tribunal, by a minimum majority (two to one), ultimately found that the 1960 Agreement was not a nullity etc. but binding on both the litigants, but the Tribunal did not, however, put forward acquiescence as a ground for basing its final finding. As we can infer from the comprehensive dissenting opinion of Mr. Bedjaoui the Tribunal did probably not make a finding on acceptance or acquiescence, because it felt that Guinea-Bissau's silence could not be interpreted as consent. Only at the time Guinea-Bissau in fact 'became aware' of the existence of the 1960 Agreement (which was at a later date) could acquiescence be inferred.[459] According to Mr. Bedjaoui Guinea-Bissau did not have sufficient knowledge of the Agreement till Senegal brought the matter up in 1983. This state of affairs was excusable because Guinea-Bissau, being a third world country, did not possess the legal machinery necessary to protect its legal interests.[460]
If we transpose these circumstances to our case, it cannot, given the apparent nature of the clear 'lack of reasons' and the 'excess of power', be contended by Venezuela that she did not posses sufficient knowledge on the matter.

In overall we can deduce from above that 'express conduct and/or statements' weigh serious enough to warrant the application of acquiescence, but prolonged silence arising out of an excusable ground as insufficient knowledge (or perhaps silence stemming out of threat) does not.

If we examine the facts of our case we can conclude the following. To begin with there subsisted clear 'knowledge' on the facts of the case on the part of Venezuela or rather the defects present in the Award were known; both the 'lack of reasons' as well as the two accounts of 'excesses of power' were apparent (contrary to later discovered facts of possible fraud and corruption). Secondly Venezuela, although admittedly too weak to speak at the turn of the century (civil war, foreign blockade of its ports etc.), nevertheless choose to remain 'silent' throughout the 1920's till mid 1940's. Sidestepping for a moment the question whether there existed a well founded fear or not, we can at least establish that a considerable amount of 'time' has in fact lapsed. 'Consistent' and 'clear' conduct or statements seem to play a factor of minor, to no, importance because, besides the statement of the Venezuelan agent in 1903, there are no

[458] 83 *ILR* 1 at 19, 15-6.
[459] Dissenting Opinion of Mr. Mohammed Bedjaoui; ibid. at 83
[460] Ibid. at 82.

acts at hand which could be interpreted as vague or contradictory or conduct exhibited that was too inconsistent so as to exclude tacit consent.

To recap all the prevailing legal formulae point to acquiescence (or estoppel); there was consistent and clear conduct by Venezuela, exhibited over a long period of time, and there was absolute knowledge on the facts. Thus all the 'supportive' tools, at first sight, do not sustain the Venezuelan view to dismiss its silence as consent.
However if we take a look at the overall regulating principles of 'good faith' and 'equity' both parties can put forward an argument. Venezuela can of course contend that her counterpart cannot in 'good faith' rely upon silence emanating out of threat. Great Britain and Guyana for their part can advance the argument that the 'equity' of the case demands that such a prolonged period of silence cannot flip around the expectation created on British-Guyanese side of acquiescence.

I believe, based on a contrary interpretation of the Venezuelan contention, that the statement of dissatisfaction in 1903 did put Great Britain on notice of Venezuelan objection (although clearly not in terms of an official protest). Given the 'known' grounds of nullity Great Britain could have expected a Venezuelan protest or claim. However Venezuela did not do so for many years to come, instead it now advances that threat for Great Britain's reaction and lack of support by the US induced it not to speak.[461] Be that as it may form a legal point of view the principles of good faith and equity normally demand that after such a long period of silence one has 'acquiesced' in the terms of an Award. Unless Venezuela's silence was the undeniable result of *outside* pressure all elements, including good faith and equity, result in acquiescence (or possibly estoppel).

Although I honestly believe that Venezuela found herself in a hard position and possibly contemplated objection: internal unrest, self-serving leaders, economic depression, economic dependence on its neighbor etc. withheld her from raising her voice. Although these circumstances appear to be rather arduous, they do not constitute a supportable claim to 'outside' pressure. Admittedly many nations at the turn of the last century found themselves in similar strenuous and hard conditions, yet very few could debatable side aside a rendered award or completed treaty on the ground of threat. And so we have to conclude, based on the stringent requirements imposed by intertemporal law on the claim of threat, that Venezuela cannot put forward the ground of threat as a valid excuse for its prolonged silence, or as the Romans used to say: *lex dura sed lex*.

[461] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 21-2.

In overall we can conclude that Venezuela, on a failure to excuse its long period of silence, should be deemed to have assented to the loss of a right to plea an 'excess of power' or a 'lack of reasons'.[462]

D. FRAUD

The Legal Effects of New Evidence

The fourth ground invoked by Venezuela to invalidate the 1899 Award is the vice of fraud. Before we examine the merit of this assertion, I quickly want to point out the obvious. The reason for not discussing the accounts of 'fraud' and 'corruption' at the same time with the grounds of 'excess of power' and 'lack of reasons' is the fact that the former accounts were not 'known' at the time of the Award. Only after the release of the official files by the British Government and the release of American private archives in the beginning of the 1950's did these 'new' facts come to light.[463] Thus the situation materially differs from the one in which we examined the previously discussed grounds of nullity.[464]

As I have already pointed out the requirement of knowledge is detrimental for the invocation of either acquiescence or estoppel,[465] and thus these two doctrines evidently do not apply to the period prior to any knowledge of these 'new' facts.[466] Next to the overtly logical point of view that is impossible to acquiesce to something that you do not know of, public international law has made a 'procedural' distinction between a normal demand for revision or nullity and a request for nullity or revision based on the discovery of a new fact.[467] The epitome of this rule is found in Article 38 of the ILC 'Model Rules'[468] which in part reads the following:

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[462] As demonstrated above both the doctrines of 'acquiescence' and 'estoppel' exhibit many similarities, yet the prime difference between the two notion lays in the requirement of showing the existence of a 'prejudice' or ' detriment' by a party wishing to invoke estoppel. For the reason of brevity I have decided to prove that 'acquiescence' can *at least* be established, because as indicated above the working of either doctrine blocks the Venezuelan argument. It should be noted, once more, that this conclusion is purely based on the premise that a doctrine of 'relative', as opposed to 'absolute', nullity applies to the facts of the case; see this author's comment *supra* p. 87-8.

[463] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 23.

[464] In the previous situation the period of silence was examined from 1899 till 1945 when Venezuela made its first 'protest' at the signing of the UN Charter; see *supra* p. 100, 25 and accompanying text n. 442, 89. In the present dispute however the facts of fraud and corruption were discovered after the sifting of the officially released files in the beginning of 1950 till 1955; Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 23. As a result we have to infer reasonably that Venezuela was aware of these 'new' facts in approximately 1956 onwards. Thus the starting point for a claim of extinctive prescription should run from 1956 till present; see also *infra* p. 107 and accompanying text n. 478.

[465] See *supra* p. 93-5.

[466] Unless of course the doctrines are reviewed in the period *after* the discovery of these new facts, i.e. the period between 1956 till present 2007. Although a claim to acquiescence would not be upheld in the latter period given the repeated protests of Venezuela and the later concluded agreements between the two parties; see *infra* p. 110 See also the similar conclusion of Nelson op. cit. n. 134 at 291-2.

[467] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 364-70.

[468] (1959) 53 *AJIL* 230

> An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision. [469]

The principle enumerated above had been noted as early as 1875 during the discussions of the Institute of International Law (*Institut de Droit international*)[470] and was already recorded at both the conventions of the Hague Peace Conferences.[471] The principle has also found substantial recognizance in rules of public international law.[472] That Article 38 on the discovery of a new fact also encompasses the specific situation of 'fraud or collusion in the production of evidence' can be inferred from its negotiating history.

At the ILC's 152nd meeting the Colombian member, Mr. Ypes, made the proposal to add to the (traditional) four grounds of nullity (as embodied in Art. 35 of the ILC Model Rules) the additional fifth ground of 'fraud or collusion in the production of evidence'.[473] After some theoretical discussion however Mr. Ypes decided to drop the latter proposal[474] on the general agreement that 'it was understood' that his proposal on fraud would be 'covered' by the workings of Article 38.[475]

In fact many authors adhere to the view that fraud almost automatically entails the discovery of a *new fact*. E.g. Carlston has noted on the latter point that:

> it is difficult to discover any logical inconsistency in the position that the discovery of the falsity of the documents relied on in an arbitration is one of a new fact and that that fact is certainly of such a nature as profoundly to influence the decision of the tribunal.[476]

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[469] Ibid. at 248.
[470] *YB ILC* (1950) Vol. II, p. 177 at point 99; see also Sandifer, *Evidence Before International Tribunals* (1975) rev. ed., sec. 105 reprinted in Wetter op. cit. n. 189 at 295.
[471] In fact the proposal was first made by Bourgeois who suggested that tribunals should "carefully distinguish between the discovery of an *error* and the discovery of a *new fact"*. The principle was subsequently recorded in Article 55 Convention for the Pacific Settlement of International Disputes of 1899, and Article 83 of the Convention for the Pacific Settlement of International Disputes of 1907; see Carlston op. cit. n. 133 at 233-5.
[472] E.g. Art. 61 of the PCIJ Statute, Art. 61 ICJ Statute; see also Art. 1 of the International Central American Tribunal; (1923) 17 *AJIL Supplement* 85, and Art. 43 of the Pan American Court of Justice; (1926) 20 *AJIL Supplement* 380.
[473] *YB ILC* (1952) Vol. I, p. 87 at point 48
[474] Mr. Ypes was persuaded by Mr. Lauterpacht who feared that the inclusion of such a fifth ground would detract too much attention from the 'traditional' grounds of nullity; ibid. at p. 87, point 66.
[475] Ibid. at p. 87 at point 67
[476] Carlston op. cit. n. 133 at 237-8.

The Doctrine of Extinctive Prescription

The above cited doctrine has been described in the Encyclopaedic Law Dictionary as follows:

> The principle of extinctive prescription, that is, the bar of claims by lapse of time, is recognized by international law. [..] The application of the principle is flexible and there are no fixed time limits [..].Undue delay in presenting a claim, which may lead to it being barred, is to be distinguished from the effects of the passage of time on the merits of the claim in cases where the claimant state has, by failing to protest or otherwise, given evidence of acquiescence. [477]

Thus, if we still examine nullity on the premise of *relative* nullity, we can establish that the claim of fraud (or corruption for that matter) has not been 'substantively' affected by the workings of either acquiescence or estoppel (i.e. in period of 1899 till 1946), but the claim to both fraud and corruption could theoretically still be 'procedurally' barred by the lapse of time *after* the full discovery of the new facts (i.e. the period of approximately 1956-7 till present)[478] by the so-called doctrine of extinctive prescription.

As stated above a certain lapse of time 'may bar an international claim in spite of the fact that no rule in international law lays down a time limit'.[479] One of the requirements of extinctive prescription is that the delay in the presentation of the claim, which prejudices the case of the defending party, must be 'unreasonable'.[480] The doctrine has primarily been developed in international law in the sphere of diplomatic protection or the nationality of claims. It has, at times, even been held that the doctrine does not apply in a claim between, or against, two equal sovereigns,[481] but it has now been recognized that the doctrine forms a 'general principle of international law'.[482] In state practice, however, prescription seems to be applied rather restrictively by international tribunals and courts.

In fact in one of the first and leading cases on extinctive prescription, i.e. the *Pious Fund of California* arbitration case[483], the Permanent Court of Arbitration refused to apply the latter

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[477] J.P. Grant & J.C. Baker (ed.), *Parry and Grant: Encyclopaedic Dictionary of International Law* (2004) 2nd ed., p. 397-8.
[478] See accompanying text n. 464 and n. 442.
[479] I. Brownlie, *Principles of Public International Law* (2003) 6th ed., p. 481.
[480] B.E. King, "Prescription of Claims in International Law" (1934) 15 *BYIL* 82 at 87 *et seq.*; see also the Courts' statement in the *Certain Phosphate Lands in Nauru* case [1992] I.C.J. Rep. 240 at 255 in which it stated that "it will be for the Court, in due time, to ensure that Nauru's delay in seizing it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law".
[481] In the *Alsop* Case (1911) it was stated that: "The principle of limitation of actions does not, in our opinion, operate as between states. It is based upon the theory [..] but as against, or between, sovereign states this rule does not apply.."; (1911) 5 *AJIL* 1079 at 1100.
[482] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 386.
[483] (1959) 9 *U.N.R.I.A.A.* 1; (1908) 2 *AJIL* 893.

doctrine on the ground that it belonged 'exclusively to the domain of civil law'.[484] Thus the contention of the US Government that Mexico could not, 'after a lapse of twenty-six years and *without* the discovery of any *new fact* affecting the sanctity of the former adjudication [i.e. decision of the Mixed Claims Commission of 1875] [..] be permitted to attack that adjudication as invalid'[485] was disallowed by the Tribunal. It has generally been understood that the latter case made 'clear that domestic rules and statutory limitations cannot simply be transposed into the field of international law'.[486] Moreover the case also illustrated that a claim after a substantial lapse of time can still be put forward, even if no 'new facts' have been discovered. Because international law does not subscribe a fixed time period for presenting a claim, the International Law Institute has recommended that such a claim be reviewed by the judge or arbitrator in the individual case.[487]

These cited principles were all reiterated more recently by the ICJ in the *Certain Phosphate Lands in Nauru* case[488] as the Court in that case stated:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[489]

Australia had argued, inter alia, that Nauru had been too late (almost twenty one years) in presenting its claim before the Court. The Court, however, reasoned that although Nauru had gained her independence back in 1968 at which time she was well aware that Australia opposed the rehabilitation of the phosphate lands, Nauru had nevertheless, during the course of time, taken the necessary 'steps' to dispute the matter. The Court observed in the latter case that Nauru's first official reply had been sent in 1983, but found that 'the question had on two occasions [earlier] been raised by the President of Nauru with the competent Australian authorities' and thus concluded, on the basis of the latter finding, that 'Nauru's Application was not rendered inadmissible by [the] passage of time'.[490]

Consequently it has been inferred by the author Higgins that the Court in the latter case seems to have interpreted the intention to dispute or the '*want of action*' as a 'determinative' factor, and found that the prejudice caused in its delay should be regarded as a 'management problem'

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[484](1908) 2 *AJIL* 893 at 901; see also K. Lamers, "Pious Fund Arbitration" (1997) 3 *EPIL* 1032 at 1033.
[485] Carlston citing the American agent Ralston (Italics added) in Carlston op. cit. n. 133 at 170-1.
[486] C.A. Fleischhauer, "Prescription" (1997) 3 *EPIL* 1105 at 1107.
[487] Ibid.
[488] [1992] I.C.J. Rep. 240
[489] Ibid. at 253-4.
[490] Ibid. at 254-5.

for the merits of the case.[491] In other words we can deduce from the findings of above that the existence of extinctive prescription should not be presumed lightly. Additionally the Court appears to interpret the presence of an intention or 'will of action' as sufficient grounds to prevent the doctrine from becoming applicable.

In the present dispute Venezuela has not merely made various statements to dispute the matter in the period starting from approximately 1956 till present, it has also by conduct and by various concluded agreements exhibited a clear and unquestionable intention to (in case of non compromise by the mediation efforts) eventually press its claim before a judicial organ.
As has been duly noted in legal literature the application of extinctive prescription can in fact be 'precluded' by 'asserting the claim through diplomatic action'.[492] Moreover it has been widely accepted that a claim of one state against another does not automatically need to be presented before a judicial organ but can in fact be submitted at a later date; this holds especially true if 'attempts at settlement' are involved.[493] The author Rosenne has, for example, stressed that the '*sole* function of a court' is *not* merely to 'decide disputes creating a *res judicata*', but that it is also one of courts' essential tasks to first give 'effect [to] reconciliation, before embarking on the more difficult process of *deciding* the dispute'.[494] As Jennings put it: 'the adjudicative process can serve, not only to resolve classical legal disputes, but it can also serve as an important tool of preventive diplomacy in more complex situations'.[495]
That a (possible long) process of conciliation, meditation or negotiation transpires before a claim is submitted before a court or a tribunal is an accepted practice and can be evidenced in e.g. the *Oil Platforms* case and the *Taba Award*.[496]

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[491] R. Higgins, "Time and the Law: International Perspectives on an Old Problem" (1997) 46 *ICLQ* 501 at 514.
[492] C.A. Fleischhauer, "Prescription" (1997) 3 *EPIL* 1105 at 1107.
[493] Higgins; ibid. at 513; Shaw op. cit. n. 188 at 951; Brownlie, in the context of acquisitive prescription, has even gone as far as to contend the view that if a state does not, after initial protest, take steps before the ICJ or the UN it is precluded from challenging the matter. He states that: "This view lacks solid foundations. If acquiescence is the crux of the matter (and it is believed that it is) one cannot dictate what its content is to be, with the consequences […. that] failure to resort to certain organs is penalized with the loss of territorial rights". I. Brownlie, *Principles of Public International Law* (2003) 6th ed., p. 149.
[494] S. Rosenne, "Some Thoughts on International Arbitration Today" (1993) 27 *Isr. L.R.* 447 at 455-6 (Italics in original).
[495] R.Y. Jennings, "Presentation" in C. Peck & R.S. Lee (ed.) *Increasing the Effectiveness of the International Court of Justice* (1997), p. 79 quoted by Shaw op. cit. n. 188 at 951.
[496] In the first case (*Oil Platforms* case) a fair amount of time passed before any claims were actually pressed before a court, the reason being that 'prolonged settlement talks' had been held between Iran and the US regarding two potential actions (one the shooting down of the Iranian airbus, and the other over the bombardment of certain oil platforms in the Gulf); R. Higgins, "Time and the Law: International Perspectives on an Old Problem" (1997) 46 *ICLQ* 501 at 513. In the second case (i.e. *Taba Award*) Israel and Egypt had by the terms of the *compromis* instructed the Tribunal of Arbitration to first 'explore the possibilities' of conciliation via the working of a semi neutral chamber before it was allowed to proceed on the merits of the case; S. Rosenne, "Some Thoughts on International Arbitration Today" (1993) 27 *Isr. L.R.* 447 at 456.

If we now compare the findings of above to the facts of the present dispute we can conclude that Venezuela has exhibited a clear and persistent intent to dispute (and resolve) the discord. Moreover Venezuela's persistency in the matter has been noted in legal literature.[497]

First of all Venezuela has on several occasions made consecutive statements expressing its lucid desire to challenge and reopen the case (e.g. the statement of the Venezuelan Chancellor at the British Caribbean Federation in 1956, the statement of Dr. Vera before the parliamentary delegation of the UK in 1960)[498].In addition Venezuela has also stressed her official claim at the international level (e.g. the multiple statements of the Venezuelan Government before the various bodies of the UN in 1962).[499] And last but not least she has concluded several agreements between herself and her counterpart(s) on the matter (the tri-partite arrangements in 1963-65, the Geneva Agreement of 1966, the Port-of-Spain Protocol of 1970).[500]

In fact from the mid 1950's onwards Venezuela and Guyana have been in a consistent process of mediation, conciliation, and negotiation. Unmistakably the Articles of the concluded Agreements (i.e. the Geneva Agreement of 1966, and Port-of-Spain Protocol of 1970 as cited above in Chapter I) reveal beyond any doubt that the purpose of both Agreements was to prevent any lapse of time, during the bilateral negotiations, to amount to a loss of either parties' legal rights or interests in the matter (compare Art. V of the Geneva Agreement, and Art. IV of the Port-of-Spain Protocol).[501] The latter two Articles have rightly been compared to Art IV (a) of the Antarctic Treaty,[502] which equally sets out to protect the legal *status quo* of its members.[503]

As has been indicated in Chapter I Venezuela's disinclination in 1982 to renew the 1970 Port-of-Spain Protocol in legal terms meant that Art. IV of the Geneva Agreement of 1966 was 'retroactively' put into effect and so the dispute was, at that previous date, officially brought before the proper international institutions (i.e. the procedure for the 'peaceful settlement of disputes' as contained in Art. 33 of the UN Charter). It can be inferred from Article 33 of the UN Charter that the submission of a dispute before the ICJ is to be preceded by the stages of negotiation, enquiry, mediation, and conciliation.[504]

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[497] As Simmonds noted in his speech on international arbitration: "the award [of the *British Guiana-Venezuela Boundary Arbitration* of 1899] has been widely challenged as null and void and the dispute is both unresolved and politically alive"; K.R. Simmonds, in "Symposium: International Arbitration" in his speech "International Arbitration Between States: The Future Prospects"; (1987-88) 14 *North. KY L. R.* 1 at 3.

[498] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 24.

[499] Ibid. at 25.

[500] See *supra* p. 28-31

[501] See text above

[502] Menon op. cit. n. 14 at 180; see also *supra* p. 29

[503] R. Wolfrumm & U.D. Klemm, "Antarctica" (1992) 1 *EPIL* 173 at 176; see also A. Berg, "Antarctica Cases (UK v. Argentina; UK v. Chile)"; ibid. at 183.

[504] Article 33 of the UN Charter reads the following:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation,

As has been noted in legal literature, both parties today still find their selves in the phase of mediation before the Special Envoy of the Secretary General.[505]

As a result no doctrine of extinctive prescription can be invoked against Venezuela.
First and foremost because no lashes in time can be imputed to Venezuela (after its discovery of these 'newly found facts' it has immediately given notice) and from a strict legal point of view no lashes in time have even transpired. As can be inferred from Dr. Cheng's study into the subject matter 'negligence' or 'laches' must be, as a precondition, imputable to the claimant state and reasons for its rebuttal are broad.[506]
Secondly prescription is blocked if due notice of a claim has been given.[507] As the Italian-Venezuela Mixed Claims Commission noted in the *Gentini* Case 'the presentation of a claim to the competent authority within proper time will interrupt the running of prescription'.[508] In the *Giacopini* Case the same Commission stated:

> In the present dispute, full notice having been given to the defendant, no danger of injustice exists, and [therefore] the rule of prescription fails. [509]

Thus we are left with the question, as was posed by Cheng, 'If a claim has been notified to the defendant, but has not been pressed for a long time, *will prescription again start to run*'? He reached the conclusion that:

> a claim [..] if it has been duly notified to the plaintiff, prescription will not run even though it is not continually pressed for some reason which is at least plausible. [510]

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conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

[505] E.g. see T.M. Franck, "The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture" (1995) 6 *EJIL* 360 at 370; see also *supra* p. 31

[506] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p.383, 381. Cheng is convinced that no 'negligence' can be inferred or no 'laches' are attributable to the claimant state if one of the followings reasons had occurred: "Incapacity, disability, want of legal agencies, prevention by war, well-founded fear, and the like constitute valid reasons. *Contra non valentem agrere nulla currit preascriptio*" Cheng, p. 384 [footnotes omitted].

[507] This is so because the rationale behind prescription is to prevent the other party's defense from being prejudiced by the delay in the presentation. "For if it had not previously been warned of the existence of the claim, it would probably not have accumulated and preserved the evidence necessary for its defense"; Cheng; ibid. at 380 [footnotes omitted].

[508] Cheng ibid. at 384.

[509] Ibid.

[510] Ibid. 385-6.

Hence it would seem justified to conclude that Venezuela's procedural right to put forward the claim of fraud has been preserved. Moreover as has just been demonstrated above this conclusion corresponds to the intentions that both parties have invested in their two concluded Agreements (which can also operate as a ground for excluding the working of extinctive prescription).[511]

As a final and obvious observation I would still like to point out that any assertion that Venezuela would be precluded from invoking fraud as a 'new fact' on the ground that such claim must be presented 'at the latest after 10 years'(see sub two of Art. 38 ILC Model Rules)[512] does not hold up. Such a contention flaws for the following two reasons.

First of all as stated the Geneva Agreement of 1966 clearly froze both parties' legal rights and subsequently this *status quo* was extended by the working of the Port-of-Spain Protocol until its lapse in 1982 when in legal terms Art. IV of the Geneva Agreement retroactively sprang into effect. Accordingly the claim should be interpreted as having being presented before the proper international institutions at the latest in 1966 at which date this legal right (i.e. invocation of a new fact) still existed. Thus in legal terms the claim is still brought within ten years after the full discovery of these new facts.

But secondly and more importantly, from a pure formalistic standpoint and irrespective of the status accorded by international law to the ILC's Model Rules, these rules were adopted officially only in 1958, and cannot therefore retroactively invalidate the Venezuelan claim before that time. It would also seem sound to assume that such 'strict' procedural requirements were not commonly accepted or regarded by the international community to be binding *before* the period of the late 1950's. One could even argue whether such conditions are generally accepted today; to recap the conclusion drawn from the famous *Pius Fund of California* arbitration case 'a statutory limitation cannot be simply transposed into the field of international law'.[513] It would seem to be more probable however to presume that because these 'new' requirements or rules were emerging in that period (i.e. the beginning of the1960's) that Venezuela chose expressly to preserve its rights in the concluded Agreements.

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[511] This conclusion can be inferred, according to Cheng, from the *The Macedonian Case* (1863); see Cheng ibid. at 378.
[512] Art. 38 (2) of the ILC Model rules reads the following:
(2) The application for revision must be made within six moths after the discovery of the new fact, and in any case within ten years of the rendering of the award.
[513] *Supra* p. 108

The Merit of the Contention

Fraud is an established ground of nullity, although fraud has sometimes been associated in the context of international law with the ground of an 'essential error' and the 'discovery of a new fact'.[514] Nevertheless the complaint of fraud has been recognized to entail a fundamental rule of international law, the violation of which will lead to nullity. Professor Sandifer, who has made an extensive study into the subject, has stated that:

> As a matter of principle, it seems clear that a party against whom an arbitral award has been rendered should not be required to comply with its terms if it is found to have been based upon false or fraudulent evidence..[515]

Carlston has noted on the subject that:

> It is clear that authority and practice sustain the conclusion that an award fraudulently procured is without obligatory force.[516]

The vice of fraud has also been widely accepted to constitute a ground for the rescinding of an arbitral decision in many 'municipal law systems'; e.g. the German and French systems. [517] Especially the American system has elaborated a broad scheme on the vice of fraud.[518]

In the international arena there have been three major cases in which an award was successfully attacked on the ground of fraud (and in two cases declared to be a nullity).[519] As previously discussed in Chapter II the *Sabotage* case between the US and Germany form a prime example of the workings on fraud. The American Agent in his attempts to revise the decision of the Mixed Claims Commission of 1930 rose as a third and final contention the allegation that the German Government had (based on some new found evidence) committed fraud. The two national Commissioners hereafter disagreed whether the request to reexamine the case could be upheld, so its Umpire Justice Roberts made the final decision, in which he stated that:

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[514]D.V. Sandifer, *Evidence Before International Tribunals* (1975) rev. ed., sec. 105 reprinted in Wetter op. cit. n. 189 at 295; see also *YB ILC* (1950) Vol. II, p. 177 at point 99; Carlston op. cit. n. 133 at 58.
[515] Sandifer ibid. at p.426 reprinted in Wetter op. cit. n. 189 at 293.
[516] Carlston op. cit. n. 133 at 58.
[517]Ibid. at 39-40.
[518] See G.C. Woodward, "Collateral Attack upon Judgments on the Ground of Fraud" (1916-17) 65 *Un. Pennsylv. L.R.* 103. In the American system a distinction is drawn between allegations of fraud. On the hand there are the cases in which the account of fraud is easily detectable or 'which shows on its face' and thus absolutely void; ibid. at 107. On the other hand there are the cases in which the 'record is regular on its face' and in which case the fraudulent act cannot set aside the judgment unless it was a case where fraud was alleged and which was never fully litigated, or perpetrated on the court; ibid. at 125.
[519] In both the *Sabotage* case and the *Gardiner* case the earlier decisions were later nullified by an independent judicial organ as opposed to the *Weil* and *La Abra* case in which the sums were repaid by the US State Department but in which case the previous decision was not 'officially' set aside.

> No tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to re-open and to revise a decision induced by fraud. If it may correct its own errors and mistakes, a fortiori it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.[520]

The Commission subsequently decided in 1936 to nullify its previous finding of 1932, in which it had ruled that the submission on fraud could not warrant a reexamination on the merits.[521] Likewise in the earlier discussed *Gardiner* case the New York Circuit Court ultimately found that Mr. Gardiner's claim, which had originally been allowed by the Mixed Claims Commission, was in fact procured by fraud (Mr. Gardiner had never owned any silver mine in Mexico).[522] An analogous case took place between Mexico and the US in the *Weil* and *La Abra* case, where initially favorable awards had been rendered by the Mixed Claims Commission, that later turned out were obtained by fraudulent conduct and thus the US State Department decided to refund the awarded money to the Mexican Government.[523]

Now that we have concluded that fraud constitutes a legitimate ground of nullity and that the right to claim fraud still subsists, we can now attempt to evaluate the assertion. As I have indicated at the beginning of this Chapter Venezuela has transmitted evidence that supports the impression that certain documents have been tempered with, but at the same time, I would like to stress that in order to substantiate the claim of fraud a proper retrial on the merits of the case would be necessary. Since an appropriate examination can only be preformed by a judicial organ in possession of the full documentation, I will briefly point out the following.

With regard to the falsification of the so-called Schomburgk Maps the contention appears to center on the question what influence these Maps might have had on the final decision of the Tribunal. The Articles of the ILC Model Rules as well as other corresponding Articles all stipulate that newly discovered facts have to constitute a 'decisive factor'.[524] Thus this leaves us with the question; what would have been the evidential nature of these Maps in the final outcome of the 1899 Award?

In general there does not appear to exist a rule in international law which precisely determines the significance of a map as evidence.[525] Rather the status of maps as evidential nature will

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[520] *YB ILC* (1950) Vol. II, p. 177 at point 99*a*.
[521] See *supra* p. 46-7
[522] See *supra* p. 44.
[523] Carlston op. cit. n. 133 at 58-61; D.V. Sandifer, *Evidence Before International Tribunals* (1975) rev. ed., sec. 106 reprinted in Wetter op. cit. n. 189 at 29-302.
[524] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 366.
[525] F. Münch, "Maps" (1997) 3 *EPIL* 287, 287.

much depend upon the facts of their production.[526] Thus the Court noted in the *Burkina Faso/Mali* case that 'maps are only intrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts'.[527]

That being said several maps have in fact been used as proof in various international proceedings; e.g. *Beagle Channel Arbitration*, *Minquiers and Ecrehos Case*, *Sovereignty over Certain Frontier Land* case, and the *Rann of Kutch Arbitration*.[528] The leading case on the use of maps as an evidential factor in deciding a dispute is off course the *Temple of Preah Vihear* case[529], which Thailand ultimately lost because she had made official use of a map showing the disputed Temple in Cambodian territory.

I believe that in the present dispute there are three reasons to assume that the Schomburgk Map(s) have indeed played an important role in the final outcome of the 1899 Paris Award. First of all in a dispute that is (partly) to be decided on the principle of *uti possidetis iuris*, maps in general tend to play a more significant role in the determination of the final outcome of an award given the simple fact that in such disputes maps help reconstruct the 'titles by discovery, occupation' etc..[530]

A second reason to assume that the Schomburgk Map(s) have played an important role, and one that is closely related to the first, is the evident fact that the Schomburgk Map(s) do not necessarily need to prove what Great Britain actually claimed at the time but rather what she did not claim. As Münch observes in his article boundaries that are drawn on an official map confirm and prove the intention of the sovereign in the sense that these maps establish as a fact the territories that the sovereign considers to *not* belong to her (i.e. territories lying outside the official sanctioned line).[531] It is especially from this point of view that the accurateness and authentication of the Schomburgk Map(s) appear to be of an 'evidential' and indeed *vital* nature.

Because we have to keep in mind that during the proceedings before the Paris Tribunal in 1898 both Venezuela and Great Britain, in their attempts to establish a superior title, relied on various colonial maps of their predecessors that often showed conflicting and self-serving borders. Thus, given the fact that both camps managed to produce and substantiate colonial maps that overlapped and conflicted with each others' 'formal' territorial claims, these latter

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[526] Shaw op. cit. n. 188 at 440.
[527] [1986] I.C.J. Rep. 554 at 582.
[528] K. Oellers-Frahm, "Beagle Channel Arbitration" (1992) 1 *EPIL* 363 at 365.
[529][1962] I.C.J. Rep. 6
[530] E.g. the King of Spain in deciding the dispute between Honduras and Nicaragua on the principle of *uti possidetis iuris* was impressed by the great conformity of maps indicating the exact most eastern point; F. Münch, "Maps" (1997) 3 *EPIL* 287 at 288.
[531] Münch ibid.

colonial maps appear to have been of mere informative nature.[532] Given the 'unreliable nature' of these 'colonial maps'[533] the Tribunal would likely have attached more importance to the later published Schomburgk Map(s), since these Map(s) could have illustrated acquiescence or recognition on the part of one the two litigant states them self. In fact the Schomburgk Map(s) provided an excellent picture of what Great Britain (after a period in time that the dispute over the territory began to crystallize (+-1840)) considered to be her legitimate claim. If these important Maps were at a later stage in the dispute altered or modified (and according to Venezuela 'aggrandized' in order to obtain newly discovered gold mines) the probative and decisive value of these (falsified) Maps would speak for themselves.

As a third reason to assume that the Schomburgk Maps would likely have been of an influential nature in the deciding of the dispute, I would like to point to the simple fact that this very impression has been given by the Paris Tribunal. The Tribunal's final Award merely stipulates a line that almost exactly corresponds to the line that was drawn by the Schomburgk Map (or at least the one presented before the Tribunal). Or as one British Counsel remarked after the final Award had been rendered.

> The Award practically endorses the Judgment of Sir Robert Schomburgk, whose line it follows except in a few particulars. [534]

In overall it would seem justified to assume that the Schomburgk Map played a 'decisive' factor in the rendering of the 1899 Award. In conclusion Venezuela's contention of fraud warrants, as minimum, a reexamination on the merits of the case.

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[532] As Justin Winsor, a geographer of the American Commission of 1895, said upon judging the numerous old maps "almost any view could find support of some kind" quoted by Rout op. cit. n. 44 at 42.
The latter conclusion seems also justified if one reads Mr. Macvane's review of the work of the American Commission that was established in 1895 by President Cleveland (see *supra* p. 22). That the ancient maps relied on in the arbitration were generally rather inaccurate and imprecise and more often than not conflicting can also be inferred from Mr. Macvane's review. He remarks that these early maps revealed severe inconsistencies; to give an impression: "There is a Baroma and a Barama and a Barima and a Barimani; all four neighboring streams. The name of the first is spelled in at least twenty-five different ways, and the rest have variations of their own. The second and the third are at the burning point of the boundary controversy. To add to this charming simplicity, the mapmakers frequently interchanged the name of the Barima with its neighbor the Amacura; and when a document represents the Barima as the boundary of Dutch territory it may be quite uncertain which river is intended." S.M. Macvane, "Report and Accompanying Papers of the Commission Appointed by the President of the United States "to Investigate and Report upon the True Divisional Line Between the Republic of Venezuela and British Guiana." (1898) 3 *Am. Hist. R.* 580 at 581.

[533] The historian Burr, member to the American Commission of 1895, speaks of "contradictory boundaries of the map-makers". G.L. Burr, "The Search for the Venezuela-Guiana Boundary" (1899) 3 *Am. Hist. R.* 470 at 475.

[534] B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 167.

E. CORRUPTION

It would be redundant to stress that Venezuela is still entitled to put forward her claim of corruption seeing as her contention regarding 'fraud' is not found to have been rendered inapplicable by the lapse of time. The latter conclusion, however, is purely based on the premise of a relative working of nullity. As I have previously illustrated the admission of such a concept in international law appears somewhat ambiguous[535] and in my eyes erroneous especially when it comes to the act of corruption. Nevertheless I will first, for reasons of totality, demonstrate that a claim of corruption can still stand in international law even from a relative standpoint on nullity.

Corruption as a Valid Ground of Nullity

Ever since the primitive stages of international law has the act of corruption been admitted as a ground of nullity. As can be recalled Pfufendorf's prime justification to reject Grotius' absolute thesis on *res judicata* was based on an instance or act of corruption. Pfufendorf was convinced that a 'decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us'. [536]

Since then numerous publicists on international law have given their interpretation of the vice; e.g. Nys speaks of an 'arbitre corrompu ou coupable de dol', Fauchille thinks of corruption as a 'déloyauté de l'arbitre', while Phillimore believes that the vice is the outcome of 'a sentence bearing upon its face glaring partiality'.[537] Hertz is even of the opinion that corruption should not only include venality but also every personal defect that deprives the arbitrator of the quality as a judge, Schätzel seems to hold a similar opinion.[538] Mani believes that the effect of corruption will ultimately lead to the impairment of 'the right of one of the parties to be heard'.[539] Lammasch, for one, is convinced that corruption must be proven and thinks that a corrupt arbitrator should be convicted, and Calvo, on the other hand, merely asserts that an

[535] *Supra* p. 87-8.
[536] Pufendorf, *De Jure Naturae et Gentium* (Oldfather trans. 1934) Vol. II, Chapter XIII, Sec. 4, p. 827 see Chapter I *supra* p. 38
[537] Nys, (1910) *Revue de Droit International et de Législation Comparée* 597; Fauchille (1926) 1 *Traité de Droit International Public* 552 both quoted by Reisman op. cit. n. 126 at 496-7 ; Phillimore (1857) 3 *Commentaries upon International Law* 5 quoted by Carlston op. cit. n. 133 at 55.
[538] Hertz, 'Essai sur le problème de la nullité' (1939, 3rd ser.) 20 *Revue de Droit International et de Législation Comparée* 492; Schätzel, 'Rechtskraft und Anfechtung von Entscheidungen Internationaler Gerichte' (1928) 6 *Frankfurter Abhandlungen zum Kriegverhütungsrecht* 18-55 quoted by Carlston, ibid. at 54, 56.
[539] V.S. Mani, *International Adjudication Procedural Aspects* (1980), p. 35.

arbitrator is in a state of incapacity when he has a concealed interest in the outcome of the dispute.[540]

In light of the statements of above it seems rather justified to quote Professor Reisman, who concluded on the subject matter that:

> With the exception of Grotius, the unanimous opinion of publicists is that corruption vitiates the award. [541]

In 'modern day'[542] state practice there has been but one apparent example of corruption; namely the earlier discussed *Caracas Claims* of the United Sates-Venezuela Claims Commission of 1866.[543] In this particular instance Venezuela advanced the claim, one year after the Mixed Claims Commission had rendered its final awards, that the Commission had been corrupted. The United Sates however initially denied the Venezuelan charge and confirmed the legality of the rendered awards.[544] But after several new complaints had arisen and after a second investigation had been initiated it was ultimately discovered that the United Sates Commissioner together with the American Minister to Venezuela had in fact partaken in an irregular procedure to nominate the arbitrator as well as displayed substantial interests in the outcomes of the awards. Thus a second Mixed Claims Commission was thereafter established which ruled that the partiality of the arbitrator had indeed rendered the previous awards 'null and void'[545]. The Commission accordingly declared that these awards were of no 'force or legal effect'.[546]

Though the act of corruption clearly constitutes a legitimate exception to the rule of finality we are now more concerned with the question; when or in what circumstances can a state make a 'valid' claim to corruption? Or if we formulate the problem a bit more accurately; what exactly amounts from a judicial standpoint to sufficient evidence to claim the act of corruption? Basically in legal doctrine two types of thresholds have been advanced. One the hand we find the criterion of *judex corruptus*, which is sometimes referred to as the rigid interpretation of the more commonly known *judex suspectus* norm. This norm requires that a claimant party has to produce sufficient evidence to 'permit the reviewing authority (or perhaps more universally a 'reasonable man') to deduce that the arbitrator was corrupted; or in other words [constitute]

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[540] Lammasch, *Die Rechtskraft Internationaler Schiedssprüche* (1913) p. 168; Calvo, 3 *Le Droit International* 485 (5th ed. 1896) quoted by Carlston; ibid. at 55.
[541] Reisman op. cit. n. 126 at 496; for a similar conclusion see Carlston op. cit. n. 133 at 55.
[542] In historical times there have been two apparent cases of proved corruption; one concerning the consul G. Manilius Volso in Roman times, and the other the conspiracy of Pope Leon X with Emperor Maximillian in the Middle Ages; see Reisman op. cit. n. 126 at 493, n. 63,64.
[543] (1898) 2 Moore, *International Arbitrations* 1658; see also *supra* p. 44.
[544] In 1873 the so-called Finality Act was passed that recognized the rendered awards to be 'valid, final, and conclusive'; Reisman op. cit. n. 126 at 494.
[545] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953) p. 358
[546] Carlston op. cit. n. 133 at 57

sufficient evidence to establish a *prima facie* case'.[547] A second threshold that has been advanced in legal doctrine is properly termed as the flexible variant of *judex suspectus*. It is based on the 'assumption that in the judicial process justice must "manifestly" be done, [i.e.] sufficient evidence must be adduced to allow a reasonable man to deduce that even if justice were done, it was not manifestly done'.[548]
Given the fact that virtually no state practice or any antecedents on this subject matter exit, it is hard to tell which of these two competing norms is more cogent; e.g. Professor Reisman holds that the more flexible norm of *judex suspectus* should be employed to validate a charge of corruption, while Professor Balasko thinks that the more rigid criterion of *judex suspectus* or *judex corruptus* should apply to a claim of corruption.[549] Dr. Mani, for one, even speaks of a seemingly lower standard according to which an arbitrator or a tribunal 'must be above suspicion'.[550]

In our case, though, it is patently obvious that Venezuela passes the threshold of the more flexible norm as well as the second and more rigid proposed criterion. The post humus account of Mallet-Prevost alone has by many been regarded as an 'accurate statement of the facts',[551] but the appended account of Lord Rusell afterwards further corroborates Mallet-Prevost's contention (from a British side) and so, according to some, appear to establish a fairly accurate picture of what took place behind the scenes in Paris.[552] At any rate the produced evidence, irrespective of the evaluation on the merits of it, seems more than adequate to warrant a 'prima facie' impression of corruption. As Dr. Cheng notes on the scope of prima facie evidence 'it does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth'.[553]

Consequently we can conclude from above that Venezuela's contention on corruption warrants (as a minimum) a reexamination or revision on the merits of the case. It should be stressed once more that the latter conclusion is solely based on the thesis that corruption constitutes a relative

[547] Reisman, op. cit. n. 126 at 505. (Italics added).
[548] Ibid.
[549] Balasko as cited by Nelson op. cit. n. 134 at 291; Reisman; ibid. at 506.
[550] V.S. Mani, *International Adjudication Procedural Aspects* (1980) p. 35.
[551] W.C. Dennis, "The Venezuela-British Guiana Boundary Arbitration of 1899" (1950) 44 *AJIL* 720 at 724; see also A. Nussbaum, "Frederic de Martens Representative Tsarist Writer on International Law" (1952) 22 *Nord. Tidsskr. Int. R.* 51 at 59.
[552] Wetter op. cit. n. 189 at 347.
[553] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 324 [footnotes omitted]. Although it should be said that Cheng believes that the latter principle remains 'rebuttalble by evidence to the contrary'. However Cheng also notes in this connection that 'where counter-proof can easily be produced' but is not timely produced or subsequently not produced at all, the presumption shifts in favor of 'prima facie' evidence because at the end of the day the maxim of *in dubio pro reo* should decide; Cheng; p. 324-6.

nullity, which in my mind does not correspond, for the reasons to be expounded hereunder, to the realities of the law on international adjudication.

The Special Status of Corruption

Although from a voidable standpoint the claim of corruption has a good prospectus of reopening an examination on the merits, the better and correct analysis is to conclude that a justified claim of corruption invalidates the award or judgment *ex tunc* and *in toto*. Such a conclusion can be inferred from the simple fact that the vice of corruption strikes at the very heart of international arbitration since it attacks the core values of the underlying system. To fully appreciate the supposition it is useful to consider the rationale behind the system of international adjudication in order to reflect upon the act of corruption within its rightful context.

The raison d'être of international arbitration is to offer two opposing states a means of settling their dispute amicably and judicially. Such an occasion arises in international law when two contending sovereigns are unable to settle their differences through 'normal' diplomatic means, and therefore chose in principle to agree to let a judicial organ decide on matters of grave national importance to them. By definition the two litigants place their trust into the hands of a tribunal, much like two contracting parties place their confidence in a municipal arbitrator, to weigh each contender's argument and to decide their dispute upon the prevailing or at least sound principles of law. In order to preserve the rights of both litigants statutory rules have been written down in a municipal law system, conversely in the international sphere 'fundamental procedural norms'[554] have been developed to safeguard the interest of its sovereign states. As Carlston has noted:

> A State, in submitting its dispute with another to the decision of an international tribunal, has certain fundamental rights which it may expect in full confidence will be respected. [..]
> By creating a tribunal and presenting their controversy to it for decision States do not renounce these rights as a consequence of the rule that a decision shall be final.[555]

Or as Morelli put it: there is a certain 'fundamental procedural norm [..] from which the decision draws its legal effect'.[556] It seems rather reasonable to assume that an international arbitration cannot stand if its proceedings have failed to respect the fundamental rules of

[554]V.S. Mani, *International Adjudication Procedural Aspects* (1980) p.19-21.
[555] Carlston op. cit. n. 133 at 36 [footnotes omitted].
[556]Morelli, "La Théorie générale du procès international" (1937) 61 *Recueil des Cours* 286 cited by Carlston op. cit. n. 133 at 37.

procedure. Obviously these rules or norms are seldom expressly written down in a *compromis*, but rather operate as 'a legal concept independent of particular rules of law applicable to it'.[557] The fundamental rules of procedure that apply to international arbitration are 'inherent in the judicial process' and are believed to be 'generally recognized in all procedures'. [558]

The justification behind such 'fundamental rules' is manifest for international law does not provide the adequate procedural safeguards of judicial review as is found in the domestic system. In fact an international arbitrator or tribunal is chosen or composed primarily (and certainly in the era before the world had ever seen a *permanent* court or tribunal) for the sole purpose of deciding one specific dispute. Hence international arbitration admits no safeguards as to review of the findings of a court of first instance but only offers a direct and absolute pronouncement. It is from this point of view why a system of international adjudication, which invariably renders international decisions with far reaching implications, needs to be conditioned and regulated by certain fundamental values. For it would seem to be illogical, in light of the procedural standards normally assigned to the legal interests of mere private parties, not to attribute sovereign states with at least a minimum of procedural safeguards.

The latter holding however does not automatically mean that every 'wrong' interpretation of an arbitrator entails the violation of a fundamental norm. Obviously a chosen arbitrator or composed tribunal that does not let both parties equally present its arguments will trigger a breach of the fundamental norm of *audi alteram partem* but whether this breach will amount to the entire or partial nullification of the proceedings will very much depend upon the circumstances of the case and the severity of the particular violation.[559] As Carlston describes:

> Not all failures to observe procedural stipulations contained in the compromis will lead to nullity of the award. The legal effect of such failure is not to be judged upon the purely abstract basis of whether it constitutes a departure from the terms of submission. The question is rather: *Does the departure constitute a deprivation of a fundamental right so as to cause international arbitration and the resulting award to lose its judicial character?*[560]

Carlston seems to have summed up the essence of the problem at hand when he 'hit the nail on the head' with this latter question; it is not the mere negligence of a procedural norm with which the institution of international arbitration is concerned but rather it needs to ascertain what is the general effect of the broken norm on the fundamental and 'judicial character' of the overall arbitral process.

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[557] Cheng op. cit. n. 553 at 258.
[558] Carlston op. cit. n. 133 at 38 [footnotes omitted].
[559] Cheng op. cit. n. 553 at 290 *et seq*.
[560] Carlston op. cit. n. 133 at 38-9 (Italics added).

With this in the back of our mind it seems rather reasonable to come to the conclusion that the act of corruption results into an absolutely void award. For an act of corruption clearly impairs the very elementary and deeply rooted norms of an 'impartial' and 'judicial' process as it deprives a party of an independent and fair decision reached by a process of legal analysis. As Mani already observed an international tribunal operates 'chiefly on two considerations: first, that it is a 'judicial' tribunal and, therefore, its *inherent responsibility* is to pronounce an *impartial* and *unbiased* judgment' and secondly that a tribunal's jurisdiction is solely based on a states' consent to it.[561] He therefore states that:

> Corruption and partiality are bound to affect the authority of the tribunal's decision. They may render the whole range of communicative process futile and result in a decision based on preconceived conclusions of the tribunal.[562]

Consequently the gravity of such an infringement can only result into one legal consequence, i.e. an 'absolute' nullity.

The conclusion reached above appears even more commendable if we weigh the matter against comparable schemes of arbitration. E.g. domestic arbitration schemes equally deem the vice of corruption to constitute such a grave and severe breach of a basic judicial trial that such a violation often invalidates the entire proceedings. Thus the 'exceptional status' of corruption in municipal law was perceived by Professor Baade, in his comparative study on nullity, when he concluded that:

> *Subject to* [certain] *exceptions* [..], both modern European and Anglo-American law observe the basic principle implicit in the doctrine of res judicata that a final judgment is valid and binding, no matter how erroneous as to its factual determinations or legal holdings or both.

These 'certain exceptions' enumerated by Baade were the following:

> Continental European law grants the extraordinary remedy [..] in certain limited cases where an otherwise final and valid judgment is tainted by defective intent, notably deceit and *corruption*. In a like manner, Anglo-American law grants equitable relief against valid judgments procured by [..] *corruption* or duress. [563]

[561] Mani op. cit. n. 554 at 20-1(Italics added).
[562] Ibid. at 35.
[563] Baade op. cit. n. 124 at 552.(Italics added).

Clearly corruption is considered to be one of the fundamental preconditions of an impartial and fair trial and therefore its violation is often penalized under the rules of municipal law by its most forceful remedy available.
In fact the latter finding for most part triggered Professor Lauterpacht in his exposition on nullity to reject an absolute thesis on *res judicata*. He reasoned that:

> An arbitral award in municipal law is final only so far as the appreciation of law and of facts underlying the judgment is concerned. It is not final when the formal requirements of rendering justice are being violated, for instance, when the judge has proved himself guilty of corruption or usurpation of powers.

He therefore reached the conclusion that:

> There is no reason to credit international arbitration with an infallibility or integrity in excess of that which we usually associate with arbitrators adjudging private cases. [564]

One can also find a 'special status' of corruption in the realm of international commercial arbitration. Professor Hobér, for example, in his comparison on the international commercial scheme notes that an international arbitrator, as a rule, has 'no allegiance to any state, or municipal law system' but must apply and abide to the rules of law as were chosen by its contracting parties. He does, however, assert that there exists an 'international public policy' that can occasionally prevail over the latter rule of party autonomy. According to Hobér such an exception to the rule would be contracts 'involving bribery and corruption' which will render contracts '*null and void* regardless of whether they [the contracts] are valid under the *lex contractus* chosen by the parties'.[565] Likewise in the interstate scheme of the World Trade Organization (WTO) corruption is considered to amount to one of the gravest breaches of the procedural norms of 'due process'.[566]

Therefore it would seem to follow logically that the act of corruption, which is normally penalized by the most forceful remedy available in the domestic as well as the interstate arbitration scheme, should equally be penalized in international arbitration by the most severe legal remedy known to public international law, i.e. an absolute nullity.

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[564] Lauterpacht op. cit. n. 146 at 119-20.
[565] K. Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (2001, Upsala) reviewed by the author Micheal Bogdan; (2002) 71 *Nord. Tidsskr. Int. R.* 199, 199 (Italics added). The author Bogdan does not, however, concur with the latter finding of Hobér but believes that an arbitrator, when confronted with a contract procured by corruption, should abstain from adjudging the matter.
[566] J.P. Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System" (1998-99) 14 *Am. U. Int. L. R.* 1173 at 1195-1203.

The latter submission sounds even more reasonable if we compare its rationale to the rules on treaty law. As can be recalled from our examination in Chapter II the scheme of the Vienna Convention on the Law of Treaties (VCLT) makes a distinction between breaches in a treaty which amount to an absolute nullity and violations which render an agreement merely voidable.[567] Thus treaties procured by way of coercion, use of force, and in violation of *jus cogens* (Art. 51-53) render a treaty void *ipso facto* as opposed to treaties completed on an error, fraud, or corruption (Art. 48-50) which will merely entail a relative nullity. The justification for making such a distinction is largely based on the severity of the violations involved.

Thus the commentary on VCLT draft articles explains that Art. 45 (which deals with a (possible) loss of a right to invoke a ground for invalidating a treaty)[568] does apply to the acts of corruption, fraud and error, but *not* to the articles on coercion, use of force, and *jus cogens*, because:

> The effects and the implications of coercion in international relations are of *such gravity* that the Commission felt that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the state which coerced it. [569]

We find a similar line of argument in the Commission's elucidation on the article of corruption. Thus when the article on corruption was introduced the Commission contemplated whether the effects of 'corruption' were not already dealt with in the article on 'coercion', since in both these cases one and the same representative had given his state's *consent* on the wrong pretexts.

> although the corruption of a representative may in some degree be analogous to his coercion by acts directed against him personally, the Commission considered that cases of threat or use of force against a representative are of *such particular gravity* as to make it desirable to treat the two grounds of invalidity in separate.[570]

Once again other voidable articles like 'error' are not equally regarded to upset the legal relations of two States in such a severe manner. So the Commission stated on error that 'treaty-making processes are such to reduce to a minimum the risk of errors on material points of substance' and therefore errors, in general, seem to affect 'the application of the treaty [rather]

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[567] *Supra* p. 58-9.
[568] (1969) 8 *ILM* 679 at 697.
[569] Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session, Monaco, January 3-28, 1966; (1967) 61 *AJIL* 248 at 393, point 5.
[570] Ibid. at 405, point 3 (Italics added).

than its validity'.[571] Clearly the seriousness of the latter violation is considered to be of less importance to the system of treaty law.

The latter finding should be weighed against the process and rationale behind the system of treaty law. The raison d'être of a treaty is to obtain a consensus of two or more equal sovereigns on a matter of mutual importance. Logically this final aim of compromise can only be achieved, among sovereign equals, via a process of negotiation. During this process the participating states are bent on finding a broad consensus based on mutual trust and confidence, since treaties ultimately regulate the legal relations between two or more states for some time to come and in *strictu senso* curtail a states' sovereign power. Eventually the end result of the negotiating process is expressed in the concluding words of a treaty.

If these final words turn out to have been procured by corrupting a representative or by presenting a false state of affairs to a particular state by the occurrence of an error or fraud, the participating state can still, upon discovery of this fact, make a choice whether it wants its 'given' consent to stand. Although the acts of corruption, fraud, and error have an overall negative impact on the working of a treaty, they do not entirely distort the *underlying* fundamental process and values of a treaty. For example a state that has accredited its representative with the power to look after its interests, and which, in an instance of corruption, discovers that its agent did not sign a treaty out of its best interests but rather out of the representative's *own* interests, such a state has possibly given a consent which might not necessarily correspond to its own will. However the state is free to retract its consent or free on the other hand to choose to validate the beneficial treaty. The same holds true *mutatis mutandis* with the acts of fraud or error; in essence these very acts boil down to the fact that a state, being under a justified impression of haven *freely* given its consent in conformity with a particular state of affairs, has in fact given its free consent under an incorrect or false preconception of the *real* facts.

The acts of coercion, use of force, and in violation of *jus cogens* on the other hand present an entirely different picture. These acts clearly impair the very underpinnings of the process and aim of the system of treaty law. States do not, out of free choosing and on an equal footing, participate in these processes of negotiation. They do not reach a mutual consensus on the subjects involved, they are instead 'forced' into signing documents that consequently purport to legally validate the interests of the coercing state(s). Obviously the system of treaty law and the entire process of negotiation and equality by which a treaty is reached is so gravely distorted by

[571] Ibid. at 401, point 1.

these acts that the Commission decided to accord these articles (i.e. coercion, use of force, and *jus cogens*) with a 'special status' and so remedy any such acts by the doctrine of absolute nullity.

This exact same principle would now also apply to the law of international arbitration. As has been set out above the entire aim of international arbitration is to settle a dispute between two equal sovereigns in a judicial and friendly manner. As a rule states have, after a failure to settle the dispute diplomatically, freely chosen to assign the discord to an 'impartial' arbitrator to be adjudged by him upon the principles of law. Generally the two states' final understanding is captured in a *compromis* which will often instruct the arbitrator which specific rules of law they wish him to take into account.

Thus if an arbitrator in his final reasoning did not correctly apply the aforementioned rules of law or if he had attributed to himself powers not invested in him by the parties; one can debate whether the outcome of his decision should be rendered void or voidable. Clearly in these instances the arbitrator made a wrong turn somewhere in his line of thought and consequently we can debate what legal consequence should automatically emanate from his final findings (As previously demonstrated some acts of 'exces de pouvoir' could be voidable while other accounts of 'exces de pouvoir' should definitely be invalidated from the very start). [572]

But when an act of corruption has transpired it impairs the very elementary and deep rooted norms of an 'impartial' and 'judicial' process as it deprives a party of a fair balanced and independent decision reached *by a process of legal analysis*. Any arbitral award or judgment is by definition the outcome of a legal reasoning and process of thought. It is reached by an arbitrator who equally balances each contender's different arguments and applies them to the principles of law. It is submitted that an arbitrator by 'error' or by 'fraud' or by 'excess of power' perhaps wrongly balanced the legal interests and facts involved, but by 'corruption' he never balanced them at all. Dating back to the Roman times (and even before)[573] justice and law were represented by the goddess Justitia (or Lady Justice); *blindfolded*, holding a *scale* and

[572] Clearly if an arbitrator attributes to himself a competence which overtly lies so far beyond the terms of submission or what any reasonable man would expect him to adjudicate upon than such a matter was, in legal terms, never put up for questioning and any pronouncement thereupon is void *ab initio*; e.g. the extravagant admission of the Paris Tribunal upon the rights of Brazil and Surinam. See *supra* p. 88.

[573] The origin of the Goddess of Justice goes back to antiquity. She was referred to as Ma'at by the ancient Egyptians and was often depicted carrying a sword with an ostrich feather in her hair. The term magistrate is derived from Ma'at because she assisted Osiris in the judgment of the dead by weighing their hearts. To the ancient Greeks she was known as Themis. It is believed that her ability to foresee the future enabled her to become one of the oracles at Delphi, which in turn led to her establishment as the goddess of divine justice. Source: University of Washington School of Law available at http://lib.law.washington.edu/ref/themis.html (last visited 28 June, 2007).

sword she personified the very essential values of any judicial trial or arbitration. Evidently the act of corruption strikes at the very heart of these values, as no scale or a blindfold would be needed.[574] This would also appear to be exactly the reason why corruption has been given such a 'special status' within all different forms of arbitration. When a supposedly 'impartial' arbitrator is corrupted his entire process of thought and reasoning is distorted. He does not reach his final findings on the sound principles of law but instead has made up his mind before hand. In other words the underlying process of legal analysis is, semantically put if you will, 'corrupted' from the very start and any finding reached thereafter should be invalidated *ab initio*.

That the act of corruption in fact constitutes the gravest violation of an international arbitral process is perhaps best demonstrated by the statement of the author Carlston, who wrote in his study on the subject that:

> An award rendered by a corrupt judge is not only void but also entirely lacking in legal meaning or authority as a precedent. It does not flow from a judge and has no judicial quality. It may not be resorted to as an expression or source of international law. It is, with certainty not approached by any other type of arbitral award which the parties are privileged to disregard, an absolute nullity. [575]

This opinion has existed for a long time and is supported by numerous authors (Wetter, Reisman, Cheng, Oppenheim, etc.)[576], who all believe that an act of corruption invalidates the entire proceedings and that any subsequent decisions rendered thereafter are without any legal effect.

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[574]As a set of weighing scales represents the instrument by which Lady Justice measures the strengths of each case's support and opposition. A blindfold on the other hand is worn to indicate that justice is (or should be) meted out objectively, without fear or favor, regardless of the identity, power, or weakness of the individuals brought before her.

[575] Carlston op. cit. n. 133 at 56-7.

[576] Compare the findings of Wetter op. cit. n. 189 at 347-50; Reisman op. cit. n. 126 at 508; Cheng op. cit. n. 553 at 358; Morelli, "La Théorie générale du procès international" (1937) 61 *Recueil des Cours* 327; Castberg, "L'excès de pouvoir dans la justice internationale" (1931) 35 *Recueil des Cours* 441,442; Balasko, *Causes de Nullité de la Sentence Arbitrale en Droit International Public* (1938) 119 all cited by Carlston op. cit. n. 133 at 56; Bluntschli, *Le Droit International Codifié* (1881), p. 289 cited by Nelson op. cit. n. 134 at 291, n. 143; Oppenheim, *International Law* (1928) 4th ed., Vol. 2, p. 28 cited by Carlston; ibid. at 56. Compare Pfufendorf's opinion *supra* p. 38. But see also Mérignhac, for example, who, in his treatise on international law, rejects a procedure that leaves to the party the discretion to resolve unilaterally an act of 'fraud' because this would be of 'doubtful wisdom'. He makes an exception however when it comes to an act of 'corruption' or bad faith on the part of the arbitrator which is discovered after the award has been rendered and which consequently, in his eyes, makes the previous award null and without effect; Mérignhac, *Traité Théorique et Practique de l'Arbitrage International* (1895), p. 318 translated and cited by D.V. Sandifer, *Evidence Before International Tribunals* (1975) rev. ed., sec. 104 reprinted in Wetter op. cit. n. 189 at 294.

The Merit of the Contention

Now we finally come to the crux of the case; if an act of corruption had in fact transpired in Paris than the entire outcome of the 1899 Award would be absolutely null and void from the start. But as indicated by Reisman the precise scope of the act of 'corruption' entails some semantic difficulties and, at times, might be differently interpreted by diverse bases of norm values.[577] So the following question arises; do the actions as depicted in the evidence presented by Venezuela amount to 'corruption'?

It is advanced here that the sequences of events in Paris culminated in an ultimately 'corrupted' Tribunal because of the following three presumptions;

-Firstly because the Umpire of the Tribunal, Dr. de Martens, did not base his final views on any principles of law but instead reached his conclusion on the grounds of expediency or diplomacy.
-Secondly because the subsequent rendered decision by the Paris Tribunal embodied a compromise 'pur sang'.
-Thirdly because the American counsel, without informing her client, 'acquiesced' in the compromise.

The reasons for assuming that these three suppositions of above constitute 'facts' that lead to the act of corruption will be expounded hereunder.

Firstly the credibility of these three events will be substantiated before we proceed on to examine the conduct itself. An account of Doctor de Martens' conduct has been given by both Mr. Mallet-Prevost and by Lord Chief Justice Russell and both men indicate that Mr. de Martens approached the British as well as the American Arbitrators separately and threatened each of them to assent to a particular border line of his choosing. Both man further explain that de Martens' conduct was entirely motivated by his wish to create a 'unanimous award' or as Lord Rusell put it; "it was his [de Martens'] duty above all else, to secure, if he could a unanimous award".[578] Thus according to both accounts Mr. de Martens did not base his final findings on any principles of law but rather on his zeal to create a unanimous award.

The accurateness of the first assumption seems so probable if we compare it to Mr. de Martens' closing remarks at the Paris Tribunal. In these remarks Mr. de Martens boosted on the legal

[577] Reisman op. cit. n. 126 at 496-8.
[578] *Supra* p. 70.

precedent of the 1899 Award as he also implicitly expounded *his* vision on international arbitration.

> Si vous vous rappelez les différences cas soumis à des Tribunaux d'Arbitrage jusqu'ici ; en 1873, à Genève dans l'affaire de l'Alabama ; en 1893, à Paris, dans l'affaire des Pêcheries de la mer de Behring, toujours vous verrez, les sentences rendues seulement à la majorité ; et vous verrez aussi qu'il y a toujours eu des dissidences parmi les arbitres.
>
> Ici nous avons au le bonheur d'avoir l'unanimité sur tous les articles de la sentence, sans aucune reserve.
>
> Permettez-moi de croire que, dans les conflits internationaux et dans la question de l'Arbitrage, cette unanimité est un immense bien : [..] c'est là un idéal vers que lequel il faut tendre ; pare que, s'il y a force légale pour les Puissances en litige dans une sentence arbitrale adoptée à la majorité, il y manque cette force morale qui est d'un bien autre prix encore. [579]

Indeed the latter statement fits excellently into the image described above. At the same time it also gives a good impression of Mr. de Martens propensity towards diplomacy instead of an adherence to the principles of law. In fact if we take a closer look at Mr. de Martens conduct over the years a similar picture emerges; especially when we look at his actions during the two Hague Peace Conferences of 1899 and 1907.

During these negotiations Mr. de Martens conduct was rather peculiar or perhaps telling of personality. So during the first discussions of the Hague Conference of 1899 Mr. de Martens vehemently opposed to the motion of Dr. Zorn, who proposed that an arbitral award 'must state the reasons upon which it is based'.[580] As Carlston noted back in 1946 (*before* any of these facts had come to light):

> Mr. de Martens opposed the motion upon what now seems the *rather remarkable ground* that it would impose upon arbitrators 'one of the most delicate obligations', and would perhaps embarrass them in their *task*. [581]

Clearly if one perceives the task of a judge to entail a 'purely' legal obligation, one would expect that the final views of the arbitrator or tribunal to culminate in a sound and convincing exposition on the law. Yet if one is convinced that a judge or arbitrator has the additional task

[579] Proceedings, British-Guiana-Venezuela Boundary Arbitration, Vol. II, p. 3239-3240, extracts from closing remarks of F. de Martens, President of the Tribunal quoted by Dennis op. cit. n. 171 at 510, n. 41.
[580] Dr. Zorn's motion related to draft article 22 which was subsequently adopted as article 52 of the final 1899 draft. The article would ultimately appear as article 79 of the 1907 Convention; Carlston op. cit. n. 133 at 52 [footnotes omitted].
[581] Ibid. at 52 (Italics added).

or option to negotiate and reach mutual understandings apart from the 'merits' of a case then one need not fully elaborate his final decision in the text of an award.
The latter behavior, however, was typical of de Martens during the entire proceedings at The Hague as he opposed virtually every motion which offered any possibly chance to review a rendered award. E.g. he most passionately attempted in 1907 (perhaps with an eye on the future) to suppress the adoption of Art. 55 of the 1899 act (on revision of an award *after the discovery of a 'new fact'*) but his motion was 'almost unanimously' rejected.[582] He made a similar effort to scrap the key article on revision (Art. 83 of the second Conference) but again he encountered forceful resistance.[583] The latter enterprise even earned him the nick name of 'an enemy of the claim of restitution'.[584]

But the most compelling substantiation of de Martens' motives on these matters is found in the article of Professor Nussbaum.[585] Mr. Nussbaum made a study into the background and character of F. de Martens in which he also touched upon the (at that date) recently published Mallet-Prevost Memorandum (at this time there was yet no knowledge of the later revealed personal letter of Lord Justice Russell). Mr. Nussbaum makes some of the following enlightening observations:

> Here we have a clear example [referring to the Venezuela- British Guiana arbitration] of de Martens "expediency" doctrine as applied to arbitration. The idea of international law, foundation of international arbitration, is cast aside; the characteristic lack of a reasoned opinion can fully be understood in the light of the memorandum [...]
>
> The whole institution of international arbitration would be damaged and impaired by a procedure such as that followed by de Martens. But, most characteristically, he seems to have been entirely unaware of this. [..]
>
> It appears that de Martens did not think of international law as something different from [..] diplomacy. [586]

Nussbaum is not the first to have made such a comment; Mr. de Martens Russian colleague, Mr. Stoykovich, once remarked that de Martens possessed a 'political conception of arbitration'. [587]

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[582] Reisman op. cit. n. 126 at 43 [footnotes omitted].
[583] Carlston; ibid. at 234-5 [footnotes omitted].
[584] Strupp op. cit. n. 143 at 684.
[585] A. Nussbaum, "Frederic de Martens Representative Tsarist Writer on International Law" (1952) 22 *Nord. Tidsskr. Int. R.* 51.
[586] Ibid. at 59-60.
[587] J.H. Ralston, *International Arbitration from Athens to Locarno* (1929), p. 91-2 cited by B.J. Kissler, *Venezuela-Guyana Boundary Dispute* (1971), p 168.

Accordingly we can conclude that the first supposition totally corresponds to de Martens character and background. As a result the second assumption that of Mallet-Prevosts' and Lord Russell's account of a forced 'compromise' seems now even more liable than ever, and has also been recognized as such.[588] Signs of 'compromise' were already noted in 1909 by General Foster in his speech at the Third Annual Meeting of the American Society of International Law.[589] Automatically the third and last presumption also seems to hold up beyond any doubt as it would have been impossible for Venezuela to have been aware of the reached 'compromise' for the American counsel by his own account admits to having kept the facts 'secret'.[590]

Seeing as all these three suppositions stand we must analyze whether it was legally permitted to reach a 'compromise' in the aforementioned manner. Or in other words; was there, beyond any doubt, the act of 'corruption'?

First of all it is submitted that Mr. de Martens described state of mind and chosen approach has amounted to an act of 'corruption'. Despite some semantic differences that may subsist on the notion of corruption, it has been generally accepted, when it comes to the valuation of a judicial parameter, to distinguish between on the one hand judicial behavior permitted to a *national* judge or arbitrator and on the other hand conduct permitted to a *neutral* judge or arbitrator.[591] A 'national' arbitrator or member is allowed, 'though not encouraged', to more or less 'champion the cause' of the party that elected them. Obviously a different and more rigid 'standard is required for a neutral member'.[592] Reisman, who has examined the semantic and cultural difficulties of the concept, found it hard to tell how one should exactly define the possible 'partiality' of a 'neutral' member. However as to the judicial standard of the *national* or chosen arbitrator or judge, Reisman is perfectly clear. He states that:

> The judicial arena, as an organized and highly formalized situation of interaction, is subject to certain cogentive expectations of arbitral behavior that do *not* tolerate *compromise*. These cogentive expectations represent the outer limits of the behavior permitted [to] the *national* arbitrator. Acts beyond this perimeter are *corrupt*. [593]

[588] Nussbaum; ibid. at 58-60; Wetter op. cit. n. 189 at 347-50; Dennis op. cit. n. 171 at 497, 510.
[589] (1909) 3 *American Society of International Law Proceedings* 25 at 26-8.
[590] Schoenrich op. cit. n. 85 at 527-8.
[591] Reisman op. cit. n. 126 at 498-53.
[592] Reisman ibid. at 498-50; see also J.P. Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System" (1998-99) 14 *Am.U. Int .L.R.* 1173 at 1198-1203.
[593] Reisman op. cit. n. 126 at 498 (Italics added).

Thus de Martens, being strictly required to abide to a higher judicial standard than of a 'national' judge, has made himself inexcusably guilty of corruption by his mere attempts alone (and subsequent success) of a 'compromise'. As Nussbaum noted:

> it is judicially inadmissible that in a divided tribunal the chairman first seeks an agreement with one group secretly, and thereafter presents an ultimatum to the other.[594]

There is strong moral support to reason that even if de Martens would not have succeeded in ultimately reaching his desired 'compromise' then still his acts of persuasion would have 'spoiled' the judicial process. As both Castberg and Balasko point out the entire integrity of a tribunal is a precondition for the validity of the award; thus they stress that an award is corrupted if 'one or more of the members of the unaffected majority might have decided otherwise had they retained their freedom of judgment intact'.[595]

As to the second fact (or supposition); is it from a juridical point of view permitted to 'compromise'?

At the outset it might be useful, if not necessary, to point out that there exists a fundamental difference between reaching a compromise or a final understanding on a dispute through a process of reasoning and persuasion based on legal arguments, and between a process of diplomatic negotiation based on political or cogent arguments. As Wetter sharply notes:

> It may of course be argued that that the process of adjusting views and conclusions tentatively formulated by the minds of decision-makers is the very basis of the work of any judicial or arbitral body. A refusal to change any notion once formed, however tentatively, would be the true mark of an undeveloped mind and indeed constitute a denial of what the entire judicial and arbitral process is about.[596]

To substitute a judicial examination or trial by a diplomatic compromise, however, has been deemed inadmissible. The general tenure on this subject[597] has probably never been better

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[594] Nussbaum op. cit. n. 585 at 59.

[595] Carlston op. cit. n. 133 at 56 citing Castberg, "L'excès de pouvoir dans la justice internationale" (1931) 35 *Recueil des Cours* 441,442 and Balasko, *Causes de Nullité de la Sentence Arbitrale en Droit International Public* (1938) 119.

[596] Wetter op. cit. n. 189 at 348.

[597] Carlston op. cit. n. 133 at 37. See also the comments of the American Commissioner in the *Chamizal Tract* Case, in which he submitted that the 'excess of power' and 'departure from the rules of the compromise' were so evidently present since the decision "breathes the spirit of *unconscious* but nevertheless *unauthorized* compromise rather than of judicial determination"; (1911) 5 *AJIL* 709 at 714 (Italics added). The same argument has been advanced with regard the earlier discussed *North Eastern Boundary Dispute*. As General Foster stated the Award of the King of The Netherlands 'was perfectly proper in diplomacy, but entirely out of place in a judicial submission'; (1909) 3 *American Society of International Law Proceedings* 25 at 28. See also Dennis who adheres to a bit 'milder' opinion on compromise. He states that: "Compromise reached through negotiations, diplomacy, mediation, is in the interests of peace and neighborship; compromise reached by a tribunal [..] which is under the obligation to judge according to the law and the facts and which may know little

captured then by the words of the American State Secretary Root. He instructed the US delegates to the Hague Conference of 1907 with the following words:

> There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation that would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. [598]

It might be thoughtful to keep in mind that the latter opinion relates to a more 'normal' communicative process of diplomatic compromise; let alone a compromise forced upon all sides by one single man, the umpire. On the other hand one might argue that is a fallacy to presume that political or expedient features do not influence the minds of the judges or arbitrators, and indeed a factor of the aforementioned kind cannot be entirely excluded in a judicial process. As Dennis has pointed out there have been other examples in international law of arbitrations in which the final decision of the judges reflected a compromise.[599] But to allow a certain margin of compromise is not the same thing as validating a final decision imposed upon all sides by the will and views of one man. However cogent or expedient the motives of de Martens might have been, they were, in all likelihood, not founded on any principles of law or reached through a process of judicial reasoning and compromise. Again if there were any firm principles of public international law, which are designed to regulate the behavior and international relations of States, and which had *actually* motivated or influenced the minds of all the judges than their final views could have been fortified by the text of the 1899 Award.

> for if there are sound legal reasons for laying a boundary one way or the other, it is not beyond the wit of man to explain them, and it is the rule rather than the exception to reach a result which does not accord with either of the parties' claims, extreme as they often are.

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or nothing to the considerations of sentiment and expediency which are properly considered in reaching a compromise, is, it is submitted, a stumbling-block in the pathway to peach through justice"; Dennis op. cit. n. 171 at 502. The legal scholar Eliot holds a similar opinion, he states that: "Now, a compromise may be an expedient temporary adjustment; but it is seldom satisfactory to either party, and it often leads within a moderate period to a renewal of strife.."; Address by President Eliot, "Defects of Arbitration as a Means of Settling International Disputes" 73 Advocate of Peace 57, March, 1911 quoted by Denis; ibid. at 495-6, n. 5.

[598] Instructions to the American Delegates to the Hague Conference, May 31, 1907; 190 *Foreign Relations of the United Sates*, pt. 2, at 1128, 1135 quoted by W.M. Reisman, "Has the International Court Exceeded its Jurisdiction?" (1986) 80 *AJIL* 128 at 134.

[599] W.C. Dennis, "Compromise – The Great Defect of Arbitration" (1911) 11 *Colum.L.R.* 493 *et seq*.

> The distinction lies in the process of reasoning by which the result is arrived at, whether it be avowed or secret. [600]

As to the last and third act that transpired; the subsequent 'acquiescence' into a 'compromise' is also inadmissible. The American counsel had been appointed to represent Venezuela's legal interests, and in this case Venezuela's (vital) sovereign rights, yet they ultimately (despite the honest intentions displayed in their fear for a possibly 'worse' judgment) assented to the *deal*. Thus Venezuela's representation too had been 'corrupted' as it ultimately chose to play along in the 'deal'; it goes without saying that any such an important issue should have been submitted to the Venezuelan Government. In my mind it appears that the 'sacrifice' of the American Counsel in obtaining the strategically important Orinoco mouth amounts to a severe impairment of Venezuela's inherent sovereign rights or to quote Mani:

> a manifestly detrimental decision by a corrupted tribunal may even be reckoned as being tantamount to a serious affront to the credibility and sovereignty of a State. [601]

In overall we should conclude that all three different accounts or acts that transpired in Paris point to the act of corruption. *A fortiori* all three acts put together result in a strong presumption of an corrupted Award and thus support the supposition that the 1899 Paris Award is, and has been, an *absolut*e nullity from the very start.

[600] Wetter op. cit. n. 189 at 349.
[601] Mani op. cit. n. 554 at 35.

CONCLUDING REMARKS

Summary

The inquiry of the present thesis has indicated that the Venezuelan Government was fully justified to question the legal validity of the 1899 Award. In fact it has been argued that the Paris Award of 1899 is a nullity in both fact and law. This finding has been based on the two different concepts of nullity, i.e. absolute and relative nullity.

In my exposition on the subject it has been advanced that, out of Venezuela's five different grounds of nullity, her first contention (i.e. the 'coercion' to the 1897 Washington Treaty) has no legal standing. Even if a judicial organ were to hold that the rule on 'coercion' was in fact a rule of positive international law at the time then the entitlement to claim the latter right must still be deemed to have been 'waived' by the Venezuelan Government. As to Venezuela's four other accounts of nullity (i.e. 'lack of reasons', 'excess of power', 'fraud', and 'corruption') the overall conclusion can be drawn that, regardless of which of the two different concepts of nullity is employed, the claim of the Venezuelan Government has a good merit.

Although I have critically analyzed the concept of relative nullity and have advanced that the concept should *only* be applied in international law, as a figure of speech, 'relatively', the present thesis has nevertheless not failed to examine the Venezuelan claim from the former point of view.

Consequently if one chooses to unconditionally adopt a relative standpoint on nullity one should deduce that the two accounts of a 'lack of reasons' and an 'excess of power' may be deemed to have been acquiesced in by the Venezuelan Government but that the right to the claims of 'fraud' and 'corruption' has clearly been preserved by Venezuela. Accordingly the latter two contentions warrant, as a minimum, a reexamination on its merits by a proper judicial organ.

Yet if one categorically adheres to an absolute view on nullity one ought to conclude that the 'excess of power', and 'corruption', and probably the 'lack of reasons', [602] amount to an invalidation of the Paris Award *ex tunc* and *in toto*.

The authors' own opinion has also been put forward, in which it has been argued on a comparative basis that the ground or act of 'corruption' constitutes such a serious breach of the fundamental values of an arbitral process that the vice amounts to the 'special group' of legal acts that render any subsequent result void *ab initio*.

[602] Whereas the 'excess of power' and 'corruption' have *absolutely* been accepted to constitute grounds of nullity, the vice of an 'lack of reasons' has sometimes been argued to reflect a rule of positive international law of a more 'recent' date. Thus whether the 'lack of reasons' (which undoubtedly forms one of the elementary rules of international arbitration today) was commonly accepted in 1899 could be debated, although the latter rule had been adopted, in the context of positive law, in 1899 in the final act of the fist Hague Peace Conference; see also accompanying text *supra* n. 358.

Thus, overall, the better and correct view is to conclude that the Paris Award of 1899 is, and has been, an absolute nullity from the very start or one can deduce as a minimum that the two accounts of 'fraud' and 'corruption' merit a proper judicial reexamination.

Epilogue

In my mind any judicial organ requested to adjudge upon the validity of the latter Award *should* decide that it was an absolute nullity. I believe that the international arbitration of the British Guyana-Venezuela Boundary Dispute, which reflected one of the most prestigious arbitrations of its time and which decided upon the vital and sovereign interests of two nations over a disputed area of the size of somewhat more than that of the State of New York and somewhat less than that of England, should not be allowed to stand in international law as it was conducted by the ad hoc Tribunal in Paris. It does not take a legal expert to conclude that the final outcome of the Tribunal was tainted by an impure procedure of 'coercion' and 'corruption' behind the scenes. Whether the result of the final Award itself was unjust *per se* is an entirely different matter and is hard to tell. Certainly both sides are believed to have made rather extreme claims to territory but what would have been a fair line truly reflecting the strength of each contenders' rights? Such a question, however fascinating from an academic point of view, warrants an entirely different study and is unlikely to be possible or even opportune today. Nevertheless, I will address this point at the end of my conclusion.
I first wish to state the reasons why I believe that the final Award made in Paris should indeed be declared to be an *absolute* nullity.

First of all, I am convinced that there are cognate and sound legal reasons to come to such a conclusion. The *equity* of the case demands it. As I have discussed in Chapter III even if we give considerable weight to Venezuela's subsequent conduct and demand that such a prolonged period of silence (nearly 50 years) must 'in all fairness' amount to a loss of right-[603] a conclusion that can be defended on good grounds-[604] then equally so we must not overlook the act of corruption, which has a strong legal truth in it and which in turn must now also be deemed 'in all fairness' to amount to the nullification of the Award.
After all in any legal decision one should, in the words of Professor Jennings, 'do justice to the weight and persuasiveness of the argument on one side and on the other'[605] or one has to 'mettre de l'eau dans son vin'. One cannot, on the one hand, set aside the flagrant vice of 'excess of power' (i.e. the 'prime

[603] I.e. the loss of a right to claim the two grounds of 'excess of power' and 'lack of reasons'; see *supra* p..
[604] It must be stated, perhaps superfluously, that one can only arrive at the latter conclusion based on the 'relative' perception of nullity, which I myself do not accept when it comes to every single account or ground of nullity; see *supra* p. 87-8 and accompanying text n. 572.
[605] R.Y. Jennings in *International Disputes: The Legal Aspects* (1972), p. 324 quoted by Wetter op. cit. n. 189 at 348.

task' of an assessment of the 1814 boundary) due to the *strict* formal requirements of acquiescence, and, at the same time, by-step the *strict* requirement of an impartial and unbiased tribunal and so validate a final decision emanating out of an act of corruption. I mean to say that 'something has got to give'.

Let there be no doubt as to the act of corruption. When evaluating the entire equity of the case one should not loose track of the bigger picture. To borrow the colorful figures of speech of Mr. Lauterpacht;[606] each of the different grounds of nullity, when assessed separately to the rules of international law, appear to warrant a sound conclusion, or at least seem to be dictated by the necessities of the system of international law. But when all the different items of nullity are taken 'together' they sketch a picture of a tribunal that after a lengthy series of proceedings (printed in no more than eleven volumes and lasting nearly half a year) reached a final decision between a Wednesday afternoon and the following Monday night.[607] Thus all the separate pieces of the puzzle appear to fall into their place; the 'excess of power', the 'lack of reasons' etc. It explains why there were no reasons given for the final outcome of the award, why there was no assessment of an 1814 boundary which would have required an immense historical legal deduction, discussion on its merits and so on and so forth.

Besides, if absolute nullity (which is normally used in any system of law to remedy the gravest instances of injustice) is accepted in the domain of international law[608] then when would it be more appropriate to employ the concept than concerning the despicable act of corruption?

Secondly there are a mixture of political, moral, and legal arguments to equally warrant the conclusion of an absolutely void Award. Fusions of legal, political, and moral arguments were bound to turn up in a dispute of the political magnitude of that of the Venezuela -Guyana Boundary Dispute. The link between the different fields of study is also inevitable for law is seen as *the* instrument to regulate the behavior or the interactions of states. States actions are driven by their political motives which in turn produce the interactions of the several states on the international scene. The very parameters of the international scene are dictated by the moral perceptions of man, which in turn are codified in law, so the synthesis of such an argument was bound to turn up sooner or later.

Thus the main contention put forward by Guyana to reject the Venezuelan claim is that, even if the Memorandum of Mallet-Prevost were accurate, there are so many borders throughout the globe today that were fixed 'through conquest, diplomatic threat, or political intrigue' that it would be very

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[606] Lauterpacht stated, when he compared the three leading rules in international adjudication (i.e. the rule of *la compétence de la compétence*, the 'excess of power', and the absence of competent supervisory machinery) that: "Each of these rules, when taken by itself, appears to be sound, or at least dictated by the necessities inherent in the shortcomings of international judicial organization. When taken together, they may prove a fruitful source of conflict and of discredit for the whole institution of international arbitration"; Lauterpacht op. cit. n. 146 at 118.

[607] Wetter op. cit. n. 189 at 344. Wetter advances the exact same conclusion; Wetter ibid. at 342-50.

[608] There appears to be adequate legal support for 'absolute' nullity; see *supra* p. 59-63, 82-3.

dangerous to set a legal precedent and alter the finality of a boundary.[609] There appears to be a strong legal truth in the latter argument. Indeed many nations and men fear that such an admission might, in legal terms so to speak, open 'Pandora's box' and give way to many dissatisfied states to open up or reopen old (or 'settled') boundary disputes with their neighbors.

However cogent and tempting the latter argument might sound, it cannot be applied in the present case or subtract from the force of the previous conclusion. Apart from the point that there exists sound legal reasoning to assume that the principle of the finality of boundaries has a maxim and is not, in all instances, absolute[610] the 'actual' argument itself needs to be placed within its proper context. It is true that in the past many borderlines were drawn after conquest or that various (peace) treaties were forced upon weaker states by their adversaries but these legal precedents are *specifically* governed by the intertemporal rules on 'coercion' and the 'use of force'. In this particular dispute the entire outset of the US intercession had been to ensure and obtain that a judicial decision on the matter would be reached. Thus the particular outcome of the 'fixed' borderline represents a judicial arbitral trial in all its essentials. Consequently we are not dealing with an 'unfair' border attained by 'coercion' but with a border line of an arbitral Award that, as it turned out, was 'corrupted'. In all honesty, how many other nations can adduce evident and reliable 'inside information' substantiated by numerous sources that the international tribunal that had rendered a final award on its borders had in fact been corrupted? To return to the prime contention of the Guyanese argument, any judicial organ invalidating the 1899 Award would *not* be setting any 'legal precedent' but would do justice to the 'unique' character of the case and make a valuable attribution to the case law on corruption.

Moreover the 'moral' force of the Guyanese argument fails. As has been indicated above the contention concentrates on the unfair and 'coerced' borders or conquests of land that have occurred in the last century and which cannot, for obvious reasons of stability, be simply set aside today. True 'coercion' and 'conquest' are deemed totally inadmissible today and are even seen as a violation of *jus cogens*, but the latter rules were an accepted (or inevitable) episode in international law and relations in the past. As such the rules must stand. *A fortiori* this is exactly the reason (apart from a procedural 'waiver') to disallow Venezuela's contention on the 'coercion to the 1897 Washington Treaty'. Surely the act of corruption is equally deemed to be totally unacceptable today, but was the latter act perhaps an 'accepted practice of states' that Guyana would have a judicial organ rely upon such a rule to disallow the Venezuelan claim?
Quite obviously this does not appear to be the case. In fact during the negotiations between the American Secretary of State with his British counterpart on the conclusion of the 1897

[609] Rout op. cit. n. 44 at 36-7.
[610] K.H. Kaikobad, "Some observations on the Doctrine of Continuity and Finality of Boundaries" (1983) 32 *BYIL* 119. E.g. Kaikobad asserts that: "It may emphasized that the doctrine of continuity of boundaries does not imply that in principle an illegal or invalid frontier must be perpetuated"; ibid. at 121.

compromise Treaty of Washington there were similar discussions held on a proposal for a 'permanent treaty of general arbitration' known as the Olney-Pauncefote Treaty. Thus during these *concurrently* held negotiations the British Lord Salisbury was greatly opposed to such an idea. In his diplomatic correspondence with the American State Secretary Olney he argued on the following grounds why Great Britain could not accede to such an enterprise.

> By whatever plan the tribunal is selected, at the end of it must be that issues in which the litigant states are the most deeply interested will be decided by the votes of one man, and that man a foreigner. He has no jury to find his facts; he has no court of appeal to correct his laws; and he is surely to be credited, justly or not, with a leaning to one litigant or other. Nations cannot afford to run such a risk in deciding controversies by which their national position may be affected. [611]

It seems beyond any doubt that no nation (especially at that time) would have accepted a final decision by a tribunal that was 'corrupted' by one man (and that man a 'foreign' umpire).
There is no doubt in my mind that if Great Britain had found out that an important award on her borders had been tainted by 'corruption' she would have demanded a revision and ultimately an invalidation of the award. As the US Government pointed out in the *Pious Fund Arbitrat*ion case of 1902 [612] Mexico could not shift its attitude towards a situation as the matter had afterwards turned out to be in her disadvantage.[613]
A similar principle would apply to the 1899 Award, if Great Britain (and Guyana as its successor) was unwilling to accept a 'corrupted' and unfair award beforehand it must now also be willing to accept the *same* argument afterwards. Once more *if* it had been Great Britain that had been faced (with a less than favorable) award tainted by an act of corruption it would equally have desired to exercise its sovereign right and set aside the award. For what holds good for Great Britain must hold good for Venezuela.
Moreover the stability of the international legal system, which has dictated as a necessity the 'security' of its boundaries, should not be forced to protect a flagrant act of corruption.

Finally I want to examine the problem 'outside the box' and draw conclusions on the dispute from a more political or practical point of view. Before doing so I wish to emphasize a final legal point. As stated at the outset of my conclusion the matter of the validity of the Award stands as a separate issue from any of the merits of the case. Admittedly an examination of the two parties' legal title to the territory of the Essequibo region might not be opportune today or even viable for that matter. The current border has been in use for a very long time (and although the area is certainly not the most

[611] Salisbury to Pauncefote, May 18, 1896, *Foreign Relations, 1896*, p. 231 quoted by M. Blakeney, "The Olney-Pauncefote Treaty of 1897 – The Failure of Anglo-American General Arbitration" (1979) 8 *Anglo-Am. L. R*. 175 at 183.
[612](1959) 9 *U.N.R.I.A.A.* 1; (1908) 2 *AJIL* 893.
[613] For details on the case see *supra* p. 73

populated region in the world)[614] it is submitted that it would be very hard if not impossible to make any changes on the ground. The unlikely possibility of such a request was already noted in the *Northern Cameroon Case*[615] by the plaintiff himself (i.e. the Republic of Cameroon). When the Republic of Cameroon complained of the alleged violations (namely the violations of the Trusteeship Agreement) it observed that the effects of the aforementioned violations were 'consummated' and the Republic admitted therefore that it could not properly ask the Court 'for a *resitutio in integrum* having the effect of non-occurrence'.[616]
So it might be thoughtful to keep in mind that a rightful invalidation of the 1899 Award does not seem to automatically imply that the existent boundaries should consequentially be thrown open so to speak.

Indeed, sidestepping the legal rules for a moment and approaching the matter from a more practical angle I am forced to ask myself the question whether the invalidation of the rendered Paris Award would have an overall positive effect on the dispute or actually help both parties in their striving for a solution. I think that an invalidation of the 1899 Award can have or even will have a positive impact on the dispute.

It is submitted that the biggest stumbling block on a path to constructive cooperation in the Essequibo region has been the unresolved nature of the 1899 Paris Award.
Clearly the Venezuelan reluctance to admit any foreign capital or issuances of economic licenses in the region is its fear of sacrificing 'historic' rights. The strict adherence to these 'historic' rights in turn has been largely fueled by Venezuelan frustration over the 1899 Award. Indeed the statement of the Venezuelan agent before the Tribunal of Arbitration at The Hague in 1903 would adequately sum up the attitude of most Venezuelans on the matter as he stated that 'the memory of it [i.e. 1899 Award] would be embittered with a sense of injustice".[617] As a matter of fact in almost all discussions on the subject in Venezuela the historical picture is sketched of a weak, civil-torn Venezuela being despoiled of her belongings by the expansionist policy of its imperial neighbor. It is submitted that Venezuela's battle is with 'imperial' Great Britain and its feeling of disappointment over the subsequent judicial validation of the 'expansion policy' of the latter. In fact these past events form the origins of the anti 'imperialist' movement still present in some elements of the Chavez administration today. A national sentiment of grave prejudice and unfairness (as the matter is, and has been, one of the rare occasions in Venezuelan politics upon which total unanimity exists) can only be reconciled by a judicial pronouncement on its injustice. In other words I think that the 'Achilles' heel' of the current boundary dispute can be removed by taking away the 'heel' itself, i.e. the perpetuation of an unfair borderline

[614] See *supra* p. 11
[615] Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, [1963] I.C.J. Rep. 15.
[616] Ibid. at 31.
[617] Ministerio de Venezuela, *Report on the Guyana Boundary Question* (1967), p. 22.

imposed by an imperial and greedy Superpower. In this way Venezuela can reconcile with the past and turn its head to the future. Truth be told many Venezuelans feel and would feel uncomfortable of the idea of taking territory from a weak and underdeveloped neighboring state (and taking up a role of the big bully of a small state).[618] Few Venezuelans even turn hot or cold over the region itself or are actually interested in the area but when the history of the tracing of the border is discussed many normal citizens passionately disavow the 'imperial' Award.[619]

Thus in my view the best and wisest approach[620] would be to invalidate the Paris Award as a 'gesture', if you will, and impel or force the two parties by legal means to come to a final understanding in which the sovereignty of the territory is ultimately held by Guyana *but* a vote in the matter is retained by Venezuela in the form of joint economic investments or projects. As a matter of fact the Venezuelan Government has intimated on several occasions its wish and desire to mutually explore the area and to incorporate the region into a broader scheme of industrial development.[621] However in the past both parties proved unable to reach any satisfactory understanding on the matter (logically either party was far too scared to grant too big of a concession in the matter as such could be interpreted as 'waiver' of its legal rights).[622] But now Guyana, by far the poorest country in the region, has much to gain from such cooperation as in the past it has unsuccessfully tried to explore and develop the mineral rich potential of the Essequibo region. Venezuela on the other hand has the investment capital which Guyana lacks; it also has the know-how (its successful exploration of its 'own' strip of the Essequibo jungle). Additionally Venezuela would be guaranteed that no foreign, self-minded private companies would pollute the area and leave Venezuela (due to the geography of the rivers) with the dump as has happened in the past.[623] Venezuela seems to be well aware that actual reversal of land is next to impossible but realizes that it is in its best interest to cooperate with its neighbor since both share an economic interest in a region which is inextricably bound by its geographical features. Besides, the Venezuelan side of the Essequibo region already forms one of Venezuela's most important industrial areas. After all any healthy economy is built on strong economic ties with its neighbors. In fact the majority of trade is usually the trade between neighbors, so the full economic potential of both countries the region, which now still forms a gap both in

[618] Rout op. cit. n. 44
[619] Centre for International Development and Conflict Management, University of Maryland, J. Davies, "Guyana-Venezuela Border Conflict" (Preliminary concept paper 2002), p. 9
[620] I would like to stress that there is yet another second option to the dispute. That is, after an invalidation of the 1899 Award, to let the principle of self determination in the Essequibo region prevail. This way the indigenous people of the area (who constitute by far the majority of the inhabitants of the region see *supra* p. 11) get the opportunity to decide upon their own future.
[621] E.g. in 1998 Venezuela made an effort to seek a solution to the controversy by proposing mutual mining and logging projects in the region but this was rejected by Guyana mainly out of fear of giving in to Venezuela's historic claim; ibid at 11. Similar efforts by Venezuela to come to a joint development of the area were proposed in the 1960's; ibid. at 7 n. 9. Likewise in the 1990's Venezuela made several proposals to sign a treaty on the protection of the environment of the area but again due to Guyanese objection failed; ibid. at 8.
[622] Ibid. at 10
[623] Ibid. at 9.

'economic' and 'political' terms, should be opened up by the aforementioned approach. The easing of the pressure on the legal/historical aspects of the case might open up the economic/political aspects of the case. Not only would the proposed solution command itself from a standpoint of international law as it would restore some of the lost confidence in the institution of arbitration[624] it would also resound to the benefit and credit of Guyanese and Venezuelans alike. That economic cooperation is the only viable solution out of the present impasse would speak for itself since it has been held to be the classical truth that:

> The welfare of the people is the ultimate law.
> (Salus Populi Suprema Est Lex)
>
> Cicero (106 BC - 43 BC)

[624] As Dr. Wetter points out, in his conclusion on the Venezuela Guyana Boundary Dispute, Latin America has been 'a white spot on the maps' of countries adhering to modern principles of conventions of arbitration. The 'negative attitude to arbitration' are believed to have been mostly brought about by unfair instances of arbitration in Latin America in the past much like the present arbitration; Wetter op. cit. n. 189 at 351.

APPENDIX

THE ARBITRAL AWARD OF 1899

Boundary between the Colony of British Guiana and the United States of Venezuela.

AWARD OF THE TRIBUNAL UNDER ARTICLE I OF THE TREATY OF ARBITRATION SIGNED AT WASHINGTON ON THE 2ND FEBRUARY, 1897 BETWEEN GREAT BRITAIN AND THE UNITED STATES OF VENEZUELA, DATED THE 3RD OCTOBER, 1899.

Whereas, on the 2nd day of February, 1897, a Treaty of Arbitration was concluded between Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland and the United States of Venezuela in the terms following: --

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of Venezuela, being desirous to provide for an amicable settlement of the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Venezuela, having resolved to submit to arbitration the question involved, and to the end of concluding a Treaty for that purpose, have appointed as their respective Plenipotentiaries:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Sir Julian Pauncefote, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Honourable Order of Bath, and of the Most Distinguished Order of St. Michaeland St. George, and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States:

And the President of the United States of Venezuela, Senor Jose Andrade, Envoy Extraordinary and Minister Plenipotentiary of Venezuela to the United States of America:

Who having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following Articles: --

[……]

AND WHEREAS the said Treaty was duly ratified, and the ratifications were duly exchanged in Washington on the 14th day of June, 1897, in conformity with the said Treaty;

AND WHEREAS since the date of the said Treaty, and before the arbitration thereby contemplated had been entered upon, the said Right Honourable Baron Herschell departed this life;

AND WHEREAS the Right Honourable Charles Baron Russell, of Killowen, Lord Chief Justice of England, Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George, has, conformably to the terms of the said Treaty, been duly nominated by the members of Her Majesty's Privy Council to act under the said Treaty in the place and stead of the late Baron Herschell;

AND WHEREAS the said four Arbitrators, namely: the said Right Honourable Lord Russell of Killowen, the Right Honourable Sir Richard Henn Collins, the Honourable Melville Weston Fuller, and the Honourable David Josiah Brewer, have, conformably to the terms of the said Treaty, selected His Excellency Frederic de Martens, Privy Councillor, Permanent Member of

the Council of the Ministry of Foreign Affairs of Russia, LL.D of the Universities of Cambridge and Edinburgh, to be the fifth Arbitrator;

AND WHEREAS the said Arbitrators have duly entered upon the said arbitration, and have duly heard and considered the oral and written arguments of the Counsel representing respectively Her Majesty the Queen and the United States of Venezuela, and have impartially and carefully examined the questions laid before them, and have investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana:

Now, we the undersigned Arbitrators do hereby make and publish our decision, determination, and Award of, upon and concerning the questions submitted to us by the said Treaty of Arbitration, and do hereby, conformably to the said Treaty of Arbitration, finally decide, award, and determine that the boundary-line between the Colony of British Guiana and the United States of Venezuela is 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 Amakura, and thence along the mid-stream of the Amakura 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 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 along the mid-stream of the Wenamu to its westernmost source, and thence in a direct line to the summit of Mount Roraima, and from Mount Roraima to the source of the Cotinga, and along the mid-stream of that river to its junction with the Takutu, and thence along the mid-stream of the Takutu to its source, and 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 Cutara 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.

In fixing the above delimitation the Arbitrators consider and decide that in times of peace the Rivers Amakura 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 to the passage of vessels along the portions of such rivers respectively owned by them shall be charged at the same rates upon the vessels of Venezuela and Great Britain, such rates being no higher than those charged to any other nation:

Provided also that no customs' duties shall be chargeable either by the Republic of Venezuela or by the Colony of British Guiana in respect of goods carried on board ships, vessels, or boats passing along the said rivers, but customs' duties shall only be chargeable in respect of goods landed in the territory of Venezuela and Great Britain respectively.

Executed and published in duplicate by us in Paris this 3rd day of October, A.D. 1899.

(Signed) F. DE MARTENS

MELVILLE WESTON FULLER

DAVID J. BREWER

RUSSELL of Kn.

R. HENN COLLINS

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