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Carla Borck
Student Assistant
IFHV
Ruhr-Universität

Patrick Beer
Student Assistant
IFHV
Ruhr-Universität

QUESTIONS:
Carla.Borck@rub.de
Patrick.Beer@rub.de

Völkerrechtsblog
INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

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BOFAXE

Tribunals, Treaties, and Turning Back Time (PART 1)

How to Deal with the Contention of a 125-Year-Old Arbitral Award

In December 2023, Venezuelan voters were asked their opinion on questions regarding the Essequibo region and whether the territory, today part of Guyana, should be turned into a new Venezuelan state in a referendum heavily lobbied for by Venezuelan President Nicolás Maduro. While these developments sparked the biggest international response yet, the territorial dispute at its core is over a century old. It was apparently resolved through arbitration in 1899 but has been contested by Venezuela since 1962. Various attempts at solving the dispute diplomatically, in accordance with the Geneva Agreement of 1966, failed. Guyana therefore eventually submitted the case to the International Court of Justice (ICJ) in 2018.

When the arbitral tribunal first delivered its Award, the concepts of modern interstate arbitration were only emerging, and the establishment of the ICJ was still a long way off. While the decision, to hold a referendum and decide a legal question about the Essequibo region based on popular opinion, alone seems questionable, it is especially complicated in this case because the over 125-year history and the subsequent changes in interstate arbitration are creating additional challenges. With this in mind, this blog post explores the ICJ's role in the system of arbitration and examines its standard of review in the present case. To do so, it will take a look at the historical developments in modern interstate arbitration up to the 1899 Arbitral Award and from then onwards, in order to contextualize the ICJ's involvement in the case. It will especially show why the ICJ may not act as a "Superrevisionsinstanz" (supreme body of appeals) in the way that some expect it to. Such an appeal is likely to have a difficult status due to the limited possibility of a review on the merits and the principles of intertemporal law, which are relevant here.

The Jay Treaty and the Alabama Claims Case: Developing Modern Arbitration

The origin of modern interstate arbitration is commonly traced back to the so-called Jay Treaty of 1794, an agreement between the U.S. and Great Britain which sought to settle unresolved issues between both nations stemming from the Treaty of Paris (1783) through which the American Revolutionary War was brought to an end. The Jay Treaty established three commissions, consisting of legally trained arbitrators who were either of British or American nationality, tasked with solving these issues. All these changes were innovative at the time since arbitral processes had, until then, relied on the use of monarchs or the Pope as arbitrators who acted in a diplomatic capacity. Even though sovereign arbitration remained a practiced option and the arbitrator's self-conception retained an undeniably strong diplomatic perspective, the Jay Treaty popularized collegial tribunals as well as the notion that awards should be rendered based on law.

These developments were consolidated through the Alabama Claims case in 1871, often credited with being the most influential arbitration in history. Once again involving the U.S. and Great Britain, the tribunal in this case concerned itself with the U.S.' accusation that Great Britain had, in the course of the American Civil War, violated the rules of neutrality by allowing Confederate warships to be built in British ports. Just like in two of the Jay Treaty's commissions, the tribunal in this case was a collegial one consisting of five arbitrators. One major novelty was the fact that only two of the party-appointed members were of the nationality of the parties, with one British and one American arbitrator each. This signified a desire for an increased level of independence of the arbitral tribunal, making it one of the reasons why the Alabama arbitration is commonly seen as the point from which arbitration took a decisive turn towards the judicial character it has today.

The 1899 Arbitration: On the Cusp of Change

This was the status quo when the arbitral tribunal deciding the territorial dispute between Venezuela and then-British Guiana rendered its award in 1899. It did so in October, roughly three months after the First Hague Peace Conference established the Permanent Court of Arbitration (PCA). With the PCA, as the "first global mechanism for the settlement of disputes between states" now in existence, interstate arbitration oriented itself towards an approach with a greater focus on institutionalization, which was accompanied by the harmonization of interstate arbitration. The proceedings became more standardized and notably shifted towards more legal rules. This change towards a legal approach materialized and became the standard for arbitration. However, the key factor of interstate arbitration, the treaty-law nature, remained. Accordingly, it remained the freedom of states to determine the terms of their arbitration, a freedom which was also respected in front of the PCA, thereby leaving states a great margin of freedom to deviate from the established standards. The aforementioned harmonization of interstate arbitration, therefore, was not so much a legal matter but a matter of fact. Consequently, the limits and standards of arbitration predominantly consist of what the parties agree on within their arbitral agreement. This is not only one of the core characteristics of international arbitration but also its rationale. What distinguishes international arbitration from other means of peaceful dispute settlement such as Court proceedings is its flexibility. This means that the parties primarily have to find accordance among themselves, instead of relying on a fixed set of (customary) rules for international arbitration.

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This is a rather antithetical approach to the one of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) which are institutions with stricter guidelines. Arbitration thus allows for more flexibility, but is also even more dependent on state consensus, which may explain the subsidiary character that interstate arbitration has taken since the establishment of the PCIJ and then the ICJ (especially as contrasted to the flourishing investor-state arbitration).

What Is the Consequence for the Position of the ICJ in This Case?

This raises the question how this key feature of interstate arbitration, state consensus, comes into play in the ICJ's decision. A consensus is the product of a fixed point in time and does not change with events afterwards. At the same time, interstate arbitration has seen tremendous changes since the rise of modern public international law. In cases like the ICJ proceedings concerning the 1899 Arbitration, it is therefore important to respect the standards of intertemporal law, to ensure that no rules of the original consensus are being distorted. Otherwise, the very foundation of arbitration would be circumvented. This means that the Washington Treaty has to be assessed based on the rules in place at the time of its conclusion, rather than those in place today. This results in a twofold set of limitations: first, the ICJ can only evaluate whether the Washington Treaty was executed rightfully with regards to the rules of its time (intertemporal law). Second, the ICJ has to respect the consensus of the states expressed in the Geneva Agreement, allowing for a review of the validity of the Award of 1899 which is independent of the merits of the Award. Only a decision regarding "the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void" (Art. 1 of the Geneva Agreement) is therefore subject to the state consensus.

In light of this, a revision of the merits seems questionable because the parties agreed on the binding and final character of the award. While the ICJ is no absolute stranger to revisions – Article 61 of the ICJ Statute regulates revisions of its own judgments under certain limited conditions – the revision of arbitral awards is not specifically regulated in the Court's Statute. The ICJ thus cannot engage in a revision of the arbitration in the technical sense, contrary to what Guyana tries to achieve in the proceedings. The Court can, however, review the relevant treaty, its provisions, and its application. It is thus essential to pay attention to the nature of arbitral awards, which are essentially the application of treaty law, more specifically of the treaty of arbitration (here the Washington Treaty). The Washington Treaty does not set forth any rules on the decision of the merits, which therefore also cannot be reviewed. It does, however, set some fundamental procedural rules whose faithful execution can be reviewed in cases where fraud is claimed, as done by Venezuela. Without going into detail regarding the parties' argumentation, it has to be stressed that the result is not going to have a direct influence on the border between the two states (as Guyana itself has implicitly asserted here). Conversely, as the decision is strictly limited to the treaty of arbitration, the ICJ will not act as a "Superrevisionsinstanz".

Either way, an execution of the referendum's official result, as envisioned by a recently created national Venezuelan law, cannot be justified by the judgment of the ICJ. Even if the ICJ were to agree with the Venezuelan claim that the 1899 arbitration is "null and void," the border would stay in place but be in need of renegotiation. However, considering the events of the last 125 years – from the first claims of fraud in 1962 by Mr. Mallet-Prevost, the discoveries of tremendous oil reserves, the numerous failed attempts of dispute settlement, and the recent referendum – renegotiation is easier said than done. As it appears, the proceedings before the ICJ will rather add to than solve the dispute.

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