DOI:10.1017/ilm.2023.47

INTRODUCTORY NOTE TO ARBITRAL AWARD OF OCT. 3, 1899 (GUY. V. VENEZ.) (PRELIMINARY OBJECTIONS) (I.C.J.)

BY BERTRAND RAMCHARAN*

[April 6, 2023]

Background

On March 29, 2018, the Government of the Co-operative Republic of Guyana (hereinafter Guyana) filed in the Registry of the Court an application instituting proceedings against the Bolivarian Republic of Venezuela (hereinafter Venezuela) with respect to a dispute concerning "the legal validity and binding effect of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899" (hereinafter the 1899 Award or the Award).

In a judgment of December 18, 2020 (hereinafter the 2020 Judgment), the Court found that it had jurisdiction to entertain the Application filed by Guyana on 29 March 2018 "in so far as it concerns the validity of the 1899 Award and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela."

On June 7, 2022, Venezuela raised what ended up being a preliminary objection to the admissibility of the Application. The Court delivered its judgment on April 6, 2023, confirming its holding in its December 18, 2020 judgment.[1]

The Issue of Admissibility

After considering the arguments advanced by the two parties, the Court held that the United Kingdom was aware of the scope of the dispute concerning the validity of the 1899 Award, which included allegations of its wrongdoing and recourse to unlawful procedures, but nonetheless accepted the scheme set out in Article IV of the Geneva Agreement of 1966, whereby Guyana and Venezuela could submit the dispute to one of the means of settlement set out in Article 33 of the Charter of the United Nations, without the involvement of the United Kingdom.

The Court considered that the Geneva Agreement had specified particular roles for Guyana and Venezuela, and did not provide a role for the United Kingdom in choosing, or participating in, the means of settlement of the dispute. It considered that the scheme established by Articles II and IV of the Geneva Agreement reflected a common understanding of all parties to that Agreement that the controversy which existed between the United Kingdom and Venezuela on February 17, 1966 would be settled by Guyana and Venezuela through one of the dispute settlement procedures envisaged in the Agreement.

The Court further noted that when the United Kingdom accepted, through the Geneva Agreement, the scheme for the settlement of the dispute between Guyana and Venezuela without its involvement, it was aware that such a settlement could involve the examination of certain allegations by Venezuela of wrongdoing by the authorities of the United Kingdom at the time of the disputed arbitration.

The Court also noted that Venezuela engaged exclusively with the Government of Guyana when implementing Article IV of the Geneva Agreement. Again, the Court observed that the United Kingdom did not seek to participate in the procedure set out in Article IV to resolve the dispute, nor did the parties request such participation. Venezuela's exclusive engagement with the Government of Guyana during the good offices process thus indicated that there was agreement among the parties that the United Kingdom had no role in the dispute-settlement process.

In view of the foregoing, the Court held that the practice of the parties to the Geneva Agreement demonstrated their agreement that the dispute could be settled without the involvement of the United Kingdom.

The Court concluded that, by virtue of being a party to the Geneva Agreement, the United Kingdom had accepted that the dispute between Guyana and Venezuela could be settled by one of the means set out in Article 33 of the Charter of the United Nations, and that it would have no role in that procedure. Under these circumstances, the

*Honorary Professor Energy, Environment, and Society, University of Dundee, Scotland; former Professor at the Geneva Graduate Institute; Commissioner of the International Commission of Jurists; has performed the functions of UN High Commissioner for Human Rights.

Court considered that the Monetary Gold principle does not come into play in this case. It followed that even if the Court, in its judgment on the merits, were called to pronounce on certain conduct attributable to the United Kingdom, that would not preclude the Court from exercising its jurisdiction, which is based on the application of the Geneva Agreement. The preliminary objection raised by Venezuela was therefore rejected.

Judge Iwasawa explained in his declaration that Venezuela's objection was not an objection to the Court's jurisdiction, as had been contended by Guyana, but an objection to admissibility.

The Issue of Third-Party Interest

In his declaration, Judge Bhandari agreed with the Court's conclusions that the United Kingdom had no role in the resolution of this dispute and that the Monetary Gold principle did not come into play. He continued that this reasoning, in principle, applies to all parties to the 1966 Geneva Agreement. Consequently, Venezuela itself could be said to have forfeited any right it might otherwise have had to object to this dispute being settled through a procedure not involving the United Kingdom.

Judge ad hoc Wolfrum explained in his declaration that the distinguishing element in this case lay in the existence of the Geneva Agreement. In participating in the Geneva Agreement, the United Kingdom had accepted that the resolution of the dispute by Guyana and Venezuela without the United Kingdom's participation might entail the discussion of acts or omissions related to the United Kingdom. He thought that, properly interpreted, the Geneva Agreement constituted a *lex specialis* for the protection of the United Kingdom's interests.

The Issue of Self-Determination

In his separate opinion, Judge Robinson expounded on the statement in paragraph 81 of the judgment that "the United Kingdom granted independence to Guyana in 1966." He argued that, as a matter of law, this statement was incorrect because the right to self-determination had already become a rule of customary international law on the adoption by the General Assembly resolution 1514 (XV) of December 14, 1960.

The Issue(s) to be Decided in the Case at the Merits Stage

In his declaration, Judge *ad hoc* Wolfrum highlighted the issue of the subject matter of the dispute. He noted that the judgment did not pronounce itself on the subject-matter of the dispute in detail. However, Venezuela had stated in a variety of contexts that the interests of the United Kingdom also formed the very subject-matter of any decision that the Court would have to render on the merits because the invalidity of the 1899 Award arose from the allegedly fraudulent conduct of the United Kingdom in respect of the arbitration that resulted in the 1899 Award.[2] Venezuela had also submitted that the disposition of the commitments and responsibilities of the United Kingdom constituted the "very object" and the "very essence" of the decision in the current case.[3] It remained unclear whether Venezuela was referring to the subject-matter of this dispute as an important element of the future deliberations or was attempting to redefine the subject-matter that was originally defined on the basis of the Application of Guyana. In light of this uncertainty, Judge *ad hoc* Wolfrum considered it appropriate to introduce some clarifying remarks on the subject-matter of the dispute before the Court.

He recalled that the Court had on several occasions pronounced itself on the subject-matter of a dispute. In the *Fisheries Jurisdiction* case, it had stated:

> There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it. Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the 'subject of the dispute' be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires 'the precise nature of the claim' to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as 'essential from the point of view of legal security and the good administration of justice' and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary*

> *Objections, Judgment, I.CJ. Reports 1992*, pp. 266-267; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14, and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).[4]

The Court continued: "It is for the Court itself, while g*iving particular attention to the formulation of the dispute chosen by the Applicant*, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties[.]"[5]

In the earlier *Fisheries* case, the Court had stated (and this is of relevance for this case):

> The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government at the sitting of October 1st, 1951, that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government at the sitting of October 5th, 1951. These are elements, which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, *the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.*[6]

Referring to the jurisprudence of the Court, the arbitral tribunal in the *South China Sea* case[7] reiterated these findings.

Although the Court has consistently stated that, in deciding on the subject-matter of a dispute, it will examine the application and pleadings of both parties, it has always emphasized that particular attention should be paid to the formulation of the applicant. In the case at hand, it is to be noted that the Court, in its judgment of December 18, 2020, stated that the subject-matter of the dispute was "the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the land boundary between Guyana and Venezuela."[8] The Court reached its conclusion in that judgment on the basis of the Geneva Agreement. This subject-matter is to be distinguished from arguments "used by the parties to sustain their respective submissions on the dispute," as stated in the *Fisheries Jurisdiction* case.[9]

ENDNOTES

1 Arbitral Award of Oct. 3, 1899 (Guy. v. Venez.), Judgment on Preliminary Objections (Apr. 6, 2023), *available at*: https://www.icj-cij.org/case/171.

2 CR 2022/21, p. 51, ¶ 36 (Tams); id., p. 36, ¶ 4 (Espósito); CR 2022/23, p. 14, ¶ *22 (Tams).*

3 Preliminary Objections of Venez., ¶¶ 32-33; CR 2022/23, p. 10, ¶ 2 (Tams); see also the Judgment, ¶ 77.

4 Fisheries Jurisdiction (Spain v. Can.), Jurisdiction of the Court, Judgment, 1998 I.C.J. Rep. 447–448, ¶ 29.

5 *Id.*, p. 448, ¶ 30 (emphasis added).

6 Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 126 (emphasis added).

7 The South China Sea Arbitration between Phil. and China, Award on Jurisdiction and Admissibility of Oct. 29, 2015, 33 R.I.A.A. 62, ¶ *150.*

8 Arbitral Award of Oct. 3, 1899 (Guy. v. Venez.), Jurisdiction of the Court, Judgment, 2020 I.C.J. Rep. 492, ¶ 135.

9 Fisheries Jurisdiction (Spain v. Can.), Jurisdiction of the Court, Judgment, 1998 I.C.J. Rep. 449, ¶ 32.

DOI:10.1017/ilm.2023.47

ARBITRAL AWARD OF OCT. 3, 1899 (GUY. V. VENEZ.) (PRELIMINARY OBJECTIONS) (I.C.J.)*

[April 6, 2023]

6 AVRIL 2023

ARRÊT

SENTENCE ARBITRALE DU 3 OCTOBRE 1899

(GUYANA c. VENEZUELA)

ARBITRAL AWARD OF 3 OCTOBER 1899

(GUYANA *v.* VENEZUELA)

6 APRIL 2023

JUDGMENT

*This text was reproduced and reformatted from the text available at the International Court of Justice website (visited October 26, 2023), https://www.icj-cij.org/case/171.

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2023

2023
6 April
General List
No. 171

6 April 2023

ARBITRAL AWARD OF 3 OCTOBER 1899 (GUYANA *v.* VENEZUELA)

PRELIMINARY OBJECTION

Reference by Venezuela to Guyana's possible lack of standing — In substance Venezuela making single preliminary objection — Preliminary objection based on argument that United Kingdom is indispensable third party without the consent of which the Court cannot adjudicate upon the dispute.

*

Historical and factual background.

Competing territorial claims of United Kingdom and Venezuela in nineteenth century — Treaty of arbitration for settlement of boundary between colony of British Guiana and Venezuela signed at Washington on 2 February 1897 — Arbitral Award of 3 October 1899.

Venezuela's repudiation of 1899 Award.

Signing of 1966 Geneva Agreement — Independence of Guyana on 26 May 1966 — Guyana became a party to Geneva Agreement alongside United Kingdom and Venezuela.

Implementation of Geneva Agreement — Mixed Commission from 1966 to 1970 — 1970 Protocol of Port of Spain — Twelve-year moratorium — Parties' subsequent referral of decision to choose means of settlement to Secretary-General of United Nations under Article IV, paragraph 2, of Geneva Agreement — Secretary-General's choice of good offices process from 1990 to 2017 — Secretary-General's decision of 30 January 2018 choosing the Court as means of settlement of the controversy — Seisin of the Court by Guyana on 29 March 2018.

*

Admissibility of Venezuela's preliminary objection.

Monetary Gold principle — Distinction between existence of the Court's jurisdiction and exercise by the Court of its jurisdiction — Venezuela's objection on basis of Monetary Gold principle is objection to exercise of the Court's jurisdiction, and not objection to jurisdiction.

Principle of res judicata *— Force of* res judicata *attaches to a judgment on jurisdiction — Operative part of a judgment possesses force of* res judicata *— Its meaning may be determined with reference to the reasoning — Force of* res judicata *does not attach to matters not determined expressly or by necessary implication — Judgment of 18 December 2020 on jurisdiction (2020 Judgment) does not address, even implicitly, issue of exercise of jurisdiction — Question whether United Kingdom is indispensable third party without the consent of which the Court may not exercise its jurisdiction not determined in 2020 Judgment —* Res judicata *of 2020 Judgment extends only to question of existence of jurisdiction — Admissibility of Venezuela's preliminary objection is not barred by 2020 Judgment.*

*The Court's Order of 19 June 2018 only concerned pleadings on question of existence of the Court's jurisdiction — Venezuela remained entitled to raise an objection to exercise by the Court of its jurisdiction within time-limit in Article 79*bis*, paragraph 1, of the Rules.*

Venezuela's preliminary objection is admissible.

*

Examination of Venezuela's preliminary objection.

Allegation that legal interests of United Kingdom would be the very subject-matter of the Court's decision — Guyana, Venezuela and United Kingdom are parties to Geneva Agreement, on which the Court's jurisdiction is based — Legal implications of United Kingdom being a party to Geneva Agreement — Interpretation of relevant provisions of Geneva Agreement necessary — The Court to apply rules of interpretation in Articles 31 to 33 of Vienna Convention on Law of Treaties, reflecting customary international law — United Kingdom participated in elaboration of Geneva Agreement in consultation with British Guiana — Forthcoming independence of British Guiana taken into account — Initial stage of process for settlement of dispute — Articles I and II of Geneva Agreement providing for appointment of Mixed Commission by Venezuela and British Guiana — No role for United Kingdom in initial stage — Venezuela and British Guiana having sole role in settlement of dispute through Mixed Commission — Final stages of process for settlement of dispute — Article IV of Geneva Agreement — No reference to United Kingdom — Guyana and Venezuela bearing responsibility to choose means of peaceful settlement — Failing agreement, matter to be referred to Secretary-General for choice of means of settlement — No role for United Kingdom in process of settlement of dispute pursuant to Article IV.

Dispute settlement scheme established by Articles II and IV of Geneva Agreement reflects a common understanding of all parties that controversy would be settled by Guyana and Venezuela without the United Kingdom's involvement — Acceptance by United Kingdom of scheme — United Kingdom aware of Venezuela's allegations of its wrongdoing — Letter of 14 February 1962 from Venezuela's Permanent Representative to the United Nations to the Secretary-General — Statements of Venezuela and United Kingdom before Fourth Committee of General Assembly in November 1962 — Tripartite Examination in 1965 of documentary material relevant to validity of 1899 Award — United Kingdom aware of scope of dispute — Acceptance by United Kingdom not to be involved in settlement of dispute between Guyana and Venezuela.

Examination of subsequent practice of parties to Geneva Agreement — Venezuela's exclusive engagement with Guyana at Mixed Commission and in implementation of Article IV of Geneva Agreement — Agreement of the parties that dispute could be settled without involvement of United Kingdom.

Acceptance by United Kingdom, by virtue of being a party to Geneva Agreement, that dispute could be settled by one of the means set out in Article 33 of Charter of United Nations without its involvement — Monetary Gold principle does not come into play — Possibility of future pronouncement in Judgment on merits regarding certain conduct attributable to United Kingdom would not preclude the Court from exercising its jurisdiction based on application of Geneva Agreement.

Venezuela's preliminary objection is rejected.

JUDGMENT

Present: President DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges* ad hoc WOLFRUM, COUVREUR; *Registrar* GAUTIER.

In the case concerning the Arbitral Award of 3 October 1899,

between

the Co-operative Republic of Guyana,
represented by

Hon. Carl B. Greenidge,
as Agent;

H.E. Ms Elisabeth Harper,
as Co-Agent;

Mr. Paul S. Reichler, Attorney at Law, 11 King's Bench Walk, London, member of the Bars of the Supreme Court of the United States and of the District of Columbia,

Mr. Philippe Sands, KC, Professor of International Law, University College London, 11 King's Bench Walk, London,

Mr. Pierre d'Argent, *professeur ordinaire*, Catholic University of Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

Ms Christina L. Beharry, Foley Hoag LLP, member of the Bars of the District of Columbia, the State of New York, the Law Society of Ontario, and England and Wales,

as Advocates;

Mr. Edward Craven, Matrix Chambers, London,

Mr. Juan Pablo Hugues Arthur, Foley Hoag LLP, member of the Bar of the State of New York,

Ms Isabella F. Uría, Attorney at Law, Foley Hoag LLP, member of the Bar of the District of Columbia,

as Counsel;

Hon. Mohabir Anil Nandlall, Member of Parliament, Attorney General and Minister of Legal Affairs,

Hon. Gail Teixeira, Member of Parliament, Minister of Parliamentary Affairs and Governance, Mr. Ronald Austin, Ambassador, Adviser to the Leader of the Opposition on Frontier Matters, Ms Donnette Streete, Director, Frontiers Department, Ministry of Foreign Affairs,

Mr. Lloyd Gunraj, First Secretary, chargé d'affaires, Embassy of the Co-operative Republic of Guyana to the Kingdom of Belgium and the European Union,

as Advisers;

Ms Nancy Lopez, Foley Hoag LLP,

as Assistant,

and

the Bolivarian Republic of Venezuela,

represented by

H.E. Ms Delcy Rodríguez, Executive Vice-President of the Bolivarian Republic of Venezuela;

H.E. Mr. Samuel Reinaldo Moncada Acosta, PhD, University of Oxford, Ambassador, Permanent Representative of the Bolivarian Republic of Venezuela to the United Nations,

as Agent;

Ms Elsie Rosales García, PhD, Professor of Criminal Law, Universidad Central de Venezuela,

as Co-Agent;

H.E. Mr. Reinaldo Muñoz, Attorney General of the Bolivarian Republic of Venezuela,

H.E. Mr. Calixto Ortega, Ambassador, Permanent Mission of the Bolivarian Republic of Venezuela to the Organisation for the Prohibition of Chemical Weapons, International Criminal Court and other international organizations,

as Senior National Authorities;

Mr. Antonio Remiro Brotóns, PhD, Professor Emeritus of Public International Law, Universidad Autónoma de Madrid,

Mr. Carlos Espósito, Professor of Public International Law, Universidad Autónoma de Madrid,

Ms Esperanza Orihuela, PhD, Professor of Public International Law, Universidad de Murcia, Mr. Alfredo De Jesús O., PhD, Paris 2 Panthéon-Assas University, Member of the Bars of Paris and the Bolivarian Republic of Venezuela, Member of the Permanent Court of Arbitration,

Mr. Paolo Palchetti, PhD, Professor, Paris 1 Panthéon-Sorbonne University,

Mr. Christian Tams, PhD, Professor of International Law, University of Glasgow, academic member of Matrix Chambers, London,

Mr. Andreas Zimmermann, LLM, Harvard, Professor of International Law, University of Potsdam, Member of the Permanent Court of Arbitration,

as Counsel and Advocates;

Mr. Carmelo Borrego, PhD, Universitat de Barcelona, Professor of Procedural Law, Universidad Central de Venezuela,

Mr. Eugenio Hernández-Bretón, PhD, University of Heidelberg, Professor of Private International Law, Universidad Central de Venezuela, Dean, Universidad Monteávila, member and former president of the Academy of Political and Social Sciences,

Mr. Julio César Pineda, PhD, International Law and International Relations, former ambassador,

Mr. Edgardo Sobenes, Consultant in International Law, LLM, Leiden University, Master, ISDE/Universitat de Barcelona,

as Counsel;

Mr. Jorge Reyes, Minister Counsellor, Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations,

Ms Anne Coulon, Attorney at Law, member of the Bar of the State of New York, Temple Garden Chambers,

Ms Gimena González, DEA, International Law and International Relations, Ms Arianny Seijo Noguera, PhD, University of Westminster,

Mr. John Schabedoth, LLM, assistant, University of Potsdam,

Mr. Valentín Martín, LLM, PhD student in International Law, Paris 1 Panthéon-Sorbonne University,

as Assistant Counsel;

Mr. Henry Franceschi, Director General of Litigation, Office of the Attorney General of the Republic,

Ms María Josefina Quijada, LLM, BA, Modern Languages,

Mr. Néstor López, LLM, BA, Modern Languages, Consul General of the Bolivarian Republic of Venezuela, Venezuelan Consulate in Barcelona,

Mr. Manuel Jiménez, LLM, Private Secretary and Personal Assistant to the Vice-President of the Republic,

Mr. Kenny Díaz, LLM, Director, Office of the Vice-President of the Republic,

Mr. Larry Davoe, LLM, Director of Legal Consultancy, Office of the Vice-President of the Republic,

Mr. Euclides Sánchez, Director of Security, Office of the Vice-President of the Republic,

Ms Alejandra Carolina Bastidas, Head of Protocol, Office of the Vice-President of the Republic,

Mr. Héctor José Castillo Riera, Security of the Vice-President of the Republic,

Mr. Daniel Alexander Quintero, Assistant to the Vice-President of the Republic,

as Members of the Delegation,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 29 March 2018, the Government of the Co-operative Republic of Guyana (hereinafter "Guyana") filed in the Registry of the Court an Application instituting proceedings against the Bolivarian Republic of Venezuela (hereinafter "Venezuela") with respect to a dispute concerning "the legal validity and binding effect of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899".

2. In its Application, Guyana sought to found the jurisdiction of the Court, under Article 36, paragraph 1, of the Statute of the Court, on Article IV, paragraph 2, of the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana" signed at Geneva on 17 February 1966 (hereinafter the "Geneva Agreement" or the "Agreement"). It explained that, pursuant to this latter provision, Guyana and Venezuela "mutually conferred upon the Secretary-General of the United Nations the authority to choose the means of settlement of the controversy and, on 30 January 2018, the Secretary-General exercised his authority by choosing judicial settlement by the Court".

3. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Venezuela. He also notified the Secretary-General of the United Nations of the filing of the Application by Guyana.

4. In addition, by a letter dated 3 July 2018, the Registrar informed all Member States of the United Nations of the filing of the Application.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

6. On 18 June 2018, at a meeting held pursuant to Article 31 of the Rules of Court by the President of the Court to ascertain the views of the Parties with regard to questions of procedure, the Executive Vice-President of Venezuela, H.E. Ms Delcy Rodríguez, stated that her Government considered that the Court manifestly lacked jurisdiction to hear the case and that Venezuela had decided not to participate in the proceedings. During the same meeting, Guyana expressed its wish for the Court to continue its consideration of the case.

7. By an Order of 19 June 2018, the Court held, pursuant to Article 79, paragraph 2, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, that, in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction, and that this question should accordingly be separately determined before any proceedings on the merits. The Court thus fixed 19 November 2018 and 18 April 2019 as the respective time-limits for the filing of a Memorial by Guyana and a Counter-Memorial by Venezuela addressed to the question of the jurisdiction of the Court. Guyana filed its Memorial on the question of the jurisdiction of the Court within the time-limit thus fixed.

8. Since the Court included upon the Bench no judge of the nationality of either Party, Guyana proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad*

hoc to sit in the case. By a letter dated 13 July 2018, Guyana informed the Court that it had chosen Ms Hilary Charlesworth. Venezuela, for its part, did not, at that stage, exercise its right to choose a judge *ad hoc* to sit in the case.

9. While Venezuela did not file a Counter-Memorial on the question of the jurisdiction of the Court within the time-limit fixed for that purpose, it submitted to the Court on 28 November 2019 a document entitled "Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018" (hereinafter the "Memorandum"). This document was immediately communicated to Guyana by the Registry of the Court.

10. A public hearing on the question of the jurisdiction of the Court was held by video link on 30 June 2020, at which Venezuela did not participate. By a letter dated 24 July 2020, Venezuela transmitted written comments on the arguments presented by Guyana at the hearing of 30 June 2020. By a letter dated 3 August 2020, Guyana provided its views on this communication from Venezuela.

11. In its Judgment of 18 December 2020 (hereinafter the "2020 Judgment"), the Court found that it had jurisdiction to entertain the Application filed by Guyana on 29 March 2018 in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela. The Court also found that it did not have jurisdiction to entertain the claims of Guyana arising from events that occurred after the signature of the Geneva Agreement.

12. By an Order of 8 March 2021, the Court fixed 8 March 2022 and 8 March 2023 as the respective time-limits for the filing of a Memorial by Guyana and a Counter-Memorial by Venezuela on the merits. Guyana filed its Memorial within the time-limit thus fixed.

13. Following the election of Ms Charlesworth as a Member of the Court, Guyana chose Mr. Rüdiger Wolfrum to replace her as judge *ad hoc* in the case. Judge Charlesworth informed the President of the Court that, in the circumstances, she had decided no longer to take part in the decision of the case. By letters dated 25 January 2022, the Registrar informed the Parties accordingly.

14. By a letter dated 6 June 2022, H.E. Ms Delcy Rodríguez, Executive Vice-President of Venezuela, informed the Court that the Venezuelan Government had appointed H.E. Mr. Samuel Reinaldo Moncada Acosta, Permanent Representative of Venezuela to the United Nations, as Agent and H.E. Mr. Félix Plasencia González, Former People's Power Minister for Foreign Affairs of Venezuela, and Ms Elsie Rosales García, Professor at the Universidad Central de Venezuela, as Co-Agents for the purposes of the case.

15. On 7 June 2022, within the time-limit prescribed by Article 79*bis*, paragraph 1, of the Rules of Court, Venezuela raised preliminary objections which it characterized as objections to the admissibility of the Application. Consequently, by an Order of 13 June 2022, the Court, noting that, by virtue of Article 79*bis*, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 7 October 2022 as the time-limit within which Guyana could present a written statement of its observations and submissions on the preliminary objections raised by Venezuela. Guyana filed its written observations on 22 July 2022.

16. By a letter dated 25 July 2022, Venezuela informed the Court that it had chosen Mr. Philippe Couvreur to sit as a judge *ad hoc* in the case.

17. By a letter dated 28 July 2022, Venezuela commented on Guyana's written observations on the preliminary objections raised by Venezuela and requested the Court to provide the Parties with the opportunity to submit supplementary written pleadings on the admissibility of the Application, within a time-limit to be determined by the Court. By a letter dated 3 August 2022, Guyana opposed the request for further written pleadings.

18. By letters dated 8 August 2022, the Parties were informed that hearings on the preliminary objections raised by Venezuela would be held from 17 to 20 October 2022. Following a request from Guyana, and after having considered the comments of Venezuela thereon, the Court postponed the opening of the hearings until 17 November 2022. The Parties were informed of the Court's decision by letters dated 23 August 2022.

19. By a letter dated 8 November 2022, the Agent of Venezuela, referring to Article 56 of the Rules of Court and Practice Direction IX, expressed the wish of his Government to produce new documents. By a letter dated

14 November 2022, the Agent of Guyana informed the Court that his Government had decided not to object to the submission of the said documents. Accordingly, the documents were added to the case file.

20. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and documents annexed would be made accessible to the public at the opening of the oral proceedings.

21. Public hearings on the preliminary objections raised by Venezuela were held on 17, 18, 21 and 22 November 2022, at which the Court heard the oral arguments and replies of:

For Venezuela: H.E. Ms Delcy Rodríguez,
Mr. Andreas Zimmermann,
Ms Esperanza Orihuela,
Mr. Carlos Espósito,
Mr. Christian Tams,
Mr. Paolo Palchetti,
Mr. Antonio Remiro Brotóns.

For Guyana: Hon. Carl B. Greenidge,
Mr. Pierre d'Argent,
Ms Christina L. Beharry,
Mr. Paul S. Reichler,
Mr. Philippe Sands.

*

22. In the Application, the following claims were made by Guyana:
"Based on the foregoing, and as further developed in the written pleadings in accordance with any Order that may be issued by the Court, Guyana requests the Court to adjudge and declare that:

(a) The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is valid and binding upon Guyana and Venezuela;

(b) Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela enjoys full sovereignty over the territory west of that boundary; Guyana and Venezuela are under an obligation to fully respect each other's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement;

(c) Venezuela shall immediately withdraw from and cease its occupation of the eastern half of the Island of Ankoko, and each and every other territory which is recognized as Guyana's sovereign territory in accordance with the 1899 Award and 1905 Agreement;

(d) Venezuela shall refrain from threatening or using force against any person and/or company licensed by Guyana to engage in economic or commercial activity in Guyanese territory as determined by the 1899 Award and 1905 Agreement, or in any maritime areas appurtenant to such territory over which Guyana has sovereignty or exercises sovereign rights, and shall not interfere with any Guyanese or Guyanese-authorized activities in those areas;

(e) Venezuela is internationally responsible for violations of Guyana's sovereignty and sovereign rights, and for all injuries suffered by Guyana as a consequence."

23. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Guyana in its Memorial:

> "For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present Submissions, the Co-operative Republic of Guyana respectfully requests the International Court of Justice:
>
> [t]o adjudge and declare that:
>
> (1) The 1899 Award is valid and binding upon Guyana and Venezuela, and the boundary established by that Award and the 1905 Agreement is the boundary between Guyana and Venezuela; and that
>
> (2) Guyana enjoys full sovereignty over the territory between the Essequibo River and the boundary established by the 1899 Award and the 1905 Agreement, and Venezuela is under an obligation to fully respect Guyana's sovereignty and territorial integrity in accordance with the boundary established by the 1899 Award and the 1905 Agreement."

24. In the preliminary objections, the following submission was presented on behalf of the Government of Venezuela: "It is requested that the Court admits the preliminary objections to the admissibility of the application filed by the Co-operative Republic of Guyana and that it terminates the on-going proceeding."

25. In the written observations on the preliminary objections, the following submissions were presented on behalf of the Government of Guyana:

> "For the foregoing reasons, Guyana respectfully submits that:
>
> *(1)* Pursuant to Article 79*ter*, paragraph 2, of the Rules, the Court should dismiss forthwith Venezuela's preliminary objection as inadmissible or reject it on the basis of the Parties' written submissions without the need for oral hearings; or, alternatively
>
> *(2)* Schedule oral hearings at the earliest possible date, to avoid needless delay in reaching a final Judgment on the Merits, and reject Venezuela's preliminary objection as early as possible after the conclusion of the hearings; and
>
> *(3)* Fix a date for the submission of Venezuela's Counter-Memorial on the Merits no later than nine months from the date of the Court's ruling on Venezuela's preliminary objection."

26. At the oral proceedings on the preliminary objections, the following final submissions were presented by the Parties:

On behalf of the Government of Venezuela,

at the hearing of 21 November 2022:

> "In the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*, for the reasons set forth in its written and oral pleadings on preliminary objections, the Bolivarian Republic of Venezuela requests the Court to adjudge and declare that Guyana's claims are inadmissible."

On behalf of the Government of Guyana,

at the hearing of 22 November 2022:

> "In accordance with Article 60 of the Rules of Court, for the reasons explained in our Written Observations of 22 July 2022 and during these hearings, the Co-Operative Republic of Guyana respectfully asks the Court:

(a) Pursuant to Article 79*ter*, paragraph 4, of the Rules, to reject Venezuela's preliminary objections as inadmissible or reject them on the basis of the Parties' submissions; and

(b) To fix a date for the submission of Venezuela's Counter-Memorial on the Merits no later than nine months from the date of the Court's ruling on Venezuela's preliminary objections."

*

27. The Court notes that Venezuela refers, in the preliminary objections submitted on 7 June 2022, to Guyana's possible lack of standing and that the final submissions of Venezuela include references to its "preliminary objections" in the plural. However, the Court understands Venezuela to be making in substance only a single preliminary objection based on the argument that the United Kingdom is an indispensable third party without the consent of which the Court cannot adjudicate upon the dispute. The Court will address the Parties' arguments concerning Venezuela's preliminary objection on this basis.

*

* *

I. HISTORICAL AND FACTUAL BACKGROUND

28. Located in the north-east of South America, Guyana is bordered by Venezuela to the west. At the time the present dispute arose, Guyana was still a British colony, known as British Guiana. It gained independence from the United Kingdom on 26 May 1966. The dispute between Guyana and Venezuela dates back to a series of events that took place during the second half of the nineteenth century.

29. The Court will begin by briefly recalling the historical and factual background to the present case, as set out in its Judgment of 18 December 2020 (see *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 464–471, paras. 29–60).

A. THE 1897 WASHINGTON TREATY AND THE 1899 AWARD

30. In the nineteenth century, the United Kingdom and Venezuela both claimed the territory located between the mouth of the Essequibo River in the east and the Orinoco River in the west.

31. In the 1890s, the United States of America encouraged both parties to submit their territorial claims to arbitration. A treaty of arbitration entitled the "Treaty between Great Britain and the United States of Venezuela Respecting the Settlement of the Boundary between the Colony of British Guiana and the United States of Venezuela" (hereinafter the "Washington Treaty") was signed in Washington on 2 February 1897.

32. According to its preamble, the purpose of the Washington Treaty was to "provide for an amicable settlement of the question . . . concerning the boundary". Article I provided as follows: "An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela." Other provisions set out the arrangements for the arbitration, including the constitution of the tribunal, the place of arbitration and the applicable rules. Finally, according to Article XIII of the Washington Treaty, "[t]he High Contracting Parties engage[d] to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators".

33. The arbitral tribunal established under the Washington Treaty rendered its Award on 3 October 1899 (hereinafter the "1899 Award" or the "Award"). The 1899 Award granted the entire mouth of the Orinoco River and the land on either side to Venezuela; it granted to the United Kingdom the land to the east extending to the Essequibo River. The following year, a joint Anglo-Venezuelan commission was charged with demarcating the boundary established by the 1899 Award. The commission carried out that task between November 1900 and June 1904. On 10 January 1905, after the boundary had been demarcated, the British and Venezuelan commissioners produced

an official boundary map and signed an agreement accepting, *inter alia*, that the co-ordinates of the points listed were correct.

B. Venezuela's repudiation of the 1899 Award and the search for a settlement of the dispute

34. On 14 February 1962, Venezuela, through its Permanent Representative, informed the Secretary-General of the United Nations that it considered there to be a dispute between itself and the United Kingdom "concerning the demarcation of the frontier between Venezuela and British Guiana". In its letter to the Secretary-General, Venezuela stated as follows:

> "The award was the result of a political transaction carried out behind Venezuela's back and sacrificing its legitimate rights. The frontier was demarcated arbitrarily, and no account was taken of the specific rules of the arbitral agreement or of the relevant principles of international law.
>
> Venezuela cannot recognize an award made in such circumstances."

In a statement before the Fourth Committee of the United Nations General Assembly delivered shortly thereafter, on 22 February 1962, Venezuela reiterated its position.

35. The Government of the United Kingdom, for its part, asserted on 13 November 1962, in a statement before the Fourth Committee, that "the Western boundary of British Guiana with Venezuela [had been] finally settled by the award which the arbitral tribunal announced on 3 October 1899", and that it could not "agree that there [could] be any dispute over the question settled by the award". The United Kingdom also stated that it was prepared to discuss with Venezuela, through diplomatic channels, arrangements for a tripartite examination of the documentary material relevant to the 1899 Award.

36. On 16 November 1962, with the authorization of the representatives of the United Kingdom and Venezuela, the Chairman of the Fourth Committee declared that the Governments of the two States (the Government of the United Kingdom acting with the full concurrence of the Government of British Guiana) would examine the "documentary material" relating to the 1899 Award (hereinafter the "Tripartite Examination"). Experts appointed by Venezuela and an expert appointed by the United Kingdom, who also acted on British Guiana's behalf at the latter's request, examined the archives of the United Kingdom in London and the Venezuelan archives in Caracas, searching for evidence relating to Venezuela's contention of nullity of the 1899 Award.

37. The Tripartite Examination took place from 1963 to 1965. It was completed on 3 August 1965 with the exchange of the experts' reports. While Venezuela's experts continued to consider the Award to be null and void, the expert of the United Kingdom was of the view that there was no evidence to support that position.

38. On 9 and 10 December 1965, the Ministers for Foreign Affairs of the United Kingdom and Venezuela and the new Prime Minister of British Guiana met in London to discuss a settlement of the dispute. However, at the close of the meeting, each party maintained its position on the matter. While the representative of Venezuela asserted that any proposal "which did not recognise that Venezuela extended to the River Essequibo would be unacceptable", the representative of British Guiana rejected any proposal that would "concern itself with the substantive issues".

C. The signing of the Geneva Agreement

39. Following the failure of the talks in London, the three delegations agreed to meet again in Geneva in February 1966. After two days of negotiations, they signed, on 17 February 1966, the Geneva Agreement, the English and Spanish texts of which are authoritative. In accordance with its Article VII, the Geneva Agreement entered into force on the same day that it was signed.

40. The Geneva Agreement was approved by the Venezuelan National Congress on 13 April 1966. It was published in the United Kingdom as a White Paper, i.e. as a policy position paper presented by the Government, and approved by the House of Assembly of British Guiana. It was officially transmitted to the Secretary-General of the United Nations on 2 May 1966 and registered with the United Nations Secretariat on 5 May 1966 (United Nations, *Treaty Series*, Vol. 561, No. 8192, p. 322).

41. On 26 May 1966, Guyana, having attained independence, became a party to the Geneva Agreement, alongside the Governments of the United Kingdom and Venezuela, in accordance with the provisions of Article VIII thereof.

42. The Geneva Agreement provides, first, for the establishment of a Mixed Commission, comprised of representatives appointed by the Government of British Guiana and the Government of Venezuela, to seek a settlement of the controversy between the parties (Arts. I and II). Article I reads as follows:

> "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."

In addition, Article IV, paragraph 1, states that, should this Commission fail in its task, the Governments of Guyana and Venezuela shall choose one of the means of peaceful settlement provided for in Article 33 of the Charter of the United Nations. In accordance with Article IV, paragraph 2, should those Governments fail to reach agreement, the decision as to the means of settlement shall be made by an appropriate international organ upon which they both agree, or, failing that, by the Secretary-General of the United Nations.

43. On 4 April 1966, by letters to the Ministers for Foreign Affairs of the United Kingdom and Venezuela, the Secretary-General of the United Nations, U Thant, acknowledged receipt of the Geneva Agreement and stated as follows:

> "I have taken note of the responsibilities which may fall to be discharged by the Secretary-General of the United Nations under Article IV (2) of the Agreement, and wish to inform you that I consider those responsibilities to be of a nature which may appropriately be discharged by the Secretary-General of the United Nations."

D. THE IMPLEMENTATION OF THE GENEVA AGREEMENT

44. The Mixed Commission was established in 1966, pursuant to Articles I and II of the Geneva Agreement, and reached the end of its mandate in 1970 without having arrived at a solution.

45. Since no solution was identified through the Mixed Commission, it fell to Venezuela and Guyana, under Article IV of the Geneva Agreement, to choose one of the means of peaceful settlement provided for in Article 33 of the Charter of the United Nations. Pursuant to a moratorium on the dispute settlement process adopted in a protocol to the Geneva Agreement and signed on 18 June 1970 (hereinafter the "Protocol of Port of Spain" or the "Protocol"), the operation of Article IV of the Geneva Agreement was suspended for a period of 12 years. In December 1981, Venezuela announced its intention to terminate the Protocol of Port of Spain. Consequently, the application of Article IV of the Geneva Agreement was resumed from 18 June 1982 in accordance with Article V, paragraph 3, of the Protocol.

46. Pursuant to Article IV, paragraph 1, of the Geneva Agreement, the Parties attempted to reach an agreement on the choice of one of the means of peaceful settlement provided for in Article 33 of the Charter of the United Nations. However, they failed to do so within the three-month time-limit set out in Article IV, paragraph 2. They also failed to agree on the choice of an appropriate international organ to decide on the means of settlement, as provided for in Article IV, paragraph 2, of the Geneva Agreement.

47. The Parties therefore proceeded to the next step, referring the decision on the means of settlement to the Secretary-General of the United Nations. After the matter was referred to him by the Parties, the Secretary-General, Mr. Javier Pérez de Cuéllar, agreed by a letter of 31 March 1983 to undertake the responsibility conferred upon him under Article IV, paragraph 2, of the Geneva Agreement. In early 1990, the Secretary-General chose the good offices process as the appropriate means of settlement.

48. Between 1990 and 2014, the good offices process was led by the following three Personal Representatives, appointed by successive Secretaries-General: Mr. Alister McIntyre (1990–1999), Mr. Oliver Jackman (1999–2007) and Mr. Norman Girvan (2010–2014).

49. In September 2015, during the 70th Session of the United Nations General Assembly, the Secretary-General, Mr. Ban Ki-moon, held a meeting with the Heads of State of Guyana and Venezuela. Thereafter, on 12 November 2015, the Secretary-General issued a document entitled "The Way Forward", in which he informed the Parties that "[i]f a practical solution to the controversy [were] not found before the end of his tenure, [he] intend[ed] to initiate the process to obtain a final and binding decision from the International Court of Justice".

50. In his statement of 16 December 2016, the Secretary-General said that he had decided to continue for a further year the good offices process, to be led by a new Personal Representative with a strengthened mandate of mediation.

51. After taking office on 1 January 2017, the new Secretary-General, Mr. António Guterres, continued the good offices process for a final year, in conformity with his predecessor's decision. In this context, on 23 February 2017, he appointed Mr. Dag Nylander as his Personal Representative and entrusted him with a strengthened mandate of mediation. Mr. Nylander held several meetings and had a number of exchanges with the Parties. In letters dated 30 January 2018 to both Parties, the Secretary-General stated that he had "carefully analyzed the developments in the good offices process during the course of 2017" and announced:

> "Consequently, I have fulfilled the responsibility that has fallen to me within the framework set by my predecessor and, significant progress not having been made toward arriving at a full agreement for the solution of the controversy, have chosen the International Court of Justice as the means that is now to be used for its solution."

52. On 29 March 2018, Guyana filed its Application in the Registry of the Court.

II. THE ADMISSIBILITY OF VENEZUELA'S PRELIMINARY OBJECTION

53. Guyana argues that Venezuela's preliminary objection concerns the exercise of the Court's jurisdiction and should be rejected as inadmissible, because it is jurisdictional in nature and not an objection to admissibility. Guyana contends that the Court's Order of 19 June 2018, in which the Court decided that the written pleadings were first to be addressed to the question of its jurisdiction, required the Parties to plead "all of the legal and factual grounds on which the Parties rely in the matter of its jurisdiction". According to Guyana, the phrase "in the matter of its jurisdiction" covers not only the existence, but also the exercise of jurisdiction.

54. Guyana maintains that the "question of the jurisdiction of the Court", within the meaning of the Court's Order of 19 June 2018 necessarily encompasses the question whether the United Kingdom consented to the Court's jurisdiction to settle the dispute regarding the validity of the Award. According to Guyana, this question lies at the heart of Venezuela's preliminary objection based on the Court's Judgment in the case concerning *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America)* and its subsequent jurisprudence.

55. Guyana contends that, in accordance with Article 79*bis* of the Rules of Court, Venezuela is no longer entitled to raise a preliminary objection which in substance concerns questions of jurisdiction that the Court raised *proprio motu* and decided in a binding judgment. Guyana asserts that it follows from the 2020 Judgment, in which the Court found that it had jurisdiction over part of Guyana's claims, that the Court may not entertain Venezuela's preliminary objection without violating the principle of *res judicata*.

56. Guyana argues that Venezuela's preliminary objection is, in any event, time-barred, because Venezuela could and should have raised its objection within the time-limit fixed by the Court's Order of 19 June 2018.

*

57. According to Venezuela, its preliminary objection is admissible. Venezuela accepts the *res judicata* effect of the Court's 2020 Judgment, but states that its preliminary objection concerns the exercise of jurisdiction and is thus an objection to the admissibility of the Application rather than to the Court's jurisdiction.

58. Venezuela argues that the Court, in its 2020 Judgment, only decided questions of jurisdiction and did not dispose, explicitly or implicitly, of questions of admissibility. Venezuela states that the 2020 Judgment consequently does not have the effect of rendering its preliminary objection inadmissible.

59. Venezuela further submits that its preliminary objection is not time-barred, because the Court's Order of 19 June 2018 only fixed time-limits for pleadings on the question of the Court's jurisdiction, referring, in Venezuela's view, to the question of the existence of the Court's jurisdiction and not its exercise. Venezuela therefore remained entitled, it argues, to raise any preliminary objection to admissibility within the time-limits set out in Article 79*bis* (1) of the Rules of Court.

* *

60. The Court recalls that it has, on a number of occasions, considered whether a State that is not party to the proceedings before it should be deemed to be an indispensable third party without the consent of which the Court cannot adjudicate.

61. In the operative paragraph of its Judgment in the case concerning *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, the Court found

> "that the jurisdiction conferred upon it by the common agreement of France, the United Kingdom, the United States of America and Italy does not, in the absence of the consent of Albania, authorize it to adjudicate upon the first Submission in the Application of the Italian Government" (*Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 34).

62. Similarly, in the case concerning *East Timor (Portugal* v. *Australia)*, the Court concluded

> "that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent" (*Judgment, I.C.J. Reports 1995*, p. 105, para. 35).

63. When rejecting an objection that a third State is an indispensable party without the consent of which the Court cannot adjudicate in a given case, the Court has proceeded on the basis that the objection concerned the exercise of jurisdiction rather than the existence of jurisdiction (see, *inter alia*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 57, para. 116; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88). For example, in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court concluded that "the Court [could] decline to exercise its jurisdiction" on the basis of the principle referred to as "Monetary Gold" (hereinafter the "Monetary Gold principle") (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 262, para. 55).

64. The above-cited jurisprudence is thus premised on a distinction between two different concepts: on the one hand, the existence of the Court's jurisdiction and, on the other, the exercise of its jurisdiction where that jurisdiction is established. Only an objection concerning the existence of the Court's jurisdiction can be characterized as an objection to jurisdiction. The Court concludes that Venezuela's objection on the basis of the Monetary Gold principle is an objection to the exercise of the Court's jurisdiction and thus does not constitute an objection to jurisdiction.

65. The Court now turns to the principle of *res judicata*, which is reflected in Articles 59 and 60 of the Statute of the Court. As the Court has stated, that principle "establishes the finality of the decision adopted in a particular case" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles*

from the Nicaraguan Coast (Nicaragua v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 125, para. 58).

66. The force of *res judicata* attaches not only to a judgment on the merits, but also to a judgment determining the Court's jurisdiction, such as the Court's 2020 Judgment (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 91, para. 117).

67. Specifically, the operative part of a judgment of the Court possesses the force of *res judicata* (*ibid.*, p. 94, para. 123). In order to determine what has been decided with the force of *res judicata*, "it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed", and it "may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, paras. 59 and 61; see also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018 (I)*, p. 166, para. 68). If a matter "has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126).

68. In the operative paragraph of its 2020 Judgment, the Court found

> "(1) that it has jurisdiction to entertain the Application filed by the Co-operative Republic of Guyana on 29 March 2018 in so far as it concerns the validity of the Arbitral Award of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between the Co-operative Republic of Guyana and the Bolivarian Republic of Venezuela; [and]
>
> (2) that it does not have jurisdiction to entertain the claims of the Co-operative Republic of Guyana arising from events that occurred after the signature of the Geneva Agreement" (*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 493, para. 138).

69. The operative paragraph of the 2020 Judgment and the reasoning underlying it only address questions concerning the existence of the Court's jurisdiction. Moreover, that Judgment does not address, even implicitly, the issue of the exercise of jurisdiction by the Court. In particular, the question whether the United Kingdom is an indispensable third party without the consent of which the Court could not exercise its jurisdiction was not determined by necessary implication in the 2020 Judgment.

70. It follows that the force of *res judicata* attaching to the 2020 Judgment extends only to the question of the existence of the Court's jurisdiction and does not bar the admissibility of Venezuela's preliminary objection.

71. The Court also notes that, by using the phrases "in the matter of its jurisdiction" and "the question of the jurisdiction of the Court" in its Order of 19 June 2018, it was referring only to the existence and not to the exercise of jurisdiction. As the Order records, during the meeting between the President of the Court and the representatives of the Parties on 18 June 2018, Venezuela stated only that it contested the Court's jurisdiction.

72. As to Guyana's argument that Venezuela's preliminary objection is time-barred, the Court recalls that, in its Order of 19 June 2018, it considered that it was "necessary for the Court to be informed of all of the legal and factual grounds on which the Parties rely in the matter of its jurisdiction" (*Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 19 June 2018, I.C.J. Reports 2018 (I)*, p. 403). Accordingly, the Court decided "that the written pleadings shall first be addressed to the question of the jurisdiction of the Court" and fixed time-limits for pleadings on that question *(ibid.)*. The Court further recalls that, in other instances, it has expressly directed parties to address both questions of jurisdiction and admissibility in pleadings (see e.g. *Relocation of the United States Embassy to Jerusalem (Palestine* v. *United States of America), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, p. 710). The time-limits that the Court fixed in its Order of 19 June 2018 thus only concerned pleadings with respect to the question of the existence of the Court's jurisdiction.

73. In light of the Court's finding above that Venezuela's preliminary objection is not an objection to the Court's jurisdiction, the time-limits that the Court set out in the Order of 19 June 2018 did not apply to pleadings with respect to such objection. Venezuela thus remained entitled to raise that objection within the time-limit set out in Article 79*bis*, paragraph 1, of the Rules of Court.

74. For these reasons, the Court concludes that Venezuela's preliminary objection is admissible. The Court will now proceed to the examination of this preliminary objection.

III. EXAMINATION OF VENEZUELA'S PRELIMINARY OBJECTION

75. In its preliminary objection, Venezuela submits that the United Kingdom is an indispensable third party to the proceedings and that the Court cannot decide the question of the validity of the 1899 Award in the United Kingdom's absence. Venezuela argues that a judgment of the Court on the merits in this case would necessarily involve, as a prerequisite, an evaluation of the lawfulness of certain "fraudulent conduct" allegedly attributable to the United Kingdom in respect of the 1899 Award. Venezuela explains that since the United Kingdom was a party to the Washington Treaty and to the arbitration that resulted in the 1899 Award, and is a party to the Geneva Agreement, an evaluation of the allegedly fraudulent conduct would involve an examination of the United Kingdom's "commitments and responsibilities".

76. Venezuela alleges that it had been coerced and deceived by the United Kingdom to enter into the Washington Treaty. It also alleges that, during the arbitral proceedings, there were certain improper communications between the legal counsel of the United Kingdom and the arbitrators that it had appointed, and that the United Kingdom knowingly submitted "doctored" and "falsified" maps to the arbitral tribunal, which rendered the 1899 Award "null and void". According to Venezuela, each of these acts, independently, operates to invalidate the 1899 Award and to engage the international responsibility of the United Kingdom. Venezuela submits that the United Kingdom's participation is required in order for Venezuela's rights to be "duly protected" in the proceedings, and adds that it is not able to dispute the rights and obligations arising from the conduct of a State that is absent from these proceedings and whose participation cannot be enjoined by this Court.

77. Relying, *inter alia*, on the Court's jurisprudence in the cases concerning *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, *East Timor (Portugal* v. *Australia)* and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Venezuela asserts that an application is inadmissible if the legal interests of a third State would constitute the very subject-matter of the decision that is applied for, and that State has not consented to adjudication by the Court. Venezuela submits that the commitments and responsibilities of the United Kingdom would constitute "the very object" and the "very essence" of the decision to be rendered in the present case because the invalidity of the 1899 Award arises from the allegedly fraudulent conduct of the United Kingdom in respect of the arbitration which resulted in the Award. In this regard, Venezuela maintains that the United Kingdom has not transferred its commitments and obligations in respect of the 1899 Award to Guyana.

78. Venezuela adds that if the Court determines that the United Kingdom is responsible for fraudulent conduct, the consequence would be not only that the 1899 Award would cease to have legal effect, as Guyana claims, but also that Venezuela would be entitled to rely on the consequences of the invalidity of a treaty, as set out in Article 69 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention").

79. Venezuela further submits that the Geneva Agreement does not operate to make Guyana a successor in respect of all the rights and obligations relating to the dispute between Venezuela and the United Kingdom. It points out that Article VIII of the Geneva Agreement provides that, upon attaining independence, Guyana shall become a party to the Agreement, not in substitution of, but alongside the United Kingdom. Therefore, in the view of Venezuela, "[t]he Agreement does not exempt the United Kingdom from its obligations and responsibilities . . . The United Kingdom thus remains an active party to this dispute . . . [and] its position has not changed in the years after the Agreement."

80. Venezuela argues that neither the United Kingdom's status as a party to the Geneva Agreement nor any conduct of that State subsequent to the conclusion of the Agreement can be regarded as consent to

adjudication by the Court. It adds that, even if it is assumed that the United Kingdom gave its consent, the Court can only rule on its rights and obligations if that State accepts the Court's jurisdiction and becomes a party to the case.

*

81. Guyana submits that the Court should reject Venezuela's preliminary objection that, in these proceedings, the United Kingdom is an indispensable third party in the absence of which the Court cannot decide the question of the validity of the 1899 Award. Guyana argues that the United Kingdom does not have legal interests that could be affected by the Court's determination of the validity of the 1899 Award, let alone interests that "constitute the very subject-matter" of the decision. Guyana maintains that the United Kingdom has no current legal interest in, or claim to, the territory in question, having relinquished all territorial claims in relation to this dispute when the United Kingdom granted independence to Guyana in 1966. It follows, therefore, that since the dispute concerns claims to territory contested between Guyana and Venezuela, the United Kingdom has no legal interests that could constitute the very subject-matter of this dispute, and there is no basis for the Court to decline to exercise its jurisdiction on account of the absence of the United Kingdom.

82. In support of its argument that the United Kingdom is not an indispensable third party in these proceedings, Guyana submits that it is not the lawfulness of any conduct by the United Kingdom that would be evaluated by the Court in determining the validity of the 1899 Award, but rather the conduct of the arbitral tribunal. Guyana submits that the conduct which the Court must address in this case is that of the arbitrators and not that of the United Kingdom, and even though a finding of misconduct by the arbitrators may require factual findings in relation to acts attributable to the United Kingdom, it would not require any legal findings in relation to the responsibility of the United Kingdom.

83. Guyana also submits that the United Kingdom consented to the Court's exercise of jurisdiction in this case by virtue of negotiating, and becoming a party to, the Geneva Agreement. It asserts that the United Kingdom has given its consent for the Court to resolve this dispute between Guyana and Venezuela, by virtue of Article IV, paragraph 1, of the Geneva Agreement (reproduced in paragraph 92 below), which accorded to Guyana and Venezuela the sole right to refer the dispute to the Court, without any involvement on the United Kingdom's part. Guyana maintains that the United Kingdom gave its consent, knowing full well that any resolution of the controversy would require the examination of Venezuela's allegations of wrongdoing by the United Kingdom in the nineteenth century.

84. Guyana adds that it matters not whether the effect of the Geneva Agreement "is characterized as an expression of consent [by the United Kingdom] to the procedure being followed without its involvement, or as a waiver of any rights it may normally have in the conduct of those processes — including judicial processes". According to Guyana, the existence of consent on the part of the United Kingdom renders Venezuela's objection based on the Court's Judgment in the case concerning *Monetary Gold Removed from Rome in 1943* and subsequent jurisprudence inapplicable.

85. Finally, Guyana cites certain statements made jointly by the United Kingdom and other States in multilateral fora, whereby they welcomed the 2020 Judgment of the Court and expressed their support for the ongoing judicial settlement of the dispute between Venezuela and Guyana. According to Guyana, these statements demonstrate that the United Kingdom itself considers that it has no legal interests that might be affected by a judgment on the merits in this case. In this respect, Guyana also refers to other conduct by the United Kingdom since Guyana attained independence. It adds that Venezuela's own conduct in that same period contradicts any contention that the United Kingdom has any legal interest in the issue of the validity of the 1899 Award.

* *

86. The Court recalls that Venezuela, invoking the Monetary Gold principle, maintains that the legal interests of the United Kingdom would be the very subject-matter of the Court's decision in the present case. Nonetheless, the Court notes that the two Parties to these proceedings, as well as the United Kingdom, are parties to the Geneva Agreement, on which the Court's jurisdiction is based. It is therefore appropriate for the Court to consider the

legal implications of the United Kingdom being a party to the Geneva Agreement, which calls for an interpretation of the relevant provisions of the Agreement.

87. To interpret the Geneva Agreement, the Court will apply the rules of treaty interpretation to be found in Articles 31 to 33 of the Vienna Convention (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33). Although that Convention is not in force between the Parties and is not, in any event, applicable to instruments concluded before it entered into force, such as the Geneva Agreement, it is well established that these Articles reflect rules of customary international law *(ibid.)*.

88. In accordance with the rule of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. These elements of interpretation are to be considered as a whole (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64).

89. The Court notes that the emphasis placed by the parties on British Guiana becoming independent is an important part of the context for purposes of interpreting Article IV of the Agreement. Indeed, the preamble makes clear that the United Kingdom participated in the elaboration of the Agreement in consultation with the Government of British Guiana. The preamble further indicates that, in elaborating the Agreement, the parties took into account the "forthcoming independence of British Guiana". The Court also observes that the references to "Guyana" in paragraphs 1 and 2 of Article IV presuppose the attainment of independence by British Guiana. This independence was attained on 26 May 1966, some three months after the conclusion of the Agreement; on that date, Guyana became a party to the Geneva Agreement in accordance with Article VIII thereof.

90. Articles I and II of the Geneva Agreement address the initial stage of the process for the settlement of the dispute between the Parties and identify the role of Venezuela and British Guiana in that process. Article I of the Agreement reads as follows:

> "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."

Paragraph 1 of Article II reads as follows:

> "Within two months of the entry into force of this Agreement, two representatives shall be appointed to the Mixed Commission by the Government of British Guiana and two by the Government of Venezuela."

91. The Court observes that, while Article I of the Agreement describes the dispute as one existing between the United Kingdom and Venezuela, Article II provides no role for the United Kingdom in the initial stage of the dispute settlement process. Rather, it places the responsibility for appointment of the representatives to the Mixed Commission on British Guiana and Venezuela. The Court notes that the reference to "British Guiana" contained in Article II, which can be distinguished from references to the "United Kingdom" contained elsewhere in the treaty and particularly in Article I, supports the interpretation that the parties to the Geneva Agreement intended for Venezuela and British Guiana to have the sole role in the settlement of the dispute through the mechanism of the Mixed Commission. It is noteworthy that such an understanding was arrived at notwithstanding that British Guiana was a colony which had not yet attained independence and was not yet a party to the treaty.

92. The Court notes that neither paragraph 1 nor paragraph 2 of Article IV of the Geneva Agreement contains any reference to the United Kingdom. These provisions read as follows:

> "(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 in 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."

93. Paragraphs 1 and 2 of Article IV, which set out the final stages of the process for the settlement of the dispute, refer only to the "Government of Guyana and the Government of Venezuela", and place upon them the responsibility to choose a means of peaceful settlement provided in Article 33 of the Charter of the United Nations or, failing agreement on such means, the responsibility to refer the decision on the means to an appropriate international organ upon which they both agree. Failing agreement on that point, the Parties would refer the matter to the Secretary-General of the United Nations who would choose one of the means of settlement provided in Article 33 of the Charter of the United Nations.

94. In the view of the Court, this examination of the relevant provisions of the Geneva Agreement, in particular the detailed provisions of Article IV, shows the importance that the parties to the Agreement attached to the conclusive resolution of the dispute. In that regard, the Court recalls that, in its 2020 Judgment, it determined that the object and purpose of the Agreement is to ensure a definitive resolution of the controversy between the Parties (*I.C.J. Reports 2020*, p. 476, para. 73).

95. Interpreting paragraphs 1 and 2 of Article IV in accordance with the ordinary meaning to be given to the terms in their context, and in the light of the Agreement's object and purpose, the Court concludes that the Geneva Agreement specifies particular roles for Guyana and Venezuela and that its provisions, including Article VIII, do not provide a role for the United Kingdom in choosing, or in participating in, the means of settlement of the dispute pursuant to Article IV.

96. Therefore, the Court considers that the scheme established by Articles II and IV of the Geneva Agreement reflects a common understanding of all parties to that Agreement that the controversy which existed between the United Kingdom and Venezuela on 17 February 1966 would be settled by Guyana and Venezuela through one of the dispute settlement procedures envisaged in the Agreement.

97. The Court further notes that when the United Kingdom accepted, through the Geneva Agreement, the scheme for the settlement of the dispute between Guyana and Venezuela without its involvement, it was aware that such a settlement could involve the examination of certain allegations by Venezuela of wrongdoing by the authorities of the United Kingdom at the time of the disputed arbitration.

98. In that respect, the Court recalls that, on 14 February 1962, Venezuela, through its Permanent Representative to the United Nations, informed the Secretary-General that it considered there to be a dispute between the United Kingdom and itself "concerning the demarcation of the frontier between Venezuela and British Guiana". In its letter to the Secretary-General, Venezuela stated as follows:

> "The award was the result of a political transaction carried out behind Venezuela's back and sacrificing its legitimate rights. The frontier was demarcated arbitrarily, and no account was taken of the specific rules of the arbitral agreement or of the relevant principles of international law.
>
> Venezuela cannot recognize an award made in such circumstances."

Venezuela reiterated its position in a statement before the Fourth Committee of the United Nations

General Assembly delivered shortly thereafter, on 22 February 1962.

99. In a statement to the Fourth Committee of the United Nations General Assembly delivered on 12 November 1962, the Minister for External Relations of Venezuela, Mr. Marcos Falcón Briceño, said that the 1899 Award "arose in circumstances which were clearly prejudicial to the rights of Venezuela". He added further that,

> "[v]iewing it in retrospect, there was no arbitral award, properly speaking. There was a settlement. There was a political compromise. And by means of this decision, the three judges who held a majority disposed of Venezuelan territory; for the two British judges were not . . . acting as judges. They were acting as government representatives, as advocates rather than as judges."

100. On 13 November 1962, the Government of the United Kingdom responded to Venezuela's statement at the Fourth Committee of the General Assembly. The United Kingdom "emphatically rejected" the "most serious allegation" of the Venezuelan Minister for External Relations that the members of the arbitral tribunal which rendered the 1899 Award "came to their decisions without reference to the rules of international law and to the other rules which the Tribunal under the terms of the Treaty ought to have applied". The United Kingdom also rejected the allegations that the 1899 Award was an "improper compromise" or a "diplomatic compromise", and stated that it could not "agree that there [could] be any dispute over the question settled by the award".

101. In the same statement, the United Kingdom offered to discuss with Venezuela, through diplomatic channels, arrangements for a tripartite examination of the documentary material relevant to the validity of the 1899 Award. Following the Tripartite Examination, on 9 and 10 December 1965, the Foreign Ministers of the United Kingdom and Venezuela and the Prime Minister of British Guiana met in London to discuss a settlement of the dispute. As the Court noted in its 2020 Judgment, in the discussion held on 9 and 10 December 1965, the United Kingdom and British Guiana rejected the Venezuelan proposal that the only solution to the frontier dispute lay in the return of the disputed territory to Venezuela, on the basis that it implied that the 1899 Award was null and void and that there was no justification for that allegation.

102. After the failure of these talks, the United Kingdom participated in the negotiation and conclusion of the Geneva Agreement. The Court is of the view that the United Kingdom was aware of the scope of the dispute concerning the validity of the 1899 Award, which included allegations of its wrongdoing and recourse to unlawful procedures, but nonetheless accepted the scheme set out in Article IV, whereby Guyana and Venezuela could submit the dispute to one of the means of settlement set out in Article 33 of the Charter of the United Nations, without the involvement of the United Kingdom. The Court considers that the ordinary meaning of the terms of Article IV read in their context and in light of the object and purpose of the Geneva Agreement, as well as the circumstances surrounding its adoption, support this conclusion.

103. Article 31, paragraph 3, of the Vienna Convention provides that, in the interpretation of a treaty, there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Accordingly, the Court will now examine the subsequent practice of the parties to the Geneva Agreement to ascertain whether it establishes their agreement on the lack of involvement of the United Kingdom in the settlement of the dispute between Guyana and Venezuela.

104. The Court observes that, at the 11th meeting of the Mixed Commission held in Caracas on 28 and 29 December 1968, the Venezuelan commissioners issued an extensive statement in which they noted the following:

> "[I]f the representatives from Guyana were willing to search in good faith satisfactory solutions for the practical settlement of the controversy, Venezuela would be willing to give reasonable time so that the Mixed Commission accomplished the mission and thus, will consent to extend the existence of that body for such periods as it deems appropriate for that purpose. Here is a proposal of practical content which we formally presented. If Guyana does not modify its behavior and continues to be intransigently locked up in its speculative position, it will corroborate with such attitude its reiterated determination to disregard the Geneva Agreement, and particularly, Article I."

The United Kingdom did not seek to participate in the above-mentioned Mixed Commission procedure; nor did Venezuela and Guyana request the United Kingdom's participation. Venezuela's exclusive engagement with the

Government of Guyana at the Mixed Commission indicates that there was a common understanding among the parties that Article II did not provide a role for the United Kingdom in the dispute settlement process.

105. The Court notes that Venezuela engaged exclusively with the Government of Guyana when implementing Article IV of the Geneva Agreement. In its Memorandum, Venezuela described the Parties' disagreements over the implementation of Article IV as follows:

> "Venezuela and Guyana failed to agree on the choice of a means of settlement and to designate an 'appropriate international organ' to proceed to do it, as provided for in the first subparagraph of Article IV.2 of the Agreement. Venezuela insisted on direct negotiations and Guyana insisted on submitting it to the International Court of Justice. Later, Venezuela proposed to entrust the UN Secretary-General with the choice of the means; Guyana committed it to the General Assembly, the Security Council or the International Court of Justice."

In respect of the good offices process conducted by the Secretary-General of the United Nations, Venezuela stated that "[i]t is worth highlighting that the designation of the good officers always took place upon acceptance by both Parties". Again, the Court observes that the United Kingdom did not seek to participate in the procedure set out in Article IV to resolve the dispute; nor did the Parties request such participation. Venezuela's exclusive engagement with the Government of Guyana during the good offices process indicates that there was agreement among the parties that the United Kingdom had no role in the dispute settlement process.

106. In view of the above, the practice of the parties to the Geneva Agreement further demonstrates their agreement that the dispute could be settled without the involvement of the United Kingdom.

107. In light of the foregoing, the Court concludes that, by virtue of being a party to the Geneva Agreement, the United Kingdom accepted that the dispute between Guyana and Venezuela could be settled by one of the means set out in Article 33 of the Charter of the United Nations, and that it would have no role in that procedure. Under these circumstances, the Court considers that the Monetary Gold principle does not come into play in this case. It follows that even if the Court, in its Judgment on the merits, were called to pronounce on certain conduct attributable to the United Kingdom, which cannot be determined at present, this would not preclude the Court from exercising its jurisdiction, which is based on the application of the Geneva Agreement. The preliminary objection raised by Venezuela must therefore be rejected.

*

* *

108. For these reasons,

THE COURT,

(1) Unanimously,

Finds that the preliminary objection raised by the Bolivarian Republic of Venezuela is admissible;

(2) By fourteen votes to one,

Rejects the preliminary objection raised by the Bolivarian Republic of Venezuela;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Wolfrum;

AGAINST: *Judge* ad hoc Couvreur;

(3) By fourteen votes to one,

Finds that it can adjudicate upon the merits of the claims of the Co-operative Republic of Guyana, in so far as they fall within the scope of paragraph 138, subparagraph 1, of the Judgment of 18 December 2020.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Wolfrum;

AGAINST: *Judge* ad hoc Couvreur.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this sixth day of April, two thousand and twenty-three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Co-operative Republic of Guyana and the Government of the Bolivarian Republic of Venezuela, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge BHANDARI appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge IWASAWA appends a declaration to the Judgment of the Court; Judge *ad hoc* WOLFRUM appends a declaration to the Judgment of the Court; Judge *ad hoc* COUVREUR appends a partially separate and partially dissenting opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

DECLARATION OF JUDGE BHANDARI

1966 Geneva Agreement — Court's finding that United Kingdom has no role in resolution of dispute and that Monetary Gold principle does not come into play — Finding concerning agreement to this arrangement also applies to other parties to Geneva Agreement.

1. I agree with the Court's Judgment and its reasoning. I make this declaration to note an additional conceptual point.

2. The Court's rejection of Venezuela's preliminary objection rests on the findings that the United Kingdom has no role in the resolution of this dispute and that the Monetary Gold principle does not come into play (Judgment, paras. 91, 95, 97, 102 and 105-107). The Court reached these conclusions on the basis of its interpretation of the 1966 Geneva Agreement and the subsequent practice of the parties to that Agreement.

3. In the Court's interpretation, which I share, the Geneva Agreement reflects a common understanding, on the part of all parties to that instrument, that the dispute existing between the United Kingdom and Venezuela on 17 February 1966 would be settled by Guyana and Venezuela through one of the procedures referenced in the Geneva Agreement (*ibid.*, paras. 95-96). Consequently, as a party to that instrument, the United Kingdom accepted that it would have no role in those procedures (*ibid.*, paras. 97 and 107). I share the view that the United Kingdom was aware of the scope of the dispute regarding the validity of the 1899 Award (*ibid.*, para. 102) and that it accepted the arrangement under Article IV, which allowed Guyana and Venezuela to submit the dispute to judicial settlement without the United Kingdom's involvement (*ibid.*, paras. 97, 102 and 107). Moreover, I share the Court's conclusion that subsequent practice confirms this understanding (*ibid.*, paras. 103-106). In particular, Venezuela engaged exclusively with the Government of Guyana, and not with the United Kingdom, during the good offices process (*ibid.*, para. 105).

4. There is little doubt that the United Kingdom accepted and supported these arrangements, especially the possibility that the dispute could be settled through one of the procedures referred to in Article 33 of the Charter of the United Nations. However, what renders this situation particular is the fact that the other parties, Venezuela and Guyana, accepted this circumstance as well.

5. It follows that one can also consider the situation from the opposite angle. Just as the United Kingdom accepted that it would have no role in the settlement of the dispute, so it could be said that, by becoming a party to the Geneva Agreement, Venezuela itself in any event also forfeited any right it might otherwise have had to object to this dispute being settled through a procedure not involving the United Kingdom. A textual interpretation of the Geneva Agreement already leads to this conclusion, but it is further bolstered by the parties' subsequent practice, as noted above.

(Signed) Dalveer BHANDARI.

SEPARATE OPINION OF JUDGE ROBINSON

Guyana's attainment of independence from the United Kingdom — Right to self- determination — Independence not a gift or grant from the United Kingdom — Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

1. I am in agreement with the findings of the Court in paragraph 108 of the Judgment. However, I utilize the medium of the separate opinion to comment on a particular issue relating to the Judgment.

2. In setting out the arguments of the Parties, the Court cites Guyana's argument that the "United Kingdom has no current legal interest in, or claim to, the territory in question, having relinquished all territorial claims in relation to this dispute when the United Kingdom granted independence to Guyana in 1966" (Judgment, para. 81). However, as a matter of law, the United Kingdom did not grant independence to Guyana. At the time of Guyana's independence in 1966, the right to self-determination had already become a rule of customary international law, on the adoption of General Assembly resolution 1514 (XV) of 14 December 1960 (hereinafter "1514"); consequently, the attainment by former colonies of independence was not a gift, grant or concession of colonial Powers. Rather, independence resulted from the discharge by the colonial Powers of an obligation imposed on them by paragraph 5 of 1514, to transfer all powers to the peoples of colonized countries in accordance with their freely expressed will. The status of the right to self-determination, as a customary norm of international law, was confirmed by the Court in its 2019 Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In light of that transformational development, it is a misstatement of the law to assert that, after the adoption of 1514, colonial Powers granted their former colonies independence, since independence was not theirs to grant.

3. The conclusion that colonized countries and peoples were not granted independence by their colonial Powers is arrived at notwithstanding the title of 1514, "Declaration on the Granting of Independence to Colonial Countries and Peoples". While the title may be relevant for the purpose of interpreting 1514, it cannot dictate an interpretation that finds no support in the text of the resolution. Nowhere in the text of 1514 is the term "grant of independence" used. The law of 1514 is that the right to self-determination is a human right that inheres in a people, and all that is required for its enjoyment is that it must reflect the freely expressed will of the people. 1514 wrested the attainment of independence from the grasp of the colonizers and placed it firmly in the hands of colonized peoples themselves.

(Signed) Patrick L. ROBINSON.

DECLARATION OF JUDGE IWASAWA

Like other objections based on the Monetary Gold principle considered by the Court in previous cases, Venezuela's objection is not an objection to the Court's jurisdiction but an objection to admissibility.

1. In the present case, the Court considers that Venezuela's preliminary objection that the United Kingdom is an indispensable third party is not barred by the force of *res judicata* of the 2020 Judgment on jurisdiction and concludes that it is admissible (Judgment, paras. 70 and 74). The Court explains that its jurisprudence on the Monetary Gold principle is premised on a distinction between the *existence* and the *exercise* of its jurisdiction, and that Venezuela's objection is an objection to the *exercise* of its jurisdiction and does not constitute an objection to jurisdiction (para. 64).

2. Venezuela contends that its objection is an objection to the admissibility of the Application and not to the Court's jurisdiction (Preliminary Objections of Venezuela, para. 12; CR 2022/21, pp. 24-25, paras. 16-18 (Zimmermann); CR 2022/23, pp. 21-26, paras. 2-28 (Zimmermann)). By contrast, Guyana argues that it is an objection to jurisdiction and not to admissibility. The Court rejects this argument of Guyana.

3. The Court has considered objections based on the Monetary Gold principle as concerned with admissibility and not the Court's jurisdiction. In the *Monetary Gold* case, the Court found that although the parties had conferred jurisdiction upon the Court, it could not "*exercise* this jurisdiction" (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 33; emphasis added). In the *Nauru* case, the Court first examined Australia's objection to jurisdiction and only subsequently considered its objection based on the Monetary Gold principle. The Court rejected the latter objection, stating that it could not decline to "*exercise* its jurisdiction" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 262, para. 55; emphasis added). In the *East Timor* case, after determining that it had jurisdiction, the Court concluded that it could not "*exercise* the jurisdiction it has" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 35; emphasis added).

4. The Court has elucidated the character of objections to admissibility in the following terms:

> "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120, citing *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29.)

An objection based on the Monetary Gold principle is one such objection calling for the Court not to exercise its jurisdiction and not to proceed to an examination of the merits. In the *Military and Paramilitary Activities* case, the Court expressly described the objection of the United States based on the Monetary Gold principle as one concerning the admissibility of the application (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 429, para. 84, and p. 431, para. 88)[1]. In discussing an objection based on the Monetary Gold principle before the Court, parties have likewise treated it as one concerned with admissibility[2]. Venezuela's objection that the United Kingdom is an indispensable third party is not an objection to the Court's jurisdiction but an objection to admissibility.

(Signed) IWASAWA Yuji.

ENDNOTES

1 See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, separate opinion of Judge Tomka, p. 899, para. 41; dissenting opinion of Judge Crawford, p. 1107, para. 33.

2 E.g. Counter-Memorial of the United States (Jurisdiction and Admissibility), *I.C.J. Pleadings*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Vol. II, pp. 133-135, paras. 437-443; Oral arguments of Nicaragua on jurisdiction and admissibility, *ibid.*, Vol. III, p. 84 (Reichler); Preliminary Objections of Australia, as reflected in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 39; Counter-Memorial of Australia, *I.C.J. Pleadings*, *East Timor (Portugal* v. *Australia)*, Vol. I, pp. 393-412, paras. 177-232; Reply of Portugal, *ibid.*, pp. 693-733, paras. 7.01-7.63; Preliminary Objections of Nigeria, as reflected in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 286, para. 18.

PARTIALLY SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE *AD HOC* COUVREUR

[Translation]

*Admissibility of the preliminary objection — Existence of the Court's jurisdiction between the Parties — Exercise of that jurisdiction — Admissibility of the Application — Court previously seised only of the question of the existence of a basis of jurisdiction between the Parties — Judgment of 18 December 2020 exclusively addressed that question — Venezuela not required to raise its objection to the exercise of the Court's jurisdiction within time-limit fixed by the Order of 19 June 2018 — Venezuela entitled to raise such an objection on 7 June 2022, within three months of the filing of the Memorial on the merits, in accordance with Article 79*bis *of the Rules of Court — Objection admissible.*

Treatment of the said objection — Guyana's legitimacy to institute the proceedings and its standing before the Court — Monetary Gold *jurisprudence — Question whether the United Kingdom has a legal interest, constituting the very subject-matter of the dispute, on which the Court must rule before making any findings on Guyana's claims — United Kingdom as a party to the 1897 Washington Treaty and to the proceedings leading to the 1899 Arbitral Award — United Kingdom's formal interest not sufficiently "current" or "real" to prevent the Court from deciding the case in its absence, in so far as grounds of nullity invoked in respect of the Award are alleged to be exclusively attributable to the arbitrators — Situation clearly different when grounds of nullity invoked are said directly to concern the United Kingdom's own conduct during the negotiation of the Washington Treaty and the elaboration of the Award — Customary rule of non-succession in respect of State responsibility — International Law Commission's draft guideline 9 — United Kingdom's own legal interests central to dispute to be settled by the Court — Impossibility for the Court to rule on Guyana's claims without first evaluating the lawfulness of the United Kingdom's conduct.*

Argument that the United Kingdom has "consented" to the Court's jurisdiction to settle the dispute and to the exercise of that jurisdiction — "Consent" necessarily implies the United Kingdom's acceptance of the Court's jurisdiction over it when the latter is called upon to rule on the lawfulness of its individual acts — Traditionally very strict requirements for establishing such acceptance not met in this case — In subscribing to Article IV of the 1966 Geneva Agreement, the United Kingdom only consented to the establishment of a general scheme for the settlement of the dispute, intended in principle to be applied without its involvement — Choosing the Court implies full compliance with its Statute, in particular as regards consensualism — Reasonable interpretation of Article IV does not suggest that the United Kingdom has unequivocally and unquestionably consented to the Court ruling on the lawfulness of its past conduct without it being able to defend its case — Specific complaints against the United Kingdom not previously identified in detail or definitively formulated in legal terms — United Kingdom's consent to the Court's jurisdiction moreover always meticulously worded — Consistent jurisprudence of the Court as regards forum prorogatum.

United Kingdom's undeniable desire to remain a "third party" as regards the settlement of the dispute — Impossibility for the Court, under the system of the Statute, to rule on the conduct and responsibility of a third party to the proceedings — Third-party consent to that effect is insufficient — Absolute necessity for the State expressing such consent to be party *to the proceedings — Inability of the Court to compel a third party to participate in proceedings — Statutory principles of reciprocity and equality of States, right to procedural fairness and adversarial proceedings — Well-established jurisprudence of the Court — United Nations Secretary-General's decision to choose the Court as the means of settlement not notified to the United Kingdom.*

Procedural complications that could arise from endorsement of the argument of the United Kingdom's "consent" — Alternative approach adopted by the Court — Full settlement of this case by the Geneva Agreement, making recourse to Monetary Gold *jurisprudence unnecessary — Consideration of the Parties' principal arguments desirable — Irrespective of variations in form, the Court's approach does not make it possible to avoid pitfalls concerning the United Kingdom's "consent" and its "participation in the proceedings" — Inescapable requirements of the Court's Statute.*

Conclusion: applicability in principle *of* Monetary Gold *jurisprudence — Difference between this case and* Monetary Gold *and* East Timor *cases — Facts not yet conclusively established — Applicant's right to a fair hearing —*

*Objection "inextricably interwoven with . . . the merits" — Moreover, the Court does not have before it "all facts necessary to decide the questions raised" — Objection to be regarded as "not exclusively preliminary", within meaning of Article 79*ter*, paragraph 4, of the Rules of Court.*

I. Introduction

1. The two essential questions put to the Court at this stage of the case were the following.

2. First, could and should the Court consider the preliminary objection raised by Venezuela on 7 June 2022 — an objection that the latter characterized as an objection "to the admissibility of the Application" — or should it instead decline to do so *in limine*, on the grounds that the said objection was itself "inadmissible" for one of the following reasons put forward by Guyana: either because the Court had already ruled on its substantive content with the force of *res judicata* in its Judgment of 18 December 2020 on jurisdiction, or because, having failed to raise the questions to which the objection related within the time-limit fixed in the Order of 19 June 2018, i.e. by 18 April 2019 at the latest, Venezuela was precluded from doing so on 7 June 2022.

3. The second essential question raised in this case was how Venezuela's objection should be dealt with, if it were found admissible and if the Court were therefore required to entertain it. It should be recalled in this regard that the Court had only three options: to uphold the objection, to reject it or to find that it did not possess an exclusively preliminary character (and examine it at the merits stage).

II. The admissibility of Venezuela's preliminary objection

4. Guyana first claimed, in substance, that Venezuela's objection based on the well-known jurisprudence in the case concerning *Monetary Gold Removed from Rome in 1943*[1] was, despite how it had been characterized, an objection to jurisdiction that was inadmissible because the Court had already found that it had jurisdiction in its Judgment of 18 December 2020. This contention is in fact based on a conflation of the "(existence of) *jurisdiction* (between the parties)" and the "*exercise of this jurisdiction* (in particular in respect of a third party)", a distinction that is nonetheless firmly rooted in the Court's jurisprudence.

5. At the meeting held by the President of the Court with the Agents of the Parties on 18 June 2018, pursuant to Article 31 of the Rules, and as noted in the Court's Order of the following day, the Vice-President of Venezuela made clear from the outset that her Government considered "that the Court manifestly lacks jurisdiction and that Venezuela ha[d] decided not to take part in the proceedings"[2]; at the same time, she handed the President of the Court a letter from the Venezuelan Head of State in which the latter stated that "there is no basis for the jurisdiction of the Court"[3]. As in similar situations in the past, the Court decided, in its Order of 19 June 2018, using standard terms whose meaning and scope had never before proved controversial, that since the Respondent had immediately and firmly disputed the existence of any basis of jurisdiction enabling the Court to rule on the dispute between the Parties, it "must resolve first of all the question of [its] *jurisdiction*, and that this question should accordingly be separately determined before any proceedings on the merits"[4]. The time-limits fixed in that Order thus expressly and exclusively concerned the filing of written pleadings on the *jurisdiction* of the Court. No grounds other than the lack of a basis of jurisdiction *inter partes* enabling the Court to entertain the case were invoked by Venezuela to justify its decision not to take part in the proceedings. Therefore, the written pleadings that were to be produced pursuant to the Court's Order dated 19 June 2018 could not address any other subject.

6. In this case, the Court had no reason to depart from its consistent practice in such situations, and it did not do so. The preliminary proceedings that it held on the question raised by the Respondent at the time proceedings were instituted could only result in a judgment confined to that same question. I shall come back to this.

7. Much has been written on the concepts of "jurisdiction" and "admissibility", on the differences and similarities between them in both the various domestic legal systems and international proceedings, on their sometimes vague definitions, and on the order in which questions of jurisdiction and admissibility ought to be examined by judicial bodies when they are seised of objections relating to such questions. However, as interesting as they are, these scholarly considerations, which are not always conducive to clarifying matters, must take a back seat when it comes to ascertaining the precise intention of a particular judicial body in using a term such as "jurisdiction" in

a given context. It must be presumed that, in the absence of any indication to the contrary, the Court intended in this case to refer to the ordinary meaning of this term in the texts governing its activity and in its own practice. As it affirmed in the well-known dictum in its Judgment in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*: "When considering whether it has *jurisdiction* or not, the Court's aim is always to ascertain whether an *intention on the part of the Parties exists to confer jurisdiction* upon it."[5] This, in the ordinary language of the Court, is exactly what it expects the parties to discuss when they are invited, as Guyana and Venezuela were, to address first the question of its "jurisdiction". In the jurisprudence of the Court, this question always involves an interpretation of the basis of jurisdiction invoked in a case, with the aim of ascertaining the extent to which *the parties* have *consented* to the Court making a decision on *their* rights and obligations at issue in that case. Nothing more, nothing less.

8. In the present case, it is undoubtedly to this end that President Maduro immediately raised the issue that in his view justified Venezuela's decision "not [to] participate in the proceedings", and it is this very point that was the subject of the preliminary proceedings held by the Court. In fact, both Guyana's Memorial on "jurisdiction" and Venezuela's informal Memorandum dated 28 November 2019 dealt exclusively with this question. As did, logically, the Judgment of 18 December 2020[6]. It is hardly necessary to recall that the central question to which the Court turned its attention in that Judgment was whether the United Nations Secretary-General's decision of 30 January 2018, made on the basis of Article IV, paragraph 2, of the 1966 Geneva Agreement, was in itself sufficient to *confer jurisdiction* on the Court, *over the Parties*, with a view to settling *the dispute between them*, or whether the Court's Statute required *the Parties* to take additional action to that end.

9. At no time during that initial phase of the case was the Court seised of, nor did it rule on, the — not only separate but also, logically, subsequent — question of the *exercise* of jurisdiction, the very existence of which it had first to establish.

10. As is well known, the Court's jurisprudence is consistent in considering that the question of respect for the rights of "absent third States" that appear to constitute the very subject-matter of a case is a bar to the "exercise" of jurisdiction previously established between the parties to that case. Thus, in the operative part of its Judgment in the case concerning *Monetary Gold Removed from Rome in 1943* — the first of its kind — the Court found that "the jurisdiction conferred upon it . . . [did] not, in the absence of the consent of Albania, authorize it to adjudicate upon the first Submission in the Application of the Italian Government"[7]. It is explained in the reasoning of that Judgment that the Court had encountered a problem in "exercis[ing]" — not only in respect of Albania but also over the parties themselves — the jurisdiction that had otherwise been conferred on it under the Statement accompanying the Washington Agreement of 25 April 1951: "The Court accordingly finds that, although Italy and the three respondent States have conferred *jurisdiction* upon the Court, it cannot *exercise this jurisdiction* to adjudicate on the first claim submitted by Italy."[8] There is thus no doubt that the Court intended to make a very clear distinction between the "(existence of) *jurisdiction* (between the parties)" and the "*exercise [of] this jurisdiction*". By contrast, in the operative paragraph of the Court's Judgment in the case concerning *East Timor (Portugal* v. *Australia)*, the question is clearly characterized as relating to the "exercise of jurisdiction": in that paragraph, the Court finds "that it cannot in the present case *exercise the jurisdiction conferred upon it by the declarations made by the Parties* under Article 36, paragraph 2, of its Statute"[9]. The situation is the same in the reasoning of other decisions relating to this question in which the objection was not upheld, such as those in the cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[10], *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*[11] and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*[12].

11. I would recall in passing here that while all questions of "admissibility" are questions concerning the exercise of jurisdiction, the opposite is not true. Questions of "admissibility" can be formal in nature, i.e. they may concern compliance with requirements of form set out in the texts governing the Court's activity: when that is the case, remedies are easily found, and the Court is generally flexible in this respect (on this point, I refer to the Court's rather frequent application, when the circumstances permit, of the so-called "*Mavrommatis*" jurisprudence of its predecessor[13]). Such questions can also be more substantive in nature and may concern, for example, the non-existence of a dispute (sometimes also covered by the basis of jurisdiction), a lack of standing or legal interest, the exercise of diplomatic protection and the nationality of the natural or legal person concerned, the non-exhaustion of

local remedies, or even abuse of process. Finally, they can also be of a general nature, as in the *Northern Cameroons* case *(Cameroon* v. *United Kingdom)*, and give rise to a Judgment in which the Court, having referred to the "limits of its judicial function", finds that it "cannot adjudicate upon the merits" of the application[14]. What all these "admissibility" questions have in common is that, unlike questions of "jurisdiction", they are not linked to the establishment of some form of consent but instead concern the appropriate exercise of the judicial function in light of the specific circumstances of a particular case[15].

12. It is thus understandable why, despite expressly acknowledging that objections such as the one raised by Italy in the *Monetary Gold* case are not "objections to jurisdiction", the Court has generally taken care not to characterize them as "objections to admissibility"[16], and why, when the Rules were revised in 1972, it introduced, in Article 67, paragraph 1, of that text, a third category of objection that remains in the Rules to this day, in Article 79*bis*: in addition to objections to jurisdiction and admissibility, paragraph 1 of this provision expressly refers to any "other objection the decision upon which is requested before any further proceedings on the merits"[17]. I would add that, shortly after the 1972 Rules entered into force, the Court expressly confirmed, albeit in a different context, that it may have occasion to examine other questions "which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require [a preliminary] examination"; in this regard, the Court referred, in particular, to its power to take such action as may be required to ensure that, if and when its *jurisdiction on the merits* is established, "the *exercise of [that] jurisdiction* [as a separate question constituting neither a question of jurisdiction nor a question of the admissibility of the application] shall not be frustrated"[18].

13. In conclusion, and applying the well-known test reaffirmed by the Court in its 2016 Judgment on preliminary objections in the case concerning *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*[19], there is no doubt that, in the present case, although the Parties are the same in both of the phases under consideration, the *petitum* and the *causa petendi* are different.

14. In addition, an examination of the operative paragraph and essential reasoning of the 18 December 2020 Judgment, in the light of the Court's practice recalled above, very clearly shows that the Court was not able to rule, by no means intended to rule and in no way did rule, explicitly or implicitly, in that Judgment, on the — completely separate — subject-matter of Venezuela's objection of 7 June 2022. That objection is therefore not *res judicata* and, in this respect, is perfectly admissible.

I can only concur with the present Judgment in this regard.

* *

15. It remains for me to say a few words, in closing on this first point, about the criticism levelled at Venezuela for not raising its objection within the time-limit fixed by the above-mentioned Order of 19 June 2018. Regardless of whether that objection was brought about by the manner in which the Court defined the subject-matter of the dispute in its Judgment of 18 December 2020, it is not, as we have just seen, an "objection to jurisdiction" as this term is commonly understood in the practice of the Court. Therefore, it did not need to be raised within that time-limit.

16. Moreover, once the Court had ruled on the preliminary question that it had identified concerning the existence of a basis of jurisdiction, and once it had found that it had jurisdiction between the Parties to entertain the aspects of the dispute specified in its decision, the proceedings on the merits of those aspects resumed, and the Respondent was entitled to raise, within three months of the filing of the Memorial on the merits, any preliminary objection on which "the Court ha[d] not taken any decision under Article 79", to quote the introductory sentence of the new Article 79*bis* of the Rules.

In this regard as well, I can only fully support the findings of the Judgment.

17. Finally, it should be observed that if, by some remote chance, the Court had considered that Venezuela's objection was to be regarded as even partially constituting an objection to jurisdiction[20], it would in any event

have had to rule on that objection — albeit not necessarily as a preliminary matter[21] — since, according to well-established jurisprudence, the Court must always be satisfied that it has jurisdiction[22].

III. The treatment of Venezuela's preliminary objection dated 7 June 2022

18. First of all, a few words should be said about Guyana's "legitimacy" as a Party to this case and its standing to bring the case before the Court. In its preliminary objection, Venezuela appeared to question this legitimacy on the ground that Guyana had not been a party to either the 1897 Washington Treaty or the arbitral proceedings that led to the Award of 3 October 1899. This claim by Venezuela, which is closely linked to its argument that the United Kingdom is an indispensable third party in this case, nonetheless appears to have been abandoned during the hearings.

19. Guyana exercised its right to self-determination in respect of an area of territory that was inherited *as it stood* from its British colonizer, in accordance with the principles of the intangibility of colonial frontiers and *uti possidetis juris*. If the title underlying the extent of that area is challenged, Guyana clearly has a direct interest and undisputed legitimacy in defending the integrity of what it considers to be its territory. It is for this reason that it was involved in the negotiation and signature of the Geneva Agreement even before it gained independence, and why it became a party thereto in addition to the United Kingdom once that independence had been achieved, in accordance with Article VIII of the said Agreement. This is also the reason why it has taken part, this time in lieu of the United Kingdom, in the procedures that have since been implemented, by reference to the Geneva Agreement, in an attempt to settle the dispute.

This question as such calls for no further comments on my part.

* *

20. The crux of Venezuela's objection concerned the application in this case of the Court's *Monetary Gold* jurisprudence, as subsequently articulated in other, previously mentioned decisions (namely *Military and Paramilitary Activities*; *El Salvador/Honduras, Application by Nicaragua for permission to intervene*; *East Timor*; and *Certain Phosphate Lands in Nauru*)[23]. The question in this case was thus not only whether legal interests of the United Kingdom would be "affected" by any decision of the Court on the merits of the dispute as the latter had defined it, but whether they would also constitute *the very subject-matter of that dispute*, in the sense that the Court could not rule on Guyana's claims separately and independently without *necessarily* also ruling *directly* on the United Kingdom's legal interests or, indeed, assessing the lawfulness of that State's conduct, as a logical prerequisite to any findings on those claims. In other words, it was a matter of ascertaining whether the United Kingdom was, to use the now standard expression, an "indispensable third party" in this case, such that in its "absence" the Court could in no way *exercise* its jurisdiction (be it over the United Kingdom or over the Parties) to decide the dispute.

21. In its observations and submissions relating to the preliminary objection, Guyana argued that the United Kingdom did not have or no longer had any legal interests that would enable the *Monetary Gold* jurisprudence to be applied in this case. During the hearings, it advanced a new argument for disregarding it: the United Kingdom had purportedly "consented" "to having the dispute . . . settled by the Court", merely by virtue of its status as a party to the Geneva Agreement and in the light of the content of Articles II and IV thereof.

* *

22. With regard, first, to the legal interests of the United Kingdom allegedly still at issue in this case, Venezuela appears in its preliminary objection to focus primarily on *that State's status as a party to the 1897 Washington Treaty* (the "*compromis*") *and to the arbitral proceedings* that were instituted on the basis of that Treaty and that led to the Award of 3 October 1899. It is true that Guyana was substituted for the United Kingdom in the territory that is partially in dispute and, in this capacity, became a party to the dispute arising from Venezuela's contention regarding the validity of the territorial title constituted by the Award; however, this does not necessarily mean that Guyana was retroactively substituted for the United Kingdom as a party to the *compromis* and the arbitral proceedings. Even after the United Kingdom had transferred all its territorial rights to Guyana, it retained its formal status of party

to the Treaty (for as long as that treaty remained in force) and a beneficiary of the Award. It is thus conceivable that, from a *strictly formal perspective*, a legal interest of the United Kingdom could be affected by, or even central to, proceedings aimed at establishing the invalidity of those instruments. In this regard, a parallel can be drawn with the 1917 decisions of the Central American Court of Justice in the well-known cases relating to the Bryan- Chamorro Treaty concluded between Nicaragua and the United States of America on 5 August 1914. In the case between El Salvador and Nicaragua, the former asked the Central American Court of Justice to enjoin the latter not to apply the Bryan-Chamorro Treaty. In this respect, the Court stated the following in particular:

> "To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of *abstention* [from applying that treaty], would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court."[24]

23. However, in the particular circumstances of the present case, the question arises as to whether such an interest should be considered sufficiently "current" and "real" to justify the Court declining to examine such an essential claim for Guyana as one aimed at preserving the integrity of what it considers to be its territory. Moreover, in the period leading up to Guyana's independence, the United Kingdom actively promoted the conclusion of the Geneva Agreement as a general procedural framework intended to facilitate the adoption of a "satisfactory" solution for the "practical" settlement of the dispute, and left to Guyana *alone*, once the latter had achieved independence, the status of party to the dispute, with that new State *alone* being represented within the Mixed Commission and having to participate *alone* in the other proceedings envisaged under Article IV of the Agreement. In these very specific circumstances, the United Kingdom could reasonably be considered to have waived any right to rely on its *formal* status as a historical party to the *compromis* and the arbitration proceedings for the purpose of objecting to the settlement, in its absence, of the question of the validity of Guyana's title to the disputed territory, at least *in so far as the grounds of nullity invoked in respect of the Award are alleged to be exclusively attributable to the arbitrators* (which would no doubt be the case as regards, for example, a lack of reasoning in the Award, or an excess of authority *stricto sensu*, which might have led the arbitrators to exceed the terms of the *compromis* and decide on the régime of navigation on the Amacuro and Barima rivers and on the lighthouse dues and customs duties that could be levied in respect of the use of those rivers). Furthermore, the "density" of the United Kingdom's legal interest resulting solely from that status as a historical party now appears so tenuous that the Court should be able to settle, in its absence, the question *thus delimited* of the validity of the said territorial title, without violating the Monetary Gold principle.

*

24. The situation appears very different, however, when the *grounds of nullity* invoked in respect of the Award are alleged *directly to concern the United Kingdom's own conduct as such*. At this stage of the proceedings, Venezuela has yet to present any submissions on the merits, and we do not have an exhaustive list of the defects it intends to cite as grounds for the invalidity of the Award. However, although the United Kingdom's conduct was mentioned in very little detail in the preliminary objection[25], at the hearings Venezuela drew attention to *grounds of nullity* relating more precisely and directly to the individual conduct of the United Kingdom.

25. These quite serious allegations *primarily concern the validity of the Washington Treaty, and call that of the Award into question only indirectly*: it is alleged that the Treaty's validity was affected by fraudulent tactics and coercion aimed, in particular, at imposing on Venezuela a predetermined arbitral tribunal composition that accommodated the wishes of the United Kingdom, and at precluding the application of the 1811 *uti possidetis juris* rule and the 1850 agreement to maintain the *status quo*, in favour of acquisitive prescription, which was advantageous to the British on account of their conduct on the ground over the preceding half-century.

26. *Other* — equally serious — *allegations directly relate to the validity of the Arbitral Award, in light of the conditions in which it was allegedly drawn up*: in this regard, Venezuela has referred to collusion between the United Kingdom and the Powers with which it shared certain geostrategic interests at the time, collusion between the United Kingdom and the arbitrators of its nationality, undue pressure placed on the arbitrators by the British Government and the President of the tribunal, the United Kingdom's production of adulterated maps alleged to have

strongly influenced the decision reached, etc. If established, such acts would constitute *not only fatal defects but also unlawful acts*, including by reference to the international law in force at the time of the alleged events.

27. The International Law Commission recently confirmed that there is no "succession in respect of State responsibility" in customary international law, and that the general rule in this regard is "non-succession". Paragraph 1 of the ILC's draft guideline 9 on the "succession of States in respect of State responsibility", which is particularly relevant to the case at hand, states the following:

> "[A]n injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:
>
> . . . . . .
>
> *(c)* when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible."[26]

This draft text codifies the existing law on the subject. The above-mentioned acts, which the United Kingdom allegedly committed first during the negotiation of the 1897 Treaty and subsequently throughout the elaboration of the 1899 Award, could therefore in no way be attributed to Guyana simply because it succeeded the United Kingdom in the disputed territory. Under these circumstances, *individual legal interests of the United Kingdom*, separate from those of Guyana, would in fact be at the centre of the dispute to be settled by the Court.

28. Moreover, it is clear that, in the scenario envisaged, as in the *Monetary Gold* and *East Timor* cases, the Court could not rule on the subject-matter of the claim, i.e. the validity of the Arbitral Award, without *first* ruling on certain aspects of the United Kingdom's conduct which are said, in some instances, to be completely separate from the conduct of the arbitrators (as in the case of the unlawful acts allegedly committed by the United Kingdom during the negotiation of the 1897 Treaty) and, on the contrary, in other instances, to be inextricably linked to and inseparable from that conduct, since they constituted the precondition for it (as in the case of the unlawful acts allegedly committed by the United Kingdom during the elaboration of the Award). In exercising its jurisdiction in this case for the purpose of ruling on Guyana's claims, the Court would thus *inevitably* need to make a *prior* assessment of the lawfulness of the United Kingdom's conduct vis-à-vis Venezuela and would, in effect, have to decide on the merits of a dispute other than the one brought before it by Guyana, this time a dispute between Venezuela and the United Kingdom, in the latter's absence[27].

* *

29. To evade the consequences of the application of the *Monetary Gold* jurisprudence, the Applicant further claimed at the hearings that the present case is different from the *Monetary Gold* case[28] because, in becoming a party to the 1966 Geneva Agreement, the United Kingdom *consented* both to the Court's *jurisdiction* to settle the dispute between Guyana and Venezuela and to the *exercise* of that jurisdiction, thereby inevitably agreeing to the examination of its own conduct by the Court to the extent necessary for the settlement of that dispute. This argument, which was outlined rather late in the proceedings, was not expanded upon before the Court.

30. Beneath its surface, I find the argument in question to be rather problematic in various respects. Indeed, not only does it fail to stand up to scrutiny in my view, but endorsing it would be dangerous given that it risks both undermining the legal certainty that only strict respect for consensualism can guarantee, and — if the argument is taken to its logical conclusion — significantly complicating the proceedings in the case and thus the settlement of the dispute. As I shall demonstrate below, these issues must not be underestimated.

31. First of all, to claim that a third party to proceedings has consented to the Court ruling on its conduct in those proceedings, with all the consequences this would entail, is inevitably tantamount to contending that it has *accepted the Court's jurisdiction* to do so: there is no escaping this conclusion, which is immediate under the system developed by the drafters of the Court's Statute and which has, moreover, been acknowledged by Guyana[29]. Yet, consistent jurisprudence shows that the establishment of such consent is subject to very strict conditions, which scarcely appear to have been met in this case.

32. Moreover, under the same system, the Court can only exercise such jurisdiction over the State concerned (and the parties) if that State is itself also *a party to the proceedings* in question: the principles of reciprocity and the equality of States[30], and the adversarial principle[31], preclude any other possibility, which would no doubt seriously jeopardize the integrity of both the rights of that State and those of the parties.

33. While it is in fact for States to consent to the *jurisdiction* of the Court or, what amounts to the same thing, to jurisdiction otherwise established between other States *being exercised in their regard* (in the sense of being extended to them), *their consent to the exercise in general of that jurisdiction* (including in respect of those other States) *is clearly insufficient* for that jurisdiction to be exercised, because the exercise of jurisdiction as such depends on non-derogable statutory norms relating to the sound administration of justice, which are not subject to any kind of State control, and on the conclusions that must be drawn therefrom by the Court in each particular case, with a view to protecting its judicial function.

34. In all the foregoing respects, the argument based on the United Kingdom's alleged "consent" appears to lead to an impasse. I shall briefly explain my thinking below.

*

35. I shall begin by examining what is in my view the first difficulty raised by this argument: the *establishment* of the United Kingdom's "*consent*".

36. Despite all its support for the conclusion of the Geneva Agreement, it seems an exaggeration, to say the least, to claim that, by becoming a party thereto, the United Kingdom unequivocally and unconditionally consented to the Court, which is not even mentioned in that instrument, one day ruling, in its absence and with no further agreement on its part, on the commission of the serious unlawful acts that are now being directly and individually attributed to it in this case, and thus, inevitably, on its responsibility in this regard. In my opinion, the gap in logic between, on the one hand, consenting in *the interest of a third party* to the immediate implementation of a procedural framework, which was intentionally *defined in broad and thus necessarily very general terms, for the purpose of settling a territorial dispute that now involves that third party*, and, on the other hand, consenting to the Court making a concrete ruling, more than a half-century later, on *one's own unlawful acts that have not previously been identified in detail or definitively formulated in legal terms*[32], is objectively much too large to be bridged by mere assumptions or speculations of acquiescence or some other form of tacit agreement.

37. To my mind, the only reasonable reading of the Geneva Agreement in this regard is that the United Kingdom, as a former colonial Power, sought to facilitate the settlement of the dispute relating to the territory that it had transferred to the newly independent Guyana by co-operating in the establishment of a general scheme to that end, and had absolutely no intention, as the Court discussed at length, of being involved in the subsequent stages of that settlement, *let alone*, I would add, of having to answer for its own prior conduct in that context. In my view, to argue that, when it signed the Agreement, the United Kingdom unequivocally intended to submit *ipso facto* to what at the time could only have been — both legally and temporally speaking — the extremely distant prospect of a ruling by the Court, on *any* past act howsoever related to the dispute in question, is to misconstrue the text and context of that Agreement, and is contrary to the intention expressed therein.

38. Moreover, one must not lose sight of another element, which, in the circumstances of the case, I consider to be critical. From the moment that the Court is chosen as the means of settlement by reference to the 1966 Agreement, the principles enshrined in its Statute apply in all respects: not only do they fully govern the implementation of this means of settlement, but the undertakings made in the Agreement must be consistent with these principles and must be interpreted in the light thereof. It would be futile to seek to have the object and purpose of the Agreement, taken in isolation, prevail over the Statute of the Court, which forms an integral part of the United Nations Charter. The inherent constraints in choosing the Court as the means of settlement, which also serve as guarantees for those who have recourse to it, were well known both when the Agreement was concluded and when the Court was chosen, and it cannot be presumed that the United Kingdom or any other party involved intended to disregard them.

39. That being so, when it comes to establishing whether a State has consented to the Court exercising jurisdiction over it, it would clearly be insufficient to claim that the State in question "could expect" the implementation of a general dispute settlement scheme agreed to in the interest of a third party, which does not expressly mention either the Court or that State's individual rights, to one day lead to that State's individual responsibility being called into question before the Court. It seems to me that it cannot reasonably be inferred from this kind of vague supposition that the State concerned has clearly consented to the Court's jurisdiction to rule on its rights and obligations in proceedings in which it would not participate, moreover, with the result that it would be deprived of the most basic right to defend its case. To the extent that it is even possible, the waiving of rights, especially those deriving directly from the Statute, such as the right not to be subject to the Court's jurisdiction without one's consent and the right to a fair hearing, cannot be so lightly presumed. It would clearly be futile to try to demonstrate such consent by relying on certain general, exclusively political statements made *a posteriori* in favour of the ongoing proceedings and supported by the United Kingdom, such as the communiqué issued on 25 June 2022 by the Heads of Government of the Commonwealth, of which Guyana is also a member: it goes without saying that statements of this kind can under no circumstances found the Court's jurisdiction over the United Kingdom in this case, nor can they confirm a title of jurisdiction not otherwise established.

40. While a sovereign State cannot be said to have, in such vague terms, given the Court a blank cheque to rule indefinitely on its conduct, the details of which are moreover no more clearly defined, it seems to me that this is especially true in the case of the United Kingdom, which, when recognizing the compulsory jurisdiction of the Court, has always proceeded with the utmost caution, setting out the limitations of such recognition clearly and meticulously[33]. It would be one thing for the United Kingdom, in approving the very broad terms of Article IV of the Geneva Agreement, to accept and promote the general principle that the territorial dispute that now existed exclusively between Guyana and Venezuela should be settled by those two States without its "involvement", but quite another for it to accept firmly and definitively the Court's jurisdiction to rule on its own responsibility for unlawful acts somehow linked to this dispute, whatever those acts might be, in the both much more specific and more hypothetical scenario that the Court should one day be seised.

41. The Court has, in the past, invariably shown itself to be far more demanding before finding that it has jurisdiction to rule on the lawfulness of the conduct of a sovereign State, as evidenced by its consistent jurisprudence, in particular as regards *forum prorogatum*[34].

*

42. The second difficulty faced by the argument of the United Kingdom's "consent" is, in my view, the following.

43. As already noted, the Court endeavours at length in its Judgment to show that the United Kingdom waived the right to be a party to any of the settlement procedures envisioned in Article IV of the Geneva Agreement, which makes no mention of it. The only conclusion that can be drawn from this is that, in this case, the United Kingdom is thus in fact a "*third party*" as regards the ongoing proceedings. Yet, under the consensual system established by the Statute of the Court, it is quite simply inconceivable for the Court to agree to rule directly, in ongoing proceedings, on the conduct and responsibility of a State that is a third party to those proceedings. For the Court to be able to examine such conduct, not only must that State have clearly conferred jurisdiction on it to do so, but it must also — an inseparable requirement under the system of the Statute — become a *party* to the proceedings in question[35]. Any other scenario would be wholly inconsistent with the most fundamental statutory principles intended to govern such proceedings, including the previously mentioned principles of reciprocity and the equality of States, and the right to fair and adversarial proceedings[36].

44. In its Judgment of 30 June 1995 in the *East Timor* case, the Court was absolutely clear on this point: "Whatever the nature [even *erga omnes*] of the obligations invoked, the Court could not rule on . . . the lawfulness of the conduct of another State *which is not a party to the case*"[37]. The specialist literature also considers that the Court cannot exercise jurisdiction over a State "not party to the proceedings", characterized as an "indispensable party" when the Court is called upon to rule directly and as a principal matter on its rights and obligations in the

context of proceedings between other States[38]. Parties to proceedings before the Court cannot act in the place of a sovereign third party to defend the latter's rights, nor can they be required to assume the burden of proving that that State has performed its obligations. Conversely, the Court, as it has noted on various occasions, does not have the power to compel a third State to become a party to ongoing proceedings[39]; as for the possibilities open to the third party itself in this respect, they appear to be quite limited (one being the as yet unprecedented scenario of possible intervention *as a party*).

45. Incidentally, in the *Monetary Gold* case, the situation in this respect was rather different from the one here. As the Court explained in its 15 June 1954 Judgment in that case, the Washington Statement, which constituted the title of jurisdiction, contained an *invitation* to Italy and Albania *to participate in the proceedings*[40]. The mere consent of those States to the Court's jurisdiction was sufficient, in that frankly highly unusual context, to make them parties to the proceedings: this is what happened in the case of Italy, but not Albania, on whose conduct the Court thus declined to rule, finding that it could not render *any* binding decision, be it in respect of Albania, which remained a third State, or the parties[41].

46. The argument that there is alleged consent to the Court's jurisdiction, tacitly expressed by the United Kingdom in Article IV of the Geneva Agreement, thus does not lead as far as its supporters would like. Even if such consent could be established — *quod non* — it would not be sufficient in itself to enable the Court, in the circumstances of the case, to exercise its jurisdiction for the purpose of ruling directly on the conduct of the United Kingdom, which deliberately chose to remain a third party to the proceedings. The Statute, from which neither the Court nor the States may depart[42], simply does not permit it to do so. And the United Kingdom was no doubt well aware of this.

*

47. In view of the foregoing, it is apparent that no matter how the argument based on the United Kingdom's alleged "consent" is framed, it cannot provide a basis for rejecting Venezuela's objection.

48. Lastly, it is appropriate to recall here an obvious fact that is of great weight in the context of this case: the letter of 30 January 2018 from the United Nations Secretary-General giving notification of his decision to choose the Court as the means of settlement of the dispute, in accordance with the terms of Article IV, paragraph 2, of the Geneva Agreement, was *not* sent to the United Kingdom, even though it is clear from the Judgment of 18 December 2020 that this decision constitutes the basis of the Court's jurisdiction in this case and forms an integral part thereof[43]. In my view, this clearly confirms not only that the jurisdiction conferred on the Court in this case does not extend to the United Kingdom and its individual acts, but also that the decision taken by the latter, in accordance with the terms of the Geneva Agreement, to remain in all respects a third party to the proceedings before the Court with all the consequences this entails, particularly as regards the protection of its rights, was duly noted and taken into consideration when the basis of jurisdiction "crystallized".

*

49. Without wishing to enter into the familiar debate as to whether a "restrictive" interpretation should be applied when establishing a State's consent to the jurisdiction of the Court[44], any novel decision on a question of such cardinal importance as that of consent to jurisdiction[45] is hardly likely to increase legal certainty or reinforce State confidence, which depends to a large extent on the positions taken in this respect[46].

50. Moreover, stating, in one form or another, that the Geneva Agreement created, *ratione personae*, some kind of jurisdictional link between the United Kingdom and the Parties that, in particular, enables the Court, *ratione materiae*, to examine Venezuela's complaints regarding the United Kingdom's conduct between 1897 and 1899, would open the door to possible procedural developments that might significantly complicate the handling of the case and delay the settlement of the dispute. Indeed, although in this case Venezuela could not seek to make counter-claims against the United Kingdom, which remains a third party to the proceedings[47], it could nevertheless invoke the recognition of this jurisdictional link to institute new proceedings against it[48], with the aim, for example, of obtaining

reparation for the unlawful acts it allegedly suffered at the hands of that State. As the Court recalled in the *LaGrand* case *(Germany* v. *United States of America)*,

> "[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (*Factory at Chorzów, P.C.I.J., Series A, No. 9*, p. 22)"[49].

While the force of *res judicata* attaching to any judgment is relative and does not extend to third parties[50], it is nevertheless difficult to see how, in the circumstances of this case, the Court could, in a subsequent decision, reconsider any finding that upholds at this stage the argument that the United Kingdom has consented to the exercise of the Court's jurisdiction over it.

* *

51. These issues — as serious as they are numerous — do not appear to have escaped the Court, which takes great care in the Judgment to avoid any impression of support for the Applicant's argument on this point. Indeed, while Guyana attempted to show that the preconditions for applying the *Monetary Gold* jurisprudence were not met in this case — first, because the United Kingdom no longer had any interest that was likely to constitute the subject-matter of the proceedings, and, second, because the latter had in any event "consented" to the Court's jurisdiction and to the exercise of that jurisdiction for the purpose of settling the dispute — the Court did its utmost to avoid having to examine those preconditions and whether they were met in the present proceedings, reasoning that this — unique — case is governed entirely by the Geneva Agreement, on the sole basis of which it was obliged to reject Venezuela's preliminary objection ahead of any such examination, which was thus rendered unnecessary. As stated in the Judgment itself, "the Monetary Gold principle does not come into play in this case"[51].

52. In my view, this formally different approach, as creative as it may be, is nonetheless not without its problems. First of all, while it is true that the Court is required only to rule on the parties' *submissions*, without necessarily having to pronounce on each of the *reasons* put forward by them[52], avoiding any decision on the arguments that formed the bulk of the debate between the parties certainly appears to be incompatible with the requirements of the sound administration of justice and is likely to generate discontent and frustration. Beyond this, however, the most important question seems to me to be whether this approach actually makes it possible to avoid the above-mentioned pitfalls of the argument that the United Kingdom's "consent" renders the *Monetary Gold* jurisprudence inapplicable. In my opinion, it does not.

53. The main problem, as I have already pointed out, lies in the fact that since the means of dispute settlement chosen under Article IV of the Geneva Agreement is the Court — which is completely different in this respect from the other means of settlement — its Statute must be applied and must take priority. To claim that the Agreement resolves everything by providing for the dispute to be settled between the Parties without the United Kingdom's involvement inevitably raises the question whether, once the Court has been seised, the general provisions of Article IV are sufficient to enable it to consider unlawful acts of the United Kingdom that have not previously been defined in precise legal terms, or, in other words, whether those provisions are capable of giving the Court jurisdiction over such acts. No matter how the Court's approach is framed, we inevitably return to this inescapable question. Yet, once again, it can only be answered in the light of the Statute's requirements on consent, as traditionally interpreted by the Court itself, particularly in its Judgment in the *Monetary Gold* case. Furthermore, as also recalled above, the Geneva Agreement and the alleged consent contained therein cannot dispose of the separate question of the United Kingdom's non-participation in the proceedings, which raises serious issues with regard to the fundamental principles of equality, reciprocity and adversarial proceedings enshrined in the same Statute.

54. The United Kingdom did not seek to derogate from the Court's Statute in 1966, nor was it able to do so. The need for its unequivocal consent to the Court's jurisdiction and for its participation in the proceedings in order for the Court to be able to make a ruling in respect of it remain the same and equally binding, be it in the context of the interpretation and application of the Geneva Agreement or in the context of applying the *Monetary Gold*

jurisprudence. Ultimately, therefore, this formally different approach does nothing to change the difficulties encountered above, nor does it appear capable of providing a solution to them.

* *

55. For all the foregoing reasons, I find myself unable to accept either the Applicant's arguments or, regretfully, the alternative approach adopted by the Court.

* *

56. While, unlike the majority, I am therefore of the opinion that the extensive *Monetary Gold* jurisprudence applies *in principle* to the present case, and that there was no compelling reason for the Court to depart from it, I nonetheless consider there to be a clear difference between this case and the *Monetary Gold* and *East Timor* cases.

57. Indeed, in those cases, the *facts* — whose lawfulness the Court had no choice but to determine before it could rule on the claims before it — *were well established*. In the *Monetary Gold* case, the Legislative Decree of 13 January 1945 ordering the confiscation of the assets of the National Bank of Albania, 88.5 per cent of which were owned by Italy, had clearly been adopted and its entry into force was undisputed. In the *East Timor* case, Indonesia's presence on that territory, which had been the subject of numerous resolutions of United Nations organs, was undeniable. And in the *Certain Phosphate Lands in Nauru* case, in which the *Monetary Gold* jurisprudence was ultimately not applied, the exploitation of those lands and the serious damage caused as a result was not in any doubt.

58. In this case, the situation is different. The acts of the United Kingdom, invoked by Venezuela in support of its allegations that the 1897 Washington Treaty and the Arbitral Award of 3 October 1899 are invalid, have not been conclusively established at this stage of the proceedings. It is true that evidence from various sources, some of which is rather troubling, has been submitted to the Court. However, according to counsel for Venezuela, only the "tip of the iceberg" has been revealed at this stage[53]. If the Court were to decide to decline to exercise its jurisdiction, solely on the basis of the impressionistic picture of the facts thus painted, it risks arbitrarily depriving the Applicant of its right to a fair hearing. What is more, there is a danger that the Court would establish a precedent that might encourage future respondents artificially to entangle the rights of third parties with their own claims, so as to escape the Court's judgment.

59. Furthermore, to uphold *at this stage* Venezuela's objection based on the United Kingdom's absence from the proceedings would, in my view, amount to prejudging the merits, since such a decision would necessarily imply that the Court considers the facts relied on by the Respondent to be established, despite their still rather vague nature. That said, in deciding to reject the objection, the Court could have similarly prejudged the merits had it not chosen to base its rejection solely on the consideration that, even if the United Kingdom's alleged conduct were established, the *Monetary Gold* jurisprudence would not apply in this case on account of the "prior" arrangement made under Article IV of the Geneva Agreement.

60. In light of the conclusions reached above, it is my view that the Rules of Court, as conceived in substance since 1972, left the Court with only one option: to declare that the objection raised by the Respondent *does not have an exclusively preliminary character*, and examine it at the merits stage[54].

61. As we know, this solution, intended to prevent preliminary objections from being too easily joined to the merits and to avoid unnecessary delays in the settlement of cases (as in the *Barcelona Traction* case, for example), was envisaged for scenarios in which preliminary objections "contain both preliminary aspects and other aspects relating to the merits"[55].

62. The Court has traditionally considered that such would be the case of an objection so "inextricably interwoven with . . . the merits"[56] that ruling on it would entail far more than simply "touch[ing] upon" them — to use the well-known phrase coined by the Permanent Court of International Justice in the case concerning *Certain German Interests in Polish Upper Silesia*[57] — and would in fact amount to determining the dispute, or certain aspects of it, on the merits.

63. The Court subsequently decided that, more generally, when it "does not have before it all facts necessary to decide the questions raised" by a preliminary objection, that objection must also be considered at the merits phase[58].

64. It is my opinion that, in this case, Venezuela's objection based on the absence of the United Kingdom as an indispensable third party met both of these conditions simultaneously[59].

(Signed) Philippe COUVREUR.

ENDNOTES

1 *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19.

2 *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 19 June 2018, I.C.J. Reports 2018 (I)*, p. 403.

3 *Ibid.*

4 *Ibid.* (emphasis added).

5 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16 (emphasis added).

6 *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 455.

7 *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 34.

8 *Ibid.*, p. 33 (emphasis added).

9 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 106, para. 38 (emphasis added).

10 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88.

11 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 114 *et seq*., paras. 52 *et seq*.

12 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 259 *et seq*., paras. 49 *et seq*.

13 *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34. For a recent decision, see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 438 *et seq*., paras. 82 *et seq*. (involving the application of this long-standing jurisprudence not to a question of formal admissibility but to one of jurisdiction *ratione personae*).

14 *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 38. Regarding these three types of "admissibility", see e.g. G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale de Justice*, Paris, Pedone, 1967, pp. 91-165.

15 See e.g. P. Couvreur, "Les procédures devant la Cour internationale de Justice et la confiance dans celles-ci", in *La confiance dans les procédures devant les juridictions internationales, Actes du colloque international de Nice des 3 et 4 juin 2021*, Paris, Pedone, 2022, p. 97.

16 See, however, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 236 (heading) and p. 280, para. 345, subpara. 2. In this Judgment, which dealt with highly complex substantive issues, the Court did not recharacterize the question raised by Uganda "concerning the *admissibility* of the DRC's claims relating to Uganda's responsibility for the fighting between Ugandan and Rwandan troops in Kisangani in June 2000", *ibid.*, p. 236, para. 196 (emphasis added). Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 430-431, paras. 86-88, and p. 442, para. 113, subpara. 2.

17 It should be recalled here that this revision of the Rules was the result of a comprehensive critical review of the previous version (from 1946, which was nearly identical to the 1936 version), which was carried out from the second half of the 1960s by Sir Gerald Fitzmaurice, who considered, in particular, that "the classification of preliminary questions into the two categories of jurisdictional questions and admissibility questions is oversimplified, and can be misleading"; see e.g. his separate opinion appended to the Court's Judgment in the case concerning *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 103. See also the distinction made by the distinguished judge between "admissibility", "receivability" and "examinability", *ibid.*, p. 102.

18 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 259, paras. 22-23 (emphasis added).

19 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 123-132, paras. 47-84.

20 Even if the Court had intended for the jurisdictional questions (*lato sensu*) to include the question of the United Kingdom's "consen[t] to adjudication by the Court", the issue of that State's (non-)participation in the proceedings could only remain outside the scope thereof.

21 See e.g. *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 29, para. 24.

22 See e.g. *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*

Herzegovina v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 76 *et seq*. ("Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia").

23 See fns. 9 to 12 above.

24 *Sentencia de 9 de marzo de 1917, Anales de la Corte de Justicia centroamericana*, Vol. VI, 1916-1917, pp. 124-125 and 168 (emphasis in the original) and reference to *Costa Rica c. Nicaragua, Sentencia de 3 de septiembre de 1916*, *ibid.*, Vol. V, 1915-1916, p. 175. The English translation is that of the Registry of the ICJ in Judge Shahabuddeen's separate opinion appended to the Court's Judgment in the *East Timor* case (*I.C.J. Reports 1995*, pp. 124-125). The learned judge explained therein that the injunction of abstention requested by El Salvador in the case in question had been considered by the Central American Court of Justice to be equivalent to asking it to declare the treaty null and void, "which of course it could not do in the absence of the other party to the Treaty" (*ibid.*, p. 125). Cf. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 122, para. 73:

> "So far as the condominium is concerned, the essential question in issue between the Parties *is not the intrinsic validity of the 1917 Judgement* of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement. Honduras, while rejecting the opposability to itself of the 1917 Judgement, *does not ask the Chamber to declare it invalid.*" (Emphasis added.)

25 See para. 51 of the said objection.

26 United Nations, Report of the International Law Commission on the work of its seventy-third session, 2022, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (UN doc. A/77/10), p. 292.

27 Cf. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32: "In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania."

28 In its Judgment of 15 June 1954 in the *Monetary Gold* case, the Court indeed noted that "it [had] not [been] contended by any Party that Albania ha[d] given her consent . . . either expressly or by implication", to the settlement by the Court of that State's dispute with Italy, *I.C.J. Reports 1954*, p. 32.

29 See e.g. CR 2022/24, p. 14, para. 5, and pp. 20 *et seq*.

30 See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 22, para. 35.

31 The "equal opportunity . . . to discuss their respective contentions", in the words of the Permanent Court, applies only to the "parties" (*Territorial Jurisdiction of the International Commission of the River Oder, Order of 15 August 1929, P.C.I.J., Series A, No. 23*, p. 45).

32 In its Judgment, the Court moreover refers in this regard only to vague criticism that Venezuela levelled *against the Award* in such political forums as the Fourth Committee of the General Assembly. *The documents cited do not mention any specific complaints calling into question the conduct of the United Kingdom*.

33 See e.g. the declaration deposited by the United Kingdom with the United Nations Secretary-General on 22 Feb. 2017, in accordance with Art. 36, para. 2, of the Statute of the Court.

34 See e.g. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 204, para. 62: consent to the Court's jurisdiction must derive from an "unequivocal" indication of desire and must itself be "voluntary" and "indisputable". This jurisprudence is as long standing as it is consistent (see e.g. *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24; *Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27; cf. *Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 39). Nowhere in the 1966 Geneva Agreement do we find the expression of such consent on the part of the United Kingdom unambiguously permitting the Court to rule directly, over a century after the facts, on its individual conduct between 1897 and 1899, whatever the as yet to be precisely identified complaints made against it.

35 Even in advisory proceedings, in which the Court is nonetheless not called upon to rule with the force of *res judicata* on the rights of States, the Permanent Court of International Justice declined to exercise its jurisdiction, in one well-known instance, on the grounds, in particular, that a State directly concerned "refused to take part [in the proceedings] in any way" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 236, para. 14, and reference to *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*).

36 The Court has considered the principle of the "sovereign equality of States" to be "one of the fundamental principles of the international legal order" and has emphasized that it applies, in particular, in the context of the peaceful settlement of international disputes (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 153, para. 27). On the general relationship between equality of the parties, respect for the adversarial principle and the sound administration of justice, cf. e.g. *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012 (I)*, p. 30, para. 47.

37 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29 (emphasis added). The Court has repeatedly stated in its jurisprudence that it cannot exercise jurisdiction over a State that is "*absent*" from the proceedings; see e.g. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32, and the declaration of President McNair, *ibid.*, p. 35; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 116, para. 55, and p. 122, para. 73. In his separate opinion appended to

the Court's Judgment in the *Northern Cameroons* case *(Cameroon* v. *United Kingdom)*, Sir Gerald Fitzmaurice explains that "[i]n the *Monetary Gold* case . . . the Court, while expressly finding that jurisdiction had been conferred upon it by the Parties, declined to exercise it because of the *absence* of another State *which the Court regarded as a necessary party to the proceedings*" (*Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 102, fn. 4 (emphasis added)). It is hardly necessary to mention that, in all these instances, what the Court was referring to was the need for an "indispensable third party" to become *a party to the proceedings* in order for the Court to be able to rule on its rights and obligations, and not the exercise of the right under the Statute not to take part in the proceedings, which, in accordance with the express terms of Art. 53 thereof, is open to all "*parties*".

38 See e.g. *Rosenne's Law and Practice of the International Court: 1920-2015*, 5th ed. by M. Shaw, Brill, 2016, Vol. II, p. 560.

39 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 135, para. 99 and reference.

40 *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 31. The Washington Statement indeed expressly provided, first, that Italy could submit to the Court its claims to the gold (para. *(b)*) and, second, that Albania could seise the Court of the question of the use of the gold belonging to it (para. *(a)*).

41 *Ibid.*, p. 33.

42 See *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 12; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 70, para. 46.

43 *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 486 *et seq.*, paras. 110 *et seq*.

44 See e.g. P. Couvreur, *The International Court of Justice and the Effectiveness of International Law*, Brill, 2017, pp. 57 *et seq*.

45 See e.g. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32. Here again, it is appropriate to include, as mentioned earlier, other fundamental principles of the Statute, such as the equality of States before the Court and the adversarial principle, which would inevitably be seriously affected by any ruling of the Court on the rights and obligations of a third party that is absent from the proceedings.

46 Regarding the Court's decisions relating to consent to its jurisdiction and their effects on State confidence, see e.g. the separate opinion of Judge Lachs appended to the Court's Judgment in the case concerning *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 52.

47 As regards these complaints, the fact that Venezuela is also unable in principle to make such counter-claims against Guyana — for the reasons set out above, relating in particular to non-succession in respect of international responsibility — is a prime example of the inequalities between States and the possible violations of their procedural rights to which the argument of the United Kingdom's "consent" might inadvertently lead.

48 Proceedings which the Court would have little choice but to join to those in the present case, thereby making the procedure significantly more complex.

49 *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 485, para. 48.

50 While that is the principle, here again we see the difficulties that could be caused by any endorsement of the argument based on the United Kingdom's alleged "consent". Indeed, it is legitimate to question whether it is consistent with the principle of the equality of States and the sound administration of justice for a State that has consented to the exercise of the Court's jurisdiction over it not to be bound by its decision because that State decided to remain a third party to the proceedings. This is no doubt a serious anomaly, reflecting the contrived and incongruous nature of such an argument. From this perspective too, consent to jurisdiction and the status of third party to the proceedings appear utterly irreconcilable.

51 See para. 107.

52 See the well-known distinction made by the Court in this regard in the case concerning *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 52.

53 CR 2022/23, p. 12, para. 12.

54 See Art. 79*ter*, para. 4, of the version of the Rules that entered into force on 21 Oct. 2019 and was applied by the Court to the subsequent proceedings in the present case.

55 See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 28, para. 49.

56 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46.

57 *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.

58 See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 40, para. 97.

59 Cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 324-325, paras. 116-117.