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

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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.

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Historical and factual background.

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Venezuela's repudiation of 1899 Award.

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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.

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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.

*

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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.

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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.

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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.

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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.

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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.

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