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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Friday 18 November 2022, at 3 p.m., at the Peace Palace,

President Donoghue, presiding,

***in the case concerning* Arbitral Award of 3 October 1899**
(Guyana *v.* Venezuela)

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le vendredi 18 novembre 2022, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire de la* Sentence arbitrale du 3 octobre 1899**
(Guyana c. Venezuela)

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judges *ad hoc*	Wolfrum
		Couvreur
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
MM. Wolfrum
Couvreur, juges *ad hoc*

M. Gautier, greffier

The Government the Co-operative Republic of Guyana is represented by:

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H.E. Ms Elisabeth Harper,

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

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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,

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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,

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

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M. Euclides Sánchez, directeur de la sécurité de la vice-présidence de la République,

Mme Alejandra Carolina Bastidas, cheffe du protocole de la vice-présidence de la République,

M. Héctor José Castillo Riera, sécurité de la vice-présidence de la République,

M. Daniel Alexander Quintero, assistant, vice-présidence de la République,

comme membres de la délégation.

The PRESIDENT: Please be seated. The sitting is open.

For reasons duly made known to me, Judge Abraham is unable to take part in today's sitting.

The Court meets this afternoon to hear the first round of oral argument of the Co-operative Republic of Guyana on the preliminary objections raised by the Bolivarian Republic of Venezuela. I shall now give the floor to the Agent of Guyana, the Honourable Carl B. Greenidge. You have the floor, Your Excellency.

Mr. GREENIDGE:

1. Madam President, distinguished Members of the Court, it is a privilege to appear before you on behalf of Guyana.

2. If I may, I would like to begin today by expressing Guyana's sincerest congratulations to Judge Caldeira Brant, a scion of our good neighbour, Brazil, for his election to the Court to complete the term of one of its most distinguished and accomplished members, the late Judge Antônio Cançado Trindade, whose loss we mourn and greatly regret. We take solace in our confidence that Judge Caldeira Brant will capably and admirably fill his illustrious predecessor's very large shoes, and we wish him every success in this endeavour. I would also like to salute the distinguished judges *ad hoc*, Judge Couvreur and Judge Wolfrum, for their appointment to the Court for the purposes of this case. It is an honour for me, and for Guyana, to appear before all of you.

3. This is the second time that Guyana has had the honour of addressing the World Court. On the last occasion, in June 2020, Guyana had the distinction of being the first State to address the Court remotely by video link, as the Court helpfully adapted its established processes and broke new ground in seeking to ensure the timely delivery of justice and the rule of law in the face of the significant challenges and disruption wrought by the COVID-19 pandemic.

4. Although the format of that hearing was novel, the substance and outcome of the proceedings were not. After affording both Parties an equal and fulsome opportunity to present their arguments concerning the Court's jurisdiction over Guyana's claims, the Court proceeded to deliver a judgment which inscribed itself firmly in its longstanding jurisprudence: over the course of 138 detailed paragraphs, the Court meticulously described, examined and appraised the arguments and issues, and adopted a thorough and impartial assessment of the law and facts. In its Judgment,

which is binding and dispositive, the Court reached the unqualified conclusion that it has jurisdiction in respect of Guyana's claim concerning the validity of the 1899 Arbitral Award, and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela.

5. In reaching that decision, the Court upheld another careful and independent decision, namely the decision of the Secretary-General of the United Nations in 2018 to entrust the Court with responsibility for resolving the dispute between Guyana and Venezuela, regarding the validity of the 1899 Award and the settlement of the Parties' land boundary dispute. As the Court will be well aware, this is a long-standing dispute which has stubbornly defied resolution for more than half a century. It has cast a long and menacing shadow over Guyana's security and development throughout its existence as a sovereign State; a shadow rooted in Venezuela's efforts to erase the long-standing land boundary between our two countries and lay claim to nearly three quarters of Guyana's land territory. The resolution of this dispute is therefore no less than existential for Guyana.

6. Much, of course, has happened in the world in the two and a half years since Guyana first appeared before this Court. In addition to the immense suffering caused by the global public health emergency, the spectre and tragic reality of armed conflict is present in many corners of the globe. Recent global events demonstrate the ascendancy of might over right in some regions — an ascendancy which presents a grave danger to international peace and security. No corner of the globe is immune to the consequences and threats which they pose, not least for the very idea of the rule of law.

7. Against that backdrop, the importance of international law as the very bedrock of international peace and security has never been more profound. And nowhere is that importance more profoundly apparent and appreciated than here, in the Great Hall of Justice at the Peace Palace, the very fount and epicentre of international justice. It is therefore a great privilege for Guyana's delegation to be present at the Great Hall today, and it is a particular privilege for me to address you in person at the start of Guyana's first round of presentations.

8. As Guyana explained on the previous occasion when it appeared before the Court, since its emergence as a sovereign State in 1966, Guyana has been steadfast in its commitment to international law as the foundation for its relations with its neighbouring States. Madam President, Members of the Court, it is on this basis that Guyana has brought its claims before this Court. It is important to

be clear that Guyana brings those claims in the spirit of amity, not enmity, towards Venezuela. Guyana desires a relationship characterized by mutual respect, good neighbourliness and peaceful coexistence with its sister South American State. Guyana filed its Application in the conviction — which was evidently shared by the Secretary-General of the United Nations — that a final judgment by the Court on the merits of Guyana's claims will provide the surest and firmest foundation for such relations to flourish.

9. Following the Secretary-General's decision to refer the matter to the Court in January 2018, and following the filing of Guyana's claims on 29 March 2018, Guyana hoped that Venezuela would engage constructively in the proceedings in order to facilitate the fair and timely resolution of the dispute by the Court. Regrettably, Venezuela chose not to do so. Venezuela chose not to file a formal written pleading, although it did submit a lengthy written Memorandum, some seven months after the deadline set by the Court for the filing of the Counter-Memorial, and chose not to participate in the oral hearing in June 2020.

10. Now, more than two years later, Venezuela has decided to participate formally in the proceedings before the Court. Guyana welcomes that decision. It regrets, however, that Venezuela's formal participation takes the form of belated preliminary objections which seek to prevent, and will inevitably delay, the determination of the merits of Guyana's claims. And it regrets too the recent submission, just one week before the hearing, of a raft of new documents, the vast majority of which have nothing to do with the preliminary objections newly raised.

11. Although Venezuela seeks to prevent the Court from determining Guyana's claims, and although it does so at a belated stage, in disregard of the Court's procedural Order of 2018, it is important to recognize the extent to which Venezuela has now availed itself of the opportunity to participate formally in the proceedings before the Court. Guyana notes that Venezuela has appointed a distinguished judge *ad hoc*. Venezuela also instructed distinguished and respected international counsel, who have presented Venezuela's arguments at this hearing. Guyana welcomes these developments, in particular the presence of Venezuela's substantial delegation in this courtroom today. Most significantly, although Venezuela seeks to challenge the Court's exercise of jurisdiction over Guyana's claims, by its participation in these proceedings it is apparent that it accepts the legitimacy of the Court's role, its power to dispense justice and the binding effect of the Court's

orders and judgments. If — as Guyana expects — the Court rejects Venezuela's preliminary objections, Guyana looks forward to Venezuela's continued active engagement at the resumed merits phase of these proceedings.

12. Madam President, as the Court has seen, the essence of Venezuela's preliminary objections is that the Court should not exercise the jurisdiction to entertain Guyana's claims it has already conclusively determined it enjoys. Guyana will demonstrate today that Venezuela's preliminary objections are both legally unsupportable and entirely without foundation. The preliminary objections appear to be a device intended to derail and delay the Court's determination of the merits of Guyana's claims. This is rather apparent from the surprising nature of Venezuela's argument. As the Court well knows, Venezuela is a sovereign State which has been a long-standing and vigorous critic of the consequences of imperial conquest and colonization of the South American continent. Notwithstanding its previous positions, Venezuela now comes to the International Court to contend that a dispute between two sovereign South American States concerning delimitation of a land boundary in South America is, in its very essence, a dispute about the continuing legal rights and obligations of a former European Power. A former colonial Power, moreover, which unconditionally relinquished any claim to the territory in question nearly sixty years ago; which has never subsequently asserted any claim, right or legal interest in respect of that territory or the Arbitral Award which determined its boundaries; and which has expressly welcomed and supported the Court's decision to exercise jurisdiction over Guyana's claims. Despite this, you heard Venezuela yesterday make a startling appeal to the need to protect "the dignity"[1] of that former imperial Power by refusing to exercise jurisdiction over a claim brought by its former imperial possession — Guyana.

13. Against this background, Madam President, Guyana expresses its gratitude to the Court, for the speed and efficiency with which it has arranged this hearing on Venezuela's preliminary objections, and for setting a timetable which accommodated the needs of Guyana and its counsel. Throughout these proceedings, Guyana and its people continue to have every confidence that the Court will determine Venezuela's preliminary objections fairly, impartially and expeditiously, and

[1] CR 2022/21, p. 54, paras. 7-8 (Palchetti).

will vindicate the Secretary-General's decision to entrust the resolution of the Parties' long-standing dispute to the Court.

14. Madam President, Members of the Court, with that introduction I can proceed to outline the presentations from Guyana's counsel which will comprise Guyana's first round. They are as follows:

— Professor Pierre d'Argent will begin by explaining that Venezuela's belated preliminary objections are procedurally improper and therefore inadmissible in light of the Court's Order of 19 June 2018 and Rule 79*bis* of the Rules of Court.

— Ms Christina Beharry will then demonstrate that Venezuela's preliminary objections conflict with the Judgment of 18 December 2020, which is *res judicata*, and to uphold those objections would be contrary to the Statute.

— Mr. Paul Reichler will then turn to the merits of Venezuela's preliminary objections. He will address the legal standard under the *Monetary Gold* line of cases. He will demonstrate that the United Kingdom is not an indispensable third party to these proceedings, under the standard first articulated in the *Monetary Gold* case. The United Kingdom, he will demonstrate, has no legal interests that will be affected by the Court's judgment, let alone the legal interests that would constitute the very subject-matter of the dispute between the Parties.

— Professor Philippe Sands will close Guyana's first round of oral submission by responding to some of the specific allegations you heard yesterday regarding the invalidity of the 1899 Arbitral Award. He will show that neither the 1966 Geneva Agreement, nor the good offices process conducted by the Secretary-General resulted in any legal interests of the United Kingdom that could conceivably be affected by a judgment on the merits of the case. He will also explain why Venezuela's preliminary objections are inconsistent with the 1966 Agreement and the conduct of the Parties and the United Kingdom in the decades since Guyana attained independence. He will show that there is no basis for the Court to decline to exercise its jurisdiction over Guyana's claims; and that, for these reasons, Venezuela's preliminary objections are bound to fail.

15. I thank you, Madam President and honourable Members of the Court, for your kind attention, and I thank you for now calling Professor d'Argent to the podium.

The PRESIDENT: I thank the Agent of Guyana for his statement. I now invite Professor Pierre d'Argent to take the floor. You have the floor, Professor.

M. D'ARGENT :

LES EXCEPTIONS PRÉLIMINAIRES SONT IRRECEVABLES

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un honneur de prendre la parole devant vous et c'est un honneur particulier de le faire, cet après-midi, au soutien de la République coopérative du Guyana.

2. Répondant au professeur Zimmermann, il me revient de vous exposer les raisons procédurales qui rendent irrecevables les exceptions préliminaires du Venezuela.

3. Vous l'avez entendu hier, l'argument du Venezuela est très simple : selon lui, son exception fondée sur le principe de l'*Or monétaire* n'entrerait pas dans les prévisions de l'ordonnance du 19 juin 2018 car une telle exception concernerait la recevabilité de la requête introductive d'instance, alors que l'ordonnance n'a visé que la question de la compétence de la Cour.

4. Madame la présidente : l'ordonnance du 19 juin 2018 a été prise compte tenu du fait que le Venezuela avait informé la Cour que, selon lui, elle n'était pas compétente pour connaître de cette affaire, et qu'il avait décidé de ne pas prendre part à la procédure. Après avoir rappelé ces faits, les considérant clés et le dispositif de l'ordonnance se lisent comme suit — ils apparaissent à votre écran — :

> «Considérant que la Cour estime, en application de l'article 79, paragraphe 2, de son Règlement, que, dans les circonstances de l'espèce, il est nécessaire de régler en premier lieu la question de sa compétence, et qu'en conséquence il doit être statué séparément, avant toute procédure sur le fond, sur cette question ;
>
> Considérant qu'il échet à la Cour d'être informée de tous les moyens de fait et de droit sur lesquels les Parties se fondent en ce qui concerne sa compétence,
>
> *Décide* que les pièces de la procédure écrite porteront d'abord sur la question de la compétence de la Cour ;»[2]

5. La question qu'il vous appartient de trancher est celle de savoir si l'exception fondée sur le principe de l'*Or monétaire*, qui est l'objet de la présente procédure incidente et telle qu'elle se

[2] *Sentence arbitrale du 3 octobre 1899 (Guyana c. Venezuela), ordonnance du 19 juin 2018, C.I.J. Recueil 2018 (I)*, p. 403.

présente dans le contexte très particulier de cette affaire, — si cette exception — est recevable à ce stade de la procédure ou si, comme le soutient le Guyana, le Venezuela aurait dû soulever cet argument dans le délai fixé par l'ordonnance, de telle manière qu'il n'était plus en droit de le faire par voie d'exceptions préliminaires en juin 2022.

6. Mesdames et Messieurs les juges, pour répondre à cette question, il faut examiner trois choses :

a) D'une part, il faut examiner les termes de l'ordonnance du 19 juin 2018 afin d'en circonscrire la portée au regard du contexte particulier de cette affaire.

b) D'autre part, il faut identifier la raison d'être et l'effet juridique d'une exception fondée sur le principe de l'*Or monétaire*, lorsqu'une telle exception est retenue.

c) Enfin, troisièmement, il faut déterminer l'effet de l'ordonnance du 19 juin 2018 au regard du système général de la procédure incidente des exceptions préliminaires.

A. La portée de l'ordonnance du 19 juin 2018 au regard de ses termes et du contexte de l'affaire

7. Les termes de l'ordonnance tout d'abord. Par celle-ci, vous l'avez vu, vous avez demandé aux Parties d'informer la Cour «de *tous* les moyens de fait et de droit sur lesquels les Parties se fondent *en ce qui concerne sa compétence*». La «question de la compétence de la Cour» ["the question of the jurisdiction of the Court"] que les Parties ont d'abord dû aborder dans leurs premières pièces de la procédure écrite devait donc y être traitée de manière exhaustive car vous attendiez d'elles qu'elles vous informent «de tous les moyens de fait et de droit … en ce qui concerne [votre] compétence». Il ne s'agissait donc pas de permettre aux Parties de retenir dans leur manche l'un ou l'autre moyen de fait ou de droit «en ce qui concerne» votre compétence.

8. *Les mots* «en ce qui concerne [l]a compétence» ["in the matter of its jurisdiction"] — ces mots — englobent non seulement l'existence de cette compétence, mais aussi son exercice. En effet, rien dans l'ordonnance ne distingue ces deux aspects et ils concernent bien tous les deux votre compétence. «En ce qui concerne [l]a compétence» sont des termes larges et englobants, visant toute éventuelle limite à la compétence de la Cour au sujet de chacune des prétentions contenues dans la requête introductive d'instance du Guyana.

9. Madame la présidente, il est par ailleurs fondamental de rappeler que «la question de la compétence» de la Cour visée par l'ordonnance se posait au regard de la seule base de compétence invoquée par le Guyana, à savoir l'article IV de l'accord de Genève de 1966. Or, le Royaume-Uni a consenti à cette disposition puisqu'il est partie à l'accord. Vous n'avez rien entendu à ce sujet lors des plaidoiries d'hier. Nulle mention de l'article IV de l'accord de Genève. Nulle mention du fait qu'en tant que partie à cet accord, le Royaume-Uni a ainsi formellement consenti à ce que la question de la validité de la sentence puisse ultimement être tranchée par la Cour, sans sa participation à la procédure et quand bien même son comportement passé serait critiqué à cette occasion. Le Venezuela n'en a rien dit. Ce point est pourtant fondamental pour apprécier l'exception préliminaire et pour comprendre qu'elle est une fabrication abstraite, artificielle et tardive n'ayant aucun fondement ni aucun sens au regard des spécificités de cette affaire. Ce point est essentiel. M[e] Reichler et le professeur Sands y reviendront.

10. Pour les besoins de la question qui me retient, ce rappel permet de comprendre que la «question de la compétence de la Cour» au sens de l'ordonnance englobait donc nécessairement une question qui est au cœur de la prétendue exception préliminaire fondée sur le principe de l'*Or monétaire*, à savoir celle du consentement du Royaume-Uni à la compétence de la Cour pour trancher le différend relatif à la validité de la sentence. Cette question relève de l'article IV de l'accord de Genève auquel le Royaume-Uni a consenti ; cette question relève ainsi de la «question de la compétence de la Cour» au sens de l'ordonnance.

11. Il n'était donc nullement besoin à la Cour de demander aux Parties de présenter également leurs moyens de fait ou de droit en matière de recevabilité pour que soit couverte l'exception dont nous débattons. Dès lors, le contraste présenté par le professeur Zimmermann entre l'ordonnance de 2018 et d'autres ordonnances prises au titre de l'article 79 du Règlement dans d'autres affaires, — ce contraste— est sans pertinence. J'en viens à mon deuxième point.

B. La raison d'être et l'effet juridique d'une exception fondée sur le principe de l'*Or monétaire*

12. Madame la présidente, Mesdames et Messieurs les juges, le Guyana reconnaît bien sûr qu'il existe, comme le professeur Zimmermann l'a rappelé, une distinction entre les exceptions d'incompétence et les exceptions d'irrecevabilité. Le Guyana sait tout autant que, lorsqu'elle est

retenue, une exception fondée sur le principe de l'*Or monétaire* conduit la Cour à ne pas exercer la compétence qu'elle possède pourtant. En cela, une telle exception ressemble à une exception d'irrecevabilité. Ressemble, mais n'en est pas une à proprement parler, et certainement pas dans le contexte particulier de cette affaire. En vous exposant avec force les points de droit que je viens de rappeler, le professeur Zimmermann a passé sous silence quelques éléments pourtant essentiels pour apprécier si l'exception du Venezuela aurait dû être soulevée conformément à l'ordonnance de 2018.

13. Avant de vous exposer ces éléments omis par mon collègue, je tiens à rappeler que, comme la Cour a eu l'occasion de le souligner, elle n'est pas liée par la qualification donnée à une exception préliminaire par la partie qui la soulève[3].

14. Je tiens ensuite à souligner que, contrairement à ce que le Venezuela et ses conseils affirment, l'exception déduite du principe de l'*Or monétaire* n'affecte pas la recevabilité de la requête introductive d'instance en tant que telle. Mes collègues ont été très englobants, très imprécis à cet égard, et ils font erreur car le principe de l'*Or monétaire* concerne les *prétentions* formulées dans la requête et non la requête elle-même. Pour reprendre les mots de la Cour dans l'affaire de *Nauru* : la Cour peut statuer sur «les *prétentions* qui lui sont … soumises pour autant que les intérêts juridiques de l'Etat tiers éventuellement affectés ne constituent pas l'objet même de la *décision* sollicitée»[4]. De même, dans l'affaire qui donna son nom au principe de l'*Or monétaire*, la Cour déclina de «statuer sur la première *conclusion* de la requête du Gouvernement italien»[5]. Et dans l'affaire du *Timor oriental*, la Cour souligna que les droits de l'Indonésie étaient «l'objet même de la *décision*» sollicitée par le Portugal[6]. Le principe de l'*Or monétaire* ne concerne donc pas la requête introductive d'instance en tant que telle, mais les prétentions, les conclusions («claims», «submissions») contenues dans la requête et sur lesquelles la Cour est appelée à se prononcer[7]. Le Venezuela le

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[3] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 123, par. 48.

[4] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 261, par. 54 (les italiques sont de nous).

[5] *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 34 (les italiques sont de nous).

[6] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 102, par. 28 (les italiques sont de nous).

[7] Pierre d'Argent, "The *Monetary Gold* Principle: A Matter of Submissions", *The American Journal of International Law (Unbound)*, Vol. 115 (2021), pp. 149-153, available at: https://www.cambridge.org/core/journals/american-journal-of-international-law/article/monetary-gold-principle-a-matter-of-submissions/5E392F2CB25608DB2EA083B8185E5184.

comprend en réalité fort bien puisqu'il écrit que son exception préliminaire «is pertinent to the extent that the Court has assumed its jurisdiction on one point, «the validity of the arbitration award»»[8]. Le professeur Palchetti l'a rappelé[9] et M[e] Reichler y reviendra.

15. Par ailleurs, et plus fondamentalement, le principe de l'*Or monétaire* concerne bien la compétence de la Cour, et cela à un double égard.

16. D'une part, la raison d'être qui sous-tend et justifie ce principe est profondément juridictionnelle. Elle tient — M[e] Reichler y reviendra également — en l'absence du consentement de l'Etat tiers à la compétence de la Cour. Comme je l'ai déjà souligné et comme le professeur Sands vous l'expliquera, cette question ne peut être analysée sans tenir compte de la base de compétence qui est la vôtre, à savoir l'article IV de l'accord de Genève auquel le Royaume-Uni a consenti.

17. D'autre part, lorsqu'elle est retenue, une exception fondée sur le principe de l'*Or monétaire* conduit la Cour, non pas simplement à décliner l'exercice de sa compétence, mais à *devoir* s'abstenir d'exercer sa compétence, quand bien même celle-ci existerait par ailleurs. Le professeur Zimmermann avait raison de citer l'arrêt *Croatie c. Serbie* dans lequel la Cour affirma que «les exceptions d'irrecevabilité reviennent à affirmer qu'il existe une raison juridique pour laquelle la Cour, même si elle a compétence, *devrait* refuser de connaître de l'affaire ou, plus communément, d'une demande spécifique y relative»[10]. S'agissant des exceptions d'irrecevabilité, le conditionnel «devrait» est important, est essentiel, et il est présent dans la version anglaise de l'arrêt («*should* decline») ainsi que dans l'arrêt relatif à l'affaire des *Plates-formes* cité dans ce paragraphe et projeté hier sur votre écran par le professeur Zimmermann : «there are reasons why the Court *should not* proceed to an examination of the merits»[11]. Mon collègue a aussi eu raison de projeter les termes de l'arrêt dans l'affaire de l'*Or monétaire*, termes par lesquels la Cour souligna qu'«elle *ne peut* exercer cette compétence» («*cannot* exercise this jurisdiction»)[12].

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[8] Exceptions préliminaires du Venezuela (EPV), 7 juin 2022, p. 10, par. 54.

[9] CR 2022/21, p. 55, par. 10 (Palchetti).

[10] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), exceptions préliminaires, arrêt, C.I.J. Recueil 2008*, p. 456, par. 120 (les italiques sont de nous).

[11] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2003*, p. 177, par. 29 (les italiques sont de nous).

[12] *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 33 (les italiques sont de nous).

18. En revanche, ce que le professeur Zimmermann a oublié de faire, c'est de contraster le conditionnel qui est de mise en matière de recevabilité avec l'impératif qui s'impose lorsque l'exception fondée sur le principe de l'*Or monétaire* est retenue. La Cour n'a alors aucune marge de manœuvre : elle doit décliner l'exercice de sa compétence. Pourquoi ? Parce que la question du consentement de l'Etat tiers est une question de compétence régie par le Statut. Ce n'est pas le cas d'une exception d'irrecevabilité. D'ailleurs, l'exception fondée sur le principe de l'*Or monétaire* n'est pas mentionnée par la Cour parmi les exemples d'exception d'irrecevabilité mentionnés dans l'arrêt *Croatie c. Serbie* sur lequel le professeur Zimmermann s'appuie, pas plus d'ailleurs que dans la liste des exceptions d'irrecevabilité que l'on peut retrouver dans le plus classique des commentaires du Statut de la Cour[13] ou sous la plume d'auteurs particulièrement avisés[14]. De plus, une exception d'irrecevabilité peut souvent être corrigée par l'auteur de l'acte irrecevable, comme c'est le cas par exemple lorsque les voies de recours internes n'ont pas été épuisées. Rien de tel pour l'exception de nature juridictionnelle déduite du principe de l'*Or monétaire*.

19. Madame la présidente, Mesdames et Messieurs les juges : votre jurisprudence est limpide quant au caractère obligatoire du déclinatoire d'exercice de la compétence, ce qui distingue l'exception déduite du principe de l'*Or monétaire* d'une exception d'irrecevabilité, et votre jurisprudence est très claire également sur le fait que l'effet juridique d'une telle exception n'est pas de rendre la requête introductive d'instance irrecevable.

20. Dans l'affaire de l'*Or monétaire*, le Gouvernement italien «pri[a] la Cour de statuer sur la *question* préliminaire *de sa compétence* pour connaître au fond de la demande»[15]. Il n'était pas question de recevabilité de la requête, mais de la «question préliminaire de [l]a compétence» de la Cour pour connaître d'une des demandes formulées dans cette requête. Au sujet de cette question de compétence, la Cour «dit que la compétence à elle conférée par le commun accord [des parties] *ne l'autorise pas*, en l'absence du consentement de l'Albanie, à statuer sur la première conclusion de la

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[13] Chr. Tomuschat, «Article 36», dans A. Zimmermann & Chr. Tams (sous la dir. de), *The Statute of the International Court of Justice. A Commentary*, 3rd ed., Oxford University Press, p. 785-791.

[14] Hugh Thirlway, *The International Court of Justice* (Oxford University Press, 2016), p. 171.

[15] *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 22.

requête du Gouvernement italien»[16]. L'absence de consentement de l'Albanie est une question de compétence, limitant celle-ci et ayant pour effet d'obliger la Cour à ne pas exercer sa compétence.

21. Dans l'affaire du *Timor oriental* — la seule autre affaire, comme vous le savez, dans laquelle la Cour retint et appliqua le principe de l'*Or monétaire* —, l'Australie soutenait que «[t]he claim [of Portugal] … contravenes the principle of consent which bars the adjudication of the legal responsibility of Indonesia without its agreement»[17]. Dans le dispositif de son contre-mémoire et de sa duplique, l'Australie en déduisait que «the Court lacks jurisdiction to decide on the Portuguese claims, *or* the claims are inadmissible»[18]. La question de la recevabilité des prétentions formulées dans la requête portugaise n'était donc avancée par l'Australie qu'à titre subsidiaire, étant entendu que la question du tiers absent à la procédure soulevait avant tout une question de compétence liée au défaut de consentement de ce tiers. Et c'est bien sous ce seul et dernier aspect que la Cour identifia la nature et l'effet juridique de l'exception soulevée par l'Australie.

22. La Cour commença, comme vous le savez, par rappeler «que l'un des principes fondamentaux de son Statut est qu'elle *ne peut* [*cannot*] trancher un différend entre des Etats sans que ceux-ci aient consenti à sa juridiction»[19]. En d'autres termes, comme dans l'affaire de l'*Or monétaire*, la Cour examina l'exception australienne au regard du principe cardinal du consentement, lequel régit sa compétence. Sans faire droit en termes d'irrecevabilité à l'exception australienne, et conformément à sa jurisprudence antérieure, la Cour ancra donc clairement cette exception dans le champ de la question de sa compétence, et elle le fit tant sous l'angle de sa raison d'être fondamentale qu'en ce qui concerne son effet. Par le dispositif de son arrêt, la Cour «*[d]it* qu'elle ne saurait, en l'espèce, exercer la compétence à elle conférée»[20]. «Ne saurait … exercer», c'est : «it cannot … exercise [the] jurisdiction».

23. Ainsi, Mesdames et Messieurs de la Cour, la classification du principe de l'*Or monétaire* comme exception d'irrecevabilité de la requête introductive d'instance n'a *jamais* été retenue par la

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[16] *Or monétaire pris à Rome en 1943, question préliminaire, arrêt, C.I.J. Recueil 1954*, p. 34 (les italiques sont de nous).

[17] *East Timor (Portugal* v. *Australia),* Counter-Memorial of the Government of Australia, 1 June 1992, para. 194.

[18] *Ibid.*, para. 413; *East Timor (Portugal* v. *Australia),* Rejoinder of the Government of Australia, 1 July 1993, para. 288.

[19] *Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995*, p. 101, par. 26 (les italiques sont de nous).

[20] *Ibid.*, p. 106, par. 38 (les italiques sont de nous).

Cour. Par ailleurs, comme je l'ai déjà souligné, la doctrine est bien plus nuancée que mon collègue ne l'a été[21]. L'exception déduite de ce principe concerne en effet les limites à la compétence de la Cour, de telle manière qu'il est «doubtful whether the problem should be classified as an admissibility issue», pour ne citer qu'un auteur bien connu[22].

24. Quoi qu'il en soit, la question qu'il vous revient de trancher n'est pas doctrinale et elle ne concerne pas l'étiquette que l'on peut mettre sur cette exception car, pour les besoins de la recevabilité de l'exception soulevée par le Venezuela à ce stade et dans le contexte procédural spécifique de cette affaire, seule compte la question de savoir si cette exception aurait pu — et aurait dû — être soulevée conformément à l'ordonnance de 2018 compte tenu de ce que cette dernière exigeait des Parties, et que j'ai rappelé il y a un instant.

25. En réalité, Mesdames et Messieurs de la Cour, le Venezuela reconnaît que le principe de l'*Or monétaire* concerne bien «la question de la compétence de la Cour» au sens de l'ordonnance de 2018. Le Venezuela écrit en effet ceci au paragraphe 27 de ses exceptions préliminaires :

> «Had the Court taken into account this fundamental principle — according to which the Court «cannot decide a dispute between States without the consent of those States to its jurisdiction» — the judgment of December 18, 2020 would have been different.»[23]

26. En d'autres termes, le Venezuela reconnaît que son exception relevait bien de la phase procédurale ouverte par l'ordonnance de 2018 et achevée par l'arrêt qu'il conteste.

27. Le Venezuela comprend donc parfaitement bien qu'il aurait pu — qu'il aurait dû — soulever dans le cadre de l'ordonnance l'exception qu'il formule aujourd'hui. S'il l'avait fait, vous auriez assurément accepté de considérer cet argument à l'occasion de la procédure ayant conduit à votre arrêt du 18 décembre 2020 car, comme je l'ai rappelé, la question du consentement du Royaume-Uni à voir la Cour statuer sur la validité de la sentence relève de l'article IV de l'accord de Genève auquel le Royaume-Uni a consenti et est partie. Vous n'auriez pas objecté en considérant que cet argument ne pouvait pas être entendu pour le motif spécieux que l'ordonnance n'avait pas visé les questions de recevabilité de la requête. Comme je l'ai rappelé, l'exception déduite de l'*Or*

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[21] Voir notamment *Rosenne's Law and Practice of the International Court 1920-2015*, 5th ed. de M. N. Shaw, Vol. II (Brill, 2016), "Jurisdiction", p. 560 et suiv..; M. Paparinskis, "Revisiting the Indispensable Third Party Principle", *Rivista di Diritto Internazionale* (2020), p. 49-84.

[22] R. Kolb, *The International Court of Justice* (Hart, 2013), p. 577.

[23] EPV, p. 4-5, para. 27.

monétaire a pour effet d'interdire à la Cour d'exercer sa compétence pour un motif touchant au principe cardinal du consentement, et non à un défaut inhérent à la requête ; cette exception concerne donc bien la compétence de la Cour, et cela aussi au regard même de l'article IV de l'accord de Genève auquel le Royaume-Uni est partie.

28. Dans le cadre de l'ordonnance de 2018, le Venezuela pouvait donc soulever l'argument qu'il vous a soumis le 7 juin dernier et dont nous débattons. Et, puisque les termes de l'ordonnance appelaient les Parties à présenter «*tous* [leurs] moyens de fait et de droit» concernant la «question de la compétence de la Cour», le Venezuela aurait *dû* soulever cet argument conformément à l'ordonnance.

C. L'effet de l'ordonnance du 19 juin 2018 au regard du système général de la procédure incidente des exceptions préliminaires

29. Madame la présidente, Mesdames et Messieurs les juges, j'en viens au dernier volet de ma démonstration. L'irrecevabilité de l'exception soulevée par le Venezuela se déduit de l'effet de l'ordonnance de 2018 au regard du système général de la procédure incidente des exceptions préliminaires.

30. Comme vous le savez, ce système est actuellement régi par les articles 79, 79*bis* et 79*ter* du Règlement, lesquels ont clarifié les dispositions contenues dans l'ancien article 79 qui était en vigueur jusqu'au 20 octobre 2019. Les exceptions préliminaires soulevées par le Venezuela en juin 2022 sont donc régies par le nouvel article 79*bis*, ainsi que l'Etat défendeur l'admet explicitement[24], sachant que l'ordonnance de juin 2018 fut prise, elle, sur la base et au titre de l'ancien article 79, paragraphe 2, lequel est, en substance, devenu le nouvel article 79, paragraphe 1.

31. L'article 79*bis* subordonne désormais explicitement la présentation de toute exception préliminaire par le défendeur au fait que «la Cour n'a pas pris de décision en application de l'article 79», c'est-à-dire au fait que la Cour n'a pas décidé de sa propre initiative «qu'il sera statué séparément sur toute question concernant sa compétence ou la recevabilité de la requête». En d'autres termes, si la Cour ordonne aux parties d'exposer séparément leurs moyens concernant «toute question» de compétence ou de recevabilité qu'elle soulève *proprio motu*, le défendeur n'est plus en

[24] EPV, p. 4-5, par. 27.

droit de soulever, au titre de l'article 79*bis*, une exception qu'il aurait pu (et donc dû) soulever dans le cadre de la ou des questions posées par la Cour[25]. L'objectif de bonne administration de la justice poursuivi par l'ordonnance prise par la Cour au titre de l'article 79, paragraphe 1, serait en effet entièrement mis à mal si, nonobstant cette ordonnance réglant la conduite du procès, le défendeur était en droit de l'ignorer tout en conservant la possibilité de soulever des exceptions préliminaires relevant de l'ordonnance par laquelle la Cour invita les Parties à s'expliquer pleinement sur tous les aspects d'une question afin d'en décider par un arrêt préalable à tout examen du fond de l'affaire.

32. Même si elle n'était pas expressément prévue par le Règlement dans son ancienne mouture, cette logique élémentaire régissait déjà le rapport entre le pouvoir de la Cour au titre de l'ancien article 79, paragraphe 2, et le droit du défendeur au titre du premier paragraphe de cette même disposition dans son ancienne version[26]. Il n'y a cependant pas lieu d'en décider puisque le Venezuela lui-même prétend agir au titre du nouvel article 79*bis*.

33. Le Venezuela soutient néanmoins qu'il n'aurait pas pu soulever ses exceptions préliminaires avant que la Cour ne se soit déclarée compétente pour connaître du différend portant sur la validité de la sentence car ce ne serait — selon lui — qu'alors que les raisons de son exception seraient apparues[27]. Avec tout le respect que je dois à mes collègues, cet argument n'a aucun sens. Il est contredit par le paragraphe 27 des exceptions préliminaires du Venezuela que j'ai projeté il y a un instant. Par ailleurs, depuis le début de cette controverse, les trois Etats liés par l'accord de Genève savent fort bien que le Venezuela a des récriminations contre un acte juridique dont le Guyana a hérité mais auquel il n'a pas participé puisqu'il n'existait pas au XIX^{e} siècle. L'objet et le but de l'accord de Genève est la résolution du différend né de la prétendue nullité de la sentence. Il suffisait au Venezuela de lire cet accord pour voir que son exception préliminaire déduite du principe de l'*Or monétaire* soulevait, compte tenu de la nature de ce principe et compte tenu de la base de compétence invoquée par le Guyana — à savoir l'article IV de l'accord de Genève, je le répète, auquel le Royaume-Uni est partie — une «question de compétence» qui aurait pu, qui aurait dû, être présentée

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[25] Juliette Mcintyre, "The International Court of Justice Releases New Rules of Court", *EJIL: Talk!* (4 Nov. 2019), available at: https://www.ejiltalk.org/the-international-court-of-justice-releases-new-rules-of-court/.

[26] Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I (Oxford University Press, 2013), p. 979.

[27] CR 2022/21, p. 28, par. 38 et suiv. (Zimmermann).

à la Cour conformément à l'ordonnance de 2018. Votre jugement de 2020 n'a rien révélé qui n'était déjà flagrant.

34. Madame la présidente, Mesdames et Messieurs les juges, je conclus : les exceptions préliminaires soulevées le 7 juin 2022 par le Venezuela doivent être déclarées irrecevables puisqu'elles relèvent bien, et à tous égards, de la «question de la compétence de la Cour» au sujet de laquelle le Venezuela devait vous présenter «tous [s]es moyens de fait et de droit» conformément à la procédure fixée par l'ordonnance de 2018.

35. Je remercie vivement la Cour pour sa bienveillante attention. Madame la présidente, puis-je vous demander de bien vouloir appeler à la barre M[e] Christina Beharry ?

The PRESIDENT: I thank Professor d'Argent and I now invite Ms Christina Beharry to address the Court. You have the floor, Madam.

Ms BEHARRY:

VENEZUELA'S PRELIMINARY OBJECTIONS CONFLICT WITH THE JUDGMENT OF 18 DECEMBER 2020 AND THE STATUTE OF THE COURT

1. Madam President, it is a great honour to appear before you today, for the first time, in this Great Hall of Justice. And it is a particular privilege for me to do so on behalf of Guyana, where several generations of my family were born.

2. You have already heard from Professor d'Argent on why Venezuela's admissibility objection based on *Monetary Gold* is necessarily an objection that addresses the Court's jurisdiction. My presentation will show that such objections are, consequently, barred by the *res judicata* effects of the Court's Judgment of 18 December 2020.

3. Madam President, what Venezuela asks the Court by way of its preliminary objections is nothing less than to undo its Judgment. Venezuela is not bashful in challenging that Judgment, stating at paragraph 19 of the Preliminary Objections that "the Court *lacks jurisdiction* to entertain Guyana's Application"[28]. You heard that again yesterday from Professor Zimmermann who said that $"the

[28] Preliminary Objections of Venezuela (POV), 7 June 2022, p. 3, para. 19, emphasis added.

December 2020 Judgment was wrongly decided" and that "the Court also lacks jurisdiction to entertain the case"[29].

4. In its Preliminary Objections, Venezuela further submits that "even if the Court were to have jurisdiction, Guyana's Application would be then inadmissible on the basis of the terms of the said judgment"[30]. The critical words here are "on the basis of the terms of the said judgment". So, according to Venezuela, the Court's Judgment itself gives rise to its preliminary objections. This point is repeated at paragraphs 14 and 20 of the same document.

5. This reasoning is not credible but Venezuela finds itself in a serious bind. As Professor d'Argent just explained, Venezuela's preliminary objections are essentially jurisdictional and therefore late under Article 79*bis* of the Rules. The only way Venezuela can find around this is to argue that the grounds for the objections did not exist prior to the Judgment, but arose from it. Even if, *quod non*, this were a way to avoid the strictures of Article 79*bis*, it puts Venezuela in direct conflict with the Judgment itself, and with its *res judicata* effects.

6. I need not explain to the Court the primacy of the *res judicata* principle which applies to all judgments of the Court. It is enshrined in the Statute under Articles 59 and 60 and in the Court's jurisprudence which has long recognized judgments as "final and without appeal"[31]. Tellingly, Venezuela's written submissions only makes a passing reference to this principle, stating that the Court's Judgment on jurisdiction suffers from "legitimation problems which cannot be covered under the cloak of *res iudicata*"[32]. Full stop.

7. And it was barely mentioned yesterday by Professor Zimmermann[33]. Venezuela therefore concedes the *res judicata* effect of the December 2020 Judgment, but only makes conclusory statements in justifying how its objections can possibly survive under this principle.

8. The *Bosnia Genocide* case is, however, instructive in this regard. There, the Court dealt with an *ex post* attempt by Serbia to reopen its Judgment upholding its jurisdiction. The Court decided:

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[29] CR 2022/21, p. 25, para. 21 (Zimmermann).

[30] POV, p. 3, para. 19.

[31] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 248.

[32] POV, p. 4, para. 26.

[33] CR 2022/21, (Zimmermann), p. 25, para. 21.

> "[I]in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute."[34]

9. The Court went on to provide the rationale for its decision, elucidating the two main purposes of *res judicata*. It stated: "This result is required by the nature of the judicial function" (that is, the finality of awards) "and the universally recognized need for stability of legal relations"[35]. Surely, Venezuela's objection would, in the words of the Court, "[d]epriv[e] a litigant [in this case, Guyana] of the benefit of a judgment it has already obtained" which "must in general be seen as a breach of the principles governing the legal settlement of disputes"[36].

10. There is no doubt that the Judgment of 18 December 2020 is *res judicata*, such that what the Court decided can only be called into question under the very strict conditions of an application for revision[37]. To recall, revision can only be requested "when it is based upon the discovery of some fact" of a decisive nature that was "unknown to the Court" and "the party claiming revision" of the judgment.

11. But these conditions are not at all fulfilled. That is why Venezuela did not pursue recourse on this basis but instead constructed its request under Article 79*bis* of the Rules, hoping to sidestep the limited nature of the actions that can be taken with respect to a final decision of the Court.

12. As you heard yesterday, Venezuela maintains that its *Monetary Gold* objection does not offend your Judgment because, allegedly, the Court did not decide on the admissibility of the Application. But, as Professor d'Argent has ably shown, this objection is profoundly jurisdictional.

13. But even if such an objection were to concern the admissibility of Guyana's Application initiating the proceedings (*quod non*), your Judgment surely ruled with *res judicata* force on its effect. In the operative clause of the Judgment, the Court held that it

> "has jurisdiction to entertain the Application . . . 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".

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[34] *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. 101, para. 138.

[35] *Ibid.*, para. 139. See also *ibid.*, pp. 90-91, para. 116.

[36] *Ibid.*, pp. 90-91, para. 116.

[37] *Ibid.*, p. 101, para. 138.

But the Court is not limited to simply the Judgment's operative clauses. As the Court noted in *Nicaragua* v. *Colombia*, "for the application of *res judicata* . . . it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed"[38]. Here, we must look to paragraph 121 of the Judgment, which states that the Court "[was] validly seised of the dispute between the Parties by way of the Application of Guyana"[39].

14. In Guyana's submission, this holding is inseparable from the operative part of the Judgment and has *res judicata* force. Guyana acknowledges that this determination is on the validity of your *seizing* by the Application, and does not directly speak to the issue of the *admissibility* of the Application. But can it be seriously contended that the Court doubted the admissibility of the Application (or even that it reserved the question) when it decided not only that it had been validly seized by Guyana's Application, but also when it affirmed its jurisdiction to "entertain" it?[40] Of course, it did not!

15. The *Bosnia* v. *Serbia* case also bears mention again. Venezuela invoked this decision yesterday acknowledging that *res judicata* attaches to any issues "which have been decided . . . or which are necessarily entailed in the decision of those issues"[41]. Guyana also finds this decision pertinent. That's because Serbia attempted to make a similar argument to avoid the *res judicata* effect of the Court's 1996 decision on jurisdiction. The Court had no difficulty concluding that its decision on subject-matter jurisdiction under Article IX of the Genocide Convention was "consistent, in law and logic" with a determination that all the conditions relating to the States' capacity to appear before it had been met. The same applies here.

16. I conclude, Madam President, with a final observation. In its Preliminary Objections, Venezuela asks the Court to "terminate[] the on-going proceeding"[42]. Notably, you did not hear that yesterday or any mention, for that matter, of how the Court should dispose of the December 2020

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[38] *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, para. 59.

[39] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 488, para. 121.

[40] *Ibid.*, p. 493, para. 138 (1).

[41] *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. 43, para. 126.

[42] POV, p. 10, conclusion.

Judgment should it accept Venezuela's *Monetary Gold* argument. This is no small matter. The fact is, Madam President, not only is there no reason to grant this request, but it would be impossible to do so without violating the Court's Statute.

17. Effectively, by requesting the termination of "the on-going proceeding", Venezuela is asking you *not* to "entertain [Guyana's] Application", which is precisely what the Judgment decided to do. To put it differently: Venezuela asks for the exact opposite of what the Court decided in its Judgment. It is therefore impossible to grant Venezuela's request without violating the *res judicata* effect of your Judgment under Articles 59 and 60 of the Statute, and Article 94 of the Charter concerning compliance with decisions of the Court. Guyana therefore respectfully submits that Venezuela's objections are precluded and should be rejected by the Court on this basis.

18. Madam President, this brings me to the end my presentation. I thank the Court for its kind attention and I ask that you now call upon Mr. Reichler to the podium. Thank you.

The PRESIDENT: I thank Ms Beharry. I now invite Mr. Paul Reichler to address the Court. You have the floor.

Mr. REICHLER:

VENEZUELA'S PRELIMINARY OBJECTIONS MUST BE REJECTED BECAUSE THE UNITED KINGDOM IS NOT AN INDISPENSABLE PARTY

1. Madam President, Members of the Court, it is, as always, an honour for me to appear before you. And it is a special privilege for me to address you today on behalf of Guyana, in a case that the Agent has described as existential for his country. At stake in this case is the sanctity of Guyana's long-standing international boundary with Venezuela, and title to nearly three quarters of Guyana's territory, which Venezuela seeks to appropriate for itself, by disavowing and disregarding that boundary, and the international Arbitral Award that established it.

2. Before getting into the substance of my presentation, I would like to follow the Agent of Guyana, and thank the Court for accommodating our request to postpone these hearings from their initial October date until now. As explained in the Agent's letter to the Court, this request was made, in part, because my presence here in October could not be assured, due to my recovery from surgery on my spinal column. As it turned out, I could not have appeared here in October. But I am fully

recovered now, and I am especially grateful to the Court for the extra month, which has made it possible for me to have the honour to appear before you today.

3. Madam President, we are here because, by means of its preliminary objections, Venezuela seeks to prevent the Court from reaching the merits of this case, and from confirming the validity of the Arbitral Award of 3 October 1899, and the lawfulness and permanence of the international boundary between Guyana and Venezuela. In Guyana's submission, Venezuela's objection to the exercise of the Court's jurisdiction in respect of these issues is completely unfounded, and the Court should, and must, proceed to resolve them, for the reasons given in Guyana's Written Observations and for the reasons provided by my colleagues and myself this afternoon.

4. Professor d'Argent and Ms Beharry have already given you sufficient reasons to dispose of Venezuela's preliminary objections on procedural grounds: the fact that, due to its nature as a jurisdictional objection and its lateness, it is barred by the Court's Rules; and the fact that the Court's jurisdiction to rule on Guyana's claims has already been determined in its Judgment of 18 December 2020, and it is now *res judicata*. It is my role to offer the Court another, equally dispositive basis for rejecting Venezuela's objections: that, under the legal principle first established by the Court in the *Monetary Gold* case, and explained in its subsequent jurisprudence, the United Kingdom is *not* an indispensable party to these proceedings.

5. Professor Tams said yesterday, in reference to *Monetary Gold*, that "[t]he Parties are agreed that this doctrine, *if it applies*, precludes the Court from exercising jurisdiction"[43]. In Guyana's submission, the doctrine does *not* apply, and *cannot* be applied, in this case. This is true for two reasons: first, the United Kingdom has no legal interests — no legal rights or obligations — that would be affected by a judgment of the Court on the merits of this case; and second, the United Kingdom has given its consent, in Article IV of the 1966 Geneva Agreement, for the Court to resolve this dispute between Guyana and Venezuela. I will address the first reason for rejecting Venezuela's preliminary objections, the *absence* of any legal interests of the United Kingdom that would constitute the very subject-matter of the judgment to be rendered by the Court on Guyana's

[43] CR 2022/21, p. 43, para. 2 (Tams); emphasis added.

claims; and Professor Sands will address the second reason, the *presence* of the United Kingdom's consent to the adjudication of this dispute by the Court.

6. Madam President, there is a fundamental disagreement between the Parties over when the principles established by the Court in *Monetary Gold* apply. Professor Tams has set out Venezuela's view. I will quote him directly so as not to inadvertently mischaracterize that view:

> "On the basis of this jurisprudence, Venezuela submits that this Court must ask itself a simple question at the present stage: would a judgment deciding on Guyana's Application 'imply an evaluation' of the lawfulness of the conduct of another State which is not party to the case, the United Kingdom? Or in the words of the Croatian *Genocide* case: Would a judgment in this case 'rule upon' the United Kingdom's conduct without its consent? If the answer is in the affirmative, the Court must decline to exercise jurisdiction. This is the test."[44]

7. With respect, this is *not* the test established in *Monetary Gold*, or in the subsequent cases that interpreted and applied it. These, we submit, are not the right questions for the Court to ask, under its well-established jurisprudence. They are questions formulated by Venezuela for the purpose of producing the answers it wants. They are not consistent with the relevant case law, of which Professor Tams gave you only a very cursory description. In our view, it is worth a closer examination, beginning with the *Monetary Gold* case itself.

8. The case came to the Court following an arbitration that found that certain gold, looted by German forces in Rome during World War II, belonged to Albania. Italy claimed entitlement to the same gold based on an alleged international wrong Albania had committed against it. Italy's claim thus required the Court to determine whether Albania, which was not a party to the *Monetary Gold* case, had committed any international legal wrongs subjecting it to liability to Italy. As the Court explained: "In order, therefore, to determine whether Italy is entitled to receive the gold, it is *necessary to determine* whether Albania has *committed any international wrong* against Italy, and whether she is *under an obligation* to pay compensation to her"[45].

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[44] CR 2022/21, p. 44, para. 7 (Tams).

[45] *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; emphasis added.

9. It was on this basis that the Court concluded that it could not exercise jurisdiction because: "In the present case, Albania's *legal interests* would not only be affected by a decision*, but would form the very subject-matter of the decision*."[46]

10. This is the essence of the Court's ruling, and the standard it set for future cases: for the Court not to exercise its jurisdiction, there must be a need for it to determine whether an absent party's legal interests would not only be affected by, but would form the very subject-matter of, the decision on the merits the Court is called upon to make. In particular, would a judgment of the Court directly affect the legal rights or obligations of an absent State, as in the case of Albania, that had not consented to its jurisdiction?

11. The Court returned to this issue and elaborated on the standard it set in *Monetary Gold*, in the *Phosphates* case, *Nauru* v. *Australia*. This is a case that Venezuela's counsel managed to overlook in his discussion of the Court's jurisprudence applying or interpreting *Monetary Gold.*

12. There, the Court rejected Australia's argument that the case should be dismissed under the *Monetary Gold* standard, on the ground, that, as alleged by Australia, its legal interests were identical to those of the United Kingdom and New Zealand, and that any adjudication of its interests would inevitably affect the legal interests of the two absent States. The Court explained that:

> "In the present case, the interests of New Zealand and the United Kingdom *do not constitute the very subject-matter of the judgment* to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case."[47]

13. The Court's decision to exercise jurisdiction did not mean that it found that the legal interests of New Zealand and the United Kingdom would be unaffected by the judgment Nauru was seeking. To the contrary, the Court recognized that "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned"[48]. Perhaps Professor Tams bypassed the *Phosphates* case because it conflicts with his thesis that all it takes for *Monetary Gold* to apply is for

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[46] *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; emphasis added.

[47] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55; emphasis added.

[48] *Ibid.*, pp. 261-262, para. 55.

the Court's judgment to "imply an evaluation" of an absent State's conduct[49]. In the *Phosphates* case the Court adopted a very different approach: it rejected Australia's preliminary objection because "the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered"[50], because the judgment would not directly affect the legal rights or obligations of those States.

14. Three years later, the Court again was called upon to interpret and apply its ruling in *Monetary Gold*, in the *East Timor* case *(Portugal* v. *Australia).* Counsel for Venezuela cited this case, but he quoted very selectively from it. In its key passage, the Court sustained Australia's preliminary objection based on *Monetary Gold*, because, in its words:

> "in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. *Indonesia's rights and obligations* would thus *constitute the very subject-matter of such a judgment* made in the absence of that State's consent."[51]

15. In this passage, as the Court made clear, especially in the last sentence quoted, that an absent State's legal interests will "constitute the very subject-matter" of the case when its judgment would directly affect the "rights and obligations" of the absent State. Even in upholding Australia's objection, the Court took care to reaffirm what it said in the *Phosphates* case: that *Monetary Gold* did not prevent it from exercising jurisdiction and issuing a judgment that might affect the legal interests of an absent State, so long as that State's interests did not constitute the very subject-matter of the dispute: "The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give *might affect the legal interests* of a State which is not a party to the case."[52]

16. The Court reaffirmed this principle once again in its 1998 Judgment in *Cameroon* v. *Nigeria.* As you will recall, Nigeria objected to Cameroon's request that the Court establish the parties' boundary through Lake Chad, on the ground that this would touch on the tripoint with Chad,

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[49] CR 2022/21, p. 44, paras. 5 and 7 (Tams).

[50] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55.

[51] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 34; emphasis added.

[52] *Ibid.*, p. 104, para. 34; emphasis added.

and thus affect the legal interests of an absent State in violation of *Monetary Gold.* The Court rejected Nigeria's objection, on the now-familiar ground that: "it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case"[53]. In that case, unlike the present one between Guyana and Venezuela, the absent State had an actual legal interest in a part of the international boundary that the Court was called upon to draw. Nevertheless, the Court ruled "the legal interests of Chad as a third State not party to the case do not constitute the very subject-matter of the judgment to be rendered on the merits of Cameroon's Application"[54].

17. What this review of the relevant jurisprudence shows is that the Court has declined to exercise jurisdiction under the *Monetary Gold* standard in only two cases. In both of them, *Monetary Gold* itself, and *East Timor*, it found that it could not decide the case without directly affecting the legal rights or obligations of an absent third State — Albania in the first case, Indonesia in the second — and that the legal interests of the absent State thus constituted the very subject-matter of the decision to be rendered.

18. This, then, is the principle to be derived from *Monetary Gold* and its progeny: the Court will not decline to exercise jurisdiction merely because the legal interests of an absent State might be affected or implicated, or merely because its conduct may be "evaluated", so long as the absent State's legal interests do not constitute the very subject-matter of the judgment to be rendered on the merits of the applicant State's claims. Accordingly, the question for the Court here — in contrast to the one Venezuela has proposed — is whether the legal interests of the United Kingdom, if any, form the very subject-matter of the judgment the Court would be required to render on Guyana's claims, such that, it would not be possible for the Court to rule on those claims without directly affecting the legal rights or obligations of the United Kingdom.

19. To answer this question — whether the legal interests of the United Kingdom constitute the very subject-matter of the judgment the Court has been called upon to render here — we need to consider what the very subject-matter of the present dispute between Guyana and Venezuela is.

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[53] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 312, para. 79.

[54] *Ibid.*

Fortunately, this is a matter on which the Parties agree. Venezuela asserts, and we concur, that the subject-matter of this dispute is set forth in paragraph 137 of the Court's Judgment of 18 December 2020[55]. In it:

> "the Court concludes that it has jurisdiction to entertain Guyana's claims concerning *the validity of the 1899 Award* about the frontier between British Guiana and Venezuela and the *related question of the definitive settlement of the dispute regarding the land boundary* between the territories of the Parties"[56].

20. To the same effect, in the first paragraph of the *dispositif*, the Court:

> "*Finds* 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."[57]

21. It is thus a matter of agreement between the Parties that the subject-matter of the judgment to be rendered by the Court is 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.

22. In these circumstances, the task of the Court, in considering Venezuela's preliminary objections under the *Monetary Gold* standard, is to determine whether the United Kingdom has legal interests that would not only be affected by, but would form the very subject-matter of, a judgment of the Court on the validity of the 1899 Arbitral Award and the related question of the definitive settlement of the land boundary between Guyana and Venezuela.

23. And this, then, leads us to the fundamental question at the heart of these proceedings: what legal interests, if any, does the United Kingdom have in the validity of the 1899 Arbitral Award, or the definitive settlement of the land boundary between Guyana and Venezuela? And, most importantly, if these legal interests exist, do they constitute the very subject-matter of the dispute to be decided by the Court?

24. For Guyana, the answers to these questions are clear: the United Kingdom has *no* legal interests in the validity of the 1899 Arbitral Award, *or* in the definitive settlement of the land boundary between Guyana and Venezuela. It therefore has no legal interests that could constitute the

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[55] CR 2022/21, pp. 44-45, para. 9 (Tams).

[56] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 493, para. 137; emphasis added.

[57] *Ibid.*, para. 138; emphasis added.

very subject-matter of this dispute. In issuing its judgment on the validity of the 1899 Arbitral Award, or the definitive settlement of the land boundary, there are no legal rights or obligations of the United Kingdom that the Court could possibly affect. There is thus no basis, taking due account of *Monetary Gold* and the subsequent jurisprudence, for the Court to decline to exercise its jurisdiction in this case because of the absence of the United Kingdom, independently of whether the United Kingdom has consented to adjudication of these issues by Guyana and Venezuela, a matter that Professor Sands will address.

25. It might be helpful if we were to ask this question: does the United Kingdom itself consider that it has legal interests that might be affected by a judgment on the merits in this case, such that it might be opposed to the exercise of the Court's jurisdiction on the issues that have been placed before it by Guyana? This is a question that Venezuela studiously avoided addressing yesterday. Perhaps they will give us their thoughts on it on Monday. If they do, they might wish to consider the following statements, in which the United Kingdom joined with other States in welcoming the Court's Judgment of 18 December 2020 and, specifically, the Court's decision to adjudicate Guyana's claims on the validity of the 1899 Award and the definitive settlement of the land boundary between Guyana and Venezuela.

26. This, for example, is from the communiqué issued by the Commonwealth Heads of Government at the conclusion of their meeting in Rwanda on 25 June 2022, at tab 2 of your folders. It was signed by all the Heads, including the Prime Minister of the United Kingdom:

> "Heads noted the decision made by the ICJ on 18 December 2020, that it has jurisdiction to entertain the Application filed by Guyana on 29 March 2018, paving the way for the ICJ to consider the merits of the case concerning the Arbitral Award of 3 October 1899 (Guyana v. Venezuela) . . . *Heads reiterated their full support for the ongoing judicial process that is intended to bring a peaceful and definitive end to the long-standing controversy between the two countries.*"[58]

27. It would be difficult to imagine a clearer statement of the United Kingdom's position in *favour* of the Court's exercise of jurisdiction to determine the validity of the 1899 Arbitral Award, and the related question of the land boundary between Guyana and Venezuela. Plainly, the

[58] Communiqué of the Commonwealth Heads of Government Meetings, "Delivering a common future: connecting, innovating, transforming", 25 June 2022, para. 112 (emphasis added), available at: https://thecommonwealth.org/news/chogm-2022-communique-leaders-statement-and-declarations-delivering-common.

United Kingdom cannot be understood to harbour any concerns that, in deciding these issues, the Court will affect its legal rights or obligations.

28. On 14 September 2021, the concluding statement of the Commonwealth Ministerial Group on Guyana, which included the United Kingdom, and is at tab 4 of your folders, contained this paragraph:

> "The Group expressed its unwavering support for the judicial process underway before the International Court of Justice chosen by the Secretary General of the United Nations under the 1966 Geneva Agreement and the Group continues to encourage Venezuela to participate in the said process."[59]

29. A similar statement was signed by the Foreign Minister of the United Kingdom and his counterparts from CARICOM and the Dominican Republic at the conclusion of the Tenth United Kingdom-Caribbean Forum on 18 March 2021. The final communiqué, at tab 3 of the folders, included this paragraph:

> "Ministers welcomed the 18 December 2020 decision of the International Court of Justice that it has jurisdiction to entertain Guyana's claim concerning the validity of the 1899 Arbitral Award, which settled the land boundary between then British Guiana and Venezuela."[60]

30. These Ministers plainly expected the Court to proceed to rule on the validity of the 1899 Award, and the United Kingdom was part of the consensus that the Court should do so. These three statements are only the most recent of many official statements signed or authored by the United Kingdom, or its responsible ministers, supporting the Court's exercise of jurisdiction in this case, or disavowing any British legal interests in the validity of the Arbitral Award or the course of the land boundary between Guyana and Venezuela. Professor Sands will take you back to official British statements from the 1960s, made upon Guyana's independence and its accession to the 1966 Geneva Agreement, and the 1970s, and the 1980s, all to the effect that the United Kingdom, following Guyana's independence in May 1966, consistently expressed the position that it no longer had any interests of a legal nature in the validity of the Arbitral Award or the course of the land boundary, and that these were matters that pertained exclusively to Guyana and Venezuela. Professor Sands will also show you that, in the 1966 Geneva Agreement, the United Kingdom

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[59] Commonwealth Ministerial Group on Guyana, Concluding Statement, 14 Sept. 2021, para. 5, available at: shorturl.at/iuBJN.

[60] Communiqué from the Tenth United Kingdom-Caribbean Forum, 18 Mar. 2021, para. 47, available at: https://today.caricom.org/2021/03/18/tenth-uk-caribbean-forum-communique/.

expressly consented that the dispute settlement process, articulated in Article IV of that agreement, would be pursued exclusively by Guyana and Venezuela, without its participation, through the final stage provided in the agreement: determination by the Secretary-General of the particular form of dispute settlement in which the two Parties, Guyana and Venezuela, would engage, which included adjudication by the Court. Indeed, it was on the basis of Article IV that the Court determined that it has jurisdiction in this case.

31. It is ironic, to say the least, that Venezuela purports to find ongoing British rights and obligations in the Arbitral Award and the international boundary that it established, despite Britain's repeated statements, since 1966, that it has no such legal interests. It is ironic, especially, because Venezuela has long portrayed itself as a champion against European and North American colonialism and imperialism. Yet, in this case it purports to find, even at this date, continuing legal interests of a former colonial Power in an arbitral award the sole purpose and effect of which was to determine the land boundary between its former colony, which became an independent State 56 years ago, and Venezuela.

32. What are these purported legal interests, which the British are said to retain, more than half a century after Guyana's independence, and how does Venezuela support its argument that they constitute the very subject-matter of this case?

33. Venezuela's principal argument, expressed in its Preliminary Objections of 7 June 2022, is that the United Kingdom has interests in the Arbitral Award of 3 October 1899 simply because it was a party to that Award[61]. Yesterday, we heard a new argument in support of the preliminary objections, not included in Venezuela's written submission, but advanced for the first time in these oral hearings: that Venezuela intends to argue, at the merits stage, that the Award is invalid due to fraudulent conduct by the United Kingdom prior to and during the hearings before the arbitral tribunal in 1899. According to Venezuela, because of this contention, which it says it intends to advance, in determining whether the Arbitral Award is valid, the Court will have to decide whether the United Kingdom engaged in unlawful conduct at the end of the nineteenth century.

[61] POV, p. 8, para. 42.

34. Of course, we have not arrived at the merits stage yet, although it might have appeared otherwise during much, if not most, of Venezuela's argument yesterday. But let us suppose that we have been transported into the future, to the merits stage, and Venezuela has made these contentions about the unlawfulness of the United Kingdom's conduct in and before 1899. Guyana does not accept Venezuela's proposition that, even then, the Court would be required to pass judgment on the lawfulness of the United Kingdom's conduct in order to determine the validity of the Arbitral Award. But, for present purposes, and *quod non*, let us assume, as Venezuela would have it, that the Court would have to decide on the lawfulness of the United Kingdom's conduct in ruling on the validity of the Arbitral Award. Even under this assumption, we are still left with the unanswered question of how the legal interests of the United Kingdom would constitute the very subject-matter of the judgment the Court is called upon to render in this case. Specifically, what legal rights or obligations of the United Kingdom, today, would be affected by the Court's judgment on the issues over which it took jurisdiction in its Judgment of 18 December 2020?

35. The answer is: none. And that is why Venezuela was unable to answer this question yesterday. The task fell to my friend, Professor Palchetti. In a telling admission, he acknowledged that the United Kingdom — this is our English translation — "has no current interest in the question of the delimitation of the disputed territory"[62]. He went on: "But, ladies and gentlemen, it does not matter that the United Kingdom has no interest in the disputed territory. It does not matter. It is not in relation to the delimitation of the land boundary that the United Kingdom is an indispensable party."[63] And he concluded: "I repeat, Venezuela does not claim that the United Kingdom has any interest in this territory today. The application of the *Monetary Gold* principle in this case has nothing to do with territorial delimitation as such."[64]

36. From these remarkable statements, two conclusions can be drawn. First, Venezuela does not challenge the exercise of the Court's jurisdiction over what the Court described, at paragraph 137 of its Judgment, and the first paragraph of the *dispositif*, as "the related question of the definitive settlement of the dispute regarding the land boundary between the territories of the Parties". But

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[62] CR 2022/21 (Palchetti), p. 53, para. 3.

[63] CR 2022/21 (Palchetti), p. 55, para. 10.

[64] CR 2022/21 (Palchetti), p. 59, para. 25.

second, by admitting that the United Kingdom has no interests in the land boundary between Guyana and Venezuela, Venezuela effectively admits that the United Kingdom has no legal interests in an arbitral award whose sole purpose and effect was to delimit that boundary. Indeed, at paragraph 137 of the Judgment of 18 December 2020, as we have seen, the Court itself refers to "the validity of the 1899 Award about the frontier between British Guiana and Venezuela"[65].

37. Professor Palchetti was unable to identify any British interests that would be affected by the Court's judgment on the validity of the Award. Instead, he spoke only of abstract "legal consequences" for the United Kingdom if the Award were declared invalid. But he declined to identify any of them specifically: "At this stage, it is immaterial to establish the precise consequences that may flow from the United Kingdom's fraudulent conduct."[66] With respect, we beg to differ. It is for Venezuela, in justifying its preliminary objections, to identify, specifically, what the consequences would be for Britain's legal interests if the Court were to invalidate the Arbitral Award on the basis of its alleged unlawful conduct during the 1899 arbitral proceedings. But Professor Palchetti could not do so. All he could do was plead: "But one cannot pretend that they don't exist."[67] Nor, we would add, can one pretend that they *do* exist. And if those legal interests *do* exist, why does Venezuela have such difficulty identifying them with any degree of specificity?

38. In the end, Professor Palchetti could only come up with this:

> "If the Court determines that the United Kingdom is responsible for fraudulent conduct, the consequence is not only that the arbitral award has no force, as Guyana claims. Venezuela will also have the right to invoke the application of the consequences provided for in Article 69 of the Vienna Convention. *Venezuela shall have the right to request the restoration of the situation prior to the award*."[68]

39. This is hopelessly inadequate to meet the *Monetary Gold* test. The "consequences" of a theoretical invalidation of the Award, and a restoration of the situation prior to the Award, would be, in Venezuela's view, the erasure of the international boundary between Guyana and Venezuela, and a return to the *status quo ante*, when the boundary was undetermined, and the territory was disputed. But we have to ask: how could these so-called "consequences" affect Britain's legal interests, when,

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[65] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 493, para. 137.

[66] CR 2022/21 (Palchetti), p. 56, para. 13.

[67] CR 2022/21 (Palchetti), p. 56, para. 13.

[68] CR 2022/21 (Palchetti), p. 56, para. 15, emphasis added.

as you have just seen, Venezuela admits, expressly, that "the United Kingdom has no interest in the disputed territory"[69] nor in "the delimitation of the disputed territory"[70]? How could the United Kingdom's legal interests constitute the very subject-matter of the judgment to be rendered by the Court on the validity of the 1899 Arbitral Award, when the United Kingdom has no legal interest in whether that Award is valid or not?

40. Venezuela's argument might have made sense in 1899, but it is entirely unsupportable now. The sole purpose of the 1899 arbitration was to fix the international boundary between British Guiana and Venezuela. This is set out in Article I of the 1897 Treaty of Washington, by which the United Kingdom and Venezuela agreed upon, and set the terms for, arbitration of this question: "I. An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela."[71]

41. It was this mandate, and only this mandate, that the Arbitral Tribunal carried out, as reflected in the sixth operative paragraph of its 1899 Award:

> "Now we, the undersigned Arbitrators, do hereby make and publish our decision, determination, and award of, upon, and concerning the questions submitted to us by the said Treaty of Arbitration, finally decide, award, and determine that the boundary-line between the Colony of British Guiana and the United States of Venezuela is as follows"[72].

And then the Award goes on to describe, in excruciating detail, that boundary line.

42. To be sure, between 1899 and 1966, when British Guiana remained a colony of the United Kingdom, the colonial Power maintained a legal interest in the international boundary between its colony and Venezuela that was fixed by the Arbitral Tribunal. But that legal interest — like all legal rights of the United Kingdom in the colony of British Guiana — came to a complete and definitive end upon the decolonization of Guyana, and its birth as an independent State, sovereign over its own national territory, on 26 May 1966. After that date, as a matter of decolonization law,

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[69] CR 2022/21 (Palchetti), p. 55, para. 10.

[70] CR 2022/21 (Palchetti), p. 53, para. 3.

[71] 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, 2 Feb. 1897, *United Kingdom Treaty Series (UKTS)*, Vol. 5, p.67, Art. I; AG, Ann. I.

[72] Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, Decision of 3 October 1899, *RIAA*, Vol. XXVIII, 3 Oct. 1899, p. 338.

the United Kingdom did not have, and could not have, any legal interests — any legal rights or obligations — in Guyana's sovereign territory, or in the international boundaries that defined it.

43. To conclude, for the reasons I have given, the United Kingdom, after 26 May 1966, did not, and could not, have any interests in the validity of an arbitral award whose sole purpose and effect was to define the international boundary of its former colony with Venezuela. Whatever the Court might decide on this question at the merits phase of the case, the legal rights and obligations of the United Kingdom will be unaffected because it has no rights or obligations that *could* be affected, either by a decision upholding the Award or one declaring it null and void. Only the legal interests of Guyana and Venezuela will be affected, however the Court rules on this issue. As a result, the *Monetary Gold* principle cannot apply to the present case, and Venezuela's preliminary objections must be rejected by the Court.

44. Madam President, Members of the Court, this concludes my presentation this afternoon. I thank you for your kind courtesy and patient attention and, after the coffee break, I ask you to please call Professor Sands to the podium.

The PRESIDENT: I thank Mr. Reichler. Before I give the floor to the next speaker, the Court will indeed observe a coffee break of 10 minutes. The sitting is adjourned.

The Court adjourned from 4.40 p.m. to 4.55 p.m.

The PRESIDENT: Please be seated. The sitting is resumed, and I now give the floor to Professor Philippe Sands. You have the floor, Professor.

Mr. SANDS:

VENEZUELA'S FALSE ALLEGATIONS OF FRAUD AND COERCION, THE EFFECT OF THE GENEVA AGREEMENT AND THE CONDUCT OF THE PARTIES AND THE UNITED KINGDOM SINCE 1966

1. Madam President, Members of the Court, it is a privilege to appear before you on behalf of Guyana.

2. In this final speech on behalf of Guyana, I will first address some of the specific factual allegations that Venezuela has raised during its first round yesterday. The merits of those

allegations — and of course, they did not feature in Venezuela's written preliminary objections — do not bear directly on the *Monetary Gold* argument. Nevertheless, they do need to be addressed: first, because of the way they have been put indicates that Venezuela's claims of fraud and corruption are false and are to be treated with great caution; and second, because their fanciful and unmeritorious nature makes clear, crystal clear, that Venezuela's attack on the validity of the 1899 Award offers no realistic possibility that the Court will conclude that the Award is a nullity. The nature of these arguments reflects the true purpose of the preliminary objections: to avoid the Court addressing these long-standing and, we say, hopeless allegations.

3. Second, I will address the terms and effect of the 1966 Agreement, the elephant in the room which Venezuela's counsel totally declined to refer to. This, presumably, is because the Agreement embodies a clear expression of consent by the United Kingdom to the Court's exercise of jurisdiction over Guyana's claims. The proposition that the *Monetary Gold* principle is engaged in this case is absurd when viewed in the light of the specific language of the Geneva Agreement.

4. Third, I will explain why Venezuela's contention that the United Kingdom has "legal interests" in the issue of the validity of the 1899 Award is contradicted by Venezuela's own conduct since Guyana attained independence, and by the conduct of the United Kingdom in the same period.

5. And fourth, and finally, I shall address the consequences of Venezuela's striking argument, from a State that has long asserted an anti-colonial instinct and now wishes to allow colonialism back in, it may be said, through the side door.

A. First, Venezuela's allegations of fraud and coercion cannot be taken at face value

6. Yesterday, Venezuela made a number of specific allegations concerning the conclusion and effects of the 1897 Treaty and Great Britain's conduct during the arbitral proceedings. Presumably, these are Venezuela's strongest grounds for impugning the validity of the 1899 Award, relying on — one has to assume — the best evidence it can find. As the high point of Venezuela's case, they do not even begin to get off the ground.

7. Venezuela alleged that it had been coerced and deceived into entering the 1897 Treaty, somehow forced to accept a situation in which no Venezuelan national sat on the arbitral tribunal. Chapters 3 and 7 of Guyana's Memorial on the merits[73] comprehensively disprove these allegations.

8. The record tells a very different story: Venezuela actually warmly welcomed the involvement of the United States in assisting with the negotiation of the terms of the 1897 Treaty. Indeed, shortly after the Treaty was signed, the Venezuelan President, no less, gave a speech to the country's Congress, welcoming "the way in which the United States intended to exercise *the intervention solicited by Venezuela*". After the intervention, he said, "the dispute assumed a most favorable aspect", and he praised the United States' "laudable efforts . . . to secure arbitration" with Great Britain[74].

9. Following its signature, the Treaty was ratified by both chambers of the Venezuelan Congress and great scenes of jubilation followed. As one local newspaper reported at the time:

> "The Congress of Venezuela has unanimously and enthusiastically ratified the Guiana boundary arbitration treaty with Great Britain . . . the House voted for the treaty unanimously amid great cheering and enthusiastic demonstrations of gratitude to 'Uncle Sam.' The Treaty was unanimously ratified by the Senate to-day."[75]

10. Venezuela was equally enthusiastic about the jurists who were appointed to serve on the tribunal. On 26 January 1897, the legal counsel to Venezuela during the Treaty negotiations sent a communication to the Foreign Minister — you can see it on the screens:

> "I think you have got what you desired — a clear and formal recognition of the appointing power of Venezuela on the face of the treaty; precisely the same two Jurists whom, at Caracas, you told me you preferred; and in addition to that you will have (if the plan is carried out) two of the highest judicial officers, on the part of Great Britain. This you owe to the tact of Mr Andrade, to the kindly help of President Cleveland and Mr Olney, and in considerable part to the disposition of the English Government to make the arrangement agreeable to Venezuela."[76]

11. Venezuela's Ambassador to the United States, Mr. José Andrade, who signed the Treaty on behalf of Venezuela, was similarly enthusiastic. He wrote to Venezuela's Foreign Minister on

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[73] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, paras. 3.13-3.37 and 7.21-7.54.

[74] "The Venezuelan Treaty: President Crespo's Message to Congress Regarding the Document Received Here", *The New York Times*, 12 Mar. 1897, emphasis added, available at: https://www.nytimes.com/1897/03/12/archives/the-venezuelan-treaty-president-crespos-message-to-congress.html.

[75] "Ratified by Venezuela: The Boundary Arbitration Treaty Enthusiastically Indorsed", *The Indianapolis News*, 6 Apr. 1897.

[76] Letter from James J. Storrow to Dr. P. Ezequiel Rojas, Venezuelan Minister for Foreign Relations, 26 Jan. 1897, emphasis added; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 31.

9 January 1897 to hail the appointment of the two US arbitrators — and again you can see it on the screen:

> "The more I think of it, the more I am convinced that Venezuela, far from wishing to restrict the participation of the United States in the composition of the Tribunal, should seek to augment it so that she (the U.S.A.) may have greater moral responsibility with regard to the result of the arbitration, and that more effective her concern during the judgment"[77].

Contrary to the tale that was spun yesterday, Venezuela was totally delighted with the state of play when the arbitration began.

12. Yesterday, you heard Venezuela seek to cast the most serious aspersions on the conduct of the British legal representatives during the 1899 arbitral proceedings. The Court was told that there was "clear evidence"[78] of "improper exchanges"[79] and "frequent . . . [and] deeply irregular contact"[80] between Great Britain's counsel and the two British arbitrators during the arbitration — these are actions which, Venezuela says, amounted to "fraudulent conduct"[81]. These are very serious allegations — does the so-called "clear evidence" actually support them? It does not, and we trust that the Court will not be taken in by allegations that appear to rest entirely on brief extracts from four letters sent by one of Great Britain's counsel, Sir Richard Webster, in 1899. Two of the letters were written during the arbitration and refer in passing to the possibility of communicating unspecified information to "our arbitrators"[82], or "the British Arbitrators"[83]. But there is no evidence — none — that any private communication, still less an improper one, ever took place. The other two letters were sent to senior British ministers after the conclusion of the arbitration, and they refer to Sir Richard's desire to discuss "one or two matters in connection with the arbitration"[84] which

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[77] Letter from Mr. Andrade to Minister Ezequiel Rojas, 9 Jan. 1897; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 30.

[78] CR 2022/21, p. 50, para. 31 (Tams).

[79] CR 2022/21, p. 37, para. 6 (Espósito).

[80] CR 2022/21, p. 50, para. 31 (Tams).

[81] CR 2022/21, p. 37, para. 6 (Espósito).

[82] Letter of Sir Richard E. Webster to Mr. Chamberlain, 19 July 1899, Chamberlain Papers, Birmingham University Library, J.C. 7/5; Letter of the Agent of the Bolivarian Republic of Venezuela to the Registrar of the Court, 8 November 2022, Ann. 9, I.DD No. 001763.

[83] Letter of Sir Richard E. Webster to the Marquis of Salisbury, 19 July 1899, Christ Church College, Oxford, Cecil Papers, Special Correspondence; Letter of the Agent of the Bolivarian Republic of Venezuela to the Registrar of the Court, 8 November 2022, Ann. 8, I.DD No. 001763.

[84] Letter of Sir Richard E. Webster to Mr. Chamberlain, 3 October 1899, Chamberlain Papers, Birmingham University Library, J.C.; Letter of the Agent of the Bolivarian Republic of Venezuela to the Registrar of the Court, 8 November 2022, Ann. 10, I.DD No. 001763.

"I cannot very well put in writing"[85]. From that general and bald-written reference to a desired future oral conversation, Venezuela's counsel somehow infers the gravest of wrongdoing. The claim is utterly speculative. There are many reasons why counsel will sometimes prefer to avoid putting certain matters in writing, as we all know, as I know. There is no inference to be drawn.

13. Venezuela also made various claims regarding the accuracy of maps submitted by Great Britain during the 1899 proceedings. Venezuela's allegations were, to put it politely, not immediately comprehensible to us. Suffice to say today that such allegations, which are for the merits of this case, reflect a farrago of errors and misconceptions on the part of Venezuela. But, we can say this. You will have noted that Venezuela expressly conceded that the alleged inaccuracy of at least some of those maps was known to Venezuela's legal counsel years *before* the 1899 arbitration — for that reason alone they simply cannot sustain claims of deceit and concealment subsequently during the proceedings.

14. More generally, Venezuela sought yesterday to portray the process which culminated in the 1899 Award as corrupt, an unjust stitch-up designed to rob Venezuela of its precious territory and resources. This too is for the merits, but please, please, please, look at the evidentiary record: it shows that Venezuela enthusiastically engaged in the arbitration; praised the competence and independence of the arbitral tribunal[86]; and publicly acclaimed the outcome as a victory and vindication for Venezuela.

15. As the Court is aware, for more than six decades after the Award, Venezuela expressly and consistently recognized, affirmed and positively relied upon the validity of the Award. As set out in detail in Chapter 4 of Guyana's Memorial on the merits[87], Venezuela's immediate reaction to the Award was to herald it as a triumph for Venezuela. Venezuela participated in the Joint Boundary Commission which demarcated the entire 825 km boundary in the strictest conformity with the terms of the Award. At the conclusion of that arduous exercise, the British and Venezuelan Boundary

[85] Letter of Sir Richard E. Webster to the Marquis of Salisbury, 3 October 1899, Christ Church College, Oxford, Cecil Papers, Special Correspondence; Letter of the Agent of the Bolivarian Republic of Venezuela to the Registrar of the Court, 8 November 2022, Ann. 11, I.DD No. 001763.

[86] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, para. 3.38.

[87] *Ibid.*, paras. 4.3-4.9.

Commissioners signed a binding agreement to confirm that the boundary was demarcated in strict compliance with the Award[88].

16. In the years that followed, Venezuela refused to countenance any minor technical modification of the boundary[89]. When Venezuela and British Guiana delimited their respective boundaries with Brazil, Venezuela repeatedly insisted upon absolute conformity with the 1899 Award. Such insistence was reflected, for example, in the location of the agreed tripoint, enshrined in the boundary treaty signed by Brazil and Venezuela in 1928[90], itself the subject of an agreed tripartite demarcation, in 1932. Venezuela was adamant that the boundary established by the 1899 Award was, in 1931, to take the words of its Foreign Minister, the "frontier de droit"[91].

17. For decades, senior representatives of the Venezuelan Government repeatedly and publicly affirmed the validity of the Award. In 1941, the Foreign Minister of Venezuela declared that the boundary between Venezuela and British Guiana was a "chose jugée"[92]. In 1944, the Venezuelan Ambassador to the United States emphasized that Venezuela had "accepted the verdict of the arbitration for which we have so persistently asked"[93]. And Venezuela published numerous official maps which consistently depicted its boundary with British Guiana following the line determined by the Award[94].

18. It was not until 1962 — yes, 63 years after the 1899 Award was delivered — that Venezuela first sought to repudiate the Award. The sudden *volte face* was based on a single allegation that the Award was the product of a corrupt "political compromise" by the arbitrators. That allegation was based on a single document, the infamous "Mallet-Prevost memorandum". As the Court well knows, the document was allegedly produced by one of Venezuela's counsel in the 1899 arbitration. It was supposedly written 18 years earlier in February 1944, nearly half a century after the events it

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[88] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, paras. 4.10-4.22.

[89] *Ibid.*, paras. 4.23-4.32.

[90] Protocol between Brazil and Venezuela respecting the Demarcation of the Frontier, Ratification exchanged at Rio de Janeiro 31 Aug. 1929, 24 July 1928, available at: https://heinonline.org/HOL/Welcome.

[91] Letter from the Venezuelan Minister for Foreign Affairs, P. Itriago Chacín, to W. O'Reilly, 31 Oct. 1931; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 53.

[92] Letter from the Venezuelan Foreign Minister, E. Gil Borges, to British Ambassador to Venezuela, D. Gainer, 15 Apr. 1941; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 56.

[93] Speech by the Venezuelan Ambassador to the United States to the Pan-American Society of the United States (1944), p. 1; MG, Vol. II, Ann. 9.

[94] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, paras. 4.43-4.45.

purported to describe, but, amazingly, just one month after 83-year-old Mr. Mallet-Prevost received Venezuela's highest national award, the Order of the Liberator, for his services as a "long-standing . . . friend and adviser" to Venezuela[95]. The text of the memorandum was only made public in 1949 — a month after the death of its supposed author. Thirteen more years passed before Venezuela first invoked it, in the run-up to the independence of Guyana.

19. Curiously, Venezuela made almost no mention of this document yesterday. Could this be because Venezuela — or maybe its counsel — know that the document is replete with errors, a litany of sweeping conjecture and totally, 100 per cent, unsubstantiated allegations. The contemporaneous evidence in the record — private diary entries, correspondence from the distinguished arbitrators, and so on — confirms that the members of the arbitral tribunal discharged their responsibilities conscientiously and with scrupulous independence.

20. The record reveals thousands of pages of written arguments and evidence, more than 200 hours of oral hearings spread over more than 50 sitting days, followed by "long debate"[96] about the issues before the arbitrators. It shows that at the outset, the arbitrators held differing views on where precisely the boundary lay, but following an intensive process of discussion, debate and mutual compromise — a process which, no doubt, is very familiar to each of you — the arbitrators reached a unanimous conclusion. There is not a shred of evidence — literally nothing — to show that the outcome was predetermined or coerced. Quite the contrary: as one of the Venezuelan-appointed arbitrators, Justice Brewer, explained on the day of the Award:

> "Until the last moment I believed a decision would be quite impossible, and it was *by the greatest conciliation and mutual concessions that a compromise was arrived at*. If any of us had been asked to give an award, each would have given one differing in extent and character. The consequence of this was that *we had to adjust our different views*, *and finally to draw a line running between what each thought right*."[97]

The contemporaneous evidence is clear. Three points may be made.

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[95] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, para. 8.23.

[96] Letter from Lord Russell to Lord Salisbury, 7 Oct. 1899, in Papers of 3rd Marquess of Salisbury, Vol. A/94, Doc. No. 2, p. 127; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 36.

[97] "Judge Brewer's Opinion — Venezuela's Arbitrator Tells How the Verdict Was Reached — Final Award A Compromise — There Were Differences on Every Point, but No Real Casting of Votes — Each Conceded Something", *The New York Times*, 5. Oct. 1899, pp. 612-613, emphasis added, available at: https://www.nytimes.com/1899/10/05/archives/judge-brewers-opinion-venezuelas-arbitrator-tells-how-the-verdict.html.

21. First, the evidence shows that the British arbitrators were persuaded by Professor Martens to make concessions during the tribunal's deliberations, and they were frustrated about the extent of the concessions they had made. In his private diary — which is well worth reading — Professor Martens described how the tribunal's deliberations had involved "a fierce debate" between the arbitrators[98]. Professor Martens "persistently demanded" that the British arbitrators "had to make concessions to the Americans", and he persuaded them to "waive" and modify their positions during the course of the deliberations[99]. Professor Martens recorded in his diary how Lord Russell "waived his line, ceding a significant area to the Venezuelans". He added: "Eager to recruit the American arbitrators, I demanded another concession from the British side"[100]. Professor Martens explained that the British arbitrators

> "were apparently angry that 1) under my influence they had to waive something that as they considered already belonged to them and 2) that due to the unanimity which I persistently demanded they had to make concessions to the Americans"[101].

This evidence — by a renowned Russian jurist, by one of the world's great jurists, on which Venezuela has passed in total silence — is difficult to reconcile with the allegation that the Award was somehow the result of an illicit Anglo-Russian political deal.

22. Second, the suggestion of a secret "deal" to favour Great Britain at the expense of Venezuela is inconsistent with the outcome, one that gave the most prized and valuable strategic asset — the mouth of the Orinoco River — to Venezuela. On the day of the Award, Mr. Mallet-Prevost and another of Venezuela's counsel, the former United States President, Benjamin Harrison, celebrated the win[102]. Venezuela's Ambassador to Britain acclaimed the Award as allowing justice to — in his words — "shine forth", giving Venezuela "exclusive dominion over the Orinoco which was the principal aim we sought to achieve through arbitration"[103]. Even the Mallet-Prevost memorandum recognizes that the Award "gave to Venezuela the most important

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[98] Private diary entries of Prof. Fyodor Fyodorovich Martens (4 June 1899-3 Oct. 1899), p. 10, emphasis added; Memorial on the merits of Guyana, 8 Mar. 2022, Vol. III, Ann. 33.

[99] *Ibid.*, p. 10.

[100] *Ibid.*, p. 11.

[101] *Ibid.*, p. 10.

[102] "Declarations from Mallet-Prevost and General Harrison, Venezuelan's Agents before the 1899 Tribunal", *The Times*, 4 Oct. 1899, p. 6, available at: https://tinyurl.com/y2nx9mj8.

[103] Letter from the Venezuelan Ambassador to the United Kingdom to the Venezuelan Minister of Foreign Affairs, 7 Oct. 1899; MG, Vol. II, Ann. 3.

strategic point at issue". Again, the evidence in the record before you totally contradicts all of Venezuela's allegations.

23. Third, the justice of the 1899 Award — and the fact that it did not unduly favour Great Britain — is also reflected by the fact that the boundary determined by the tribunal corresponded closely to the line previously identified by the Venezuelan Boundary Commission appointed by United States President Grover Cleveland. In the words of one member of that Commission, the line determined by the 1899 Award was "thoroughly just" and: "It is with pride and satisfaction that I find their [i.e. the tribunal's] award agreeing, substantially, with the line which, after so much trouble, our own commission had worked out."[104]

24. To conclude, the claim that the 1899 Award was the product of improper collusion and a secret political deal is as outrageous as it is unsubstantiated. It is contradicted by the evidential record, and by the outcome of the arbitration. It is fanciful. There is, we submit, no realistic prospect of Venezuela persuading the Court that the Award is invalid on this basis.

25. Which is precisely why, with respect, Venezuela now scrapes the barrel with its concocted, newfound *Monetary Gold* argument. Mr. Reichler has explained the United Kingdom has since 1966 had no legal interest in the validity or invalidity of the Award, much less any legal interests that could conceivably be said to constitute the very subject-matter of the issues the Court has been called upon to decide. Beyond that, the *Monetary Gold* principle is not engaged at all, because the United Kingdom has consented to these proceedings, and it has allowed the Court to resolve this outstanding controversy.

B. The 1966 Geneva Agreement

26. Let us turn to the 1966 Agreement, which you know very well. We listened with great interest to the various submissions of counsel for Venezuela, and we noted the total failure to address at all the legal terms of that instrument which is at the heart of these proceedings, the agreement that formed the basis of the Court's clear and correct December 2020 Judgment. For Venezuela, it seems, the 1966 Agreement is the legal instrument that dares not speak its name.

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[104] Andrew D. White, *Autobiography of Andrew Dickson White* (1917), Vol. II, p. 124.

27. In the light of the 1966 Agreement, the *Monetary Gold* argument is wholly misconceived. The Agreement reflects the clearest expression by the United Kingdom that it accepts that it has no role at all in, as Article I puts it, the "practical settlement of the controversy . . . which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 . . . is null and void". The United Kingdom is a party to that Agreement, by which it has unambiguously and explicitly affirmed that it shall have no role whatsoever in any aspect of the "practical settlement" of any part of that controversy.

28. Whether that recognition is characterized as an expression of consent 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 — matters not. Either way, the United Kingdom has accepted that "the object of the Geneva Agreement was to seek a solution to the frontier dispute between the parties that originated from their opposing views as to the validity of the 1899 Award" — that is the way this Court put it in paragraph 65 of the 2020 Judgment — and that the United Kingdom will have no role in any of the procedures that may be utilized to reach that solution[105]. In paragraph 66 of your Judgment, the Court ruled that the "controversy" to be settled through the mechanism established under the Geneva Agreement "concerns the question of the validity of the 1899 Award, as well as its legal implications for the boundary line"[106].

29. What are the practical mechanisms? Article II of the Geneva Agreement provides that the Mixed Commission to resolve that controversy is to be appointed "by the Government of British Guiana and the Government of Venezuela". There is no role for the United Kingdom. The United Kingdom accepted by this binding treaty obligation that it would have no role in the work of the Mixed Commission, none whatsoever. That included with respect to any consideration by the Mixed Commission of any factual allegations that touched upon "the question of the validity of the 1899 Award". In other words, the United Kingdom accorded to Guyana and Venezuela alone the power to engage with the Mixed Commission on all the allegations of British wrongdoing, fraud or any of the other horrors that Venezuela now claims — or newly claims — to have been perpetrated

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[105] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 473-474, para. 65.

[106] *Ibid.*, p. 474, para. 66.

by perfidious Albion, and to do so without any involvement of the United Kingdom whatsoever. The United Kingdom did not create a carve-out, to forbid the Mixed Commission from dealing with such matters. The 1966 Agreement places no limit on the competence or powers of the Mixed Commission to resolve the outstanding controversy.

30. The same goes for all the other processes envisaged by the Agreement. Article IV (1), for example, provides that the Mixed Commission may, "in its final report, refer to the Government of Guyana and the Government of Venezuela any outstanding questions". No mention of the United Kingdom. "Those Governments [i.e. Guyana and Venezuela] shall without delay choose one of the means of peaceful settlement provided in Article 33 of the Charter of the United Nations." Madam President, may I make two points: first, the words "[t]hose Governments" refer only to the Governments of Guyana and Venezuela, not the United Kingdom; and second, "the means of peaceful settlement provided in Article 33 of the [United Nations] Charter" embraces judicial settlement, including resort to the International Court of Justice, as the Court explicitly recognized in paragraph 82 of its Judgment of 2020[107], which is *res judicata*. In other words, by Article IV (I) the United Kingdom has explicitly accorded to Guyana and Venezuela the sole right to refer the controversy — or any part of it — to this Court, without any involvement on the part of the United Kingdom. The United Kingdom cannot itself refer the controversy to the Court, the United Kingdom cannot be a respondent in any case under the Agreement. And, like Article II, Article IV (1) makes no provision to carve out from any such proceedings before the Court any issues relating to allegations of nineteenth century wrongdoing by the United Kingdom of the kind of which we heard yesterday.

31. Put simply, the 1966 Agreement places no limit to the jurisdiction, or the exercise of the jurisdiction, of the Court to resolve the controversy. Again, to draw from your paragraph 82 in the 2020 Judgment, if the parties to the 1966 Agreement had wished to exclude allegations of nineteenth century British wrongdoing being addressed by the Court in any proceedings referred to it under Article IV (1), they could have done so in the negotiations. But they did not do so.

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[107] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 478, para. 82.

32. Exactly the same conclusions apply in relation to a referral to this Court by the Secretary-General of the United Nations, under Article IV (2).

33. Against this background, is it really imaginable that the negotiators of the 1966 Agreement intended, with one hand, to accord to Guyana and Venezuela, or to the Secretary-General, the power to refer to the Court the "controversy" concerning "the question of the validity of the 1899 Award"; but simultaneously, with the other hand, to remove that power by requiring the Court to exercise the jurisdiction granted to it to resolve the "controversy" because of the application of the *Monetary Gold* principle? Let me be blunt. Such a conclusion would be absurd. It would deprive Article IV of any *effet utile*. It would render Article IV a dead letter in relation to judicial settlement by this Court, or indeed by any other judicial or arbitral process, since the parties to the 1966 Agreement knew full well that any resolution of the controversy would necessarily have to address the arguments made by Venezuela with respect to allegations of nineteenth century wrongdoing by the United Kingdom.

34. And this, presumably, is why Venezuela chose to steer so wide a berth yesterday around the 1966 Agreement, including the crucial language of Article IV. The lawyers of Venezuela know, as we know, and as you surely know, that by negotiating, signing and bringing into effect the 1966 Agreement, the United Kingdom very obviously gave its consent to the Court to exercise the jurisdiction you have ruled the Court has. To accede to Venezuela's application would be to recognize that the United Kingdom contributed to a legal instrument that gives the Court jurisdiction, but simultaneously withheld its consent to allow the Court to exercise that jurisdiction. There is nothing in the plain meaning of the 1966 Agreement to support such a conclusion. Quite the contrary. There is nothing in the object and purpose of the 1966 Agreement to support such a conclusion. Quite the contrary. My good friend Professor Tams asked a question: "Would you, the Court, in deciding upon Guyana's claims, have to 'rule upon [the United Kingdom's] conduct without its consent'?" The answer to that question is totally plain. It is no[108].

35. There is *no* other way of looking at this, one that also makes clear that the *Monetary Gold* principle can be of no avail to Venezuela, in this case. The 1966 Agreement, and in particular the provisions of Articles II and IV, for the practical settlement of the controversy, make it clear that the

[108] CR 2022/21, p. 51, para. 37 (Tams).

United Kingdom recognized that going forward, the only two parties which were directly interested in the resolution of the controversy were Guyana and Venezuela. By the Agreement, the United Kingdom accepted that it would no longer be an interested party. And Venezuela has recognized this reality, and articulated it, as this Court itself noted in its 2020 Judgment. I refer you to your own paragraph 74, in which the Court set out its conclusion that Guyana and Venezuela had conferred on the Secretary-General the authority to choose a means for the settlement of the controversy that would be "binding on them"[109]. Then in the following paragraph, paragraph 75, the Court wrote — you can see it on your screens:

> "This conclusion is also supported by the position of Venezuela set out in its Exposition of Motives for the Draft Law Ratifying the Protocol of Port of Spain of 22 June 1970, in which it is stated that
>
> > 'the possibility existed that . . . an issue of such vital importance . . . as the determination of the means of dispute settlement, would have left the hands of the two directly interested Parties, to be decided by an international institution chosen by them, or failing that, by the Secretary-General of the United Nations'."[110]

36. This makes clear that in 1970 Venezuela considered that it and Guyana alone were "the two directly interested Parties" in this "controversy", that the United Kingdom was not a directly interested party. That continued to be Venezuela's position for another 50 years. At no point during the 27-year good offices process did Venezuela ever suggest that it was somehow necessary to engage with the United Kingdom concerning any aspect of the controversy over the validity of the 1899 Award and the related issue of the Parties' land boundary. This remained Venezuela's position right up to and including the Memorandum it submitted to this Court on 28 November 2019, which contained no hint of its newly concocted argument that the United Kingdom is, somehow, a necessary third party with a continuing legal interest in the matter. I refer you to paragraph 70 of Venezuela's 2019 Memorandum, which explicitly states that the Court's jurisdiction was "legally dependent on *both* Parties' consent to the jurisdiction of the Court"[111]. The Memorandum says nothing about the need for the United Kingdom to be a party, in any way, to the proceedings, an argument which

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[109] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 476, para. 74.

[110] *Ibid.*, para. 75.

[111] MV, para. 70, emphasis in original.

Venezuela full well knew — as recently as 2019 — was totally hopeless, given the plain meaning of the 1966 Agreement. Fifty years on, maybe assisted by a new team of lawyers, and in direct contravention to decades of practice before the Mixed Commission and the good offices of the United Nations Secretary-General, in the course of which Venezuela was entirely 100 per cent content to proceed without any United Kingdom involvement . . . all of a sudden, magically, conveniently, the United Kingdom has become a "directly interested" party.

C. The conduct of the United Kingdom since Guyana attained independence

37. I turn to the conduct of the United Kingdom in the six decades since Guyana attained independence — following on from what Mr. Reichler said to you: that conduct is totally inconsistent with Venezuela's *Monetary Gold* argument. At no time, since granting Guyana independence on 26 May 1966, has the United Kingdom ever asserted, claimed or even hinted that it has any possible interest in either the question of the validity of the 1899 Award or the location of the boundary between Venezuela and Guyana or *any* aspect of *any* matter that might have to be decided in relation to the resolution of those issues. Not once. Never. *Jamais*. This is for the simple reason that in 1966, at the date of Guyana's independence, the United Kingdom expressly and unambiguously relinquished any such interest or claim.

38. The absence of any relevant legal interest on the part of the United Kingdom is reflected in the legal instruments through which the United Kingdom gave effect to that grant of independence. It is the Guyana Independence Act of 1966 — Section 1 of which was enacted by the British Parliament on the eve of Guyana's independence in May 1966 — that provided that (as you can see on your screens):

> "[o]n and after 26th May 1966 . . . Her Majesty's Government in the United Kingdom *shall have no responsibility for the government of the territory* which immediately before that day constitutes the Colony of British Guiana and which on and after that day is to be called Guyana."[112]

39. Thus, from the date of Guyana's independence, the United Kingdom unequivocally and explicitly gave up any claim to any rights in respect of the territory which, immediately before

[112] Guyana Independence Act 1966, section 1 (1), emphasis added, available at: https://www.legislation.gov.uk/ukpga/1966/14/enacted#:~:text=An%20Act%20to%20provide%20for,connected%20with%20the%20matters%20aforesaid.

independence, had been the territory of the British colony. It accepted that it had no legal interests in relation to the status of that territory, or in any process that would determine the status of that territory.

40. The United Kingdom has also expressly disavowed any interest in the question of the validity of the 1899 Award, or the location of the Guyana-Venezuela land boundary. Indeed, the British Government has even gone further: it has stressed that it would be positively *inappropriate* for the United Kingdom to play any role — whether active or otherwise — in relation to the controversy between Guyana and Venezuela concerning those questions. Unlike Venezuela, it seems the United Kingdom has no interest in a continuing role for the former colonial Power. As early as 1968, for example, the British Minister of State for Foreign and Commonwealth Affairs told the United Kingdom Parliament that

> "Guyana put her signature to the Geneva Agreement and as an independent country is now negotiating with Venezuela. The meetings are continuing, and although there has not been much progress *so far the matter is being discussed, as it should be discussed, by two independent countries*."[113]

41. Two years later, in March 1970, after the Mixed Commission failed to yield a resolution of the controversy, another British Government Minister told Parliament that:

> "It is our sincere hope that the problems between the two parties will be solved peacefully *by the two independent countries concerned*, *as provided for in the Geneva Agreement*. It imposed obligations on both sides. It established the procedure which they should follow if they failed to agree. They are still discussing, so we must hope that they will reach agreement or otherwise follow the procedure in the agreement"[114].

42. There is no hint, none, of the United Kingdom having any continuing legal interest, as opposed to a political interest in trying to be helpful, in the outcome of discussions between Guyana and Venezuela, two independent countries, and certainly not a legal interest that could be said in any way to constitute the very subject-matter of the issues in discussion. Nor is there any hint anywhere in the evidence of any concern on the part of the United Kingdom that the outcome of the procedure that is to be followed might somehow shed a negative light on past British actions.

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[113] Hansard, House of Lords Debates, Vol. 297, Col. 226, 6 Nov. 1968, emphasis added, available at: https://hansard.parliament.uk/Lords/1968-11-06/debates/92d27874-96b6-4f2f-a2d5-83b9de6db9a3/GuyanaVenezuelanClaims.

[114] Hansard, House of Commons Debates, Vol. 800, Col. 980, 27 Apr. 1970, emphasis added, available at: https://api.parliament.uk/historic-hansard/commons/1970/apr/27/guyana-republic-bill-lords.

43. Eleven years later, in 1981, the British Government summarized its official position to the United Kingdom Parliament in the following terms:

> "There is of course no question of our changing our historical view of the 1899 Award. However, now that Guyana is independent and a sovereign state, we believe that it would not be right for us to take an active part in pursuing the settlement of the controversy. *It is for the Governments of Venezuela and Guyana to settle this matter between themselves.* As the House will know, neither the Geneva Agreement nor the Port of Spain Protocol provides for any further action on the part of the United Kingdom after Guyanese independence . . .
>
> In these circumstances . . . it would not seem either appropriate or helpful for Her Majesty's Government now to play an active role in this controversy."[115]

44. This position — which disposes entirely of the Application — is also reflected in a document contained in the new material which Venezuela filed last week, but somehow it did not notice the implications thereof. On 5 October 1983, the UK Foreign and Commonwealth Office sent a letter to the UK diplomatic mission in New York. This is what it stated:

> "Finally, you will know that Ministers maintain the position that we should be very cautious about any attempts to re-involve HMG in this dispute . . . You will note that, whilst we have an interest in the smooth working of the Geneva Agreement, *we do not consider that the Agreement envisages any further role for the United Kingdom* . . . I know you will have fully in mind *the need not to leave the impression with anyone that we consider we still have* locus standi *in the dispute*."[116]

45. No *locus standi*, no legal interest, it could not be clearer.

D. Venezuela's arguments are contrary to the principles of decolonization

46. There is one further point to be made about Venezuela's *Monetary Gold* argument, and it has been mentioned already: it is totally inconsistent with the law and practice on State succession, decolonization and self-determination. On Venezuela's case, notwithstanding the fact that Guyana had become fully independent more than half a century ago, the United Kingdom, as its former colonial Power, somehow retains an ongoing legal interest in the 1897 Treaty, in the 1899 Arbitral Award and in the 1905 Boundary Agreement. The indisputable fact is that the United Kingdom's interests passed long ago to Guyana, when it became an independent sovereign State in 1966.

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[115] Hansard, House of Lords Debates, Vol. 423, Col. 537, 24 July 1981, emphasis added, available at: https://hansard.parliament.uk/Lords/1981-07-24/debates/457940c6-c3fd-42bc-a1c0-e526d7b68f9f/Guyana-VenezuelaDispute.

[116] Letter from the Foreign and Commonwealth Office to the UK Diplomatic Mission in New York, 5 Oct. 1983, para. 5, emphasis added; Letter of the Agent of the Bolivarian Republic of Venezuela to the Registrar of the Court, 8 November 2022, Ann. 22, I.DD No. 001763.

47. Venezuela's preliminary objection is premised on a belief that the process of decolonization is somehow incomplete, inchoate or imperfect. It seems to suggest that notwithstanding General Assembly resolution 1514, and its independence since 1966, Guyana's liberation from the shackles of colonialism is somehow only partial, that it is in some way still subject to a lingering residue of the colonizer's interest, like a teenage child somehow dependent upon the continued largesse of its parent. For a country that has so long proclaimed itself to be anti-colonial, this is, to put it generously, a rather curious position to adopt.

48. If Venezuela is right, then it would seem to follow that any former colonial Power, anywhere in the world, would retain a continuing "legal interest" in respect of any potential judicial determination, for example, of the boundaries of any of its former colonies, where such determination turned in some way on some impugned act of the former colonial Power. This, with respect, totally offends against the law of State succession and the law of decolonization.

49. At the same time, it would also provide any party to a dispute arising from a colonial-era boundary treaty — and as we know, there are a great many of them — with a very simple mechanism for preventing this Court, or indeed, any other international tribunal, from exercising such jurisdiction as it has over the dispute. Simply allege fraud or some other horrendous act against the former colonial Power and, hey presto, *Monetary Gold* applies and the case cannot proceed because jurisdiction cannot be exercised without the participation of the former colonial Power. You can see the mischief that will follow if you come close to accepting this argument. It is not so much a case of "poudre aux yeux", as Professor Palchetti put it, it is more like this Court running into a brick wall[117].

50. These unprincipled and, frankly, repugnant possibilities find no support in the case law, or in the world as it really is. On the contrary, as noted in Guyana's written submissions, the Court has frequently and regularly determined boundary disputes between former colonies of different colonial Powers based on colonial-era treaties or other instruments, without the involvement of the former colonial parties to those treaties, and without any legal issues or difficulties arising[118].

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[117] CR 2022/21, p. 59, para. 25 (Palchetti).

[118] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*.

E. Conclusion

51. To conclude, and I will be blunt: the reality is, in our submission, that Venezuela does not really truly regard the United Kingdom as an indispensable third party to these proceedings. The reality — as everyone in this room knows — is that the United Kingdom has no legal skin in this game, and Venezuela and its counsel know that. The reality is that Venezuela's preliminary objections are a concoction, a late attempt to derail the process, to prevent this Court from delivering the impartial and authoritative ruling which will finally bring this controversy to a legal end.

52. Madam President, for the reasons I and Mr. Reichler have summarized, Venezuela's preliminary objections are incoherent, legally misconceived and factually baseless. The preliminary objections totally ignore the realities of the 1966 Agreement and the Court's jurisprudence on the indispensable third party. They ignore Venezuela's own conduct over decades. They ignore the conduct of the United Kingdom over decades, the former colonial Power whose purported "interests" Venezuela now suddenly claims actually go to the very essence of this case. They ignore the fundamental precepts of State succession, decolonization and self-determination. They are, in short, totally hopeless. For these reasons, and for the additional reasons summarized by my colleagues Professor d'Argent and Ms Beharry, the preliminary objections must be rejected.

53. Madam President, Members of the Court, I thank you very much for your kind attention. I take the opportunity to thank Mr. Edward Craven for his assistance in preparing these submissions. This concludes Guyana's first round of oral arguments. We wish you all a wonderful weekend. Thank you very much.

The PRESIDENT: I thank Professor Sands, whose statement brings to an end today's sitting, as well as the first round of oral argument. The Court will reconvene on Monday 21 November 2022 at 10 a.m. to hear Venezuela's second round of oral pleadings. At the end of that sitting, Venezuela will present its final submissions. Guyana will present its second round of oral argument on Tuesday 22 November 2022 at 10 a.m. At the end of that sitting, Guyana will also present its final submissions. Each Party will have a maximum of 45 minutes to present its arguments for the second round.

As the Parties and their counsel turn to their preparation for the second round of oral proceedings, I take this opportunity to remind them of Article 60, paragraph 1, of the Rules of Court, pursuant to which the oral statements of the second round are to be as succinct as possible. The Court

has emphasized this requirement in Practice Direction VI. The Parties should not use the second round to repeat statements that they have previously made. The second round is an opportunity to respond to points that were made earlier in these oral proceedings. Moreover, the Parties are not obliged to use all the time allotted to them. The sitting is adjourned.

The Court rose at 5.50 p.m.

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