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

[Translation]

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

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

Argument that the United Kingdom has "consented" to the Court's jurisdiction to settle the dispute and to the exercise of that jurisdiction — "Consent" necessarily implies the United Kingdom's acceptance of the Court's jurisdiction over it when the latter is called upon to rule on the lawfulness of its individual acts — Traditionally very strict requirements for establishing such acceptance not met in this case — In subscribing to Article IV of the 1966 Geneva Agreement, the United Kingdom only

consented to the establishment of a general scheme for the settlement of the dispute, intended in principle to be applied without its involvement — Choosing the Court implies full compliance with its Statute, in particular as regards consensualism — Reasonable interpretation of Article IV does not suggest that the United Kingdom has unequivocally and unquestionably consented to the Court ruling on the lawfulness of its past conduct without it being able to defend its case — Specific complaints against the United Kingdom not previously identified in detail or definitively formulated in legal terms — United Kingdom's consent to the Court's jurisdiction moreover always meticulously worded — Consistent jurisprudence of the Court as regards forum prorogatum.

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

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

Conclusion: applicability in principle *of* Monetary Gold *jurisprudence — Difference between this case and* Monetary Gold *and* East Timor *cases — Facts not yet conclusively established — Applicant's right to a fair hearing — Objection "inextricably interwoven with . . . the merits" — Moreover, the Court does not have before it "all facts necessary to decide the questions raised" — Objection to be regarded as "not exclusively preliminary", within meaning of Article 79*ter*, paragraph 4, of the Rules of Court.*

I. Introduction

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

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

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

II. The Admissibility of Venezuela's Preliminary Objection

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

5. At the meeting held by the President of the Court with the Agents of the Parties on 18 June 2018, pursuant to Article 31 of the Rules, and as noted in the Court's Order of the following day, the Vice-President of Venezuela made clear from the outset that her Government considered "that the Court manifestly lacks jurisdiction and that Venezuela ha[d] decided not to take part in the proceedings"[2]; at the same time, she handed the President of the Court a letter from the Venezuelan Head of State in which the latter stated that "there is no basis for the jurisdiction of the Court"[3]. As in similar situations in the past, the Court decided, in its Order of 19 June 2018, using standard terms whose meaning and scope had never before proved

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

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

[3] *Ibid.*

controversial, that since the Respondent had immediately and firmly disputed the existence of any basis of jurisdiction enabling the Court to rule on the dispute between the Parties, it "must resolve first of all the question of [its] *jurisdiction*, and that this question should accordingly be separately determined before any proceedings on the merits"[4]. The time-limits fixed in that Order thus expressly and exclusively concerned the filing of written pleadings on the *jurisdiction* of the Court. No grounds other than the lack of a basis of jurisdiction *inter partes* enabling the Court to entertain the case were invoked by Venezuela to justify its decision not to take part in the proceedings. Therefore, the written pleadings that were to be produced pursuant to the Court's Order dated 19 June 2018 could not address any other subject.

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

7. Much has been written on the concepts of "jurisdiction" and "admissibility", on the differences and similarities between them in both the various domestic legal systems and international proceedings, on their sometimes vague definitions, and on the order in which questions of jurisdiction and admissibility ought to be examined by judicial bodies when they are seised of objections relating to such questions. However, as interesting as they are, these scholarly considerations, which are not always conducive to clarifying matters, must take a back seat when it comes to ascertaining the precise intention of a particular judicial body in using a term such as "jurisdiction" in a given context. It must be presumed that, in the absence of any indication to the contrary, the Court intended in this case to refer to the ordinary meaning of this term in the texts governing its activity and in its own practice. As it affirmed in the well-known dictum in its Judgment in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*: "When considering whether it has *jurisdiction* or not, the Court's aim is always to ascertain whether an *intention on the part of the Parties exists to confer jurisdiction* upon it."[5] This, in the ordinary language of the Court, is exactly what it expects the parties to discuss when they are invited, as Guyana and Venezuela were, to address first the question of its "jurisdiction". In the jurisprudence of the Court, this question always involves an interpretation of the basis of jurisdiction invoked in a case, with the aim of ascertaining the extent to which *the parties* have *consented* to the Court making a decision on *their* rights and obligations at issue in that case. Nothing more, nothing less.

[4] *Ibid*. (emphasis added).

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

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

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

10. As is well known, the Court's jurisprudence is consistent in considering that the question of respect for the rights of "absent third States" that appear to constitute the very subject-matter of a case is a bar to the "exercise" of jurisdiction previously established between the parties to that case. Thus, in the operative part of its Judgment in the case concerning *Monetary Gold Removed from Rome in 1943* — the first of its kind — the Court found that "the jurisdiction conferred upon it . . . [did] not, in the absence of the consent of Albania, authorize it to adjudicate upon the first Submission in the Application of the Italian Government"[7]. It is explained in the reasoning of that Judgment that the Court had encountered a problem in "exercis[ing]" — not only in respect of Albania but also over the parties themselves — the jurisdiction that had otherwise been conferred on it under the Statement accompanying the Washington Agreement of 25 April 1951: "The Court accordingly finds that, although Italy and the three respondent States have conferred *jurisdiction* upon the Court, it cannot *exercise this jurisdiction* to adjudicate on the first claim submitted by Italy."[8] There is thus no doubt that the Court intended to make a very clear distinction between the "(existence of) *jurisdiction* (between the parties)" and the "*exercise [of] this jurisdiction*". By contrast, in the operative paragraph of the Court's Judgment in the case concerning *East Timor (Portugal* v. *Australia)*, the question is

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

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

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

clearly characterized as relating to the "exercise of jurisdiction": in that paragraph, the Court finds "that it cannot in the present case *exercise the jurisdiction conferred upon it by the declarations made by the Parties* under Article 36, paragraph 2, of its Statute"[9]. The situation is the same in the reasoning of other decisions relating to this question in which the objection was not upheld, such as those in the cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[10], *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*[11] and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*[12].

11. I would recall in passing here that while all questions of "admissibility" are questions concerning the exercise of jurisdiction, the opposite is not true. Questions of "admissibility" can be formal in nature, i.e. they may concern compliance with requirements of form set out in the texts governing the Court's activity: when that is the case, remedies are easily found, and the Court is generally flexible in this respect (on this point, I refer to the Court's rather frequent application, when the circumstances permit, of the so-called "*Mavrommatis*" jurisprudence of its predecessor[13]). Such questions can also be more substantive in nature and may concern, for example, the non-existence of a dispute (sometimes also covered by the basis of jurisdiction), a lack of standing or legal interest, the exercise of diplomatic protection and the nationality of the natural or legal person concerned, the non-exhaustion of local remedies, or even abuse of process. Finally, they can also be of a general nature, as in the *Northern Cameroons* case *(Cameroon* v. *United Kingdom)*, and give rise to a Judgment in which the Court, having referred to the "limits of its judicial function", finds that it "cannot adjudicate upon the merits" of the application[14]. What all these "admissibility" questions have in common is that, unlike questions of "jurisdiction", they are not linked to the establishment of some form of consent but instead concern the appropriate

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

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

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

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

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

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

exercise of the judicial function in light of the specific circumstances of a particular case[15].

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

13. In conclusion, and applying the well-known test reaffirmed by the Court in its 2016 Judgment on preliminary objections in the case concerning

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

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

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

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

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. *Colombia)*[19], there is no doubt that, in the present case, although the Parties are the same in both of the phases under consideration, the *petitum* and the *causa petendi* are different.

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

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

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

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

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

17. Finally, it should be observed that if, by some remote chance, the Court had considered that Venezuela's objection was to be regarded as even partially constituting an objection to jurisdiction[20], it would in any event have had to rule on that objection — albeit not necessarily as a preliminary

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

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

matter[21] — since, according to well-established jurisprudence, the Court must always be satisfied that it has jurisdiction[22].

III. The Treatment of Venezuela's Preliminary Objection Dated 7 June 2022

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

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

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

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20. The crux of Venezuela's objection concerned the application in this case of the Court's *Monetary Gold* jurisprudence, as subsequently articulated in other, previously mentioned decisions (namely *Military and Paramilitary Activities*; *El Salvador/Honduras, Application by Nicaragua for permission to intervene*; *East Timor*; and *Certain Phosphate Lands in Nauru*)[23]. The question in this case was thus not only whether legal interests

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

[22] See e.g. *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 76 *et seq.* ("Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia").

[23] See notes 9 to 12 above.

of the United Kingdom would be "affected" by any decision of the Court on the merits of the dispute as the latter had defined it, but whether they would also constitute *the very subject-matter of that dispute*, in the sense that the Court could not rule on Guyana's claims separately and independently without *necessarily* also ruling *directly* on the United Kingdom's legal interests or, indeed, assessing the lawfulness of that State's conduct, as a logical prerequisite to any findings on those claims. In other words, it was a matter of ascertaining whether the United Kingdom was, to use the now standard expression, an "indispensable third party" in this case, such that in its "absence" the Court could in no way *exercise* its jurisdiction (be it over the United Kingdom or over the Parties) to decide the dispute.

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

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22. With regard, first, to the legal interests of the United Kingdom allegedly still at issue in this case, Venezuela appears in its preliminary objection to focus primarily on *that State's status as a party to the 1897 Washington Treaty* (the "*compromis*") *and to the arbitral proceedings* that were instituted on the basis of that Treaty and that led to the Award of 3 October 1899. It is true that Guyana was substituted for the United Kingdom in the territory that is partially in dispute and, in this capacity, became a party to the dispute arising from Venezuela's contention regarding the validity of the territorial title constituted by the Award; however, this does not necessarily mean that Guyana was retroactively substituted for the United Kingdom as a party to the *compromis* and the arbitral proceedings. Even after the United Kingdom had transferred all its territorial rights to Guyana, it retained its formal status of party to the Treaty (for as long as that treaty remained in force) and a beneficiary of the Award. It is thus conceivable that, from a *strictly formal perspective*, a legal interest of the United Kingdom could be affected by, or even central to, proceedings aimed at establishing the invalidity of those instruments. In this regard, a parallel can be drawn with the 1917 decisions of the Central American Court of Justice in the well-known cases relating to the Bryan-Chamorro Treaty concluded between Nicaragua and the United States of America on 5 August 1914. In the case between El Salvador and Nicaragua, the former asked the Central American Court of Justice to enjoin the latter not to apply the Bryan-Chamorro Treaty. In this respect, the Court stated the following in particular:

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

23. However, in the particular circumstances of the present case, the question arises as to whether such an interest should be considered sufficiently "current" and "real" to justify the Court declining to examine such an essential claim for Guyana as one aimed at preserving the integrity of what it considers to be its territory. Moreover, in the period leading up to Guyana's independence, the United Kingdom actively promoted the conclusion of the Geneva Agreement as a general procedural framework intended to facilitate the adoption of a "satisfactory" solution for the "practical" settlement of the dispute, and left to Guyana *alone*, once the latter had achieved independence, the status of party to the dispute, with that new State *alone* being represented within the Mixed Commission and having to participate *alone* in the other proceedings envisaged under Article IV of the Agreement. In these very specific circumstances, the United Kingdom could reasonably be considered to have waived any right to rely on its *formal* status as a historical party to the *compromis* and the arbitration proceedings for the purpose of objecting to the settlement, in its absence, of the question of the validity of Guyana's title to the disputed territory, at least *in so far as the grounds of nullity invoked in respect of the Award are alleged to be exclusively attributable to the arbitrators* (which would no doubt be the case as regards, for example, a lack of reasoning in the Award, or an excess of authority *stricto sensu*, which might have led the arbitrators to exceed the terms of the *compromis* and decide on the régime of navigation on the Amacuro and Barima Rivers and on the lighthouse dues and customs duties that could be levied in respect of the use of those rivers). Furthermore, the "density" of the United Kingdom's legal interest resulting solely from that status as a

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

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

historical party now appears so tenuous that the Court should be able to settle, in its absence, the question *thus delimited* of the validity of the said territorial title, without violating the Monetary Gold principle.

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

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

26. *Other* — equally serious — *allegations directly relate to the validity of the Arbitral Award, in light of the conditions in which it was allegedly drawn up*: in this regard, Venezuela has referred to collusion between the United Kingdom and the Powers with which it shared certain geostrategic interests at the time, collusion between the United Kingdom and the arbitrators of its nationality, undue pressure placed on the arbitrators by the British Government and the President of the tribunal, the United Kingdom's production of adulterated maps alleged to have strongly influenced the decision reached, etc. If established, such acts would constitute *not only fatal defects but also unlawful acts*, including by reference to the international law in force at the time of the alleged events.

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

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[25] See paragraph 51 of the said objection.

"[A]n injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

. . . . . .

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible."[26]

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

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

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29. To evade the consequences of the application of the *Monetary Gold* jurisprudence, the Applicant further claimed at the hearings that the present

[26] United Nations, Report of the International Law Commission on the Work of Its Seventy-Third Session, 2022, *Official Records of the General Assembly, Seventy-Seventh Session, Supplement No. 10*, UN doc. A/77/10, p. 292.

[27] Cf. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32:

"In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania."

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

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

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

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

33. While it is in fact for States to consent to the *jurisdiction* of the Court or, what amounts to the same thing, to jurisdiction otherwise established between other States *being exercised in their regard* (in the sense of being extended to them), *their consent to the exercise in general of that jurisdiction* (including in respect of those other States) *is clearly insufficient* for that

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

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

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

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

jurisdiction to be exercised, because the exercise of jurisdiction as such depends on non-derogable statutory norms relating to the sound administration of justice, which are not subject to any kind of State control, and on the conclusions that must be drawn therefrom by the Court in each particular case, with a view to protecting its judicial function.

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

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

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

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

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

speaking — the extremely distant prospect of a ruling by the Court, on *any* past *act* howsoever related to the dispute in question, is to misconstrue the text and context of that Agreement, and is contrary to the intention expressed therein.

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

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

40. While a sovereign State cannot be said to have, in such vague terms, given the Court a blank cheque to rule indefinitely on its conduct, the details of which are moreover no more clearly defined, it seems to me that this is especially true in the case of the United Kingdom, which, when recognizing

the compulsory jurisdiction of the Court, has always proceeded with the utmost caution, setting out the limitations of such recognition clearly and meticulously[33]. It would be one thing for the United Kingdom, in approving the very broad terms of Article IV of the Geneva Agreement, to accept and promote the general principle that the territorial dispute that now existed exclusively between Guyana and Venezuela should be settled by those two States without its "involvement", but quite another for it to accept firmly and definitively the Court's jurisdiction to rule on its own responsibility for unlawful acts somehow linked to this dispute, whatever those acts might be, in the both much more specific and more hypothetical scenario that the Court should one day be seised.

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

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

43. As already noted, the Court endeavours at length in its Judgment to show that the United Kingdom waived the right to be a party to any of the settlement procedures envisioned in Article IV of the Geneva Agreement, which makes no mention of it. The only conclusion that can be drawn from this is that, in this case, the United Kingdom is thus in fact a "*third party*" as regards the ongoing proceedings. Yet, under the consensual system established by the Statute of the Court, it is quite simply inconceivable for the Court to agree to rule directly, in ongoing proceedings, on the conduct and responsibility of a State that is a third party to those proceedings. For the Court to be able to examine such conduct, not only must that State have clearly conferred jurisdiction on it to do so, but it must also — an inseparable requirement under the system of the Statute — become a *party* to the

[33] See e.g. the declaration deposited by the United Kingdom with the United Nations Secretary-General on 22 February 2017, in accordance with Article 36, paragraph 2, of the Statute of the Court.

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

proceedings in question[35]. Any other scenario would be wholly inconsistent with the most fundamental statutory principles intended to govern such proceedings, including the previously mentioned principles of reciprocity and the equality of States, and the right to fair and adversarial proceedings[36].

44. In its Judgment of 30 June 1995 in the *East Timor* case, the Court was absolutely clear on this point: "Whatever the nature [even *erga omnes*] of the obligations invoked, the Court could not rule on . . . the lawfulness of the conduct of another State *which is not a party to the case*."[37] The specialist literature also considers that the Court cannot exercise jurisdiction over a State "not party to the proceedings", characterized as an "indispensable party" when the Court is called upon to rule directly and as a principal matter on its rights and obligations in the context of proceedings between other States[38]. Parties to proceedings before the Court cannot act in the place

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

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

[37] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29 (emphasis added). The Court has repeatedly stated in its jurisprudence that it cannot exercise jurisdiction over a State that is "*absent*" from the proceedings; see e.g. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32, and the declaration of President McNair, *ibid.*, p. 35; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 116, para. 55, and p. 122, para. 73. In his separate opinion appended to the Court's Judgment in the *Northern Cameroons* case *(Cameroon* v. *United Kingdom)*, Sir Gerald Fitzmaurice explains that "[i]n the *Monetary Gold* case . . . the Court, while expressly finding that jurisdiction had been conferred upon it by the Parties, declined to exercise it because of the *absence* of another State *which the Court regarded as a necessary party to the proceedings*" (*Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 102, note 4 (emphasis added)). It is hardly necessary to mention that, in all these instances, what the Court was referring to was the need for an "indispensable third party" to become *a party to the proceedings* in order for the Court to be able to rule on its rights and obligations, and not the exercise of the right under the Statute not to take part in the proceedings, which, in accordance with the express terms of Article 53 thereof, is open to all "*parties*".

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

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

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

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

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

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

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

[41] *Ibid.*, p. 33.

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

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

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

50. Moreover, stating, in one form or another, that the Geneva Agreement created, *ratione personae*, some kind of jurisdictional link between the United Kingdom and the Parties that, in particular, enables the Court, *ratione materiae*, to examine Venezuela's complaints regarding the United Kingdom's conduct between 1897 and 1899, would open the door to possible procedural developments that might significantly complicate the handling of the case and delay the settlement of the dispute. Indeed, although in this case Venezuela could not seek to make counter-claims against the

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

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

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

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

United Kingdom, which remains a third party to the proceedings[47], it could nevertheless invoke the recognition of this jurisdictional link to institute new proceedings against it[48], with the aim, for example, of obtaining reparation for the unlawful acts it allegedly suffered at the hands of that State. As the Court recalled in the *LaGrand* case *(Germany* v. *United States of America)*,

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

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

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51. These issues — as serious as they are numerous — do not appear to have escaped the Court, which takes great care in the Judgment to avoid any impression of support for the Applicant's argument on this point. Indeed, while Guyana attempted to show that the preconditions for applying the *Monetary Gold* jurisprudence were not met in this case — first, because the United Kingdom no longer had any interest that was likely to constitute the subject-matter of the proceedings, and, second, because the latter had in any event "consented" to the Court's jurisdiction and to the exercise of that jurisdiction for the purpose of settling the dispute — the Court did its utmost to avoid having to examine those preconditions and whether they were met in

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

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

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

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

the present proceedings, reasoning that this — unique — case is governed entirely by the Geneva Agreement, on the sole basis of which it was obliged to reject Venezuela's preliminary objection ahead of any such examination, which was thus rendered unnecessary. As stated in the Judgment itself, "the Monetary Gold principle does not come into play in this case"[51].

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

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

54. The United Kingdom did not seek to derogate from the Court's Statute in 1966, nor was it able to do so. The need for its unequivocal consent to the Court's jurisdiction and for its participation in the proceedings in order for the Court to be able to make a ruling in respect of it remain the same

[51] See paragraph 107.

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

and equally binding, be it in the context of the interpretation and application of the Geneva Agreement or in the context of applying the *Monetary Gold* jurisprudence. Ultimately, therefore, this formally different approach does nothing to change the difficulties encountered above, nor does it appear capable of providing a solution to them.

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

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

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

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

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

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

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

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

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

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

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[54] See Article 79*ter*, paragraph 4, of the version of the Rules that entered into force on 21 October 2019 and was applied by the Court to the subsequent proceedings in the present case.

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

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

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

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

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

(Signed) Philippe COUVREUR.

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