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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Thursday 17 November 2022, at 10 a.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 jeudi 17 novembre 2022, à 10 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
		Abraham
		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
Abraham
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:

Hon. Carl B. Greenidge,

as Agent;

H.E. Ms Elisabeth Harper,

as Co-Agent;

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

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

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

as Counsel;

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

Hon. Gail Teixeira, Member of Parliament, Minister of Parliamentary Affairs and Governance,

Mr. Ronald Austin, Ambassador, Adviser to the Leader of the Opposition on Frontier Matters,

Ms Donnette Streete, Director, Frontiers Department, Ministry of Foreign Affairs,

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

as Advisers;

Ms Nancy Lopez, Foley Hoag LLP,

as Assistant.

Le Gouvernement de la République coopérative du Guyana est représenté par :

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comme agent ;

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l'honorable Gail Teixeira, membre du Parlement, ministre des affaires parlementaires et de la conduite des affaires publiques,

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

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M. Julio César Pineda, PhD, droit international et relations internationales, ancien ambassadeur,

M. Edgardo Sobenes, consultant en droit international, LLM, Université de Leyde, Master, ISDE/Universitat de Barcelona,

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

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

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

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

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

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

as Members of the Delegation.

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M. Kenny Díaz, LLM, directeur de cabinet de la vice-présidente de la République,

M. Larry Davoe, LLM, directeur des affaires juridiques de la vice-présidence de la République,

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.

The Court meets today, and will meet in the coming days, to hear the Parties' oral arguments on the preliminary objections raised by the Respondent in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*. This morning, the Court will hear the first round of oral argument by the Bolivarian Republic of Venezuela.

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In line with the approach adopted by the Court with respect to its public sittings, the present hearing will take place in person. However, taking into account the current public health situation in relation to the COVID-19 pandemic, a limited number of seats has been made available for members of the diplomatic corps and guests, as well as for members of the public. All those present in the Great Hall of Justice will be required to wear face masks at all times, except when taking the floor.

I also note that, in addition to interpretation from and into the Court's two official languages, English and French, interpretation from and into Spanish is available, in accordance with a specific arrangement made at the request of Venezuela.

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Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. The Co-operative Republic of Guyana first chose Ms Hilary Charlesworth. Following Ms Charlesworth's election as a Member of the Court, Guyana chose Mr. Rüdiger Wolfrum. Judge Charlesworth subsequently indicated that, in the circumstances, she had decided no longer to take part in the decision of the case. Venezuela chose Mr. Philippe Couvreur to sit as judge *ad hoc* in the case.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Before inviting Mr. Wolfrum and Mr. Couvreur to make their solemn declarations, I shall first, in accordance with custom, say a few words about their careers and qualifications.

Mr. Wolfrum, of German nationality, studied law at the Universities of Bonn and Tübingen and subsequently obtained a PhD in international law from the University of Bonn in 1973. During his illustrious academic career, spanning over thirty years, he first taught national public law and international public law at the law faculties of the Universities of Mainz and Kiel in the 1980s and 1990s. From 1993 to 2012, he was Professor at the faculty of law at Heidelberg University, as well as Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and, more recently, Managing Director of the Max Planck Foundation for International Peace and the Rule of Law, of which he is currently an Honorary Director. Alongside his distinguished career as a scholar, Mr. Wolfrum has played an important judicial role, having served as a judge at the International Tribunal for the Law of the Sea from 1996 to 2018, during which time he was elected by his colleagues to serve as Vice-President and as President. He has also been chosen as a judge *ad hoc* in the case concerning *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, currently pending before the Court.

Mr. Wolfrum is also an experienced arbitrator, having been a member of numerous international arbitral tribunals, as well as the Timor Sea Conciliation Commission between Timor-Leste and Australia. He is a Member of the Institut de droit international, is the recipient of a great many academic awards, and has an impressive number of publications to his name, in diverse areas of international law, as well as in national and comparative public law.

Mr. Couvreur, of Belgian nationality, served as the Registrar of this Court from 2000 to 2019, having prior to that held various positions in the Court's Registry since 1982, including that of Principal Legal Secretary. Mr. Couvreur studied law and philosophy at the University of Namur and the Catholic University of Louvain, before completing his postgraduate studies in international and European law at King's College London and the Complutense University of Madrid. In parallel with his illustrious career at the Court, Mr. Couvreur has taught law as a visiting professor and guest lecturer at various universities in his home country, most recently at the law faculty of the Catholic University of Louvain, as well as at other academic institutions around the world. Mr. Couvreur has also given courses at both the Hague Academy of International Law and the Xiamen Academy of

International Law, and has been invited on multiple occasions to address participants at conferences and seminars on international law.

Since stepping down from his functions as Registrar, Mr. Couvreur was chosen as judge *ad hoc* in the case concerning *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*, currently pending before the Court. He is also serving as an arbitrator in investor-State proceedings.

Mr. Couvreur is an Associate Member of the Institut de droit international, as well as a member of numerous learned societies, such as the Real Academia de Ciencias morales y políticas of Spain. He has had bestowed upon him a number of prestigious orders and decorations. Throughout his outstanding career, he has authored many articles, monographs and papers in French, English and Spanish on a wide range of topics of international law, with a particular focus on the Court.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Wolfrum to make the solemn declaration prescribed by the Statute, and I request that all those present rise. Mr. Wolfrum, you have the floor.

Mr. WOLFRUM: Thank you, Madam President.

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. I now invite Mr. Couvreur to make the solemn declaration prescribed by the Statute.

M. COUVREUR:

> "Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience."

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declarations made by Judge *ad hoc* Wolfrum and Judge *ad hoc* Couvreur and declare them duly installed as judges *ad hoc* in the case concerning the *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*.

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I shall now briefly recall the principal procedural steps in the case.

On 29 March 2018, Guyana filed in the Registry of the Court an Application instituting proceedings against Venezuela with respect to a dispute concerning "the legal validity and binding effect of the Award Regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899", to which I shall refer as the "Arbitral Award of 3 October 1899". To found the jurisdiction of the Court, Guyana invoked Article 36, paragraph 1, of the Statute of the Court, and Article IV, paragraph 2, of the Agreement to resolve the controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the frontier between Venezuela and British Guiana signed at Geneva on 17 February 1966, to which I shall refer as the "Geneva Agreement". Pursuant to Article IV, paragraph 2, of the Geneva Agreement, the Secretary-General of the United Nations decided, on 30 January 2018, to choose judicial settlement by the Court as the means of settlement of the controversy.

By an Order of 19 June 2018, having been informed that the Venezuelan Government considered that the Court manifestly lacked jurisdiction and that Venezuela had decided not to take part in the proceedings, the Court decided that it was necessary first of all to resolve the question of its jurisdiction. Following the filing of a Memorial by Guyana on the question of jurisdiction, and the submission by Venezuela of a document titled "Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Cooperative Republic of Guyana on March 29th, 2018", a public hearing was held on 30 June 2020 on the question of jurisdiction, in which Venezuela did not participate. In its Judgment of 18 December 2020, the Court found that it had jurisdiction to entertain the Application filed by Guyana 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.

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

On 7 June 2022, Venezuela raised preliminary objections to the admissibility of the Application with reference to Article 79*bis* of the Rules of Court. Consequently, by an Order of 13 June 2022, the Court fixed 7 October 2022 as the time-limit within which Guyana could present

a written statement of its observations and submissions on the preliminary objections raised by Venezuela. Guyana filed its written statement on 22 July 2022, and the case thus became ready for hearing in respect of the preliminary objections.

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Pursuant to Article 53, paragraph 2, of its Rules, the Court decided, after consulting the Parties, that copies of the written pleadings and documents annexed would be made accessible to the public at the opening of the oral proceedings. Further, in accordance with the Court's practice, these pleadings and documents annexed will be placed on the Court's website from today.

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I would now like to welcome the eminent representatives of Guyana and Venezuela who are in the Great Hall of Justice today. In particular, I recognize the presence of H.E. Ms Delcy Rodríguez, Executive Vice-President of the Bolivarian Republic of Venezuela, as well as the Agent of Guyana and the Agent of Venezuela, each accompanied by members of their respective State's delegations. In accordance with the arrangements on the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and second round of oral argument. The first round of oral argument will begin today with the statement of Venezuela, and will close tomorrow afternoon, following Guyana's first round of oral pleading. Each Party has been allocated a period of three hours for the first round. The second round of oral argument will begin on the morning of Monday 21 November 2022 and conclude on the morning of Tuesday 22 November 2022. Each Party will have a maximum of forty-five minutes to present its reply.

In this first sitting, Venezuela may, if required, avail itself of a short extension beyond 1 p.m. today, in view of the time taken up by my introductory remarks.

I shall now give the floor to Executive Vice-President of the Bolivarian Republic of Venezuela, H.E. Ms Delcy Rodríguez. You have the floor, Your Excellency.

Ms RODRÍGUEZ:

OPENING REMARKS

1. Madame la présidente, Mesdames et Messieurs les juges. C'est un honneur de me tenir devant cette Cour pour défendre les droits historiques de la République bolivarienne du Venezuela en cette affaire qui met en jeu ses plus hauts intérêts sur les plans constitutionnel, historique et international.

2. Le Venezuela …

The PRESIDENT : I am informed that there is no translation into English. With apologies, Excellency, let me ask you to begin again and let's see whether the technical problems have been resolved.

Ms RODRÍGUEZ : I begin again.

The PRESIDENT : Yes, please, if you would, sorry.

Mme RODRÍGUEZ :

1. Madame la présidente, Mesdames et Messieurs les juges. C'est un honneur de me tenir devant cette Cour pour défendre les droits historiques de la République bolivarienne du Venezuela en cette affaire qui met en jeu ses plus hauts intérêts sur les plans constitutionnel, historique et international.

2. Le Venezuela est le seul et l'unique héritier historique indiscutable du territoire situé à l'ouest du fleuve Essequibo. L'origine de ses droits est la conséquence historique, légale et politique de sa succession au titre de l'Espagne et de la naissance de notre République.

3. Le Venezuela apprécie et respecte la Cour internationale de Justice en tant qu'organe judiciaire principal des Nations Unies. Le Venezuela continue de penser que la Cour n'est pas compétente pour connaître de cette affaire ; nous démontrerons néanmoins que la requête du Guyana est irrecevable.

4. Distinguished Judges.

4. Distinguished Judges, Guyana filed a unilateral Application requesting a ruling on the validity of the arbitration award of 1899. Venezuela maintains that the object of and the reason why the Geneva Agreement was signed in 1966 is that of "seeking satisfactory solutions for the practical settlement of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 . . . is null and void".

5. Nothing in the Geneva Agreement indicates that the parties agreed to resolve the nullity or the validity of the award. This is an absolutely irrelevant matter considering it was settled by the Geneva Agreement itself.

6. On the contrary, the United Kingdom and Venezuela reached an agreement, which constitutes a *lex specialis* between the parties, as exhaustively and expressly stated in this title: "Agreement to Resolve the Controversy between Venezuela and the United Kingdom".

7. It cannot be understood how Guyana now intends to escape from the practical settlement of the dispute with its claim, since it is impossible through a practical settlement to amicably resolve whether or not the award is valid.

8. There is a serious problem of admissibility that affects the litigious object and the Applicant and Respondent that is revealed, with such force, that it makes it impossible to continue with the merits of the Application filed by Guyana.

9. Furthermore, an Application has been filed against Venezuela by someone who did not participate in the fraud of 1899, even though Guyana, together with the United Kingdom, recognized in 1966 the Venezuelan claim, thus committing itself to an amicable settlement through its subsequent accession to the Geneva Agreement.

10. The current misguided and ill-intentioned interpretation of the Agreement by Guyana affects the rights of the Venezuelan people and vital interests of the Republic, specifically its territorial integrity.

11. For this reason, Venezuela, in compliance with its constitutional duty and in accordance with international law, filed preliminary objections to the admissibility of the Application in question, and appears in this incidental phase, to note that the Court should not admit Guyana's Application.

12. We submit that this Court would not be in a position to resolve Guyana's Application, because the United Kingdom, the indispensable party to settle the subject-matter of the dispute requested by Guyana, is not participating.

13. I would like to clarify some historical and factual aspects that put Venezuela's position in context.

14. In 1777, the Spanish Crown created the Capitanía General de Venezuela, made up by the Provinces of Venezuela, Cumaná, Guayana, Maracaibo, Margarita and Trinidad, as you can see on the map that is projected on the screen.

15. This administrative unit is the territorial source of what later became the Republic of Venezuela, that was born with its declaration of independence and its Constitution of 1811. As from that time, the Venezuelan constitutional history reflects the belonging of the Guayana Esequiba province to the Venezuelan territory.

16. In 1825, the United Kingdom recognized Gran Colombia, which had as its eastern boundary the territory of Venezuela's Guayana Esequiba.

17. The United Kingdom never, *never*, had title over the territory of Guayana Esequiba.

18. Three constants can be identified from 1841 to 1895. The first is Venezuela's permanent protest against the British falsehoods and imperial threats.

19. The second is Venezuela's sustained willingness to resolve the situation through peaceful, amicable and direct means.

20. The third is the reiterated territorial dispossession attempt by an empire located 12,000 km away in London, the capital city of the British empire.

21. Throughout the nineteenth century, the British Government sought to unilaterally assert new land rights by publishing doctored maps containing falsified borderlines in its favour, and also claimed that the boundaries were not subject to negotiation as they would be defended by use of force, thus reaffirming the British imperial voracity for the gold mines and other natural resources of the territory.

22. Given such circumstances of abuse of sovereignty and dispossession, Venezuela sought the assistance of third parties to ease tensions and protect its territory.

23. The intervention of the United States, as Venezuela's representative in the negotiations, opened a new stage in the territorial controversy between Venezuela and Great Britain, in which the interests of the world's largest imperial Power in the world (Great Britain) clashed with those of an emerging Power (the United States) that seeks to impose its hegemony in the western hemisphere.

24. An arbitration agreement was organized where all the pieces were arranged to give way to a fraud through deception. The aim of the United Kingdom was to steal the Venezuelan territory for geopolitical and economic reasons.

25. Madam President, distinguished Judges, much of my address has focused on the United Kingdom. This responds to the fact that in this story there are two protagonists: the colonial Power of the United Kingdom (the land-grabber) and Venezuela (the victim).

26. Guyana lacked existence as a subject of international law at the time when the fraud was consummated.

27. The Co-operative Republic of Guyana came into existence as a republic after the signing of the Geneva Agreement, being fundamental in the territorial controversy.

28. Madam President, distinguished Judges, in his well-known 1949 Memorandum, Mallet-Prevost recounted the fraudulent and deceptive actions against Venezuela.

29. Prevost's revelation prompted further research, carried out by Venezuelan historians in the official archives of Great Britain and the United States, who obtained abundant unknown historical evidence.

30. These new documentary findings contributed to confirming the fraud committed by the United Kingdom in the arbitration.

31. It is completely consistent that Venezuela, following the discovery of the fraud of the Arbitral Award of 1899, denounced the situation within the United Nations General Assembly in 1962.

32. If the Venezuelan claim was absurd, would the United Kingdom have spent four years of negotiations from 1962 to 1966? The answer is no.

33. If such negotiations had not revealed that something was seriously wrong with the Award, the United Kingdom would never have confirmed the Venezuelan contention that the Award was invalid.

34. In direct connection with arbitration fraud, it is now beginning to be revealed how the United Kingdom acted disloyally, lying during the formulation of the Geneva Agreement and signing a commitment to reaching an amicable and practical settlement, the compliance of which is still awaited. In reality, what the United Kingdom did was covering up its improper behaviour.

35. An evidence of that is the Note of November 1963, from the British Embassy in Caracas to the Foreign Office in London: "Sooner or later the Venezuelan Government would have to be told that Her Majesty's Government could not agree to modification of British Guiana and Venezuela frontier. *The problem was how and when to convey this information*." (Emphasis added.)

36. Madam President, this Court has found that it has jurisdiction to examine the validity of the Award in its decision of December 2020. But how could the Court examine the validity of the Award without the participation of the United Kingdom?

37. How would the determination of the validity or nullity of the Award be reached without the concurrence of the main actor — the United Kingdom — who, in its pursuit of profit, acted against a sovereign State? It would involve the examination of the United Kingdom's conduct.

38. This is the situation that underpins Venezuela's preliminary objections, that is the need to determine the actions and consequent responsibility of an indispensable party in this proceeding — the United Kingdom.

39. Madam President, distinguished Judges, it is now necessary to understand how we arrived at Guyana's unilateral Application.

40. At the beginning of 2015, the entire relationship changed in the search for an amicable settlement. Guyana, spurred by the energy transnationals that have been behind this territorial controversy for decades, seized the opportunity to accelerate its action with a view to a claim on the validity of the Award.

41. These same transnationals, a third party that would have nothing to look for in this litigation, are the ones funding Guyana's legal assistance in this proceeding before the Court.

42. After decades of prospections with few results, in 2015 the American oil company Exxon Mobil announced a "world famous discovery". It is the same year that Guyana forgets about the good officer and abandons the negotiations.

43. Guyana begun an oil adventure by unilaterally granting large concessions to transnational companies, which Venezuela has constantly protested. In doing so, Guyana has destroyed the environment of Guayana Esequiba's territory with its illegal actions.

44. Guyana ignores the ruling of the Geneva Agreement to resolve the territorial controversy, affecting the territorial integrity of Venezuela with its illegal prospections — going so far as to make incursions into undisputed territorial waters of Venezuela.

45. Madam President, distinguished Judges, for my country it is fundamental to make clear that, contrary to what Guyana has said, Venezuela's preliminary objections are not an appeal to the Court's Judgment on jurisdiction.

46. Venezuela understands the particular *res judicata* effects on jurisdiction of the 2020 Judgment, regardless of whether it is adverse to the interest of Venezuela. Venezuela's objections refer only to the admissibility of Guyana's Application.

47. Venezuela's objections are based on the following facts:

— First, the United Kingdom and the Republic of Venezuela were parties to the Washington Treaty. The Co-operative Republic of Guyana was not.

— Second, the United Kingdom and the Republic of Venezuela were parties to the arbitration that gave rise to the Award of 1899. The Co-operative Republic of Guyana was not.

— Third, the *United Kingdom* remains a party to the Geneva Agreement.

— Fourth, the United Kingdom, the indispensable party for this Application, is *not in this room*.

48. These give rise to the following legal consequence: Venezuela cannot dispute the rights and obligations of the conduct of a State that is absent from these proceedings and whose participation cannot be enjoined by this Court.

49. So, due to the absence of this indispensable party, the Court must declare Guyana's Application inadmissible, as will be clearly demonstrated in these hearings.

50. Madam President, distinguished Members of the Court, Professors Andreas Zimmermann, Esperanza Orihuela, Carlos Espósito, Christian Tams, Paolo Palchetti and Antonio Remiro Brotóns will demonstrate that Venezuela's preliminary objection is admissible.

51. Madam President, Venezuela is committed to practising tolerance and living together in peace with one another as good neighbours, as set forth in the Charter of the United Nations. That is

why we extend once again our hand to Guyana to settle the existent territorial controversy, abiding by the Geneva Agreement. A decision by this Court rejecting the Application, unilaterally filed by Guyana, will contribute in a positive and constructive manner to said purpose, through the correct administration of justice.

52. Finally, to Venezuela this matter is in the soul of our homeland: today we say with our Liberator, Simon Bolivar: "Primero el suelo nativo que nada . . . Nuestra vida no es otra cosa que la herencia de nuestro país." ("First and foremost, our native land . . . Our life is nothing but the heritage of our homeland.") Many thanks, distinguished Judges and Madam President.

The PRESIDENT: I thank the Executive Vice President of Venezuela for her statement. I now invite Professor Andreas Zimmermann to take the floor. You have the floor, Professor.

Mr. ZIMMERMANN:

VENEZUELA'S PRELIMINARY OBJECTION IS ADMISSIBLE

A. Introduction

1. Madam President, Members of the Court, it is once again an honour to appear before this Court, and to do so this time on behalf of the Bolivarian Republic of Venezuela.

2. In the following, I will now demonstrate that Venezuela's preliminary objection is admissible — and I will be brief. And I will be rather brief because its admissibility cannot seriously be questioned.

B. Jurisdiction and admissibility distinguished

3. Members of the Court, in its practice, the Court has always carefully distinguished between the question whether it *has* jurisdiction to hear a case, on the one hand, and whether it may *exercise* such jurisdiction once established, i.e. whether a case is admissible, on the other hand.

4. This crucial distinction has, *inter alia*, been confirmed in the Court's 2008 Judgment in the *Croatian Genocide* case. There the Court confirmed: "A distinction between these two kinds of

objections [i.e. between an objection to jurisdiction and one going to the admissibility of the claims] is well recognized in the practice of the Court."[1]

5. The Court — you — then continued, quoting the Judgment in the *Oil Platforms* case, that:

> "Objections to admissibility normally take the form of an assertion that, *even if the Court has jurisdiction* and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court *should not proceed to an examination of the merits*."[2]

6. Hence, an objection to admissibility consists in the contention "that there exists a legal reason, even when there *is* jurisdiction, why the Court *should decline to hear the case*"[3].

7. The distinction between these two categories of issues and preliminary objections is thus clear and well established. Accordingly, a judgment dealing with jurisdictional issues, and determining that the Court does have *jurisdiction* in a given case, does not — *does not* — dispose at the same time of a preliminary objection that relates to the *admissibility* of the application.

8. This crucial distinction between jurisdiction on the one hand and admissibility on the other is also mirrored in the Court's practice when calling upon parties what to address in their pleadings devoted to their respective preliminary objections.

9. Thus, in the two *Nuclear Tests* cases[4], one of the *Nuclear Disarmament* cases, namely the one involving Pakistan[5], and most recently — as you can see — in the case between the State of Palestine and the United States[6], the Court ordered the parties in their pleadings on possible preliminary objections to address both issues of jurisdiction *and* admissibility.

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120; reference omitted, emphasis added.

[3] *Ibid.*; emphasis added.

[4] *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 106; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 142.

[5] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Jurisdiction and Admissibility, Order of 10 July 2014, I.C.J. Reports 2014*, p. 472.

[6] *Relocation of the United States Embassy to Jerusalem (Palestine* v. *United States of America), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, p. 710.

10. In sharp contrast thereto, in the two *Fisheries Jurisdiction* cases between Germany and the *United Kingdom* v. *Iceland*[7], in the *Aegean Continental Shelf* case[8], as well as most notably in another one of the *Nuclear Disarmament (Marshall Islands* v. *India)* cases[9], the Court specifically told the parties to exclusively focus on jurisdictional issues, jurisdictional issues only.

11. And, as you can see — and what is thus obviously particularly relevant now — the very same holds true for the case before you today, the case between Guyana and Venezuela. In your Order of 19 June 2018, the Court told the Parties to only address issues of jurisdiction — and *not* simultaneously also matters of admissibility[10].

12. Guyana as well as Venezuela heeded that call — and indeed how could it be otherwise. Both Parties, Guyana in its Memorial of 19 November 2018[11], and Venezuela — despite not formally participating in this part of the proceedings — in its Memorandum of 28 November 2019[12], thus only argued matters of jurisdiction, but not yet issues that related to the admissibility of Guyana's Application.

13. What is now brought out by this long-established practice is that the Court has clearly established a distinction whether the subsequent phase of a given case dealing with the issue of preliminary objections should cover jurisdiction and admissibility, or matters of jurisdiction only. Guyana's claim that Venezuela's preliminary objection as to the admissibility of Guyana's Application should be rejected, is thus, I might say, misleading. It seems that it is for that very reason that Guyana in its Written Observations is trying to blur the red line between these two categories of preliminary objections. It does so by consistently referring to the question of whether the Court has

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[7] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 182; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 189.

[8] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Order of 14 October 1976, I.C.J. Reports 1976*, p. 43.

[9] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Order of 10 July 2014, I.C.J. Reports 2014*, p. 465.

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

[11] Memorial of the Co-operative Republic of Guyana (MG), 19 Nov. 2018, Vol. I.

[12] Memorandum of the Bolivarian Republic of Venezuela on the Application filed before the International Court of Justice by the Co-operative Republic of Guyana on March 29th, 2018 (MV), 28 Nov. 2019.

jurisdiction or not — and does so even when discussing Venezuela's preliminary objection which clearly does *not* claim that the Court lacks jurisdiction.

14. That brings me to my next point, namely the character of the *Monetary Gold* principle as a challenge to the admissibility of a case brought, rather than as a challenge relating to the Court's jurisdiction.

15. Or to put it otherwise, I will now show that the *Monetary Gold* objection is one that relates to the *exercise* of jurisdiction by the Court, and not to the *existence or non-existence* of its jurisdiction.

C. *Monetary Gold* principle-based objection as an objection to admissibility

16. This qualification, apart from being shared by quite a number of academic commentators[13], as well as by counsel pleading for Nauru in 1995[14], was already confirmed by the *Monetary Gold* Judgment itself, where the Court found that "although Italy and the three respondent States *have conferred jurisdiction* upon the Court, *it* [the Court] *cannot exercise this jurisdiction*"[15].

17. Ever since, the Court has confirmed this qualification. Notably in the *Certain Phosphate Lands in Nauru* case, the Court in its Judgment first considered the question of its jurisdiction[16]. It then, and only in a subsequent step, considered the separate question of whether Nauru's application was inadmissible on the basis of the *Monetary Gold* principle, finding that the Court could not decline to *exercise* its previously established jurisdiction[17].

18. On the whole, it cannot thus be doubted that the preliminary objection like the one submitted by Venezuela, which is based on the fact that a third State — i.e. in the case at hand, the

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[13] Cf. e.g. C. Brown, *A Common Law of International Adjudication* (2007), p. 78; M. Paparinskis, "Procedural Aspects of Shared Responsibility in the International Court of Justice", *Journal of International Dispute Settlement 4 (2013)*, p. 302; Y. Shani, *Assessing the Effectiveness of International Courts* (2014), p. 86; S. Talmon, "A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq"; P. Shiner, A. Williams, *The Iraq War and International Law*, p. 215; C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), p. 23.

[14] *East Timor (Portugal* v. *Australia)*, CR 1995/15, p. 41 (Pellet).

[15] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 33, emphasis added; cf. *ibid.*, also the *dispositif*, p. 34.

[16] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 245, paras. 8 *et seq.*

[17] *Ibid.*, p. 262, paras. 49 *et seq*.

United Kingdom — is an indispensable party to the proceedings, relates to the admissibility of the case rather than to the Court's jurisdiction. The said objection is therefore not barred by the *res judicata* effect of the Court's Judgment of 18 December 2020, which dealt exclusively with the Court's jurisdiction.

D. Venezuela's preliminary objection and the 2020 Judgment on jurisdiction

19. Madam President, Members of the Court, in its attempt to nevertheless support its hypothesis that Venezuela's preliminary objection is not admissible, Guyana argues that said objection constitutes "an attack on the Court's jurisdiction", already established by the Court's Judgment[18], that it is merely "a misguided attempt to persuade the Court to revisit or revise" said Judgment[19], or that it is meant to be an appeal against it[20].

20. While I congratulate our colleagues for being so eloquent, all these allegations boil down one way or the other to a single one, namely that Venezuela is barred from raising its preliminary objection related to the admissibility of Guyana's Application due to the *res judicata* character of the Court's December 2020 Judgment.

21. In that regard, let me start reiterating that Venezuela continues to strongly believe that the December 2020 Judgment was wrongly decided, and that Guyana's Application is not only inadmissible, but that the Court also lacks jurisdiction to entertain the case in the first place.

22. But be that as it may, Venezuela acknowledges that the December 2020 Judgment has the force of *res judicata* as between the Parties. Indeed, how could it be otherwise, given that the Court has on several occasions, and notably in its 2007 merits Judgment in the Bosnian *Genocide* case[21], stressed that even judgments on jurisdiction possess a *res judicata* character.

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

[19] Written Observations of Guyana on Venezuela's Preliminary Objections (WOG), 15 July 2022, p. 1, para. 4.

[20] *Ibid.*, p. 2, para. 5.

[21] *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. 89 *et seq*., paras. 114 *et seq*.

23. But — and this is an important and crucial "but" — but such *res judicata* effect only extends to what has been really decided in such a jurisdictional holding either *expressis verbis* or by necessary implication. As this Court put it in its 2007 Judgment in the Bosnian *Genocide* case:

> "in respect of a particular judgment it may be necessary to distinguish between, first, the *issues which have been decided with the force of* res judicata*, or which are necessarily entailed in the decision of those issues*; . . . and . . . *matters which have not been ruled upon at all. . . . If a matter has not in fact been determined, expressly or by necessary implication, then no force of* res judicata *attaches to it*"[22].

24. Applied to the case now before you, Guyana would have had to argue in its Written Observations that the Court's 2020 Judgment on jurisdiction — and let me reiterate that it was not a judgment on jurisdiction and admissibility, but one on jurisdiction only — that this Judgment on jurisdiction had by the same token nevertheless decided the admissibility issue we are now discussing today and tomorrow.

25. And Guyana would have had to argue that the Court did so without even giving the slightest hint in the Judgment that the Court wanted to do this. It is obviously true that Guyana itself had, both in its Memorial and in its final oral submission, requested the Court "to find that it has jurisdiction to hear the claims presented by Guyana, and that these claims are admissible", and this fact is duly recorded in the usual descriptive part — descriptive part — of the Court's Judgment[23].

26. Yet, on the same occasion the Court also notes that Venezuela had solely contended "that the Court *lacks jurisdiction* to entertain the case"[24]. It is in light of this divergence of views on the Court's jurisdiction, that the Court then in the operative part of the 2020 Judgment merely decided on that very issue, namely whether it *has* jurisdiction or not[25].

27. This limitation of the *res judicata* of the said Judgment is further confirmed by the fact that the Court specifically addresses and decided two jurisdictional subquestions relating to the Court's jurisdiction *ratione materiae*, and *ratione temporis* respectively in the 2020 Judgment [26].

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[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126; emphasis added.

[23] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 463, paras. 20-21.

[24] *Ibid.*, para. 22; emphasis added.

[25] *Ibid.*, p. 493, para 138.

[26] *Ibid.*, pp. 488 *et seq.,* paras. 122 *et seq*.

28. Besides, I might also briefly recall what I said at the beginning of my statement, namely that the Court had from the outset deliberately, and unlike in other recent cases such as the *Palestine* v. *United States of America* case, asked the parties to solely discuss the Court's jurisdiction.

29. Guyana thus now would have had to argue that, as the *Bosnian Genocide* Judgment put it, the issue of the admissibility of Guyana's case "was an element in the reasoning of the . . . Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction"[27].

30. Or to put it otherwise: the Court's 2020 finding on jurisdiction would have to constitute — as you put it in 2007 — "a finding which is only consistent, in law and logic, with the proposition that"[28] the case is also admissible.

31. Besides, now finding that Guyana's application is inadmissible would — to again use the Court's 2007 formula — have to "*contradict the finding* of jurisdiction made in the earlier judgment"[29]. (Emphasis added.)

32. Madam President, Members of the Court, but where is such a necessary implication to be found in the December 2020 Judgment?

33. Where can we find a necessary implication allegedly extending the scope of its *res judicata* to matters of admissibility?

34. And where can we find a necessary implication that the Court had meant in its 2020 Judgment not only to address, but also to decide with force of *res judicata,* the issue of the United Kingdom being a necessary third party within the meaning of the Court's *Monetary Gold* jurisprudence?

35. Having read — and re-read time and again — both, the Judgment itself and Guyana's Written Observations, I have to admit that I failed at least to detect such necessary implication.

36. Now, obviously, I do not blame the Court, because the answer is simple: from the outset both the Court, as well as the Parties, were solely concerned with, and focused on, the scope of the Court's jurisdiction under the 1966 Geneva Agreement. Hence no indication is to be found of any

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[27] *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. 100, para. 135.

[28] *Ibid.*, p. 99, para. 133.

[29] *Ibid.,* p. 96, para. 128.

such "necessary implication" in the Court's 2020 Judgment as also having decided the issue of the *admissibility* of Venezuela's preliminary objection now before the Court.

37. Let me end with a final remark which further confirms the admissibility of Venezuela's preliminary objection.

E. Only the Court's 2020 Judgment and Guyana's Memorial revealed the applicability of the *Monetary Gold* principle

38. Members of the Court, it was only the Court's own 2020 Judgment on jurisdiction and Guyana's own Memorial which, contrary to Guyana's original much broader claims made in its Application, revealed what the Court would have to rule on, should the case ever reach the merits phase.

39. It was only after the Court's Judgment that it had become clear that, during a possible merits phase, the Court would *not* consider events that occurred after British Guyana had gained independence.

40. And it was thus only at this point that it also became clear that the Court would not consider the course of the land boundary as such, with that issue being obviously of concern for Guyana and Venezuela only, and not the United Kingdom.

41. Rather, your Judgment — the Court's 2020 Judgment — revealed that, in the case at hand, the Court has to necessarily decide upon the validity or invalidity of the 1899 Award[30]. Yet, it was the United Kingdom — not Guyana — that was party to those proceedings, and it was also the United Kingdom, as will subsequently be shown by my colleagues in detail — not Guyana, the United Kingdom — that interfered in these proceedings in violation of international law.

42. It was accordingly only once the Court had rendered its 2020 Judgment, which Venezuela accepts has become *res judicata* as far as the Court's jurisdiction is concerned, it was then only that it became apparent that the United Kingdom is an indispensable third party within the meaning of the Court's *Monetary Gold* jurisprudence.

43. Following up on the Court's Judgment, Guyana's subsequent Memorial itself then contained manifold references to the behaviour by the United Kingdom related to the arbitral

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[30] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, pp. 492-493, paras. 136-137.

proceedings, including but not limited to issues of fraud, error and corruption — all committed or not committed by the United Kingdom[31].

44. It was therefore only after Venezuela had become aware of the Court's 2020 Judgment, and after it had become aware of the position taken by Guyana itself, that Venezuela decided, and indeed could decide, to submit a preliminary objection related to the admissibility of Guyana's Application. As a matter of fact, it had only by then become clear, that the United Kingdom is and remains a necessary third party in these proceedings within the meaning of the Court's *Monetary Gold* jurisprudence.

45. And it is on this very basis, and in line with the Court's well-established jurisprudence and a sound administration of justice, that the Court must therefore now consider Venezuela's admissibility-related preliminary objection.

F. Conclusion

46. Madam President, Members of the Court, on the whole, I therefore submit to you that it cannot be seriously doubted that Venezuela was entitled to bring this preliminary objection we are now discussing — and my colleagues will now further demonstrate that this objection must also be entertained.

47. This brings me to the end of my presentation.

48. I thank you for your kind attention and kindly request you, Madam President, to now give the floor to my colleague Professor Esperanza Orihuela. Thank you so much.

The PRESIDENT: I thank Prof. Zimmermann. I shall now give the floor to Prof. Esperanza Orihuela. You have the floor, Professor.

Mme ORIHUELA :

LES FAITS – 1RE PARTIE

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un honneur pour moi de me présenter devant vous pour évoquer les faits qui justifient l'irrecevabilité de la requête.

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[31] MG, Vol. I, 19 Nov. 2018, pp. 173 *et seq*.

2. Comme l'a expliqué le professeur Zimmermann, l'arrêt de la Cour sur la compétence est à l'origine de la situation dans laquelle nous nous trouvons aujourd'hui.

3. Une décision sur le fond de l'affaire impliquerait nécessairement que la Cour se prononce sur la conduite du Royaume-Uni avant et pendant la procédure arbitrale. Et, en conséquence, le Royaume-Uni est une partie indispensable à la présente instance. En effet, c'est le caractère frauduleux du comportement du Royaume-Uni durant cette période qui justifie la nullité de la sentence arbitrale au cœur de l'affaire.

4. Mon exposé portera sur les éléments de fait pertinents relatifs à la période ayant précédé la sentence de 1899. Ces éléments montrent que le Royaume-Uni est le principal concerné par l'analyse de l'arbitrage. J'évoquerai ces faits dans un but précis : celui de montrer qu'il serait impossible pour la Cour de trancher la question de la validité de la sentence sans trancher en premier lieu la question de la légalité de son comportement. C'est parce que les droits et les obligations du Royaume-Uni constitueraient l'objet même d'une décision de la Cour sur le fond que celui-ci est une partie indispensable à cette affaire et que la requête du Guyana est irrecevable.

5. J'insisterai sur la période correspondant à la négociation du traité de Washington. Je vous parlerai d'abord de la façon dont la clause relative à la composition du tribunal arbitral a été négociée. Je parlerai ensuite de la négociation de la règle sur la possession adverse, comprise à l'article IV, paragraphe *a)* du traité. Mais avant toute chose, permettez-moi d'aborder le contexte historique et socio-politique dans lequel s'inscrit cette période.

A. Le contexte historique et socio-politique

6. Au moment de la création de la Guyane britannique, le traité de Londres était le seul titre valide dont les Britanniques pouvaient se prévaloir dans la région vis-à-vis de leur voisin, la République du Venezuela. Par ce traité, qui date du 13 août 1814, les Pays-Bas ont cédé à la Grande-Bretagne les localités — «settlements» en anglais — qu'ils avaient reçues de l'Espagne en 1648 par le biais du traité de Münster. Je rappelle que, à cette époque, les Pays-Bas n'occupaient pas le territoire à l'ouest du fleuve Esequibo. Ils ont cédé à la Grande-Bretagne des localités situées *à l'est*, à savoir Demerara, Berbice et Esequibo.

7. Au moment de la conclusion du traité de Londres, le Venezuela avait déjà proclamé son indépendance vis-à-vis de l'Espagne, en 1810. Le nouvel Etat avait hérité des titres correspondant à la capitainerie générale du Venezuela, à laquelle appartenait sans conteste la Guayana Esequiba. Celle-ci s'étendait jusqu'au fleuve Esequibo.

8. Les limites du territoire du Venezuela furent notifiées à la Grande-Bretagne en 1821, 1824 et 1825. Elle ne les a jamais contestées. Toutefois, à partir des années 1840, la Grande-Bretagne commença à s'intéresser au territoire du Venezuela. Elle eut recours à des supercheries telles que la falsification de cartes et le déplacement des bornes servant à démarquer la frontière terrestre. L'intention des Britanniques était de déposséder le Venezuela, un Etat souverain, d'une vaste partie de son territoire. Ceci, en vue de s'approprier ses ressources naturelles.

9. La Grande-Bretagne a poursuivi ses tentatives de spoliation des terres vénézuéliennes jusque dans les années 1890. Elle le fit en dépit des protestations du Venezuela et de ses efforts pour mettre fin à ce comportement inacceptable et contraire au droit.

10. La Grande-Bretagne entreprit de modifier progressivement les cartes de la région, en vue de donner une apparence de normalité à une situation absolument inacceptable. Cela ressort très clairement d'une note adressée le 29 septembre 1893 au premier ministre du Royaume-Uni par un représentant vénézuélien. Sa traduction en français est actuellement projetée à l'écran. L'auteur signale «les différences substantielles que présentent les diverses lignes de délimitation de la frontière proposées par le gouvernement [britannique]». Il dénonce «la prétention que le Venezuela devrait accepter sans aucune compensation [une] ligne … qui le dépossède non seulement du fleuve Guaima, … mais aussi de la rivière Barima et de la Punta du même nom, avec ses territoires adjacents.»[32]

11. Comme vous pouvez le constater, le scénario alors mis en scène par le Royaume-Uni reposait sur le système de droit ne laissant aucune place aux principes de l'égalité souveraine et de respect mutuel entre Etats. Cette conception du droit international justifiait qu'elle s'approprie les terres d'autres nations.

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[32] Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (réf. I.DD No.001763), annexe 3.

12. Madame la présidente, Mesdames et Messieurs les juges, le Guyana affirme dans son mémoire que le traité de 1897 fut régulièrement conclu et que le tribunal arbitral constitué en 1899 le fut valablement. Pour ce faire, il ignore entièrement la conduite du Royaume-Uni. Il refuse en particulier de tenir compte des éléments concrets démontrant le caractère illicite de cette conduite, préférant se référer en termes abstraits à l'arbitrage. Or, il s'est produit au cours de la période qui nous occupe des événements qui infirment la position du demandeur.

B. La composition du tribunal arbitral

13. D'année en année, le Venezuela n'a cessé de chercher à obtenir l'intervention d'un tiers pour mettre fin à la situation de non-droit que lui imposait le Royaume-Uni en toute impunité. Après 19 ans d'efforts, les Etats-Unis ont enfin décidé de lui prêter attention. A la suite de l'intervention du président Cleveland, le Congrès des Etats-Unis a approuvé, en décembre 1896, un budget de 100 000 dollars pour l'établissement d'une commission chargée d'enquêter et de faire un rapport sur le tracé réel de la frontière entre le Venezuela et la Grande-Bretagne. Les efforts de la Grande-Bretagne se sont alors centrés sur la négociation des termes de l'arbitrage avec les Etats-Unis, de façon à s'assurer un résultat favorable.

14. Les négociations qui aboutirent à l'adoption du traité de Washington se sont tenues quasiment exclusivement entre les Etats-Unis et la Grande-Bretagne. C'est tout juste si le Venezuela fut autorisé à formuler quelques propositions. Celles-ci furent en tout état de cause systématiquement rejetées ou dénaturées en vue de garantir un résultat conforme aux intérêts britanniques.

15. La composition du tribunal fut déterminée par la Grande-Bretagne elle-même. Celle-ci s'assura, d'une part, que le tribunal ne compterait aucun arbitre de nationalité vénézuélienne. Elle s'assura, d'autre part, que le Venezuela serait exclu de tout processus de désignation d'arbitre qui pourrait s'avérer nécessaire par la suite. Ceci, pour s'assurer que la sentence conforterait la position anglaise.

16. La correspondance de Lord Salisbury, premier ministre de la Grande-Bretagne, illustre les efforts fournis par la partie britannique pour exclure à tout prix les Vénézuéliens du tribunal arbitral.

17. Le texte qui est projeté à l'écran est un télégramme envoyé par le premier ministre britannique à l'ambassadeur britannique à Washington, Sir Julian Pauncefote. Il est daté du 5 juin 1896. Comme vous pouvez le voir, Lord Salisbury écrivait que

> «[l]'arbitre» — il parle de l'arbitre désigné pour le Venezuela — «devrait être choisi par les Etats-Unis. La juridiction de recours du Venezuela, en vertu de la version corrigée de la clause 4, devrait être la Cour suprême de Washington et non la Cour suprême de Caracas, et le Venezuela devrait être obligé d'accepter toute décision approuvée par les Etats-Unis ou non rejetée par la Cour suprême de Washington.»[33]

18. Naturellement, le Venezuela s'est opposé à cette privation de son droit à désigner librement certains membres du tribunal arbitral. Toutefois, contraint de se plier aux exigences de la partie adverse, il finit par désigner deux ressortissants des Etats-Unis. Bien que le traité de Washington prévît la désignation d'un arbitre par le président des Etats-Unis du Venezuela, les négociateurs du traité ont imposé à ce dernier de désigner Melville Weston Fuller, président de la Cour suprême des Etats-Unis.

19. La lettre envoyée par l'ambassadeur britannique à Washington au premier ministre britannique le 18 décembre 1896 ne laisse aucun doute sur le mépris avec lequel les propositions vénézuéliennes furent systématiquement rejetées. Elle montre aussi clairement que ce sont les Britanniques, et eux seuls, qui ont œuvré à l'exclusion des citoyens vénézuéliens du tribunal. Je vais en lire deux extraits très parlants. Le texte original est projeté à l'écran ; j'en lirai une traduction en français :

> «Il n'y a aucun risque que M. Olney écoute, même un instant, les hurlements vénézuéliens en faveur d'une modification de nos conditions d'arbitrage. Mais je ne suis pas sûr qu'il ne poussera pas les juges américains à nommer un Vénézuélien comme arbitre.»

Un peu plus loin, Sir Julian ajoute :

> «Il peut sembler injuste qu'il y ait deux Anglais de notre côté et aucun Vénézuélien de l'autre, mais les Vénézuéliens ont accepté d'être représentés par les Etats-Unis, et j'ai clairement compris que la question serait arbitrée précisément comme si la controverse était entre la Grande-Bretagne et les Etats-Unis, pour la raison, entre autres, que nous ne connaissons aucun juriste vénézuélien digne de ce nom, ou à qui nous consentirions à confier la fonction d'arbitre dans ce cas.»[34]

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[33] Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (réf. I.DD No.001763), annexe 4.

[34] *Ibid.*, annexe 5.

20. Pour compléter ce tableau, le Venezuela dut aller jusqu'à renoncer, en cas de vacance, à participer au remplacement des arbitres désignés «pour le Venezuela» ou «on the part of Venezuela», pour reprendre les termes de l'article II du traité de Washington. C'est le comble !

21. Mesdames et Messieurs les juges, les textes auxquels je me suis référée démontrent que la Grande-Bretagne a interdit au Venezuela de désigner des arbitres de sa nationalité. Cette interdiction s'est matérialisée par l'adoption de l'article II du traité de Washington, ouvrant ainsi la voie à l'obtention d'une décision nécessairement favorable au Royaume-Uni. Les Vénézuéliens furent exclus de la procédure sans autre forme de procès. Comme le juriste Héctor Gros Espiell l'a affirmé par la suite, le traité de Washington est un traité *indigne*.

C. La règle relative à la possession adverse

22. Madame la présidente, Mesdames et Messieurs les juges, une des difficultés majeures lors de la négociation du traité de Washington fut la définition du territoire qui serait soumis à l'arbitrage. D'un côté, le Venezuela souhaitait que l'ensemble du territoire contesté soit examiné par le tribunal. De l'autre, la Grande-Bretagne insistait pour exclure du champ d'application de l'arbitrage certains territoires à l'ouest du fleuve Esequibo. Pour obtenir gain de cause, la Grande-Bretagne fit insérer dans le texte du traité la règle suivante :

> «La possession contraire ou la prescription pendant une période de cinquante ans constituera un titre valable. Les arbitres pourront juger que le contrôle politique exclusif d'un district ainsi que l'occupation effective de celui-ci suffisent pour constituer une possession contraire ou pour créer un titre par prescription.»[35]

23. Il faut souligner que, par un échange de notes datant de la fin de l'année 1850, le Venezuela et la Grande-Bretagne s'étaient engagés à maintenir la situation territoriale telle qu'elle existait en 1840. Toutefois, la Grande-Bretagne et les Etats-Unis se mirent d'accord pour exclure du traité toute référence à cet accord. Dans une lettre du 29 octobre 1886, le secrétaire d'Etat des Etats-Unis, M. Olney, écrivait ainsi à Pauncefote, ambassadeur britannique à Washington :

> «Il est très souhaitable, à mon avis, qu'il ne soit donné à l'accord de 1850 aucun statut dans la lettre même de la Convention, pas même sous forme de référence, et encore moins en essayant de définir sa portée et sa signification. Si l'on tente de

[35] Traité de Washington, paragraphe *a)* de l'article IV.

> l'interpréter, cela nous entraînerait dans un débat prolongé qui repousserait indéfiniment la réalisation de l'objectif que nous avons maintenant à l'esprit.»[36]

Comme nous le verrons dans un instant, le Venezuela se voyait pourtant promettre au même moment que l'accord de 1850 s'appliquerait devant le tribunal.

24. En mars 1899, le Venezuela a invoqué devant le tribunal arbitral l'accord de 1850 pour déterminer le point de départ du délai de prescription de 50 ans. En réponse, les avocats de la partie britannique ont maintenu qu'un accord passé avec Olney rendait l'échange de lettres de 1850 inapplicable par le tribunal.

25. Madame la présidente, Mesdames et Messieurs les juges, les faits que je vous ai décrits étayent la thèse selon laquelle la Grande-Bretagne s'est rendue coupable de manœuvres dolosives lors de la négociation du traité d'arbitrage, dès son origine et jusqu'à son adoption. Pour cette raison, et parce que l'auteur de cette conduite frauduleuse est absent de la procédure, le Venezuela maintient que la requête introduite par le Guyana doit être déclarée irrecevable. Je le répète : il n'est pas question ici de répondre aux arguments du Guyana sur le fond de l'affaire. Il s'agit de réaffirmer avec conviction l'exception d'irrecevabilité soulevée par le Venezuela, tirée de l'absence d'une partie indispensable à l'instance.

26. Madame la présidente, Mesdames et Messieurs les juges, ainsi s'achève mon exposé. Je vous remercie sincèrement de votre attention. Madame la présidente, je vous prie de bien vouloir inviter à la barre le professeur Carlos Espósito, afin qu'il continue l'exposé des faits du Venezuela.

The PRESIDENT: I thank Professor Orihuela. I now give the floor to Professor Carlos Espósito. You have the floor, Professor.

Mr. ESPÓSITO:

FACTS II

A. Introduction

1. Madam President, Members of the Court, Excellencies, it is an honour to appear before you to continue the pleading of Venezuela.

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[36] Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (réf. I.DD No.001763), annexe 6.

2. Professor Orihuela has already presented pertinent facts as to the United Kingdom's fraudulent conduct in relation to the 1897 Arbitration Agreement, described as early as 12 December 1896 by a former Minister of Venezuela to the Court of St James, Mr. Tomás Michelena, as "an English trick"[37]. In this part I will address yet another set of fraudulent behaviour by the United Kingdom relating to the arbitration proceedings. Venezuela submits that a judgment of the Court on the merits of this case would imply the evaluation of the lawfulness of these conducts attributed to the United Kingdom, which is not a party to the case[38].

3. More specifically, Venezuela contends that there have been several instances of fraudulent conduct by lawyers and high-ranking officials of Great Britain that affect the validity of the arbitral proceedings, which lawfulness the Court would need to evaluate to arrive to a decision on the merits of this case. Our task is to substantiate our preliminary objections and provide the correct factual and legal view of our position. To do so, Excellencies, we need to unavoidably refer to certain facts that demonstrate and confirm that the Court cannot decide the case in the absence of the United Kingdom as it is an indispensable party within the meaning of the *Monetary Gold* principle.

4. The facts that make the presence of Great Britain an indispensable party in this case are already present in Guyana's Memorial. Indeed, in its Memorial, Guyana requests the Court to rule on the validity of the Award of 3 October 1899 in relation to coercive and fraudulent conduct by the United Kingdom that in Venezuela's view renders the award null and void[39]. Now, obviously Guyana and Venezuela disagree as to whether such coercive and fraudulent conduct by the United Kingdom took place or not. They also disagree on its legal effects. But Guyana and Venezuela do agree that it is the alleged illegal behaviour of the United Kingdom that lies at the core of the dispute — and, were the Court to ever consider the merits, it would have to necessarily decide this issue which constitutes part of the very subject-matter of the case.

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[37] Mr. Thomas Michelena, former Minister of Venezuela to the Court of St James, reported in the *New York Journal*, 12 Dec. 1896, reproduced in Wetter, J. G., *The International Arbitration Process*, Oceana Publications, Inc., Dobs Ferry, New York, 1979, Vol. III. Chap. VIII: "The Venezuela-Guyana Boundary Dispute: An In-Depth Documentary Case Study of Nullity of an Arbitral Award", p. 17.

[38] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 102, para. 29.

[39] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. 1, Chaps. 7 and 8.

5. I will now focus on two specific types of fraudulent conduct by British lawyers and high-ranking officials, which lawfulness the Court would need to evaluate if it were to determine the validity of the Arbitral Award, making the United Kingdom an indispensable party and Guyana's case, hence, inadmissible.

B. Fraudulent conduct by British lawyers during the arbitration proceedings

6. Excellencies, firstly, I will address the fraudulent conduct by British lawyers during the arbitration proceedings. Proper conduct of counsel is essential to the validity of arbitration proceedings. Improper conduct of counsel in collusion with arbitrators affects the very essence of the judicial function. Regarding the 1899 Arbitral Award, there are however serious indications that lawyers from Great Britain had improper exchanges with the arbitrators appointed by Great Britain. I refer to letters from Sir Richard Webster, Britain's senior counsel, to Lord Salisbury, Foreign Secretary of Great Britain, and to Mr. Joseph Chamberlain, the Colonial Minister of Great Britain. This correspondence indicates a fraudulent conduct between party lawyers and, in Webster's own words, "our arbitrators".

7. In a letter dated 19 July 1899, while the arbitration proceedings were taking place in Paris, Sir Richard Webster writes to Lord Salisbury to assure him that he is fully aware of the importance of obtaining Point Barima for Great Britain and said: "I do not propose to make any concession. If I have any reason to believe the Tribunal is against me on this part of the case, *I shall endeavour to let the British Arbitrators know our view of the position*."[40] (Emphasis added.)

8. On the same day, Sir Richard Webster wrote to Mr. Joseph Chamberlain, Minister of Colonies, to ask for guidance and to let him know his position to be prepared in case the Court asks him questions "publicly or privately". Once again, Sir Richard Webster writes:

> "If I find it necessary to take any independent[,] *I shall do so privately through our own Arbitrators* and only when I am satisfied that having regard to expressions of opinion of the part of some member of the Tribunal it is desirable that *our arbitrators* should appreciate our views."[41] (Emphasis added.)

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[40] Letter of Sir Richard E. Webster to the Marquis of Salisbury, 19 July 1899, Christ Church College, Oxford, Cecil Papers, Special Correspondence, Ann. 8 to the Letter from the Agent of Venezuela to the Registrar of the ICJ, 8 Nov. 2022.

[41] Letter of Sir Richard E. Webster to Mr. Chamberlain, 19 July 1899, Chamberlain Papers, Birmingham University Library, J.C. 7/5, Ann. 9 to the Letter from the Agent of Venezuela to the Registrar of the ICJ, 8 Nov. 2022.

9. On 3 October 1899, the day the Arbitral Award is made public, Webster writes letters to Chamberlain and Salisbury to express his satisfaction with the outcome of the arbitration, which he considers "a great success for Great Britain". In both letters, Webster requests a meeting in private, because there are things he cannot reveal in public. In his letter to Chamberlain, he literally says: "When you can spare me a few minutes there are one or two matters in connection with the arbitration as to which I should like to talk to you. *I cannot very well put them in writing*."[42] (Emphasis added.)

10. Webster uses the same words in his letter to Lord Salisbury of 3 October 1899. He writes: "there are one or two important matters in connection with the arbitration which *I cannot very well put in writing*."[43] (Emphasis added.)

11. Venezuela considers that these statements by the lead counsel for Great Britain prove an inappropriate relationship of those lawyers and, in their own words, *their* arbitrators. They involve representatives and organs of Great Britain and are attributable to Great Britain. They are capable of not only rendering the Arbitral Award null and void but also triggering the international responsibility of their State under international law. Such fraudulent conduct vitiates any arbitral proceedings and is as unjustifiable in 1899 as it is today. Ruling on the lawfulness of these conducts would imply an evaluation of the lawfulness of the conduct of a State which is not a party to these proceedings.

C. Adulteration of maps submitted to the arbitral tribunal

12. Excellencies, another key issue that the Court will have to address if the case were to reach the merits concerns the adulteration of maps by British officials submitted to the arbitral tribunal.

13. Guyana argues in its Memorial that maps at that time usually contained inaccuracies[44], and that in any case there is no evidence that those maps were decisive for the decision taken by the arbitral tribunal[45]. Contrary to what Guyana affirms, Venezuela firmly believes that these maps had

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[42] Letter of Sir Richard E. Webster to Mr. Chamberlain, 3 October1899, Chamberlain Papers, Birmingham University Library, J.C. 7/5. Ann. 10 to the Letter from the Agent of Venezuela to the Registrar of the ICJ, 8 Nov. 2022.

[43] Letter of Sir Richard E. Webster to the Marquis of Salisbury, 3 October 1899, Christ Church College, Oxford, Cecil Papers, Special Correspondence, Ann. 11 to the Letter from the Agent of Venezuela to the Registrar of the ICJ, 8 Nov. 2022.

[44] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. 1, para. 8.58.

[45] *Ibid.*, para. 8.55.

a decisive influence on the solution adopted by the Tribunal. This is evidenced by the boundary line finally established in the Award. Indeed, the arbitral tribunal granted, without giving any legal grounds, almost the totality of the disputed territory to Great Britain based on adulterated maps.

14. The relevant facts were well established already in the report submitted by the Venezuelan experts to the National Government on the issue of the boundaries with British Guiana, published in 1965[46]. The first maps of 1835 by the geographer Robert Schomburgk respected the boundary line fixed on the Esequibo River. That is the green line on the map, on your right. The map published in 1840 severely altered that boundary with a new line known as the "Schomburgk line". That is the blue line on the map on the screen. The line became the core of the British strategy to increase the territory of British Guiana at the expense of the sovereign rights of Venezuela. But even Schomburgk, who worked for the Royal Geographical Society and the Colonial Office, and was knighted despite being a German national, warned that such a boundary should be agreed upon between both countries. All British leaders up to Lord Salisbury in the 1880s had recognized those lands as Venezuelan territories or at least as controversial territories. Lord Aberdeen, in a statement — he was at that time Foreign Secretary of Great Britain — illustrates this. Lord Aberdeen had recognized on 31 January 1842 that the posts that had been installed by Great Britain were not "indications of dominion and empire on the part of Great Britain". Rather, they were "merely a preliminary measure open to future discussion between the two governments", something that was reflected in the crucial Agreement of 1850, that was intended to preserve Venezuela's rights against British incursions and illegitimate advances into its territory.

15. In the 1880s, however, Great Britain changed its view of the second Schomburgk line as originally established, that is, as a mere British claim. Let us recall that the first Schomburgk map of 1835 recognized the Esequibo River as the boundary between Venezuela and the British Guiana. The second Schomburgk line dramatically increased the territory of British Guiana and became a boundary of what Great Britain considered their undisputed territory. The point to be emphasized here is that the Schomburgk line was fraudulently altered in the 1880s, as you can see observing the

[46] Hermann González Oropeza, S.J. and Pablo Ojer, *Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional*, 18 Mar. 1965 (Memorial on the merits of Guyana, 8 Mar. 2022, Ann. 74).

red line of the map projected on the screen. Indeed, in the maps published by Schomburgk in 1840, 1841 and 1847 in his reports, the line drawn crossed Cuyuni and the southern basin. This was reflected in the numerous maps published by the British Government and in the Colonial List, including the famous 1875 map published by Mr. Stanford in 1876 on behalf of the Colonial Government, known as the "Schomburgk map".

16. In 1886, a new map was published at the initiative of the Colonial Office that enlarged the line drawn by Sir Robert Schomburgk, who had died more than two decades earlier. This new map covered the great bend of the Cuyuni. This map was published in 1886 but continued to bear the publication date of the earlier 1875 map. As counsel James Storrow and legal adviser William Scruggs explained in their brief for Venezuela in 1890 before the Venezuelan Boundary Commission, established by the United States Congress: "The new line first invented or asserted in 1886 thus appeared as if it were the original line of 1875, supported by the authority of the surveyors whose names still appeared on the map as before."[47] The Foreign Secretary, Lord Salisbury, however, referred to that line on 13 February 1890 as "the line surveyed by Sir Richard Schomburgk in 1841"[48].

17. These adulterations were pointed out by Sir Edward Hertslet, Librarian of the Foreign Office at that time. In his memorandum of 1 June 1886[49], Hertslet highlighted the adulterations in the map published by Mr. Stanford in 1875 for the Colonial Office of Great Britain. He recommended including a note stating that it was a corrected map, and he also underlined the note that appeared on the original map. The note erased from the original map read:

> "The Boundaries indicated in this Map are those laid down by the late Sir Robert Schomburgk who was engaged in exploring the Colony during the years 1835 to 1839, under the direction of the Royal Geographical Society. But the Boundaries thus laid down between Brazil on the one side, and Venezuela on the other, and the Colony of British Guiana must not be taken as authoritative; as they have never been adjusted by the respective Governments and an engagement subsists between the Governments of

[47] James J. Storrow and William L. Scruggs, Brief for Venezuela Before the Venezuela Boundary Commission, First Part: Introduction and Summary, 1890, p. 21.

[48] Quoted by James J. Storrow and William L. Scruggs, Brief for Venezuela Before the Venezuela Boundary Commission. First Part: Introduction and Summary, *op cit.*

[49] Public Record Office, F.O. 80/30, cf. verbatim records, pp. 2114 ff.

> Great Britain and Venezuela by which neither is at liberty to encroach upon or occupy territory claimed by both."[50]

18. In a letter of 14 June 1886, included in the report by González Oropeza and Ojer, already cited, Sir Edward Hertslet stated clearly that their case was "a poor one indeed" because the map sent to the Venezuelan Government in 1891 was inaccurate and the map published by the Ministry of Colonies in 1875 was "all wrong"[51].

19. The fact is that in June 1886, Sir Robert Herbert, Permanent Under-Secretary of State for the Colonies, by direction of Earl Granville, Secretary of State for Foreign Affairs, "ordered the boundary to be corrected and all copies of the map in existence to be destroyed"[52]. Great Britain used these maps with an adulterated boundary line that coincided with the so-called Schomburgk line of 1886.

20. Excellencies, what is relevant at this point is not whether there were modifications to the maps prior to the proceedings, nor whether they were known by both Parties, as alleged in Guyana's Memorial. What is relevant, Your Excellencies, is that Great Britain knowingly submitted doctored maps to the arbitral tribunal, a fraudulent conduct that undermines the establishment of the truth by the arbitral tribunal and impedes the proper exercise of the judicial function.

21. Venezuela submits that the decisive character of these adulterated maps is showed by observing the coincidence between the lines of the adulterated maps and the boundary finally established by the arbitral tribunal. Again, Guyana disputes this, but what is important is that once again if the Court were to ever deal with the merits of the case it would necessarily first and foremost consider and decide the question whether the United Kingdom deliberately submitted falsified maps to the arbitral tribunal, not only eventually rendering its award null and void, but also engaging the United Kingdom's international responsibility for disenfranchising Venezuela of an essential part of its sovereign territory.

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[50] Reproduced in J. G. Wetter, *The International Arbitration Process*, Oceana Publications, Inc. Dobs Ferry, New York, 1979, Vol. III, Chap. VIII: The Venezuela-Guyana Boundary Dispute: An In-Depth Documentary Case Study of Nullity of an Arbitral Award, pp. 145-146.

[51] Letter from Sir E. Hertslet to Mr. Jervoise dated 14 June 1886, Public Record Office, F.O. 80/309, reproduced in Hermann González Oropeza, S.J. and Pablo Ojer, *Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional,* 18 Mar. 1965, p. 35 (Memorial on the merits of Guyana, 8 Mar. 2022, Ann. 74).

[52] Public Record Office, F.O. 80/373, reproduced in the Appendix to Hermann González Oropeza, S.J. and Pablo Ojer, *Informe que los expertos venezolanos para la cuestión de límites con Guayana Británica presentan al Gobierno Nacional,* 18 Mar. 1965, p. 35, complete copy of Ann. 74 (Memorial on the merits of Guyana, 8 Mar. 2022).

D. Conclusion

22. Excellencies, the facts clearly show that the actions of the United Kingdom are one of the essential reasons for the nullity of the Arbitral Award of 3 October 1899. To determine the validity of the Award, it would be necessary to evaluate the lawfulness of its conduct. At this point, of course, we do not intend to discuss Guyana's arguments on the merits. Our submissions are only intended to confirm Venezuela's conviction that the United Kingdom is an indispensable party and that the Court therefore cannot rule on the validity of the Arbitral Award of 3 October 1899 in the arbitration between Venezuela and Great Britain because the United Kingdom is not a party to this case.

23. This brings me to the end of my presentation. Madam President, I now respectfully ask you to call my colleague, Professor Christian Tams, to continue Venezuela's pleadings and thank you, Excellencies, for your kind attention.

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

The Court adjourned from 11.40 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I shall now give the floor to Prof. Christian Tams. You have the floor, Professor.

Mr. TAMS: Thank you, Madam President.

THE UNITED KINGDOM AS AN INDISPENSABLE PARTY

Introduction

1. Madam President, distinguished Judges, it is an honour to address you and to continue Venezuela's argument after the coffee break. You have, before the coffee break, heard my colleagues set out the facts on which Venezuela's argument is based. It falls to me to demonstrate that these facts lead to one, clear conclusion: the United Kingdom is an indispensable party, in whose absence this case cannot proceed. I will develop this argument. Following this, my colleague, Professor Palchetti, will set out why the United Kingdom remains an indispensable party after Guyana's independence.

2. Madam President, Venezuela's argument rests on the jurisprudence of this Court, and notably the *Monetary Gold* doctrine. The Parties are agreed that this doctrine, if it applies, precludes the Court from exercising jurisdiction. The initial formulation of the doctrine, in the *Monetary Gold* case, remains instructive: on the face of it, this was a dispute between Italy and the Allied Powers about competing claims by Italy and Britain to monetary gold. But Italy's claim to the gold depended on the conduct of Albania, which was accused of having violated Italy's rights. And as the Court noted unanimously, "[t]o go into the merits of such questions would be to decide a dispute between Italy and Albania"[53]. This could not be done without Albania's consent, which had not been given.

3. Importantly, the Court in 1954 reached its decision unanimously, before the merits had been argued. When it declined to exercise jurisdiction, it was uncertain whether or not Albania's conduct was unlawful. But one thing was clear: a merits decision would have to address the matter. And this, the Court found unanimously, could not be done.

The rationale of the *Monetary Gold* doctrine

4. Madam President, in the almost seven decades since *Monetary Gold*, this Court has had much opportunity to clarify the purpose of the doctrine named after the case. In Venezuela's submission, the decisions in the *East Timor* case and the Croatian-Serbian *Genocide* case are particularly instructive, as they identified the "rationale" of the doctrine[54].

5. First, *East Timor.* In that case, Portugal had claimed that Australia had acted unlawfully in agreeing to the Timor Gap Treaty with Indonesia, bearing on territories belonging to East Timor. Australia objected: to decide on the case as brought by Portugal, the Court, said Australia, would have to decide on the rights and competence of Indonesia in relation to East Timor. The Court accepted this argument. It considered that Portugal's claims depended on a prior question: could Indonesia enter into treaties concerning areas off the coast of East Timor? Contrary to Portugal's claim, Australia's conduct was not separable from that of Indonesia. In the words of the Court as you see them on the slide: "The Court could not rule on the lawfulness of the conduct of a [respondent]

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[53] *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.

[54] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 57, para. 116.

State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case"[55].

6. The second case that Venezuela submits is instructive is the Croatian *Genocide* case. My colleague, Professor Palchetti, will speak to it in more detail. I will merely highlight one aspect. The relevant section is on the slide. It is an assessment of the Court's jurisprudence on the *Monetary Gold* doctrine. And "[i]n both *Monetary Gold* and *East Timor*", we read, "the Court declined to exercise its jurisdiction to adjudicate upon the application, because it considered that to do so would have been contrary to the right of a State not party to the proceedings not to have the Court rule upon its conduct without its consent"[56].

7. "Not to have the Court rule upon the conduct" of an absent third State. Or, in the similar terms of the *East Timor* Judgment, "no implied evaluation" of the lawfulness of the conduct of another State. This, Madam President, distinguished Judges, is the rationale of the *Monetary Gold* doctrine, as shaped in the jurisprudence of this Court. 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.

The *Monetary Gold* doctrine: application to the present dispute

8. Madam President, based on this test, Venezuela's argument is straightforward. In order to settle this dispute, the Court *will*, as a prerequisite, have to rule on the United Kingdom's conduct. This follows from Guyana's own Memorial submitted on 8 March 2022. It is confirmed by the presentations by my colleagues, Professors Orihuela and Espósito. And it results from the Court's Judgment in this case of 18 December 2020.

9. Permit me to begin with this Judgment, the Judgment of 18 December. In it, a majority of this Court upheld jurisdiction over Guyana's claims. Importantly, paragraph 137 that you see on this

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[55] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29.

[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 57, para. 116.

slide clarified that not all of Guyana's claims came within the Court's jurisdiction, only those "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"[57].

10. With all respect, I note that not everything in this formulation is clear to Venezuela. But three matters *are* clear, and they all point to the central role of the United Kingdom, highlighted by the Vice-President in her opening speech.

11. First, this case is primarily about the validity of a disputed arbitral award rendered between Venezuela and the United Kingdom — disputed because Venezuela accused the United Kingdom of having acted fraudulently.

12. Second, the Award whose validity is primarily at stake was rendered on the basis of a disputed arbitration agreement, concluded between Venezuela and the United Kingdom — disputed because Venezuela complained of fraudulent British conduct.

13. Third, Guyana brought the case on the basis of the Geneva Agreement: another treaty concluded between Venezuela and the United Kingdom. A treaty that, as stated in its preamble, was meant to resolve a "controversy between Venezuela and the United Kingdom". A treaty to which the United Kingdom remains a party until today.

14. Madam President, the Judgment of 2020 was rendered against Venezuela's objections. But we live with its implications — and the key implication is that this case is now firmly a case about an arbitral award that triggered a British-Venezuelan controversy. A controversy peppered with allegations of fraud, deceit and coercion. A controversy that Venezuela and the United Kingdom tried to defuse through the mechanism of the Geneva Agreement. The United Kingdom is at the heart of the dispute as defined in the Court's 2020 Judgment.

15. Madam President, how have the Parties sought to deal with this Judgment, and if I can put it in this way, the obvious *Monetary Gold* spectre that it raised? I will begin with Guyana's Memorial. Guyana, as the claimant, is free to formulate its claims. And of course, Guyana has made use of this freedom to present this dispute in a way that minimizes the role of the United Kingdom. Guyana's

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

counsel are no strangers to *Monetary Gold*. So it comes as no surprise that Guyana's Memorial relies on the trusted technique of parties that seek to avoid the implication of the *Monetary Gold* doctrine: it presents the dispute as one about abstract legal issues, and it seeks to gloss over the role of the indispensable party — in this case the United Kingdom. It does so with respect to both the Arbitration Agreement of 1897 and the 1899 Award rendered on its basis. But Madam President, with respect to both the Agreement and the Award, the United Kingdom cannot be glossed over.

The Court cannot assess the validity of the Washington Arbitration Agreement without evaluating the conduct of the United Kingdom

16. Let me begin with the Arbitration Agreement. On the slide, you see the main headings of Guyana's Memorial in so far as it addresses this issue. To be clear, this is the Agreement that Venezuela had attacked before the United Nations, arguing that it had been deceived and pressured to accept it. But if you look at Guyana's Memorial, or the main headings, you would not know. Guyana presents the Venezuelan-British controversy as an abstract legal question of validity, in which the United Kingdom has no role. Guyana seeks to do what Portugal sought to do in the *East Timor* case: it seeks to decouple its claim from the underlying legal issue, so as to steer clear of *Monetary Gold*. And so Guyana says, and you see it on the slide, it says "no fraud". It says "no coercion". It says the *compromis* "was validly concluded". Everything is in the passive. In Guyana's Memorial, there are no actors in the headings.

17. But Madam President, just as Portugal's attempt in *East Timor*, this only goes so far. There is no fraud without fraudsters. Coercion means one State has to coerce another State. If Guyana asks you to find "no corruption" in the heading, it really asks you to find that the United Kingdom has not corrupted. If it asks you to find "no coercion", what it really asks is that the United Kingdom did not coerce, or did not coerce enough to make the treaty invalid.

18. While Guyana seeks to define the United Kingdom away from the dispute, it is very clear from my colleagues' presentations that this cannot succeed. Professor Orihuela has pointed you to evidence suggesting that the United Kingdom, in negotiations with the United States, materially prejudiced Venezuela's position by insisting on the principle of prescription. Evidence indicates that Venezuela was deceived about this. Other evidence that you have been shown suggests that the United Kingdom pressured Venezuela to accept a tribunal with British judges, but no Venezuelan

arbitrators because, as you have been shown, in the view of the United Kingdom there were no Venezuelan arbitrators worthy of the name in the view of Great Britain at the time.

19. In light of this evidence, the real questions that this Court will have to confront are not abstract. They implicate the United Kingdom. Did the United Kingdom coerce Venezuela? Did the United Kingdom act fraudulently? Should this case reach the merits, you would hear full argument on the matter, and you would be asked to evaluate Guyana's and Venezuela's competing claims on the validity of the Arbitration Agreement — that "unworthy treaty", in the words of Héctor Gros Espiell. And any finding of invalidity would of course have very real consequences for Venezuela and the United Kingdom — my colleague Professor Palchetti will speak to this. For present purposes, all that matters is that a merits judgment would have to evaluate the conduct of the United Kingdom — precisely what the *Monetary Gold* doctrine seeks to preclude.

The Court cannot assess the validity of the Arbitral Award without evaluating the conduct of the United Kingdom

20. Madam President, Members of the Court, permit me to move on to the Arbitral Award itself. Can its validity be assessed without assessing the conduct of the United Kingdom, one of the two parties in the proceedings and the main beneficiary of the outcome?

21. Again, I begin with Guyana's Memorial. And we see the same strategy at play. Guyana presents the question of validity as an abstract one, as one not implicating the United Kingdom if we look at the headings.

22. On the slide, you see them, you see that Guyana speaks — in the second roman heading — of "Venezuela's Allegations of Corruption, Collusion" as if these allegations had been made in the abstract. The headings you see are mostly about the Tribunal. It fulfilled its functions, asserts Guyana. It properly exercises its functions, it says in the opening line. It produced a legally valid Award. And in its Written Observations, Guyana takes this to extremes. This is what is says in paragraph 21: "the Award's validity . . . depends on the lawfulness of the conduct of the Arbitral Tribunal, not on that of the U.K.", is what Guyana says[58].

[58] Written Observations of Guyana on the Preliminary Objections of Venezuela (WOG), para. 21.

23. Madam President, with all due respect to our colleagues, it seems to me that this attempt to read the United Kingdom out of the history is getting desperate. It is desperate because if a tribunal is corrupt, someone must have corrupted it. Desperate because by definition you cannot collude on your own. And desperate also because to present its clean take on the British-Venezuelan controversy over the Arbitral Award, Guyana has to erase from the record Venezuela's very real charges of fraud, of deceit — which were charges made against the United Kingdom.

24. And it is when reading beyond the headings that we see that even Guyana in its Memorial cannot ignore the United Kingdom. Venezuela invites the Court to look carefully at Sections II (E) and II (F) of Chapter 8 of Guyana's Memorial, in which Guyana addresses some of Venezuela's claims. These sections are, in essence, a defence of the United Kingdom's conduct. I cannot take you through all of the material, but permit me to take you to two excerpts.

25. The first excerpt concerns the problem of tampered evidence, of "doctored maps" used in the proceedings. On the slide, you see reproduced an extract from para. 8.54 of Guyana's Memorial and it speaks there to Venezuela's allegations:

> "The 1965 Report [that is the report in which Venezuela compiled many of its concerns about the Award] asserts that Venezuela has 'evidence' that lines marked in maps dated 1841 and 1842, which were presented to the Tribunal, had been tampered with by the Colonial Office. Venezuela also alleges that Great Britain falsely represented that a map of the Schomburgk Line presented to the Tribunal was a map that had been produced by Schomburgk in 1844."[59]

26. The Court is aware of these maps — from the presentation by my colleague, Professor Carlos Espósito, just before the coffee break. But as is clear from this passage that you see on the slide, Guyana is also aware. And what is more, Guyana knows that in order to uphold the validity of the Award, it has to defend the United Kingdom against Venezuela's charges. And this is exactly what Guyana's Memorial does. Please have a look at the following sections, which set out, if I may say so, Guyana's defence of the United Kingdom: they are from roughly the same section of the Memorial, still paragraph 8.54 and paragraph 8.60. Let me read the relevant excerpts to you. This is what Guyana says:

> "Venezuela has not provided . . . any particulars in support of its allegations that maps were tampered with; nor has it explained how and why those maps were supposedly of 'decisive importance' to the Tribunal's determination."

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[59] Memorial on the merits of Guyana, 8 Mar. 2022, Vol. I, para. 8.54.

Now, six paragraphs on, this what we read:

> "[T]the evidence shows that far from seeking to deceive Venezuela and the Tribunal, Great Britain candidly acknowledged the limitations of the various maps upon which it relied and proactively drew attention to the amendment to its erroneous map, which Venezuela now seeks to characterise as an improper and secret amendment that was concealed from the Tribunal."[60]

This was Guyana speaking.

27. If I put this in my own words, I might say Guyana argues that the United Kingdom's tampering has not been proven (that is the opening of paragraph 8.54). Or that there may have been tampering with maps, but we cannot be sure about its effects on the Award (that would still be 8.54). In paragraph 8.60, we see another line of defence. In my own words, Guyana seems to accept that the United Kingdom tampered with maps, but perhaps its bad faith had not been fully established.

28. Now, we do not know whether this Court would accept Guyana's, if I may say so, benevolent reading of the United Kingdom's conduct. Or whether it would follow Venezuela's assessment, namely that the United Kingdom's tampering with the evidence vitiates the Award, with all the legal consequences that this has for the relations between the two parties to the Award, Venezuela and the United Kingdom. But at this stage, it is irrelevant. What is relevant is that both Parties — Venezuela but also Guyana — ask the Court to rule upon the conduct of the United Kingdom.

29. Madam President, the tampered maps are just one example of disputed British conduct. There are others — and again, to appreciate as much, we need look no further than to Guyana's Memorial.

30. Section II (F) of Chapter 8 of this Memorial contains a lengthy defence of the United Kingdom. A defence against another charge, initially set out in the memorandum of Severo Mallet-Prevost — referred to by the Vice President — published in 1949 posthumously in the *American Journal of International Law*. In that memorandum, there was the following allegation: "there was some deal between Great Britain and Russia by which the two powers induced their representatives on the Tribunal to vote as they did"[61]. Now, clearly, Guyana does not accept this

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[60] *Ibid.*, paras. 8.54 and 8.60.

[61] Otto Schoenrich, "Note: The Venezuela-British Guiana Boundary Dispute (Mallet-Prevost)", *American Journal of International Law* (1949), Vol. 43, p. 523.

claim: it disputes it. But to dispute it, it goes to great lengths to evaluate the United Kingdom's conduct. In official British Foreign Office documents, says Guyana, there is no evidence of a deal[62]. Great Britain at the time, speculates Guyana, would have been unlikely to strike a deal with Russia[63]. The two British arbitrators, states Guyana, did not, as alleged by Venezuela, travel to the United Kingdom with Professor Martens to meet British Government officials[64]. And so on and so forth. Chapter 8, Section II (F) of Guyana's Memorial contains Guyana's lengthy defence of the United Kingdom — Guyana's suggestion on how you should "rule on" the United Kingdom's conduct. Guyana invites you to do exactly what the *Monetary Gold* doctrine seeks to preclude.

31. I note in passing that Guyana is surprisingly silent when it comes to other evidence pointing to fraudulent conduct. We are waiting to hear how Guyana will respond to the specifics of Venezuela's claim, as presented by Professor Espósito: and in particular to the clear evidence that, throughout the arbitral proceedings, Britain's senior counsel, Mr. Webster, was in frequent — and, if I may say so, deeply irregular — contact with the United Kingdom's arbitrators. Professor Espósito has spoken to this. I will merely recall two statements.

32. The first is Mr. Webster's candid admission, in a letter to Lord Salisbury, that if he had "any reason to believe the Tribunal is against me on this part of the case" he would happily "let the British arbitrators know our view of the position".

33. The second statement is also on the slide, Mr. Webster's perhaps even more candid admission that, where "necessary" — his word, "necessary" — he would be happy to take "independent action . . . privately through our arbitrators". You have it all there, "our arbitrators", Professor Espósito referred to that.

34. We do not know whether Guyana seized this as another instance of "no fraud" — to take the terms of the heading of its Memorial; whether, in light of these statements, Guyana will cling to and affirm its — if I may say — frankly astonishing position that whatever fault there was could only be the Tribunal's, but not could not implicate Great Britain. But most fundamentally, how does

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[62] MGG, 8 Mar. 2022, Vol. I, para. 8.78.

[63] *Ibid.*, para. 8.90.

[64] *Ibid.*, para. 8.87.

Guyana suggest the impact of the United Kingdom's conduct during the proceedings could be assessed — without ruling on the lawfulness of this conduct?

35. Madam President, Members of the Court, this brings me to the end of my presentation. As I conclude, permit me briefly to step back from the details. This is, as you have heard my colleagues say frequently, the preliminary objections stage of the case. We are not meant to plead the merits. But in order to allow the Court to rule on the preliminary objection, Venezuela has had to highlight — like Australia in *East Timor*, like Italy in *Monetary Gold* — what a hypothetical merits case might look like.

36. Even from this limited discussion, it is clear that the United Kingdom's conduct — which Venezuela attacks and Guyana defends — would be the very subject-matter of any decision that the Court would have to render if it reached the merits of Guyana's claim. To reiterate: Guyana asks you to uphold the validity of a disputed Award rendered in the United Kingdom's favour. An Award rendered on the basis of a disputed United Kingdom-Venezuelan treaty that bears all the hallmarks of unworthy nineteenth century treaty-making that hopefully we have left behind. An Award over which Venezuela and the United Kingdom quarrelled and argued for decades. Now, this argument was not about abstract questions. It was fundamentally about the conduct of the United Kingdom — and about the consequences of its conduct, should it be found to have been unlawful. Britain's conduct as a colonial Power scheming to usurp the territory of an independent State in Latin America. Britain's handling or mishandling of evidence. Britain's potentially fraudulent behaviour during arbitral proceedings — and the consequences flowing from such fraud if established. To state that the United Kingdom is to this case what Indonesia was to East Timor would be a gross understatement. It is at the heart of this case.

37. And so, in concluding, Venezuela leaves you with a simple question, adapted from the language of the *Croatian Genocide* case: would you, in deciding upon Guyana's claims, have to "rule upon [the United Kingdom's] conduct without its consent"[65]? In Venezuela's submission, the answer to this question is a resounding "yes, you would". And this is why this Court is precluded from exercising its jurisdiction.

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[65] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 57, para. 116.

38. Madam President, this concludes my presentation. I am grateful for your and your colleagues' kind attention and I would now ask you to call upon Professor Paolo Palchetti to continue Venezuela's presentation.

The PRESIDENT: I thank Prof. Tams. I now invite Prof. Paolo Palchetti to take the floor. You have the floor, Professor.

M. PALCHETTI :

L'INDÉPENDANCE DU GUYANA N'A AUCUNE CONSÉQUENCE SUR L'APPLICATION DU PRINCIPE DE L'*OR MONÉTAIRE* AU ROYAUME-UNI

I. Introduction

1. Madame la présidente, mesdames et messieurs les juges, c'est un honneur pour moi de me présenter devant vous. Madame la présidente, comme le professeur Tams vient de le montrer, les conditions pour l'application du principe de l'*Or monétaire* sont remplies. La Cour ne peut juger ni de la validité du compromis ni de celle de la sentence arbitrale sans statuer au préalable sur le comportement du Royaume-Uni.

2. A ce stade, il ne me reste qu'à aborder un dernier point. Il s'agit d'établir si la succession entre le Royaume-Uni et le Guyana constitue un obstacle à l'application du principe de l'*Or monétaire*. C'est ce que prétend le Guyana[66]. Le Guyana essaye de vous convaincre que, depuis l'accès à l'indépendance de son ancienne colonie, le Royaume-Uni n'a plus aucun intérêt en cause dans le présent différend. C'est cette absence d'intérêt qui, d'après le Guyana, justifierait que la Cour rejette l'exception préliminaire.

3. Mesdames et Messieurs les juges, le Venezuela reconnaît que, dans certaines circonstances, une situation de succession entre Etats peut avoir des implications sur l'application du principe de l'*Or monétaire*. Cependant, dans notre affaire, une exception à l'application de ce principe ne peut trouver à se justifier. Il y a à cela deux raisons essentielles :

[66] Exposé écrit du Guyana sur les exceptions préliminaires du Venezuela (EEG), par. 20 et 31.

— d'une part, la question que la Cour devra trancher — à savoir si le Royaume-Uni a tenu une conduite frauduleuse — entraîne des conséquences juridiques pour le Royaume-Uni en droit international ;

— d'autre part, ces conséquences sont opposables au Royaume-Uni bien que cet Etat n'ait aujourd'hui aucun intérêt s'agissant de la question de la délimitation du territoire contesté.

Ces deux raisons sont suffisantes pour reconnaître que le principe de l'*Or monétaire* interdit à la Cour de se prononcer dans la présente instance.

II. L'application du principe de l'*Or monétaire* en cas de succession d'Etats

4. Dans l'arrêt de 2015 relatif à l'affaire du *Génocide (Croatie c. Serbie)*, la Cour a rappelé que le principe de l'*Or monétaire* protège le «droit d'un Etat non partie à l'instance à ce que la Cour ne se prononce pas sur son comportement sans son consentement». La Cour a ensuite ajouté :

> «On ne saurait tenir pareil raisonnement en ce qui concerne un Etat qui a cessé d'exister … puisque pareil Etat n'est plus titulaire d'aucun droit et n'a plus la capacité de donner ou de refuser de donner son consentement à la compétence de la Cour.»[67]

5. L'application du principe de l'*Or monétaire* dans la présente instance doit être appréciée à la lumière des critères établis par la Cour. Ce principe — nous dit la Cour — peut ne pas s'appliquer en cas de succession d'Etats. Mais cette possibilité — ajoute la Cour — est soumise à des conditions précises. Or, dans notre affaire, ces conditions ne sont pas remplies :

— en premier lieu, la position du Royaume-Uni ne peut évidemment pas être assimilée à celle d'un Etat qui n'existe plus ;

— en second lieu, le Royaume-Uni ne peut pas être considéré comme un Etat qui «n'est plus titulaire d'aucun droit [ou d'aucune obligation]» en ce qui concerne la question de la validité du compromis ou de la sentence arbitrale ;

— finalement, ni le Venezuela ni le Royaume-Uni n'ont accepté de considérer le Guyana comme le seul Etat titulaire de droits et obligations découlant de la question de la validité de ces actes.

Ce sont, Madame la présidente, les trois points que je vais développer successivement.

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[67] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt, C.I.J. Recueil 2015 (I)*, p. 57, par. 116.

III. Le Royaume-Uni n'est pas «un Etat qui a cessé d'exister»

6. Premièrement, si un Etat cesse d'exister, le principe de l'*Or monétaire* ne peut trouver à s'appliquer. La raison est simple. Ce principe — je le répète — protège le «droit d'un Etat non partie à l'instance à ce que la Cour ne se prononce pas sur son comportement sans son consentement»[68]. Si un Etat n'existe plus, le droit de l'Etat n'existe plus non plus. Mais si l'Etat ne cesse pas d'exister, celui-ci garde entièrement son droit à ce que la Cour ne se prononce pas.

7. Le Royaume-Uni n'est pas un Etat qui a cessé d'exister. Le Royaume-Uni garde son droit à ce que la Cour ne se prononce pas sur son comportement. Il garde la «capacité de donner ou de refuser de donner son consentement à la compétence de la Cour»[69]. Cela, en soi, est suffisant pour justifier l'application du principe de l'*Or monétaire*. Mais, Madame la présidente, j'ajoute une considération. La question portée devant la Cour n'est pas une question quelconque. Il s'agit pour la Cour d'établir si le Royaume-Uni s'est rendu responsable d'une conduite frauduleuse. Il s'agit d'une question qui touche directement à la dignité d'un Etat. Le consentement de l'Etat est indispensable pour que la Cour puisse se prononcer sur une accusation aussi grave.

IV. Le Royaume-Uni n'est pas un Etat qui «n'est plus titulaire d'aucun droit [ou d'aucune obligation]» par rapport aux conséquences découlant de la question de la validité du compromis ou de la sentence

8. Mais ce n'est pas seulement la dignité de l'Etat qui est en cause. Une décision de la Cour aurait également des conséquences juridiques précises pour le Royaume-Uni en droit international. Je passe ici à mon second point.

9. Dans ses observations, le Guyana a concentré ses efforts sur la tentative de minimiser la portée des conséquences juridiques pour le Royaume-Uni[70]. Selon le Guyana, les conséquences d'une décision de la Cour sur la validité du compromis ou de la sentence arbitrale concernent uniquement la délimitation territoriale. Le Royaume-Uni — insiste le Guyana — n'a plus aucun intérêt sur le territoire contesté et donc le principe de l'*Or monétaire* ne pourrait pas s'appliquer.

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[68] *Ibid.*

[69] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt, C.I.J. Recueil 2015 (I)*, p. 57, par. 116.

[70] EEG, par. 20-21 et 31.

10. Mais, Mesdames et Messieurs les juges, peu importe que le Royaume-Uni n'ait aucun intérêt sur le territoire contesté. Peu importe. Ce n'est pas par rapport à la délimitation de la frontière terrestre que le Royaume-Uni est une partie indispensable. La question au centre du présent différend est désormais celle de la validité du compromis et de la sentence arbitrale. C'est la question que le Guyana porte aujourd'hui devant la Cour. C'est le véritable objet du différend.

11. Il suffit de lire le mémoire du Guyana pour s'en rendre compte. Ce que le Guyana vous demande, c'est d'établir si le Royaume-Uni s'est rendu responsable de dol ou de corruption. Ce que le Guyana vous demande, c'est d'établir si ce dol ou cette corruption entraînent l'invalidité du traité de Washington ou de la sentence arbitrale[71]. Dans le mémoire du Guyana vous ne trouvez rien sur la frontière terrestre. Le différend devant vous est devenu un différend qui a un seul objet : la validité du compromis et de la sentence arbitrale. Mais ce différend concerne essentiellement le rapport entre le Venezuela et le Royaume-Uni. C'est par rapport à cette question que l'application du principe de l'*Or monétaire* doit être appréciée.

12. Madame la présidente, établir que le Royaume-Uni a tenu une conduite frauduleuse implique également d'établir quelles sont les conséquences d'une telle conduite. Certes, dans son mémoire, le Guyana oublie entièrement d'analyser cette question. Il oublie d'indiquer quelles sont les conséquences de la nullité d'un traité ou d'une sentence arbitrale. En gardant le silence, le Guyana espère probablement contourner le problème. Pourtant, la question des conséquences juridiques est incontournable. On ne peut pas prétendre établir la nullité d'un traité ou la nullité d'une sentence arbitrale sans établir également les conséquences qui en découlent. Le dol ou la corruption ainsi que, j'insiste sur ce point, l'exploitation abusive d'un territoire sur la base d'un titre obtenu grâce à cela, comportent évidemment des conséquences juridiques. Il y a un problème de responsabilité internationale. C'est l'Etat qui a tenu la conduite frauduleuse qui doit en répondre. La Commission du droit international l'a dit expressément. Selon la Commission du droit international, le dol ou la contrainte soulèvent «des questions tant de responsabilité et de réparation que de nullité»[72]. Selon la Commission, «il est établi clairement pour le dol, l'acte de corruption ou la contrainte que ceux-ci

[71] Mémoire sur le fond du Guyana, 8 mars 2022, vol. 1, chap. 7 et 8.

[72] *Annuaire de la Commission du droit international*, 1966, vol. II, p. 288.

constituent en eux-mêmes des faits illicites ; ces vices ne constituent donc pas, ou pas uniquement, des vices du consentement»[73].

13. A ce stade, peu importe l'établissement des conséquences précises qui peuvent découler de la conduite frauduleuse du Royaume-Uni. Toutes ces questions concernent le fond. Mais on ne peut pas prétendre que ces conséquences n'existent pas.

14. La convention de Vienne sur le droit des traités établit de manière très claire les règles applicables en la matière. Il suffit ici de se référer à la règle coutumière contenue à l'article 69 de la convention. Cette disposition prévoit que, si des actes ont été accomplis sur la base d'un traité nul, «*a)* Toute partie peut demander à toute autre partie d'établir pour autant que possible dans leurs relations mutuelles la situation qui aurait existé si ces actes n'avaient pas été accomplis». Mesdames et Messieurs les juges, j'attire votre attention sur le paragraphe 3 de cette disposition. Ce paragraphe établit un régime aggravé des conséquences en cas de dol ou de corruption. Et c'est ce régime aggravé qui est susceptible de s'appliquer dans notre affaire.

15. Si la Cour détermine que le Royaume-Uni est responsable d'une conduite frauduleuse, la conséquence n'est pas seulement que la sentence arbitrale n'a plus de force juridique, comme le prétend le Guyana. Le Venezuela aura également le droit d'invoquer l'application des conséquences prévues par l'article 69 de la convention de Vienne. Le Venezuela aura le droit de demander le rétablissement de la situation antérieure à la sentence. Le Guyana ne peut pas prétendre que cela ne concerne que les relations entre le Venezuela et le Guyana, d'autant plus que le Guyana n'est pas l'Etat auquel la conduite frauduleuse serait imputable. Une telle responsabilité incombe au Royaume-Uni.

16. Qu'il me soit permis de préciser ce point. Dans notre affaire, l'application de la règle contenue à l'article 69 soulève une question importante. C'est la question de l'exploitation abusive des ressources d'un territoire acquis de manière frauduleuse. Et ce n'est pas la première fois que le Venezuela soulève cette question. Cette question a déjà été portée à l'attention du Royaume-Uni à maintes reprises.

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[73] *Annuaire de la Commission du droit international*, 1982, vol. II, deuxième partie, p. 69.

17. Pour ne prendre qu'un seul exemple, je peux mentionner la déclaration du ministre des affaires étrangères du Venezuela du 25 mai 1965. Cette déclaration fut adoptée comme réponse à la décision du Gouvernement de la Guyane britannique d'autoriser des explorations pétrolières dans le territoire contesté. A cette occasion, le ministre des affaires étrangères du Venezuela a communiqué «à toutes les parties intéressées», et en premier lieu au Royaume-Uni, que le Venezuela ne reconnaissait pas ces concessions et qu'il exprimait dès lors des réserves «quant à toutes conséquences éventuelles».[74]

18. Madame la présidente, pour résumer sur ce point : une décision de la Cour sur l'existence d'une conduite frauduleuse du Royaume-Uni aurait des conséquences qui iraient bien au-delà de la délimitation de la frontière terrestre entre le Guyana et le Venezuela. Ce sont des conséquences qui incomberaient à un Etat — le Royaume-Uni — qui n'est pas partie à la présente instance. Le principe de l'*Or monétaire* interdit à la Cour de se prononcer sur le comportement de cet Etat sans son consentement.

V. Ni le Royaume-Uni ni le Venezuela n'ont accepté de considérer le Guyana comme le seul Etat titulaire de droits et obligations découlant de la question de la validité du compromis ou de la sentence

19. Je passe à mon troisième et dernier point que je peux résumer ainsi : le Venezuela n'a jamais accepté de reconnaître le Guyana comme la seule partie titulaire de droits et obligations par rapport au présent différend.

20. Mesdames et Messieurs les juges, le Royaume-Uni, le Venezuela et le Guyana auraient pu se mettre d'accord. Ils auraient pu reconnaître que le Guyana était l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au différend qui est devant vous. L'acceptation d'une telle succession par les parties concernées aurait empêché aujourd'hui le Venezuela d'invoquer le principe de l'*Or monétaire*.

21. Des exemples de ce type d'accord ne manquent pas. Parmi les affaires actuellement pendantes devant la Cour, une question de succession d'Etats se posait dans le cadre du différend concernant le *Projet Gabčíkovo-Nagymaros*. Or, dans cette affaire, avant de soumettre leur différend

[74] Nota de la Cancillería Venezolana de fecha 21 de junio de 1965 a la Embajada Británica en Caracas por medio de la cual se transcribe el texto del comunicado por la Cancillería y publicado el dia 25 de mayo de 1965 (annexe 15).

à la Cour, les parties ont pris soin de préciser leur position. Le compromis visant à établir la juridiction de la Cour énonce que la République slovaque est «l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros»[75]. L'intérêt à faire une telle précision dans un compromis a bien été mis en exergue par le juge Crawford. Comme le juge Crawford le souligne, un tel compromis montre que les Etats peuvent se mettre d'accord afin d'éviter l'application du principe de l'*Or monétaire*. Pour reprendre les mots du juge Crawford : «this was succession to exclusive responsibility by agreement, and there was no *Monetary Gold* issue»[76].

22. Pourtant, un tel accord qui établit la responsabilité exclusive du Guyana n'a jamais été conclu. Au contraire, l'accord de Genève de 1966, qui fonde la compétence de la Cour dans la présente instance, va clairement dans la direction opposée. L'accord ne présente pas le Guyana comme unique successeur en ce qui concerne tous les droits et obligations relatifs au différend entre le Venezuela et le Royaume-Uni. L'accord se limite à établir que, une fois devenu indépendant, le Guyana sera également partie à l'accord, et cela non pas en substitution, mais aux côtés du Royaume-Uni. L'accord n'exonère pas le Royaume-Uni de ses obligations et responsabilités. En vertu de l'accord, le Royaume-Uni a l'obligation de résoudre «à l'amiable, d'une manière acceptable pour les deux parties»[77] le différend qui l'oppose au Venezuela. Le Royaume-Uni reste donc partie active du présent différend. Et la position de cet Etat n'a pas changé dans les années qui ont suivi l'accord. Sa participation au protocole de Port of Spain le démontre bien[78].

23. Madame la présidente, cette situation a toujours été reconnue par les parties intéressées. Je me permets de citer la position d'un ancien haut fonctionnaire du Guyana, ancien ambassadeur du Guyana à Caracas, et l'un des auteurs les plus cités par le Guyana, M. Odeen Ishmael. Dans un article publié en 2015, M. Ishmael observe ce qui suit :

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[75] Compromis entre la République de Hongrie et la République slovaque visant à soumettre à la Cour internationale de Justice les contestations concernant le projet Gabčíkovo-Nagymaros, signé à Bruxelles le 7 avril 1993.

[76] Crawford, *State Responsibility. The General Part*, Cambridge University Press, 2013, p. 666.

[77] Préambule de l'accord de Genève de 1966.

[78] Protocole à l'accord tendant à régler le différend entre le Venezuela et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord relatif à la frontière entre le Venezuela et la Guyane britannique, signé à Genève le 17 février 1966 («protocole de Port of Spain»).

> «Great Britain never has handed over its rights as a party to the Guyana government, and must, therefore, play an active role in resisting any claim by Venezuela to Guyana's territory.»[79]

24. Mesdames et Messieurs les juges, là encore, la stratégie du Guyana consiste à minimiser l'importance de l'accord de Genève. Le Guyana observe que l'accord en tant que tel n'établit que des obligations procédurales pour les parties[80]. Cet argument est à la fois non pertinent et erroné. Non pertinent car il n'a aucune importance pour établir si le principe de l'*Or monétaire* s'applique ou pas. Aux fins de l'application de ce principe, ce qui compte c'est que l'accord n'exonère pas le Royaume-Uni de sa responsabilité. Erroné également, car il paraît artificiel de séparer obligations substantielles et obligations procédurales. Au contraire, l'accord montre bien que les obligations respectives de ces trois Etats, obligations à la fois substantielles et procédurales, sont intimement liées.

25. Qu'il me soit permis d'aborder un dernier argument du Guyana. Selon cet argument, l'application dans la présente affaire du principe de l'*Or monétaire* constituerait «an absurd result that would gravely offend not only the law of State succession, but the fundamental rules on decolonization and self-determination of peoples»[81]. Madame la présidente, ce scénario catastrophique se fonde entièrement sur une inférence erronée — l'inférence selon laquelle, si la Cour applique le principe de l'*Or monétaire*, elle finirait par reconnaître que le Royaume-Uni détient encore un intérêt sur le territoire contesté. Je le répète : le Venezuela ne prétend pas que le Royaume-Uni puisse aujourd'hui avoir un intérêt quelconque sur ce territoire. L'application du principe de l'*Or monétaire* dans la présente affaire n'a rien à voir avec la délimitation territoriale en tant que telle. Toute référence à la décolonisation ou au principe d'autodétermination des peuples est donc de la poudre aux yeux.

VI. Conclusions

26. Avant de terminer, je me permets d'insister sur le point que je pense avoir établi : l'accès à l'indépendance du Guyana n'a aucune conséquence sur l'application du principe de l'*Or monétaire*

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[79] Odeen Ishmael, «Guyana-Venezuela: The "controversy" over the arbitral award of 1899» (11 septembre 2015), disponible à l'adresse suivante : https://www.coha.org/guyana-venezuela-the-controversy-over-the-arbitral-award-of-1899/.

[80] EEG, par. 25.

[81] *Ibid.*, par. 32.

dans la présente affaire. Le différend devant la Cour concerne la détermination de l'existence d'une conduite frauduleuse de la part du Royaume-Uni. La Cour ne peut pas se prononcer sur une telle conduite frauduleuse et sur les conséquences qui en découlent sans le consentement du Royaume-Uni.

Madame la présidente, Mesdames et Messieurs les juges, je vous remercie pour votre attention et je vous prie, Madame la présidente, de bien vouloir donner la parole au professeur Antonio Remiro Brotóns.

The PRESIDENT: I thank Prof. Palchetti. I shall now give the floor to Prof. Antonio Remiro Brotóns. You have the floor, Professor.

M. REMIRO BROTÓNS :

RÉCAPITULATION

1. Madame la présidente, Mesdames et Messieurs les juges, il m'incombe de conclure ce premier tour de plaidoiries du Venezuela. Ma mission à cet égard est d'offrir une récapitulation des faits les plus *relevant* qui nous ont amenés jusqu'ici et qui confirment que le Royaume-Uni est une partie indispensable à l'affaire.

2. Tout a commencé, comme l'a déjà expliqué Madame la vice-présidente de la République, par l'usurpation du territoire vénézuélien par l'Empire britannique à l'ouest du fleuve Essequibo, finalement consolidée au moyen d'un arbitrage fallacieux. Le Venezuela et le Royaume-Uni, avec l'incorporation du Guyana à la suite de son indépendance, sont convenus de régler leur différend territorial par des procédures permettant de parvenir à un règlement pratique acceptable pour toutes les parties. Malheureusement, le Guyana a choisi d'ignorer l'objet et le but de cet accord, signé à Genève le 17 février 1966, et, en même temps, il l'a invoqué pour demander à la Cour de se prononcer sur la validité de la sentence arbitrale du 3 octobre 1899 rendue entre le Venezuela et la Grande-Bretagne. La Cour s'est déclarée compétente sur ce point — une compétence que le Venezuela conteste — et, ce faisant, elle a soulevé également un problème de recevabilité de la requête, qui ne peut être examinée sans la présence, comme partie indispensable, du Royaume-Uni. C'est pourquoi nous sommes ici.

A. L'usurpation

3. Madame la présidente, Mesdames et Messieurs les juges, le Royaume-Uni s'est installé à l'est de la rivière Essequibo grâce à la cession des établissements néerlandais en Guyane par les Pays-Bas dans le traité de Londres du 13 août 1814.

4. Le Venezuela était devenu indépendant en 1810, succédant à la Couronne espagnole de tous ses droits. Ces droits s'étendaient à la Guayana Esequiba, conformément aux traités signés par la Couronne.

5. A partir de 1840, l'Empire britannique décida d'ignorer le *pacta sunt servanda* et de s'emparer du territoire à l'ouest du fleuve Essequibo par voie *de fait*.

6. Vaines étaient les revendications et les protestations qui, au fil des décennies, ont été formulées ; vains les accords, comme celui conclu par l'échange de notes des 18 novembre et 20 décembre 1850 entre le Venezuela et la Grande-Bretagne, qui a matérialisé l'engagement à maintenir le *statu quo* territorial de 1840. Le Royaume-Uni a essayé de dessiner unilatéralement de nouvelles frontières sur des cartes toujours plus agressives et ambitieuses, ressortant directement à la falsification et adultération par le *Colonial Office* de ses lignes.

7. Déjà à l'époque, Andrew Carnegie, que sans doute vous connaissez bien, capturait avec exactitude le *modus operandi* sur le terrain. Dans ses mots, déjà sur l'écran, dans la langue originale — j'utiliserai le français :

> «[la Grand Bretagne] commence modestement par revendiquer une frontière ; le Venezuela lui demande de soumettre ses prétentions à l'arbitrage ; cela lui est refusé ; on oublie l'affaire pour un temps, lorsqu'il apparaît que la frontière de l'Angleterre a été déplacée de beaucoup et qu'elle englobe davantage de territoire contigu au Venezuela ; nouvelle remontrance du Venezuela, et nouvelle pause. Lorsque la question est relancée, la Grande-Bretagne découvre qu'elle s'est encore trompée et qu'elle n'a pas revendiqué suffisamment, et que sa troisième revendication va bien au-delà de la deuxième. Enfin, une quatrième ligne est tracée, qui s'étend sur des gisements aurifères de grande valeur et place réellement la Grande-Bretagne sur les rives de l'Orénoque.»[82]

8. Face à la puissance de l'Empire britannique, une jeune république, maintes fois bafouée, a tenté de s'élever par la voie diplomatique. Toutefois, l'égalité souveraine des Etats, aussi formelle soit-elle, ne s'est pas appliquée à leurs relations. C'était l'époque où l'on prêchait le droit international des *pays civilisés*, clairement différenciés des *barbares et des sauvages*. C'est sur la base de ces catégories et ces idées, assumées par des internationalistes respectables et craignant Dieu,

[82] Carnegie, A., "The Venezuelan Question", *The North American Review*, 1896, Vol. 162, No. 471, pp. 133-134.

tels que James Lorimer[83] ou Fedor Fedorovic Martens[84], entre autres, que la domination coloniale trouvait la justification et le refuge.

9. Dans la pratique, les républiques latino-américaines, conceptuellement *civilisées*, étaient traitées, ou plutôt maltraitées, comme des pays barbares ou semi-civilisés. C'est dans ce contexte que va s'orchestrer l'arbitrage sur la Guayana Esequiba à la fin du XIX^{e} siècle.

B. L'arbitrage

10. Madame la présidente, Mesdames et Messieurs les juges, l'Empire britannique avait toujours catégoriquement refusé de négocier avec le Venezuela l'arbitrage proposé à maintes reprises par la République, jusqu'à ce que le président des Etats-Unis, Grover Cleveland, invoquant la *doctrine Monroe*, devienne le seul interlocuteur du Gouvernement britannique.

11. Le traité d'arbitrage relatif au règlement de la question de la frontière, signé le 2 février 1897, était, en réalité, la reproduction d'un accord préliminaire concerté et conclu le 12 novembre 1896 par le secrétaire d'Etat, Richard Olney, et l'ambassadeur britannique, Sir Julian Pauncefote, sous la supervision de Lord Salisbury, premier ministre et secrétaire des relations extérieures britannique. Un cadre entièrement anglo-américain qui consolidait, sous menace d'abandon, le rôle marginal et marginalisé du Venezuela.

12. L'ambassadeur Pauncefote rassurait son premier ministre à Londres, dans sa lettre du 18 décembre 1896, expliquant que la question serait arbitrée «comme si la controverse était entre la Grande-Bretagne et les Etats-Unis»[85].

13. Selon les mots de Paul Reuter,

> «[l]es conditions dans lesquelles le Venezuela avait consenti à se faire représenter, en dehors de tout protectorat ou de toute institution régulière, par un pays tiers semblent se

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[83] Lorimer, J., *The Instituts of the Law of Nations. A Treatise on the jural relations of separate political communities*, Edimburgh and London, Blackwood, 2 vol., 1883-1884.

[84] Martens, F.F., *Sovremennoe meždunarodnoe pravo civilizovannych «narodov»*, Sanktpeterburg, Tipografīja ministerstva putej soobščenīja, 1882-1883 ; traduction allemande (C. Bergbohm): *Völkerrecht. Das internationale Recht der civilisirten Nationen*, t. 1, Berlin, 1883 ; traduction française (de Alfred Léo) *Traité de droit international*, Paris, 1883.

85 Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (réf. I.DD No. 001763), annexe 5.

rencontrer rarement dans une procédure arbitrale, et révèlent une situation quasi coloniale»[86].

14. Madame la présidente, Mesdames et Messieurs les juges, au cours de la procédure, les arbitres britanniques ont semblé agir en tant que représentants du Gouvernement britannique dans une communication *fluide* et *très réservée* avec l'avocat principal du Royaume-Uni, Sir Richard Webster[87].

15. Pendant l'été 1899, le président du tribunal arbitral, Fedor Fedorovic Martens, et Sir Julian Pauncefote faisaient des allers-retours entre Paris et La Haye. A La Haye, où la première conférence de la paix débattait du projet de convention pour le règlement pacifique des différends internationaux, Martens se battait sans succès pour éviter l'obligation de motiver les décisions, une obligation définie comme une «garantie fondamentale»[88] ; sans aucun doute, un élément essentiel pour réduire les possibilités de compromis politique ou de nature arbitraire.

16. Comme on pouvait déjà le deviner, la décision rendue à Paris le 3 octobre 1899, où se tenaient les audiences d'arbitrage, allait être — et a été — une décision non motivée. C'est peut-être la raison pour laquelle, bien que disposant de trois mois pour rendre l'arrêt[89], six jours à compter de la clôture des audiences orales ont suffi pour le rédiger en un peu plus de huit cents mots, sans se laisser décourager par les milliers de documents sur la table et les exigences de l'arbitrage en droit qui avait été conclu. Tout simplement, le Royaume-Uni manquait de titres à l'appui de ses revendications.

17. La sentence arbitrale du 3 octobre 1899 est le fleuron du fait colonial. La sentence est venue *blanchir* l'occupation illégale par le Royaume-Uni d'un territoire indubitablement vénézuélien

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[86] Reuter, P., «La motivation et la révision des sentences arbitrales à la Conférence de la Paix de La Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Venezuela», *Mélanges offerts à Juraj Andrassy,* M. Nijhoff, La Haye, 1968, p. 246.

[87] Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (Réf. I.DD No. 001763), annexes 8-11.

[88] Report of Chevalier Descamps, in the name of the Third Commission, in J. Brown Scott (dir), *The Proceedings of The Hague Conferences,* Carnegie Endowment for International Peace, Washington, New York, Oxford University Press, 1920, p. 149.

[89] Article X du traité du 2 février 1897.

et a été, comme l'a dit Mallet-Prévost lui-même, quelques jours seulement après le prononcé de la décision, «un coup porté à l'arbitrage» («a blow to arbitration»)[90].

18. Grover Cleveland, lui-même, dans une lettre à Richard Olney, datée du 3 mars 1901, révélait : «En examinant le sujet, je suis surpris de constater à quel point la Grande-Bretagne a vraiment agi de manière mesquine et méchante.»[91]

19. Mais, après tout, le traitement de la soi-disant «question vénézuélienne» a servi à consolider la doctrine Monroe avec sa reconnaissance par la Grande-Bretagne — l'objectif avoué par Grover Cleveland, pour s'être intéressé à la question[92] — en échange de garantir au Royaume-Uni la large satisfaction de ses revendications à l'ouest de l'Essequibo, au détriment des droits souverains d'un Venezuela trompé. C'est ainsi que les bases du *grand rapprochement* des Etats-Unis et du Royaume-Uni ont été posées.

C. Le moment de la décolonisation

20. Madame la présidente, Mesdames et Messieurs les juges, pendant des décennies, un Venezuela impuissant face au Royaume-Uni a intériorisé la dépossession, son esprit rongé par un sentiment de profonde injustice, étouffé par le type de concepts qui condamnent les faibles face aux puissants, qui font de la résignation dans l'infortune une source de légitimation des intérêts des plus forts. La porte se ferme à la révision de situations injustes et anachroniques traduites dans des traités et des arbitrages qui semblent aujourd'hui scandaleux. Mais rien ne dure éternellement.

21. Le processus historique de décolonisation promu au sein des Nations Unies a ouvert des portes qui avaient été fermées pendant la longue période du colonialisme. Les Nations Unies ont admis la possibilité de revendications de la part d'Etats ayant subi l'usurpation d'une partie de leur territoire par une puissance coloniale, même si cette usurpation avait été consentie par un traité ou tout autre moyen de légitimation. Il fallait éviter qu'une application erronée de l'autodétermination

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[90] Lettre adressée au greffier de la Cour par l'agent de la République bolivarienne du Venezuela le 8 novembre 2022 (réf. I.DD No. 001763), annexe 12.

[91] Lettre du président Grover Cleveland au secrétaire d'Etat Richard Olney, datée du 3 mars 1901, Library of Congress of the United States, *Grover Cleveland Papers*, vol. 357, fol. 38.199. Aussi dans *Lettres de Grover Cleveland (1850-1908)*, A. Nevins (dir. publ.), New York : Houghton Mifflin, 1933.

[92] Cleveland, G., *Presidential Problems*, New York : The Century Co., 1904, p. 280.

d'une population résultant du fait colonial ne vienne consolider l'atteinte antérieure à l'intégrité territoriale d'un Etat voisin.

22. C'est à cette époque et dans ce contexte que, lorsque le Gouvernement de Londres a annoncé son intention de procéder à la décolonisation de la Guyane britannique, le Venezuela a présenté sa revendication sur la Guayana Esequiba à la IV^e^ Commission de l'Assemblée générale des Nations Unies, une revendication qui avait déjà été annoncée à l'aube de la Charte. Le Venezuela encourageait et favorisait le processus d'indépendance de la colonie de la Guyane britannique — bien sûr ! — ; mais il ne pouvait pas accepter son extension territoriale au-delà de l'Essequibo.

23. L'affaire a été rapidement retirée de l'ordre du jour de la IV^e^ Commission car les parties ont annoncé que, suite à ses recommandations, elles négociaient un accord. Pour le Venezuela, la décision du 3 octobre 1899 était nulle et non avenue.

24. Etait-il possible de négocier la soumission de ce litige à un tribunal arbitral ou à cette Cour elle-même ? Oui, c'était possible. Mais cela n'a pas été fait.

D. L'accord de Genève et l'arrêt du 18 décembre 2020

25. Les autorités britanniques, comme celles de la Guyane, étaient pressées, très pressées, de procéder à l'indépendance du territoire non autonome. La solution du différend territorial ne devait donc pas être recherchée dans la confirmation ou l'infirmation du caractère nul et non avenu de la décision du 3 octobre 1899, mais dans l'élaboration d'une procédure permettant de parvenir à un règlement pratique, acceptable pour toutes les parties, du différend sur «la frontière», comme en témoigne le titre de l'accord signé à Genève le 17 février 1966[93].

26. Ce n'est pas sans ironie qu'une clause de cet accord soit maintenant invoquée pour liquider son objet et son but. Dans ses observations écrites sur les exceptions préliminaires du Venezuela, le Guyana affirme à maintes reprises que l'accord de Genève porte exclusivement sur les *procédures* de règlement du différend relatif à la *validité* de la sentence de 1899[94], et que le Secrétaire général

[93] Accord tendant à régler le différend relatif à la frontière entre le Venezuela et la Guyane britannique, signé à Genève le 17 février 1966, Nations Unies, *Recueil des traités*, 1966, nº 8192, p. 322 et suiv.

[94] EEG, par. 25 et 35.

des Nations Unies a décidé qu'il appartenait à la Cour de régler ce différend, le différend sur la *validité* de la sentence[95].

27. Ces deux observations sont erronées. A aucun moment des négociations ayant abouti à l'accord, il n'a été question que la Cour se prononce sur la validité ou la nullité de la sentence de 1899, et encore moins à la demande unilatérale de l'une des parties. D'autre part, la déclaration du Secrétaire général des Nations Unies du 30 janvier 2018 fait référence au fait qu'il a choisi la Cour «comme le moyen à utiliser pour la solution du différend (frontalier)» («as the means to be used for the solution of the (border) controversy») et non pas pour qu'elle se prononce sur la *validité* de ladite sentence[96].

28. La Cour, cependant, s'est déclarée compétente sur ce point dans son arrêt du 18 décembre 2020. Mais cette décision a toutefois soulevé un problème de recevabilité de la demande du Guyana.

29. La validité ou la nullité de la sentence arbitrale de 1899 ne peut être établie sans la présence du Royaume-Uni. C'est son comportement dans cette procédure qui est en cause et qui est déterminant pour la décision.

30. Le Venezuela accuse le Royaume-Uni de conduite inappropriée, illicite, frauduleuse. Sa responsabilité internationale est en jeu. Le Guyana ne peut pas remplacer le Royaume-Uni ou le substituer.

31. La qualité de partie indispensable du Royaume-Uni répond non seulement à la protection des droits et intérêts légitimes du Venezuela ainsi qu'à ceux de l'Etat absent, mais aussi au bon exercice de l'administration de la justice confiée à la Cour, qui ne dispose pas, à moins que le Royaume-Uni ne soit partie à la procédure, de la documentation qui permettrait un examen exhaustif des faits et, par conséquent, une décision dûment motivée sur le fond. Le Royaume-Uni est une partie indispensable tant pour la résolution de l'objet du litige que pour les conséquences juridiques que la décision de cette Cour peut engendrer.

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[95] *Ibid.*, par. 26 et 36.

[96] SG/SM/18879-CIJ/630, 30 janvier 2018.

E. Conclusion

32. Madame la présidente, Mesdames et Messieurs les juges, pour conclure : les exceptions préliminaires du Venezuela portent sur la recevabilité de la requête, et non sur la compétence de la Cour, et elles ne sont pas contraires à l'arrêt du 18 décembre 2020. Deuxièmement, le Venezuela a démontré que les principes juridiques régissant la condition de *partie indispensable* sont satisfaits en l'espèce. Troisièmement, il y a des indices très fermes d'une conduite inappropriée du Royaume-Uni dans l'arbitrage, ce qui engagerait sa responsabilité internationale. Quatrièmement, les négociations entre le Venezuela et le Guyana avaient pour but de parvenir à un arrangement pratique et mutuellement acceptable pour résoudre le différend territorial. Et, cinquièmement, le Royaume-Uni, comme une des parties à l'accord de Genève, a conservé un intérêt juridique permanent en ce qui concerne la validité de la sentence arbitrale.

33. Madame la présidente, Mesdames et Messieurs les juges, cette présentation met un terme au premier tour de plaidoiries du Venezuela. Je vous remercie pour votre attention.

The PRESIDENT: I thank Prof. Remiro Brotóns, whose statement brings to an end today's sitting. Oral argument in the case will resume tomorrow, Friday 18 November 2022 at 3 p.m., for the first round of oral argument of Guyana. The sitting is adjourned.

The Court rose at 1.10 p.m.

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