

DECLARATION OF JUDGE *AD HOC* WOLFRUM

The relationship between the Geneva Agreement and the Monetary Gold principle — Subsequent practice of the parties to the Geneva Agreement — Subject-matter of the legal dispute between Guyana and Venezuela.

1. Having voted in favour of the conclusions reached by the Court, I nevertheless consider it appropriate to submit some considerations on the reasoning of the Court. I will discuss briefly only three aspects, namely the relationship between the application of the Monetary Gold principle¹ and the Agreement between Venezuela and the United Kingdom of Great Britain and Northern Ireland (the “Geneva Agreement”), the subsequent practice of the parties to the Geneva Agreement, as well as the subject-matter of the dispute before the Court. These issues are interlinked. The objective of this declaration is to endorse the reasoning of the Court either by supplementing it or by emphasizing a particular aspect.

2. Venezuela relied, in its reasoning, dominantly on the Monetary Gold principle, arguing that the United Kingdom was an indispensable third party without the participation of which the Application of Guyana was inadmissible². It is hard to deny that, at first glance, the situation in this dispute resembles the factual situation between Albania, Italy, France, the United Kingdom and the United States of America in the case of *Monetary Gold Removed from Rome in 1943* and the situation between Indonesia, Portugal and Australia in the *East Timor* case (*Portugal v. Australia*)³. What is different in the present case is the existence of the Geneva Agreement between Venezuela, the United Kingdom and, ultimately, Guyana.

3. I agree with the findings of the Judgment that the United Kingdom directly or indirectly declined to take part in the attempts to resolve the controversy over the dispute between Venezuela and then British Guiana. Referring to Article 33 of the United Nations Charter, the Geneva Agreement provides for possible avenues for resolving the dispute by non-judicial or judicial means. By leaving the resolution of the dispute to Venezuela and now Guyana alone⁴, the United Kingdom made it clear that it would not

¹ See Judgment, para. 63; see also *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19.

² CR 2022/21, p. 20, para. 49 (Rodríguez); p. 36, para. 3 (Espósito); pp. 42-43, paras. 1-2 (Tams); CR 2023/23, pp. 14-15, paras. 25-26 (Tams); see also the Judgment, paras. 76-77.

³ *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90.

⁴ See Articles IV and VI of the Geneva Agreement.

participate in the endeavour. While accepting the sole obligation of these two States, the United Kingdom was well aware that, in resolving the dispute, acts or omissions of the arbitrators appointed by the United Kingdom, as well as activities of representatives of the United Kingdom in the context of the 1899 Award, may be addressed.

4. Theoretically, there are two options regarding how to interpret the Geneva Agreement. One option is to consider that the Geneva Agreement embodies the consent of the United Kingdom as required under the Monetary Gold principle, so that the Court may exercise its jurisdiction in this case without the United Kingdom participating. The second and preferable option is, in my view, that treaty arrangements, such as the Geneva Agreement, and the Monetary Gold principle are two parallel approaches to protect procedurally the interests of a third State — here the United Kingdom. Whereas the Monetary Gold principle covers the issue in the abstract, the Geneva Agreement covers the particular situation before the Court and thus is to be considered a *lex specialis*. It is therefore necessary, as the Judgment states, to first interpret the Geneva Agreement in order to ascertain whether the United Kingdom has declared with sufficient clarity that it leaves the resolution of the dispute between Guyana and Venezuela to the two Parties, in full awareness of the implications this may have for the United Kingdom, and whether there is a corresponding agreement of Guyana and Venezuela. I endorse the interpretation of the Geneva Agreement as set out in paragraphs 87 to 102 of the Judgment that the dispute could be settled without the involvement of the United Kingdom.

5. Consequently, I agree with the Court's conclusion that it was unnecessary to consider further the applicability of the Monetary Gold principle. As the Judgment rightly states in paragraph 107, the Monetary Gold principle does "not come into play".

6. This, however, does not mean that the Court cannot consider all information provided by the Parties concerning the alleged fraudulent behaviour of the arbitrators.

7. The Judgment considers it necessary to assess the subsequent practice of the parties to the Geneva Agreement under Article 31 (3) (b) of the Vienna Convention on the Law of Treaties (see paragraph 103 of the Judgment). The Court has dealt with the issue of subsequent practice in several cases, including in detail in the *Kasikili/Sedudu Island* case⁵. I wonder whether the long quotations in paragraphs 104 and 105 provide any direct information on the practice of the three parties to the Geneva Agreement. It is evident, though, that neither Venezuela nor Guyana attempted to draw the United Kingdom into the ongoing discourse concerning the settlement of the dispute, nor was there any initiative on the side of the United Kingdom to influence the

⁵ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999 (II)*, p. 1094, para. 74.

discourse between Guyana and Venezuela. This has been appropriately stated in paragraph 106 of the Judgment.

8. The Judgment does not pronounce itself on the subject-matter of the dispute in detail. However, Venezuela has stated in a variety of contexts that the interests of the United Kingdom also form the very subject-matter of any decision that the Court would have to render on the merits, because the invalidity of the 1899 Award arises from the allegedly fraudulent conduct of the United Kingdom in respect of the arbitration which resulted in the 1899 Award⁶. Venezuela also submits that the disposition of the commitments and responsibilities of the United Kingdom constitutes the “very object” and the “very essence” of the decision in the current case⁷. It remains unclear as to whether Venezuela refers to the subject-matter of this dispute as an important element of the future deliberations or whether Venezuela attempts to redefine the subject-matter which was originally defined on the basis of the Application of Guyana. In light of this uncertainty, it seems appropriate to introduce some clarifying remarks on the subject-matter of this dispute before the Court.

9. The Court has on several occasions pronounced itself on the subject-matter of a dispute. In the *Fisheries Jurisdiction* case, it stated:

“There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it.

Paragraph 1 of Article 40 of the Statute of the Court requires moreover that the ‘subject of the dispute’ be indicated in the Application; and, for its part, paragraph 2 of Article 38 of the Rules of Court requires ‘the precise nature of the claim’ to be specified in the Application. In a number of instances in the past the Court has had occasion to refer to these provisions. It has characterized them as ‘essential from the point of view of legal security and the good administration of justice’ and, on this basis, has held inadmissible new claims, formulated during the course of proceedings, which, if they had been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267; see also *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14, and *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173).”⁸

⁶ CR 2022/21, p. 51, para. 36 (Tams); p. 36, para. 4 (Espósito); CR 2022/23, p. 14, para. 22 (Tams).

⁷ Preliminary Objections of the Bolivarian Republic of Venezuela (POV), paras. 32-33; CR 2022/23, p. 10, para. 2 (Tams); see also the Judgment, para. 77.

⁸ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29.

The Court continued:

“It is for the Court itself, while *giving particular attention to the formulation of the dispute chosen by the Applicant*, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties[.]”⁹

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

“The subject of the dispute being quite concrete, the Court cannot entertain the suggestion made by the Agent of the United Kingdom Government at the sitting of October 1st, 1951, that the Court should deliver a Judgment which for the moment would confine itself to adjudicating on the definitions, principles or rules stated, a suggestion which, moreover, was objected to by the Agent of the Norwegian Government at the sitting of October 5th, 1951. These are elements, which might furnish reasons in support of the Judgment, but cannot constitute the decision. It further follows that even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, *the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree.*”¹⁰

11. Referring to the jurisprudence of the Court, the arbitral tribunal in the *South China Sea* case¹¹ reiterated these findings.

12. Although the Court has consistently stated that, in deciding on the subject-matter of a dispute it will examine the application and pleadings of

⁹ *Ibid.*, p. 448, para. 30 (emphasis added).

¹⁰ *Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, p. 126 (emphasis added).

¹¹ United Nations, *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award on Jurisdiction and Admissibility of 29 October 2015, Reports of International Arbitral Awards (RIAA)*, Vol. XXXIII, p. 62, para. 150. The relevant paragraph reads:

“Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterised. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the [United Nations] Convention [on the Law of the Sea] or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to ‘isolate the real issue in the case and to identify the object of the claim’. In so doing it is not only entitled to interpret the submissions of the parties, but bound to do so. As set out in *Fisheries Jurisdiction (Spain v. Canada)*, it is for the Court itself ‘to determine on an objective basis the dispute dividing the parties, by examining the position of both parties’. Such a determination will be based not only on the ‘Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence’. *In the process, a distinction should be made ‘between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute.’*” (Emphasis added.)

both parties, it has always emphasized that particular attention should be paid to the formulation of the applicant. In the case at hand, it is to be noted that the Court, in its Judgment of 18 December 2020, had stated that the subject-matter of the dispute was “the validity of the 1899 Award about the frontier between British Guiana and Venezuela and the related question of the definitive settlement of the land boundary between Guyana and Venezuela”¹². The Court had reached its conclusion in that Judgment on the basis of the Geneva Agreement. This subject-matter is to be distinguished from arguments “used by the parties to sustain their respective submissions on the dispute”, as stated in the *Fisheries Jurisdiction* case¹³.

(Signed) Rüdiger WOLFRUM.

¹² *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 2020, p. 492, para. 135.

¹³ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 449, para. 32.