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Jurisdiction and Admissibility: Never the Twain Shall Meet?

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CASE COMMENT: JURISDICTION AND ADMISSIBILITY: NEVER THE TWAIN SHALL MEET?

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*Jurisdiction and admissibility questions are often conflated in the practice of international tribunals, including the International Court of Justice, where preliminary objections concerning jurisdiction and/or admissibility are commonly raised. The ICJ is required to rule on preliminary objections before proceeding to the merits of the dispute as issues of jurisdiction and admissibility are often dispositive. Once preliminary objections are raised, the proceedings on merits stand automatically suspended and an incidental procedural phase is opened, as per Article 79*bis *of the ICJ Rules. If the ICJ upholds a preliminary objection, the whole case or certain claims may not proceed to merits at all. As such, preliminary objections are a powerful tool for the parties to ICJ proceedings.*

As common as they are, preliminary objections continue to retain an allure of ambiguity since questions regarding their temporal and substantive limitations remain obscure. Particularly, it has been debated whether preliminary objections can be raised after a judgment on jurisdiction is delivered. Against this juncture, the April 2023 judgment of the ICJ in Guyana v Venezuela *brings much needed clarity and affirms that preliminary objections can be raised after a judgment on jurisdiction, as long as the same issues are not raised again. This judgment provides valuable lessons for students, academics and practitioners not only on ICJ practice and procedure, but also on the essence of the distinction between jurisdiction and admissibility. It also has ramifications for the international legal order more generally.*

I. Introduction

This paper focuses on the questions of jurisdiction and admissibility that arise from Venezuela's preliminary objections in the case concerning the *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* ("***Guyana v Venezuela***" or the **"2023 Judgment"**) before the International Court of Justice ("the **Court**" or "**ICJ**").

Preliminary objections concern either jurisdiction or admissibility, and they are commonly raised by parties to proceedings before the Court. The ICJ is required to rule on preliminary objections before proceeding to the merits of the dispute as issues of jurisdiction and admissibility are often dispositive.[1] Once preliminary objections are raised, the proceedings on merits stand automatically suspended and an incidental procedural phase is opened, as per Article 79*bis* of the ICJ Rules. If the ICJ upholds a preliminary objection, the case – or at least some of its claims – may not proceed to merits.

The paramountcy of preliminary objections is grounded in the principle that respondent states are vested with a fundamental procedural right to not submit to a court, as the court in question may lack jurisdiction or could be improperly seized.[2] To what extent and in what manner this fundamental procedural right may be invoked has been the subject matter of many a dispute before the ICJ.

In *Guyana v Venezuela*, the key question was whether a preliminary objection may be raised after a judgment on jurisdiction has already been issued. The underlying dispute between Guyana and Venezuela (the "**Parties**") dates back to the 19th Century, when the United Kingdom (the "UK") (as the colonizer of British Guiana, the former colonial name of Guyana) and Venezuela laid claim to the area

[1] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 639 at 658.
[2] *Ibid*.

between the mouth of the Essequibo River in the east and the Orinoco River in the west.[3]

The disputing parties entered the Treaty of Washington in 1897 to submit the delimitation issue to a five-member arbitral tribunal with Russian diplomat Fyodor de Martens as the chairperson (the "**Arbitral Tribunal**").[4] The Arbitral Tribunal issued an award dated 3 October 1899, delimiting the boundary between the then colony of British Guiana and Venezuela (the "**1899 Award**").

After several decades of compliance, in 1962, Venezuela refused to recognize the 1899 Award, alleging corruption on the part of the UK agents and the Arbitral Tribunal, based on a note left by the late Severo Mallet-Prevost.[5] These allegations led to further negotiations between the parties and resulted in a settlement in 1966 (the "**Geneva Agreement**").[6]

Under the terms of the Geneva Agreement, Venezuela and Guyana attempted to settle the boundary dispute through a Mixed Commission and subsequently, good offices of the United Nations Secretary-General ("**UNSG**"), to no avail.[7] On 30 January 2018, the UNSG concluded that the amicable processes failed, and using the powers delegated to his office under the Geneva Agreement, the UNSG chose the ICJ as the means of dispute settlement.[8] Accordingly, Guyana filed its application on 29 March 2018 (the "**Application**"), asserting the validity of the 1899 Award.

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[3] *Arbitral award of 3 October 1899 (Guyana v Venezuela)*, [2023] ICJ Rep at para 30, online: <icj-cij.org> [perma.cc/V26W-WSXP] [*Guyana* 2023].
[4] *Case concerning Arbitral Award of 3 October 1899 (Co-operative Republic of Guyana v Bolivarian Republic of Venezuela)*, "Memorial of Guyana" (19 November 2018), ICJ Pleadings (vol 1) 1, online: <icj-cij.org> [perma.cc/CHG5-UL5F].
[5] William Cullen Dennis, "The Venezuela-British Guiana Boundary Arbitration of 1899" (1950) 44:4 AJIL 720 at 721–25.
[6] *Guyana* 2023, *supra* note 3 at para 39.
[7] *Guyana* 2023, *supra* note 3 at paras 45–51.
[8] *Guyana* 2023, *supra* note 3 at para 51.

Despite initially refusing to participate in the proceedings,[9] Venezuela decided to raise a preliminary objection on 7 June 2022, nearly 18 months after the ICJ issued its judgment on jurisdiction on 18 December 2020, finding that it had the jurisdiction to adjudicate Guyana's Application regarding the validity of the 1899 Award ("**2020 Judgment**").[10]

On 6 April 2023, the ICJ admitted Venezuela's preliminary objection, although it was raised after the 2020 Judgment on jurisdiction. While the preliminary objection was ultimately rejected because of its substance, the ICJ permitted Venezuela to belatedly participate in the proceedings. The 2023 Judgment elucidates – for the first time and in unequivocal fashion[11] – the critical distinction between the "existence" and the "exercise of the Court's jurisdiction",[12] which goes to the heart of the admissibility of Venezuela's preliminary objection.

The issue remains topical, as Venezuela continues to resist the ICJ's jurisdiction and politicize the matter.[13] Since the 2023 Judgement, the ICJ unanimously indicated provisional measures for non-aggravation and specifically asked Venezuela to maintain the status quo (the "**Order**").[14] In apparent defiance of the Order, Venezuela has held a referendum and asserted a popular mandate pursuant to the referendum's results, purporting to exercise alleged

[9] *Guyana* 2023, *supra* note 3 at para 6.
[10] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Preliminary Objections of Venezuela to the Application" (7 June 2022), ICJ Pleadings at paras 9–12, online: <icj-cij.org> [perma.cc/8UY4-NCQQ].
[11] Sarah Thin, "Admissibility vs Jurisdiction in Guyana v Venezuela (ICJ)" (23 April 2023), online (blog): <ejiltalk.org> [perma.cc/6RFS-WGFD] [Thin].
[12] *Guyana* 2023, *supra* note 3 at para 64.
[13] Andreína Chávez Alava, "Venezuela Reaffirms 'Historical Truth' Over the Essequibo, Rejects ICJ Jurisdiction", *VenezuelaAnalysis* (10 April 2024), online: <venezuelanalysis.com> [perma.cc/768B-RAZ8] [Alava].
[14] *Arbitral Award of 3 October 1899*, Order of 1 December 2023, [2023] ICJ Rep, online: <icj-cij.org> [perma.cc/MYY4-N6CQ]. Although the judges endorsed the same order, some judges delivered separate opinions as their reasoning differed from that of the majority. See *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, Order of 1 December 2023, Declaration of Judge Sebutinde, [2023] ICJ Rep, online: <icj-cij.org> [perma.cc/N4ZK-SYGK]; *Arbitral Award of 3 October 1899*, Order of 1 December 2023, Separate Opinion of Judge Robinson, [2023] ICJ Rep, online: <icj-cij.org> [perma.cc/7S2J-9MAG].

rights in respect of the territory under dispute.[15] On the other hand, the Parties continued their diplomatic engagement,[16] and in April 2024, Venezuela lodged its so-called counter-memorial with the ICJ under protest.[17] As the saga continues, the fundamental legal questions as to jurisdiction and admissibility of disputes before the ICJ remain relevant and raise interesting questions for future cases, including in the context of third-party interventions.

This paper is structured as follows: Part II discusses the key aspects of the 2020 Judgment. Part III delves into Venezuela's preliminary objection and Guyana's response, including an analysis based on the 2023 Judgment. Part IV concludes the discussion, highlighting certain compelling aspects of the 2023 Judgment.

II. 2020 Judgment

The 2020 Judgment resolved the question of the ICJ's jurisdiction to decide Guyana's Application. The controversy over jurisdiction arose primarily because of a unique feature of the Geneva Agreement, which empowered the UNSG to choose a means of dispute settlement stipulated in Article 33 of the Charter of the United Nations until the controversy is resolved or until all the means of peaceful settlement contemplated therein are exhausted.[18]

Notably, the Geneva Agreement did not expressly enshrine the consent of the parties to submit a controversy to the ICJ. Venezuela argued that it only provides for a decision by a third party, i.e., the UNSG, regarding the choice of the means of settlement. Venezuela

[15] "Venezuela claims large support for annexing oil-rich Guyana territory", *AlJazeera* (4 December 2023), online: <aljazeera.com> [perma.cc/EJ8Y-SDE7].
[16] See API Agency for Public Information, News Release, "Venezuela & Guyana sign joint peace Declaration of Argyle" (15 December 2023), online: <gov.vc>. [perma.cc/9KVZ-DP39].
[17] Alava, *supra* note 13.
[18] *Geneva Agreement to resolve the controversy over the frontier between Venezuela and British Guiana*, 17 February 1966, UKTS 1966 No 13, art IV [Geneva Agreement].

further argued that consent by the parties would be subsequently required for the Court to assert its jurisdiction.[19]

The Court did not accept Venezuela's interpretation, observing that it would defeat the authority of the UNSG and violate the object and purpose of the Geneva Agreement to interpret the UNSG's powers as subject to subsequent consent by the States.[20] The Court held that the UNSG was empowered to make a binding decision regarding judicial settlement, thereby referring the matter to the ICJ.[21] This is the first case involving a third-party referral to confer jurisdiction upon the Court,[22] although there are other treaties that provide appointing authority to the UNSG.[23]

Further, the Court reviewed the Geneva Agreement, which referred to "the controversy . . . which has arisen" between the parties.[24] Noting the usage of the present perfect tense, the Court concluded that only claims that existed as on the date of the Geneva Agreement would fall within the material scope of the Court's jurisdiction.[25]

The Court's treatment of the jurisdictional issues indicates that the Geneva agreement may share more in common with special agreements (i.e., *compromis*) than a compromissory clause contained within a treaty, since the latter usually also encompasses disputes over future events.

III. Venezuela's Preliminary Objection

As mentioned above, Venezuela raised a preliminary objection after the ICJ delivered the 2020 Judgment on jurisdiction. Hence, the

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[19] *Memorandum of Venezuela (Guayana v Venezuela)*, "Memorandum of Venezuela on the Application filed before the ICJ by Guyana" (29 March 2018), ICJ Pleadings, online: <icj-cij.org> [perma.cc/NJ7D-ELDN].
[20] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, [2020] ICJ Rep 455 at 487 [*Guyana* 2020]; see also (*ibid* at 511, Robinson J); (*ibid* at 501–02, Abraham J, dissenting); (*ibid* at 510, Gaja J); (*ibid* at 507, Bennouna J, dissenting); (*ibid* at 519, Gevorgian J).
[21] *Guyana* 2020, *supra* note 20 at 477.
[22] Winston Anderson, "Arbitral Award of 3 October 1899 (Guyana v. Venezuela)" (2022) 116:4 AJIL 836 at 836.
[23] See e.g. *Treaty of Peace with Romania*, USSR, UK, US, Australia, BSSR, etc., and Romania, 10 February 1947, 42 UNTS 645, art 33; see also *Guyana* 2020, *supra* note 20 at 497, Tomka J.
[24] Geneva Agreement, *supra* note 18, art I.
[25] *Guyana* 2020, *supra* note 20 at 492.

question was two-fold: (A) whether the objection is barred by the *res judicata* effect of the 2020 Judgment; and (B) if not, whether it has any merit.

A. RES JUDICATA EFFECT OF 2020 JUDGMENT

i. Venezuela's position

Venezuela asserted that its preliminary objection was not an appeal of the 2020 Judgment on jurisdiction.[26] Venezuela clarified that it accepts the *res judicata* effect of the 2020 Judgment and claimed that it only seeks to challenge the admissibility of Guyana's Application.[27]

Venezuela argued that the UK is an indispensable party to the proceedings primarily because the claim of invalidity of the award is premised on proving that UK agents having corrupted members of the tribunal. Venezuela argued that as this is an admissibility issue and as the 2020 Judgment only dealt with the issue of jurisdiction, it should not be constrained from raising a preliminary objection as to admissibility.[28]

Further, Venezuela noted that the ICJ's Order dated 19 June 2018[29] requested the Parties to only address issues of jurisdiction and not matters of admissibility.[30] As such, Venezuela argued that its preliminary objection was within the time-limit under Article 79*bis* of the Rules of Court.[31]

Lastly, Venezuela argued that its objection based on Monetary Gold is not affected by the *res judicata* effect of the 2020 Judgment

[26] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Public sitting held at the Peace Palace" (17 November 2022), ICJ Pleadings at 20, online: <icj-cij.org> [perma.cc/9QLE-E5HS] [Public sitting 17].
[27] *Guyana* 2023*, supra* note 3 at para 57.
[28] *Guyana* 2023, *supra* note 3 at para 58.
[29] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, Order of 19 June 2018, [2018] ICJ Rep 403.
[30] Public sitting 17, *supra* note 26 at 23.
[31] *Guyana* 2023, *supra* note 3 at para 59.

since this particular issue was not decided by that Judgment, either expressly or by necessary implication.[32]

ii. Guyana's response

Guyana argued that Venezuela's purported objection is a veiled attack on the Court's jurisdiction, which was already decided in the 2020 Judgment.[33] According to Guyana, the objection would only be admissible if it is shown to arise out of the ICJ's 2020 Judgment. In Guyana's view, Venezuela's preliminary objection does not arise out of the 2020 Judgment as the underlying facts were known to Venezuela since the conclusion of the Geneva Agreement; and regardless of the Geneva Agreement, Venezuela had complied with the 1899 Award for six decades.[34]

Guyana asserted that the ICJ had also ruled on the issue of admissibility, with *res judicata* effect, on the basis that the Court recognized it was "validly seised of the dispute between the Parties by way of the Application of Guyana",[35] and that it had jurisdiction to "entertain" it.[36] As such, on Guyana's case, Venezuela's objection concerns jurisdiction of the ICJ, which was rendered moot as it had already been determined by the Court.

Guyana stressed that *res judicata* is enshrined in Articles 59 and 60 of the Statute, according to which the ICJ's judgments are final and without appeal. Guyana argued that Venezuela is indirectly seeking to appeal the 2020 Judgment, which has expressly or implicitly decided questions of jurisdiction and admissibility.[37]

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[32] Public sitting 17, *supra* note 26 at 26.
[33] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Written Observations of Guyana on Venezuela's Preliminary Objections" (15 July 2022), ICJ Pleadings at para 4, online: <icj-cij.org> [perma.cc/5TJF-RHWR] [Observations of Guyana].
[34] *Guyana* 2023, *supra* note 3 at para 36.
[35] *Guyana* 2020, *supra* note 20 at 488.
[36] *Ibid* at 493.
[37] Observations of Guyana, *supra* note 33 at para 5.

iii. Analysis on implications of *res judicata*

The 2020 Judgment addresses issues of jurisdiction and does not delve into admissibility. This raises the question of whether the 2020 Judgment is only logically and legally consistent with the proposition that the case is admissible. In other words, the question is whether the findings on jurisdiction extend to issues of admissibility as well. This is in line with the ICJ's 2007 Judgment in the *Bosnian Genocide*.[38]

Guyana sought to conflate questions of jurisdiction and admissibility, by arguing that the ICJ has already decided on both in the 2020 Judgment through necessary implication. However, Venezuela highlighted the key distinction between the two aspects through the *Nottebohm* case, where the ICJ had found jurisdiction only to later find Liechtenstein's application inadmissible.[39] As such, existence of jurisdiction would not necessarily presuppose the exercise of it.

The question remained whether Venezuela is indirectly seeking to appeal the 2020 Judgment. In *Bosnia v Serbia*, the ICJ held that where there is a judgment on jurisdiction with *res judicata* effect, as per Article 36(6) of the Statute, it may not be questioned or re-examined, with limited exceptions of revision under Article 61 of the Statute.[40]

Indeed, the rationale behind *res judicata* is grounded in the essential nature of the ICJ's judicial function, i.e., the finality of awards and the need for stability in legal relations.[41] Denial of the *res judicata* effect of the 2020 Judgment, would, in Guyana's view, deprive it of the

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[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzogovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at 95 [*Bosnia v Serbia*].
[39] *Nottebohm Case (second phase) (Liechtenstein v Guatemala)*, [1955] ICJ Rep 4 at 26.
[40] *Bosnia v Serbia*, *supra* note 38 at 101.
[41] *Ibid* at 101.

benefit of the judgment already obtained, resulting in a "breach of the principles governing the legal settlement of disputes".[42]

Ultimately, the question is whether the *res judicata* effect of the 2020 Judgment would preclude an admissibility objection premised on the *Monetary Gold* principle. To resolve this issue, the entire judgment must be considered, and it must be assessed whether the judgment expressly or by necessary implication deals with this question. In *Nicaragua v Colombia*, the ICJ observed that "for the application of res judicata . . . it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed".[43] Hence, it is important to consider the 2020 Judgment in totality and not merely focus on the operative part.

As discussed above, the 2020 Judgment only deals with the question of jurisdiction, whereas Venezuela's objection that the UK is an indispensable third party is a question of admissibility.[44] In any event, a review of the 2020 Judgment in its entirety does not provide any indication that the question of an indispensable third party was raised or considered.[45]

Additionally, the threshold to preclude further objections is high. For instance, in *Bosnia v Serbia*, the ICJ found that its finding on jurisdiction *ratione materia* under Article IX of the Genocide Convention was "consistent, in law and logic" with a finding that the conditions concerning the States' capacity to appear before the Court were already met.[46] This high threshold is not met in the present case. There is no indication in the 2020 Judgment that issues of admissibility, including the issue of an indispensable third party, were considered; nor is there any implication by law or logic that an assessment of issues

[42] *Ibid* at 90–91.
[43] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)*, [2016] ICJ Rep 100 at 126.
[44] See also *Arbitral Award of 3 October 1899*, Declaration of Judge Iwasawa, [2023] ICJ Rep at para 4, online: <icj-cij.org> [perma.cc/7UDF-RS4S].
[45] See *Guyana* 2023, *supra* note 3, Couvreur J at para 14, partially dissenting, online: <icj-cij.org> [perma.cc/4MGH-S7TA].
[46] *Bosnia v Serbia*, *supra* note 38 at 99.

of jurisdiction would necessarily foreclose an assessment of the issues of admissibility.

Therefore, in light of the reasons discussed above, the ICJ rightly found that Venezuela's preliminary objection is a question of admissibility which would not be precluded by the *res judicata* effect of the 2020 Judgment.[47]

B. MONETARY GOLD EXCEPTION

i. VENEZUELA'S POSITION

Venezuela argued that the UK's alleged conduct in corrupting the Arbitral Tribunal was an essential reason for the nullity of the 1899 Award.[48] In Venezuela's view, to assess the validity of the 1899 Award, it would be essential to rule upon the legality of the UK's actions as a "prerequisite".[49]

Venezuela focused on two specific acts of alleged fraud by the UK.[50] First, they pointed out the purported collusion between the UK's counsel and the arbitrators, to obtain political concessions in favour of the UK. Second, they pointed to alleged adulteration of the maps submitted to the arbitral tribunal. As such, Venezuela considered the UK to be an indispensable party, in the absence of which the ICJ could not determine the validity of the 1899 Award.

Venezuela also advanced the following ancillary arguments in support of its contention that the UK is an indispensable party[51]: i) the UK and Venezuela were parties to the Washington Treaty, whilst Guyana was not; ii) the UK and Venezuela were parties to the arbitral

[47] *Guyana* 2023, *supra* note 3 at para 70.
[48] Public sitting 17, *supra* note 26 at 42.
[49] *Ibid* at 44.
[50] *Ibid* at 37–38.
[51] *Ibid* at 20.

proceedings that resulted in the Award of 1899, whilst Guyana was not; and iii) the UK continues to be a party to the Geneva Agreement.

Venezuela drew a parallel to the *Monetary Gold*[52] and *East Timor*[53] cases, discussed further below. Lastly, Venezuela asserted that if the 1899 Award is set aside, it would seek reparations from the UK[54] and as such, the ICJ's findings would hold legal consequences for the UK.

i. Guyana's position

Guyana argued that the UK is not an indispensable party and in any event, the UK consented to the ICJ resolving a dispute between Guyana and Venezuela by negotiating and becoming party to the 1966 Geneva Agreement.[55] Article IV therein provides Guyana and Venezuela the exclusive right to refer disputes to the ICJ (through delegated powers to the UN Secretary General) without envisaging any role for the UK.

Further, Guyana argued that the UK consented to such a mechanism with full awareness that any judgment concerning the validity of the 1899 Award would involve resolution of Venezuela's allegations regarding the UK's conduct vis-à-vis the Arbitral Tribunal.[56] As such, in Guyana's view, the UK waived any right it may have had in the judicial process or, in the alternative, the UK had simply consented to judicial procedure taking place in its absence.[57]

Guyana stressed that the allegations against the UK associated with the 1899 Award pivot around the wrongful conduct of the

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[52] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v France, UK and USA)*, [1954] ICJ Rep 19 [Monetary Gold case].
[53] *East Timor (Portugal v Australia)*, [1995] ICJ Rep 90 [East Timor case].
[54] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Public sitting held at the Peace Palace" (21 November 2022), ICJ Pleadings at 17, online: <icj-cij.org> [perma.cc/BP2Z-JF29].
[55] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Public sitting held at the Peace Palace" (18 November 2022), ICJ Pleadings at 30, online: <icj-cij.org> [perma.cc/V3CW-63CX] [Public sitting 18].
[56] *Ibid* at 51.
[57] *Guyana* 2023, *supra* note 3 at para 84.

arbitrators and not the UK, *per se.*[58] In Guyana's view, the conduct of a party would not taint the arbitral award. In particular, Guyana pointed to *Croatia v Slovenia*, where the misconduct by one of the arbitrators was the pivotal issue, and the State agent's collusion with the arbitrator would only be assessed by way of implication rather than as a prerequisite.[59]

Therefore, Guyana reiterated that Venezuela's preoccupation with the UK as an indispensable party is a mere red herring and the subject-matter of the case does not concern the state responsibility of the UK under international law.[60] In other words, the responsibility of the UK would not have to be assessed as a prerequisite, but rather that it would simply be an implication of the judgment, thereby not giving rise to the application of the *Monetary Gold* principle.

ii. Analysis of Venezuela's Monetary Gold objection

a) Applicability of the Monetary Gold Principle

The ICJ resolved the controversy surrounding the *Monetary Gold* principle without delving into its substance.[61] Rather, the ICJ interpreted the 1966 Geneva Agreement through the principles enshrined in the *Vienna Convention on the Law of Treaties* to find that it does "not provide a role for the United Kingdom in choosing, or in participating in, the means of settlement of the dispute pursuant to Article IV".[62]

Therefore, the Court concluded that the 1966 Geneva Agreement records the mutual understanding of the parties and that it would be

[58] *Guyana* 2023, *supra* note 3 at para 82.
[59] *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, "Public sitting held at the Peace Palace" (22 November 2022), ICJ Pleadings at 15, online: <icj-cij.org> [perma.cc/6AJE-TKQ6].
[60] *Ibid* at 16.
[61] *Guyana* 2023, *supra* note 3 at para 107.
[62] *Guyana* 2023, *supra* note 3 at paras 95, 102.

Guyana and Venezuela who will participate in resolving the controversy.[63] As a corollary, the UK accepted that Venezuela's allegations regarding its conduct would be determined in its absence.[64]

Further, as per Article 31(3) of the *Vienna Convention on the Law of Treaties*,[65] the Court reaffirmed its conclusion in light of the Parties' subsequent conduct surrounding the Geneva Agreement, which did not indicate that they considered the UK to be a necessary party.[66] Indeed, the weakness of Venezuela's case on the *Monetary Gold* exception is exposed by its consistent participation in the Mixed Commission, and even filing its 28 November 2019 memorandum without any mention of the UK as a necessary party.[67]

As such, the ICJ concluded that the provisions of the Geneva Agreement preclude an argument that the UK might be a necessary party to dispute settlement under the said Agreement.[68] The ICJ did not analyse the merits of the *Monetary Gold* exception, thereby losing a valuable opportunity to elucidate the application of the elusive and controversial exception[69] that has been applied in very few cases.[70] Nevertheless, for the sake of argument, the author briefly delves into the substance of the *Monetary Gold* principle.

b) The merits of the Monetary Gold Principle

That the ICJ can only exercise its jurisdiction over a State with the consent of that State is a well-established principle of international

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[63] *Guyana* 2023, *supra* note 3 at para 96.
[64] *Guyana* 2023, *supra* note 3 at para 97; see also *Arbitral Award of 3 October 1899 (Guyana v Venezuela)*, Declaration of Judge *ad hoc* Wolfrum, [2023] ICJ Rep at para 3, online: <icj-cij.org> [perma.cc/6SGW-E4RB] [Wolfrum Declaration].
[65] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31(3) (entered into force 27 January 1980).
[66] *Guyana* 2023, *supra* note 3 at paras 103, 106; see also *Wolfrum Declaration*, *supra* note 64 at para 7.
[67] Public sitting 18, *supra* note 55 at 54 para 36; see also *Guyana* 2023, *supra* note 3, Bhandari J at para 5, online: <icj-cij.org> [perma.cc/RZE9-BQEW].
[68] *Guyana* 2023, *supra* note 3 at para 107.
[69] See e.g. Zachary Mollengarden & Noam Zamir, "The Monetary Gold Principle: Back to Basics" (2021) 115:1 AJIL 41.
[70] Ori Pomson, "Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?" (2019) 10:1 J Int Dispute Settlement 88 at 104.

law embodied in the ICJ Statute.[71] In the *Monetary Gold* case, the Court found that "although Italy and the three respondent States have conferred jurisdiction upon the Court, [the Court] cannot exercise this jurisdiction".[72] The Court could not determine Italy's entitlement nor the priority vis-à-vis UK's entitlement, since the legal interests of Albania constituted the "very subject-matter" of the requested decision.[73]

In the *East Timor* case, the question was whether Portugal or Indonesia power to make treaties concerning the continental shelf resources of East Timor, and therefore, whether Indonesia's entry into and continued presence in the territory was lawful, which could not have been determined without Indonesia as a party.[74] Some scholars, notably the late Judge Ajibola, argue that it is a question of a characterisation of the issue.[75]

If the essential question is not whether Indonesia has the power to conclude the treaty but whether Portugal as the administrative Power of East Timor has the exclusive authority in international law to conclude treaties on behalf of East Timor, would Indonesia still be an indispensable party? This question is open to debate. In the author's view, the characterisation or nomology of an issue should not alter its fundamental nature. Even if the question is framed as an assessment of Portugal's authority, it would be incomplete to consider the same without evaluating any competing authority of Indonesia.

It is clear from ICJ jurisprudence that the *Monetary Gold* principle applies only where a determination of the legal position of a third State is a necessary pre-condition to the determination of the case

[71] Statute of the International Court of Justice, 33 UNTS 993, art 36.
[72] Monetary Gold case, *supra* note 52 at 33.
[73] Monetary Gold case, *supra* note 52 at 32.
[74] East Timor case, *supra note* 53 at 105.
[75] Bola Ajibola, "The International Court of Justice and Absent Third States" (1996) 4:1 African YB Intl L Online 83.

before the Court.[76] An inference or implication as to the legal position of that third State is not enough: its position is protected by Article 59 of the Statute.[77]

In *Certain Phosphate Lands in Nauru*, the Court in its judgment first considered the question of its jurisdiction. 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.[78]

The Court recognized that a finding regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned. However, the Court did not need a finding of that legal situation to form a basis for their decision.

In a similar vein, the ICJ's findings regarding the 1899 Award may imply that the UK's conduct in those arbitral proceedings might be unlawful. However, the lawfulness of the UK's conduct is not the subject matter of the dispute. Rather, it is a mere facet to the determination of the validity of the 1899 Award, based on whether the arbitral tribunal was compromised. Therefore, in the author's view, there is arguably no merit in Venezuela's claim that the UK is an indispensable third party. This conclusion is further reaffirmed by Venezuela's consistent State practice and the interpretation of the Geneva Agreement, which evidence that the parties did not foresee a role for the UK in any dispute resolution process concerning the Geneva Agreement.

IV. Conclusion

[76] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, "Application Instituting Proceedings Submitted by Croatia" (2 July 1999), ICJ Pleadings, online: <icj-cij.org> [perma.cc/UZ6Z-DCM5].
[77] Statute of the International Court of Justice, 33 UNTS 993, art 59.
[78] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, [1992] ICJ Rep 240 at 262ff.

In the practice of the ICJ, it is generally accepted that objections not brought in the preliminary phase or objections raised after the prescribed time-period may be re-submitted along with the case on merits. It is up to the ICJ to decide the objections before proceeding to a discussion on the merits.[79] Only where the respondent State proceeds to present its case on merits without raising any objections on jurisdiction may it be argued that it has acquiesced to the jurisdiction of the ICJ, giving rise to *forum prorogatum.*[80]

The threshold is high for excluding preliminary objections and the 2023 Judgment affirms this conclusion. The author agrees with the Court that the Venezuela's preliminary objection is a question of admissibility, and it is not barred by the *res judicata* effect of the 2020 Judgment, which only deals with the existence of the Court's jurisdiction. As such, there were no procedural grounds to dismiss Venezuela's preliminary objection, which nevertheless ultimately failed for lack of substance.

The Court's interpretation of the Geneva Agreement to infer the UK's consent to absent itself from any dispute resolution process under the Geneva Agreement is compelling. Certainly, where the terms of an agreement clearly demonstrate a common understanding regarding the lack of a continued involvement of a certain party, it is baseless and outright contradictory to argue that such a party's involvement is nevertheless indispensable to proceedings under the agreement. Therefore, Venezuela's argument premised on the *Monetary Gold* principle was tangential to the core issue, which was that the UK consented to non-involvement in dispute settlement under the Geneva Agreement.

Even on substance, for the reasons discussed above, Venezuela's arguments based on the *Monetary Gold* principle do not appear to hold

[79] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, [2014] ICJ Rep 226 at 342.
[80] *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)*, [1972] ICJ Rep 46 at 52.

water. It is worth noting that only in two cases – the eponymous case and the *East Timor* case – has the ICJ upheld a *Monetary Gold* exception to exercising its jurisdiction. As such, it is not surprising that Venezuela's objection did not sail through.

The Court's analysis of the UK's consent to non-involvement affirms that the procedural right enshrined in the indispensable third-party principle may be waived. That said, the crucial fact is that the UK did not waive its right as part of the procedure before the ICJ; rather, its waiver was inferred from the 1966 Geneva Agreement. This aspect is relevant to third-party interventions in ICJ proceedings, which is highly topical at the moment given the 32 interventions filed in *Ukraine v Russia*.[81]

Further, it is a separate question whether the ICJ's position should set a procedural precedent, providing recalcitrant parties a back-door to challenge the Court's authority and to protract the proceedings.[82] In other words, by adopting a restrictive reading of *res judicata* and a refined approach to jurisdiction vis-à-vis admissibility, the ICJ has at once enriched the jurisprudence whilst potentially providing a second bite at the cherry to intransigent parties.

Therefore, in more than one sense, *Guyana v Venezuela* contributes to the ICJ jurisprudence and holds potential implications for future cases before the Court, both for parties present and absent, and for public international law more generally.

[81] *Allegations of Genocide under the Genocide Convention (Ukraine v Russian Federation)*, [2024] ICJ Rep, online: < icj-cij.org> [perma.cc/L5MM-YJWR].
[82] Thin, *supra* note 11.