

SYMPOSIUM ON ZACHARY MOLLENGARDEN & NOAM ZAMIR “THE MONETARY GOLD PRINCIPLE: BACK TO BASICS”

THE MONETARY GOLD PRINCIPLE: A MATTER OF SUBMISSIONS

Pierre d'Argent*

In “*The Monetary Gold Principle: Back to Basics*,” Zachary Mollengarden and Noam Zamir claim that the well-known principle runs against fundamental ICJ statutory provisions. It would “depart” from Article 36(1), “undermine” Article 62, “import factors external” to Article 59 and “obscure . . . rather than illuminate . . . the relevant rules of law” contrary to Article 38(1).¹ Additionally, the policy considerations upon which the principle is allegedly based—compliance, due process, and legitimacy—would support its abolition, rather than its perpetuation. I argue that the authors’ claims are unpersuasive in relation to Article 36(1) of the ICJ Statute (consent of the parties to adjudication) since they fail to distinguish between having jurisdiction in a case and exercising jurisdiction to decide a claim. The authors also overestimate the role of Article 62 in securing third-party interests, since only intervention as a party, rather than a non-party, is sufficient to overcome the *Monetary Gold* limitation.

Subject-Matter of the Dispute and Subject-Matter of the Claims

The principal claim of the Article is that the *Monetary Gold* principle “departs” from the principle of consensual jurisdiction as enshrined in Article 36(1) of the ICJ Statute. The *Monetary Gold* principle would wrongly require the Court to enquire about the consent of a non-party, or to take the absence of its consent into account for jurisdictional purposes.

It is common ground that Article 36(1) stands for the cardinal proposition that the jurisdiction of the Court over “cases” (“*affaires*”) rests solely on the consent of the parties. The parties in question are those that are parties to the *dispute* referred to the Court which, by such referral, becomes a “case” within the meaning of Article 36(1). Obviously, for the Court to have jurisdiction over the “case,” the respondent does not need to consent to the *claims* submitted for decision as there would be no dispute left to adjudicate; for the Court to have jurisdiction, it is enough that, together with claimant, the respondent somehow agreed that the Court has jurisdiction over the subject-matter of the *dispute*.

As is well-known and undisputed, the *Monetary Gold* principle is triggered only if the legal interests of a third absent state “form the very subject-matter of the decision that is applied for.”² It is thus not enough that the legal interests of a third state might be affected by a future judgment of the Court; the *Monetary Gold* principle only

* Full Professor at the University of Louvain, Louvain-La-Neuve, Belgium; Member of the Institute of International Law; Member of the Brussels Bar & Special Counsel to Foley Hoag LLP; formerly, First Secretary of the International Court of Justice.

¹ Zachary Mollengarden & Noam Zamir, *The Monetary Gold Principle: Back to Basics*, 115 AJIL 41, 71 (2021).

² *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 ICJ REP 261, para. 54 (June 26).

applies in the rather exceptional circumstances where the Court cannot adjudicate a claim submitted to it without deciding, as a legal and logical prerequisite, on the rights or obligations of the absent state.

The *Monetary Gold* principle is thus unrelated to the determination of the subject-matter of the *dispute* submitted to the Court for the purpose of deciding its consent-based subject-matter jurisdiction.³ Rather, the principle concerns the subject-matter of the *claims* submitted to the Court for adjudication (i.e., the “subject-matter of the decision that is applied for”) and which concretely articulate, or spell out, the dispute. Properly understood, the *Monetary Gold* principle applies only if it is impossible for the Court to decide on a *claim* submitted to it without, at the same time, adjudicating the rights or obligations of the third absent state. The operative part of the 1954 judgment is very clear in that regard. The Court declined “to adjudicate *upon the first Submission* in the Application of the Italian Government” despite having “jurisdiction conferred upon it by the common agreement of [the Parties].”⁴

The principle is about the *exercise* of jurisdiction, not about jurisdiction itself.⁵ However, because it relates to the subject-matter of submissions, the principle is very close to constituting a reason for declaring a submission inadmissible.⁶ In other words, its application very much depends on the way grievances are articulated. For instance, in *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, had the DRC requested from the Court that it adjudge and declare that Uganda conspired with Rwanda to use force illegally, the principle could have been triggered. However, the principle was not engaged by the DRC’s carefully worded submissions, not even by the one relating to the fighting between the respondent and the alleged third absent state (i.e., Rwanda) that occurred in the city of Kisangani.⁷ The fact that the Court, instead of addressing the entire dispute through the lens of the *Monetary Gold* principle, limited its possible relevance to one of the Congolese submissions only highlights the true object of the principle. It relates to the subject-matter of the submissions, rather than to the subject-matter of the dispute as such.

Because the *Monetary Gold* principle concerns the subject-matter of submissions in the context of a dispute over which the Court has subject-matter jurisdiction, nothing prevents the principle from applying *mutatis mutandis* to counter-claims. Admittedly, the Court has never applied the principle to counter-claims, and the issue has rarely—if at all—been addressed in scholarship. However, the possible application of the *Monetary Gold* principle to counter-claims again helps to clarify the principle’s object: it is about submissions. Refusing to entertain a counter-claim on the basis of the *Monetary Gold* principle would of course leave the jurisdiction of the Court in the case unaffected.

The points above are not weakened by the fact that the *dispositif* of the *East Timor* judgment did not declare, as in 1954, that the Court could not adjudicate upon the *submissions* of the claimant. Instead, it stated that the Court “cannot in the present case exercise the jurisdiction conferred upon it by the [optional clauses of] the Parties . . . to adjudicate upon the *dispute* referred to it.”⁸ Indeed, before upholding Australia’s *Monetary Gold* objection, the Court first dismissed its objection according to which Indonesia was the rightful respondent in

³ On the objective determination of the subject-matter of the dispute by the Court see e.g., [Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination](#) (Ukr. v. Russ.) 2019 ICJ REP 575, para. 24 (Nov. 8).

⁴ [Monetary Gold Removed from Rome in 1943](#) (It. v. Fr., U.K. & U.S.), 1954 ICJ REP 34 (June 15).

⁵ [East Timor](#) (Port. v. Austl.), 1995 ICJ REP 106, para. 38 (June 30); Pierre d’Argent, [Preliminary Objections: International Court of Justice \(ICJ\)](#), MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (Hélène Ruiz Fabri ed., 2019).

⁶ See [Mollengarden & Zamir](#), *supra* note 1, at n. 72 referring to Judge Tomka’s opinion in the Marshall Islands case; see also JAMES CRAWFORD, [BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW](#) (2019) referring to the inadmissibility of claims.

⁷ [Armed Activities on the Territory of the Congo](#) (Dem. Rep. Congo v. Uganda), 2005 ICJ REP 236, 236–238, paras. 196–204 (Dec. 19).

⁸ [East Timor](#) (Port. v. Austl.) 1995 ICJ REP 106, para. 38 (June 30).

the case and that no dispute existed between the Parties.⁹ The phrasing of the operative part was thus nothing more than a shortcut for referring to the claims submitted for decision by Portugal because the central issue to be determined was about the “very subject-matter of the Court’s [requested] decision.”¹⁰ The Portuguese claims about the unlawfulness of Australia’s conclusion of a treaty with Indonesia could not have been decided by the Court without “necessarily determin[ing] whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf.”¹¹

Thus, the *Monetary Gold* principle does not command inquiry into the consent of a third state in order to determine if the Court has jurisdiction over the dispute; it only requires doing so in order to determine if such jurisdiction can be *exercised* over a *claim* (or counter-claim) that is part of the case but actually hides a dispute with a third state. It bears repeating: the Court has never considered that the lack of consent of a non-party defeats the *existence* of its jurisdiction over the case; it has always ruled under the *Monetary Gold* principle that such jurisdiction could not be *exercised* over *claims* that, despite being part of the case, cannot be decided without making a finding on the rights or obligations of a non-party.

The authors write: “what appears to be straightforward inverse reasoning—‘if p, then q; ergo, if *not* p, then *not* q’—masks an interpolation.”¹² However, their formula actually masks a confusion because, under the *Monetary Gold* principle, the negated q is not the same as the non-negated q while the p’s respectively appertain to different subjects. Therefore, it is wrong to affirm that the *Monetary Gold* principle “privileges the consent of absent third parties, and thereby improperly directs the Court to refuse to decide cases over which it has jurisdiction.”¹³ The principle only directs the Court to refuse to decide *claims* over which it cannot *exercise* jurisdiction due to their inner configuration and content. Whether this results in the termination of the case altogether is purely circumstantial and only depends on the articulation of the various claims—as in the *Monetary Gold* case¹⁴—or on their common prerequisite—as in the *East Timor* case.¹⁵ If “the absence of a third party leaves the Court unable to exercise the jurisdiction otherwise afforded by Article 36,”¹⁶ it is simply because this non-exercise concerns certain claims while the existence of jurisdiction over the dispute pursuant to Article 36 remains unaffected. For lack of identical *causa petendi*, *res judicata* would not be an obstacle to a new Application concerning the same dispute between the same parties based on the same jurisdictional link but articulating different claims that do not engage the *Monetary Gold* principle.¹⁷

Intervention by Third Parties

The authors also claim that the *Monetary Gold* principle “undermines” Article 62 of the ICJ Statute which provides for the possible intervention of third states in a case. However, contrary to what they suggest, Article 62 is no perfect cure to the alleged pitfalls of the *Monetary Gold* principle.

⁹ *Id.* at 100, para. 22.

¹⁰ *Id.* at 102, para. 28.

¹¹ *Id.*

¹² *Mollengarden & Zamir*, *supra* note 1, at 43.

¹³ *Id.*

¹⁴ *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), 1954 ICJ REP 34 (June 15), at 33–34.

¹⁵ *East Timor* (Port. v. Austl.) 1995 ICJ Rep. 106, para. 38, n. 5 (June 30).

¹⁶ *Mollengarden & Zamir*, *supra* note 1, at 57.

¹⁷ On *res judicata*, see B. Salas Kantor & M. E. Zavala Achurra, *The Principle of res judicata Before the International Court of Justice: in the Midst of Comradeship and Divorce Between International Tribunals*, 10 J. INT’L DISP. SETTLEMENT 288 (2019).

To start with, let me say that I have no quarrel with the authors' claims that "Article 62 constitutes the appropriate, statutorily-designated mechanism for apprising the Court of third-party interests, that states should make greater use of it, and that the ICJ should be more liberal in assessing their applications to intervene."¹⁸ However, the *Monetary Gold* principle as such does not "work . . . at cross purposes to Article 62 by compelling the Court to dispose of the case before it can be fully apprised of the interests in play."¹⁹ Again, this is because the dispensation of the case altogether before any intervention pursuant to Article 62 is purely circumstantial and not a necessary outcome under the *Monetary Gold* principle. A third state may apply to intervene prior to the raising of preliminary objections by the respondent²⁰ and the Rules require that the Court treat such incidental proceedings "as a matter of priority."²¹ Moreover, as indicated earlier, the case may articulate some claims that do not come within the ambit of the *Monetary Gold* principle. Those claims will survive any challenge based on it, provided that they are not logically dependent on other claims that cannot be examined because of the principle.

I also have no quarrel with the authors' interpretation of "Article 62 as serving an information-producing function" and I agree that such interpretation "does not entail opening the doors of the Court to all comers."²² It is, however, not certain that considering Article 62 as an information-production device will entice the Court to open its doors more generously to interveners. In fact, it might have the exact opposite effect, as epitomized by the failed interventions of Costa Rica and Honduras in the *Nicaragua v. Colombia* case where the purpose of informing the Court through intervention was aptly used by Nicaragua's counsel to convince the Court not to grant it:

As [Costa Rica] has repeatedly emphasized, its purpose in bringing this Application [to intervene] was to inform the Court of its legal interests. It has now done so. Mission accomplished. On that happy note, Costa Rica, like the Cheshire cat in *Alice in Wonderland*, can slowly fade away, leaving only its smile behind.²³

Be that as it may, there is one fundamental blind spot in the authors' argument based on Article 62. Only an intervention of the third absent state *as a party* can cure the defects of claims disallowed under the *Monetary Gold* principle; an intervention as a non-party would not suffice.²⁴ This is because only an intervention as a party allows the Court to exercise jurisdiction as regards the intervening state by making relevant findings in the operative part of the judgment—and that is what is needed to overcome the *Monetary Gold* obstacle affecting a submission. Therefore, Article 62 is not, as such, the perfect procedural cure to the allegedly statutory-inconsistent *Monetary Gold* principle. It is only a partial cure and it is therefore not "undermined" by that principle. Moreover, intervening as a party requires that a jurisdictional link as to the subject-matter of the intervention exists with the parties to the case.²⁵ If such a link does not exist prior to the request for intervention, the respondent in the case would have no interest whatsoever in accepting the intervention on a *forum prorogatum* basis if the intervention might defeat its *Monetary Gold* objection. As a result, the intervention as a party would fail, and the *Monetary Gold* principle would be upheld. Thus, even an intervention as a party is not a guaranteed cure for claims exposed to the *Monetary Gold* principle; rather, that incidental proceedings and the principle share a common concern and are governed by a common condition.

¹⁸ [Mollengarden & Zamir](#), *supra* note 1, at 43.

¹⁹ *Id.*

²⁰ ICJ, [Rules of Court](#) art. 81 (1978).

²¹ *Id.* art. 84.

²² [Mollengarden & Zamir](#), *supra* note 1, at 62.

²³ Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene, Verbatim Record 31–32, para. 12 (*Reichler*), [CR 2010/13](#) (Oct. 13, 2010).

²⁴ [CRAWFORD](#), *supra* note 6, at 672.

²⁵ [Territorial and Maritime Dispute](#), (Nicar. v. Colom.), Application for Permission to Intervene, 2011 ICJ REP 432, para. 28 (May 4).

There is no space in this short essay to address the two other statutory arguments and the three policy arguments on which Mollengarden and Zamir base their attack on the *Monetary Gold* principle.²⁶ Throughout their paper, they note “the tensions between the bilateral presuppositions of the Statute and the increasingly multilateral nature of international affairs and international disputes.”²⁷ This observation is perfectly valid. However, in a world of coalitions and joint actions—which do not, per se, constitute the breeding ground for the *Monetary Gold* principle as the *Nauru* and *DRC v. Uganda* cases demonstrate—the bilateralism of the Statute also has some virtues. It is indeed probably the best way to assure procedural equality between the parties, which is a fundamental tenet of judicial proceedings. Importing a third state into a case on the basis of Article 62 may tilt that delicate balance in favor of one of the parties, and the Court will always be careful to prevent such transformation. Legitimacy through due process is also about that.

Conclusion

With their radical critique wrapped up in a striking title—*back to basics*—Mollengarden and Zamir suggest that, had they been more sophisticated and able to see the obvious, successive generations of judges would not have perpetuated a well-known principle on baseless grounds—even if only to decline to apply it on the facts of the case.²⁸ Offering the reader a sort of revelation shifts the argumentative burden to the “proponents”²⁹ of the received wisdom, now an opposing thesis, as the authors routinely do throughout their piece.³⁰ There is something artistic, or even religious, in such a way to proceed. However, this begs the question: where does the misunderstanding really lie?

Such is the cruelty of scholarship. Either the author’s paper will be confined to oblivion, or this one will be. Maybe both. In any event, neither paper rises to the expectations of Article 38(1)(d) of the Statute. Let us indeed be modest for a moment. The ongoing development of international law through its effective application by courts and tribunals renders our “teachings” always more “subsidiary” to solid case-law.

²⁶ Nor is there space to address the authors’ use of the [Relocation of the United States Embassy to Jerusalem](#) case throughout their paper. Prior to examining whether the *Monetary Gold* principle would prevent the Court from exercising jurisdiction over Palestine’s claims, the Court would have to determine if the bilateral obligations bundled in the Vienna Convention on Diplomatic Relations apply between parties to the Convention that do not entertain such relations.

²⁷ [Mollengarden & Zamir](#), *supra* note 1, at 74; see also *id.* at 45, 54, 56.

²⁸ See recently [Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean](#), Preliminary Objections, Judgment para. 97 (ITLOS, Jan. 28, 2021).

²⁹ The term is used twenty-four times in the paper.

³⁰ See [Mollengarden & Zamir](#), *supra* note 1, at 57, 59, 69, 71, 75.