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Jurisdiction or Admissibility? The Nature of the Monetary Gold Principle as Applied by the International Court of Justice

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Abstract: *This article seeks to address a fundamental theoretical question about the nature of the Monetary Gold principle as applied in the case law of the International Court of Justice. The primary inquiry revolves around whether the Monetary Gold principle pertains to the admissibility of claims before the Court, the jurisdiction of the Court to adjudicate a case, or whether it should be approached from an entirely different perspective.*

Keywords: *The Monetary Gold principle, Jurisdiction, Admissibility, Preliminary Objections.*

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1. Theoretical Introduction

The distinction between the concepts of admissibility and jurisdiction before the International Court of Justice (ICJ) often remains ambiguous in international law discourse, which has the potential to create considerable confusion. From a theoretical or academic perspective, this differentiation is typically emphasized as being significant. However, its practical utility is often questioned by some practitioners, who argue that the distinction is often less meaningful in real-world applications.

There have been even some instances in the history of the World Court where the parties themselves did not make a clear distinction when presenting arguments on the admissibility of a claim/jurisdiction before the judges, or in their written submissions, and the Court itself ended up not putting that much weight on the conceptual distinction in that particular case: "The Counter-Memorial of the United Kingdom, in Part II thereof, dealt with the merits of the case, the stated reason being that the United Kingdom thought assertions of the Republic of Cameroon should not remain unanswered. Part I of the Counter-Memorial raised a number of preliminary objections. These objections were developed at considerable length during the course of the oral hearing. For reasons which will subsequently appear, the Court does not find it necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds. During the course of the oral hearing *little distinction if any was made by the Parties themselves between "jurisdiction" and "admissibility".*"[1]

Practitioners frequently contend that whether an objection pertains to the admissibility of a claim before the ICJ or to the Court's jurisdiction to hear the case, the outcome is ultimately the same: the Court will dismiss the applicant's claim. Nevertheless, while the end result may indeed be identical, the paths leading to that conclusion are frequently quite distinct and fraught with complexities, unique to the issues of admissibility and jurisdiction. Each path encompasses different procedural and substantive challenges, which underscores the nuanced nature of these legal concepts as they are applied by the International Court of Justice.

Thus, the differentiation between the concepts of admissibility and jurisdiction is not merely a theoretical exercise, but a reflection of the nuanced nature of international dispute resolution. Recognizing and understanding these distinctions is often crucial for navigating the intricate landscape of international law and ensuring that legal principles are applied with precision

[1] *Northern Cameroons (Cameroon v United Kingdom),* International Court of Justice, Preliminary Objections, Judgment, ICJ Rep 15, 2 December 1963, p. 27.

and rigor. Practical considerations must not overshadow the theoretical importance of these concepts, as each concept plays a vital role in the adjudication process and the administration of justice on the international stage.

The eminent scholar and practitioner Jan Paulsson went so far as to assert, when referring to the notions of admissibility and jurisdiction, that: "They are indeed as different as night and day. It may be difficult to establish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exist."[2]

The essential difference between the two concepts as used in international adjudication has been concisely described as follows: "Unlike questions of jurisdiction that pertain to whether legal power exists or not, questions of admissibility pertain to whether or not the court may decline to exercise the power to adjudicate."[3] The Court itself pronounced on the subject 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."[4]

We can imply from these attempts at defining the "twilight zone," that another crucial distinction between the two concepts is that there is a certain element of discretion[5] that the Court can exercise when it ponders questions regarding the admissibility of a claim brought before it, and materialized in a submission, as opposed to the questions pertaining to the jurisdiction of the Court, where it not only has the right but also the duty to render a decision if it determines that it has jurisdiction over the matter.

Another crucial practical consideration to keep in mind when an objection concerns the admissibility of the claim or the jurisdiction of the Court is that jurisdictional objections can typically be raised at any stage of the

[2] Jan Paulsson, Gerald Aksen, Robert Briner (eds) "Jurisdiction and Admissibility",, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, 2005, pp. 601, 607.

[3] Yuval Shany, Cesare P.R. Romano, Karen J. Alter, Chrisanthi Avgerou (eds), "Jurisdiction and Admissibility", *The Oxford Handbook of International Adjudication*, 2013, p. 788.

[4] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6), para. 29..

[5] The Court uses this term especially when referring to the admissibility of requests for an Advisory Opinion.

proceedings before the Court and are not subject to the doctrine of waiver.[6] The ICJ has long recognized an implied duty to be vigilant herself on all matters of jurisdiction, the parties merely drawing the attention of the Court to such issues: "The Court's position, in regard to jurisdiction, cannot be compared to the position of municipal courts, amongst which jurisdiction is apportioned by the State, either *ratione materiae* or in accordance with a hierarchical system. This division of jurisdiction is, generally speaking, binding upon the Parties and implies an obligation on the part of the Courts ex officio to ensure its observance. Since in such cases the raising of an objection by one Party merely draws the attention of the Court to an objection to the jurisdiction which it must ex officio consider, a Party may take this step at any stage of the proceedings."[7] On the other hand, issues of admissibility, if not raised before the merits are addressed, will be generally considered waived.[8]

Other authors have also described the concept of jurisdiction to pertain to the *propriety of the Court's deciding the case*.[9] This was meant to refer to questions regarding the personal capacity of the claimant to appear before the Court, the legal nature of the claim and the title of jurisdiction that entails the consent of the parties.[10] On the other hand, admissibility is to be understood as being concerned with *formal or material defects in the claim as formulated,* assuming that the Court could, in principle, consider a case of that nature.[11]

Judge Fitzmaurice has also attempted to clarify the matter in his separate Opinion in *the Northern Cameroons* case: "A given preliminary objection may on occasion be partly one of jurisdiction and partly of receivability, but the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application

[6] Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals* (2002), Kluwer Law International, , p. 244.

[7] *Rights of Minorities in Upper Silesia (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26)*

[8] Chittharanjan F. Amerasinghe, *op.cit.*

[9] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 202.

[10] *Ibid.*

[11] *Ibid.*

of such a provision, then it will normally be an objection to the receivability of the claim."[12]

In terms of the importance that should be awarded to matters of jurisdiction, the late Shabtai Rosenne put it very well when saying that: "Jurisdiction is the link between the general political organization of international society and the functioning of the Court. It is the channel through which the law-applying organ receives its power to decide a case with binding force for the parties to that case. The question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more. When a respondent raises a matter of jurisdiction – the term is taken from Article 36, paragraph 6, of the Statute as will be explained later – it frequently indicates the absence of political agreement that the Court should entertain the case. These are not mere technical issues. This imposes an attitude of caution in everything relating to jurisdiction."[13]

Having thus briefly analyzed the importance of distinguishing between the two concepts and how this distinction is typically described in the literature and ICJ case law, we can now turn our attention to a more specific question in the realm of admissibility and jurisdiction: what is the nature of the Monetary Gold principle as applied by the International Court of Justice?

2. The Monetary Gold Principle

At first glance, when considering the various definitions and characterizations of the two concepts, it might seem that the issue of indispensable third parties, specifically the Monetary Gold principle, pertains more to admissibility than to jurisdiction. Indeed, because it relates to the subject-matter of submissions, the principle is very close to constituting question of admissibility. In other words, its application very much depends on the way the submissions themselves are articulated.[14] However, the principle actually pertains to the *exercise* of jurisdiction, rather than to the admissibility of a claim or to the Court's jurisdiction to adjudge the matter itself.[15]

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[12] The Northern Cameroons (Cameroon v. U. K.), 1963 I.C.J. 15 (Dec. 2), pp.102-103.

[13] Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006),Martinus Nijhoff,, p. 803.

[14] Pierre d'Argent, *The Monetary Gold Principle: A Matter of Submissions*,Symposium on Zachary Mollengarden & Noam Zamir "The Monetary Gold Principle: Back to Basics", p. 150.

[15] *Ibid.*

Upon closer examination of the actual Monetary Gold case, it becomes evident that this was not an issue related to any formal or material defects in the initial claim, defects that the claimant could have potentially corrected through a subsequent amended claim. Rather, the Monetary Gold principle seems to address a deeper, more fundamental question regarding the Court's jurisdiction and the way in which it might exercise the judicial function in accordance with the Statute. Specifically, this highlights the limitation that the Court cannot adjudicate a case if an indispensable third party has not given its explicit consent to be bound by the proceedings.

Therefore, the issue is fundamentally about the title of jurisdiction, or more precisely, the lack of such a title, which prevents the Court from ultimately exercising its jurisdiction in cases involving parties like Albania who have not consented to the Court's authority. This underscores the principle's focus on the jurisdictional legitimacy required for the Court to proceed with a case, rather than merely the admissibility of claims presented to it. It may look like just a "matter of submissions",[16] but it runs deeper than that.

States have also argued that the Court ought to find a claim *inadmissible* on the grounds that the interests of third parties will be affected. This was the case, for example, in the *Land and maritime boundary between Cameroon and Nigeria* (Preliminary objections, 1998), where Nigeria argued that the Court must find the application *inadmissible* (did not plea for the Court to refuse to exercise its jurisdiction)[17] because the requested maritime delimitation in the Gulf of Guinea regarded the interests of five coastal States between which there was no agreement as to the means of resolving the matter.

The Court initially rejected the preliminary objection because it deemed it to be a question that should be examined at the merits stage, where it finally declared that it could not accept that there was an overall inadmissibility, in that case, preventing it from deciding the dispute, preserving thus its ability of adjudication to the maximum practical extent possible.[18] It appears then that the correct way to deal with the rule represented by the Monetary Gold principle (the indispensable third party rule) is to characterize it as a matter of *jurisdiction* (lack of consent of the third party), or rather as a matter of the Court's *exercise* of its own jurisdiction, as opposed to a matter of *admissibility*

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[16] *Ibid.*

[17] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), ICJ Reports 1998, para. 112.

[18] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 576.

of a certain claim (which entails that there is a defect with the claim that could potentially be overcome by introducing another, amended claim, later).[19]

As we have seen, the Monetary Gold principle borrows defining characteristics from both admissibility and jurisdictional rules. Most notably, it is a matter of careful framing of the case on the Claimant's side that will ultimately result in whether the Court will assess the submissions and arrive at the conclusion that the Monetary Gold rule *precludes* it from exercising its jurisdiction. This is highly uncommon in jurisdictional matters because they typically cannot be resolved simply by the claimant configuring the dispute differently by way of its submissions.

The subtle intricacies that arise when an objection is raised for the absence of indispensable third parties was very well illustrated by professor Pierre d'Argent: "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. 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."[20]

There have been mentions regarding the character of the Monetary Gold Principle in seminal works of international law scholarship such as Brownlie's Principles of International Law, which squarely places it in the realm of admissibility: "An objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time. Examples include undue delay in presenting the claim, failure to exhaust local remedies, mootness, and *absence of a necessary third party*."[21]

At the same time, the author defines objections relating to jurisdiction as follows: "Objections to jurisdiction relate to conditions affecting the parties' consent to have the tribunal decide the case at all. If successful, jurisdictional

[19] Robert Kolb, *The International Court of Justice* (2013), Hart Publishing, p. 576-577.

[20] Pierre d'Argent, *op. cit.*

[21] James Crawford, *Brownlie's Principles of International Law* (2019), Oxford University Press, p. 667.

objections stop all proceedings in the case, since they deprive the tribunal of the authority to give rulings as to the admissibility or substance of the claim."[22]

However, if we look closely at the indispensable third-party doctrine, we can easily observe that an objection on the matter does indeed relate to consent, just not the consent of the parties that are before the Court, *but of a party that ought to be*. The Monetary Gold principle reveals thus a matter of fundamental legitimacy and authority of the international dispute resolution system envisaged by the Statute of the International Court of Justice and the essentially consensual nature of it.

The Monetary Gold Principle has historically been interpreted narrowly by the Court. This approach prevents a broad application of the principle, which would otherwise obstruct the Court's jurisdiction over a great deal of cases. Given that a decision often impacts the legal interests of third parties that did not give their consent for the ICJ to decide the dispute, a broader interpretation could significantly reduce the Court's caseload if it entailed a requirement for individual consent from all interested third parties.

As such, the restriction imposed by the Monetary Gold principle is a relatively limited one[23] because it *only* applies to this particular scenario: The Court must logically decide first a dispute over which it doesn't have jurisdiction, in order to be able to decide the dispute over which it has jurisdiction. This logical succession of disputes that are inextricably linked so that the legal interests of a third party would form "the very subject matter of the decision" is a rare occurrence. In fact, only two cases in the history of the Court's jurisprudence have found an actual application of the principle (*The Monetary Gold removed from Rome* and *The East Timor* cases).

In the case of *Certain phosphate lands at Nauru* (Nauru v. Australia, Preliminary objections, 1992), the Court has made it clear that the principle does not apply if there are simultaneous effects of the Court's judgment on third parties if there is not also a logical priority of one question over the other. In that case, Nauru's application concerned the administration of certain phosphate lands jointly exploited by Australia, New Zealand, and the UK. However, Nauru could only bring a claim before the Court against Australia because only Australia had a valid title of jurisdiction on which the claim could be based. It was clear that, because the projects were jointly administered, a judgment that found Australia in violation of international

[22] *Ibid.*

[23] *Ibid.*, p. 569.

obligations, would incur that New Zealand and the UK were also in violation of the same international obligations.

However, the Court decided that it was able to exercise its jurisdiction in this case because the decision would have only *incidental* (though simultaneous) effects on the legal interests of third States.[24] The Court highlighted that third States are typically protected by Article 59, which provides that a judgment is binding only between the parties involved and pertains solely to the specific case decided. In this instance, determining the responsibility of New Zealand and the United Kingdom was not necessary for determining Australia's responsibility, even though any findings could have implications for the legal situation of those two States.[25]

Respondent States have often attempted to broaden and extend the application of the Monetary Gold principle to serve their own legal interests and specific purposes in various proceedings. However, the International Court of Justice has always remained vigilant in not conceding to these efforts, for the aforementioned reasons. Therefore, the Monetary Gold principle remains applicable in a limited scope, addressing specific legal scenarios that are not frequently encountered in the Court's typical caseload.

3. A Potential Key to Interpretation

There exists a scarcity of comprehensive legal literature that thoroughly explores the fundamental essence of the Monetary Gold principle. Specifically, it remains uncertain whether this principle primarily concerns matters of the Court's jurisdiction, the admissibility of claims, or if it constitutes a distinct and separate legal concept altogether. This article aims to answer that specific question, on what is the nature of the Court’s self-imposed limit to adjudicate, stemming from its Statute, which has come to be known as the Monetary Gold principle.

As we have seen, the Monetary Gold principle limits the Court's jurisdiction in a way that incorporates defining characteristics from both objections to admissibility and jurisdiction. This hybrid character calls for a different and more nuanced approach when addressing the scope and nature of this principle as applied by the ICJ. This jurisdiction limitation is one of a more fundamental nature, similar to mootness, which may result in the refusal of

[24] *Ibid.*, p. 571.

[25] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *The Statute of the International Court of Justice - A Commentary*, (2019), Oxford University Press, p. 730.

the Court to exercise its jurisdiction on grounds such as propriety.[26] There have been certain doctrinal interpretations according to which the self-imposed limit stemming from the Monetary Gold rule implies the exercise of the Court's discretion, entailing a certain margin of appreciation on the part of the Court.[27]

However, this cannot be accepted when considering the wording of the ICJ's judgments regarding the Monetary Gold principle, as the Court often uses much stronger language, implying a peremptory limitation[28] rather than an exercise of discretion. For example, when Portugal tried to overcome the Monetary Gold obstacle by arguing that the *jus cogens* right of self-determination of peoples, which was central to the proceedings, should be prioritized over Indonesia's sovereignty (the latter being the focus of the Monetary Gold rule),[29] the Court said: "Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a 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. Where this is so, the Court *cannot act*, even if the right in question is a right *erga omnes*."[30]

In the *Monetary Gold removed from Rome* case, the Court used similar wording: "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania (…) Where (…) the vital issue to be settled concerns the international responsibility of a third State, *the Court cannot*, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[31]

Furthermore, the term *precluded* has been also utilized by the Court and the parties when referring to the Monetary Gold principle in the *Certain phosphate lands at Nauru* case: "But the absence of such a request in no way *precludes* the Court from adjudicating upon the claims submitted to it,

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[26] Chittharanjan F. Amerasinghe, *op.cit.*, p. 238.

[27] *Ibid.*

[28] *Ibid.*

[29] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *op. cit.*, p. 733.

[30] East Timor (Port. v. Austl.), 1995 I.C.J. 91 (Order of June 30), pp. 90, 102, para. 29.; Bogdan Aurescu, Ion Gâlea, Lazăr Elena, Ioana Oltean, "*Scurtă culegere de jurisprudență*", Hamangiu, 2018

[31] Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds.), *op. cit.*,p. 729.

provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for."[32]

As well as in the next paragraph where it rejected the Australian objection: "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the Monetary Gold case (…) Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom previous to the determination of Australia's responsibility. It nonetheless asserts that there would be a simultaneous determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally ***precluded*** by the fundamental reasons underlying the Monetary Gold decision. The Court cannot accept this contention."[33]

As evident from the Court's strong wording when discussing the effects of a finding that applies the Monetary Gold principle (it *cannot act*, it is *precluded* from exercising its jurisdiction), this rule represents a peremptory limitation to the Court's jurisdiction, rather than an exercise of its discretion. The Court cannot fulfill its judicial function when the interests of an indispensable third party would form "the very subject matter of the decision" because it would essentially go against its own Statute. The consent-based jurisdiction that the Court exercises under its Statute cannot permit such an irregularity as adjudicating a case between consenting parties while essentially and necessarily judging a case between non-consenting parties.

Thus, this is the key to interpretation that this article seeks to propose. We can assert that an objection invoking the Monetary Gold principle due to the absence of an indispensable third party might hold a more fundamental (peremptory) position than the typical objections the Court usually addresses regarding jurisdiction or admissibility. While an objection based on this principle effectively challenges the Court's *jurisdiction,* it does so indirectly; the title of jurisdiction presented to the Court by the parties to the case can be perfectly valid, and the Court could still be precluded from *the exercise of that jurisdiction.* It is not a problem with the top of the jurisdiction pyramid but rather with its foundation.

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[32] Certain phosphate lands at Nauru (Nauru v. Australia, Preliminary objections, 1992), ICJ, p. 260-261, pp. 54.

[33] *Ibid.*, p. 261, pp. 55.

4. Conclusions

In conclusion, the Monetary Gold principle and the indispensable third-party doctrine are crucial because they directly pertain to the core exercise of the judicial function, albeit having very narrow practical applicability nowadays due to the way the Court (rightly) confined their interpretation. There was a risk that extensively interpreting this doctrine would impede a great deal of potential dispute resolution before the ICJ and essentially give precedence to the consent of non-participating third-party States over the consent of the States appearing before the Court. However, the Court conclusively dealt with that risk by confining the interpretation of the doctrine to a particular scenario, both temporally and logically, as we have seen above.

Furthermore, applying this principle involves the interpretation and correct application of the Court’s own Statute, thus underscoring its essential role in maintaining the integrity and proper functioning of the Court's judicial processes. The significance of the Monetary Gold principle lies in its ability to ensure that the Court does not overstep its statutory bounds by effectively adjudicating cases involving non-consenting parties, thereby safeguarding the consent-based jurisdiction that underpins the Court's authority and legitimacy in the international arena.

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