International Court of Justice—preliminary objection—Monetary Gold *principle—jurisdiction and the exercise thereof—third state consent*

ARBITRAL AWARD OF 3 OCTOBER 1899 (GUYANA V. VENEZUELA). Preliminary Objection. 2023 ICJ Rep. 262. *At* https://www.icj-cij.org/case/171/judgments.
International Court of Justice, April 6, 2023.

On April 6, 2023, the International Court of Justice (ICJ or Court) rendered its judgment on Venezuela's preliminary objection in *Guyana v. Venezuela*. Venezuela argued that the United Kingdom was an indispensable third party to the case, rendering Guyana's application inadmissible under the *Monetary Gold* principle. Pursuant to the *Monetary Gold* principle, the Court may not adjudicate a case where, as logical prerequisite, it would need to pronounce upon the legal interests of a third state.[1] Guyana contended that Venezuela's preliminary objection was inadmissible and that, in any event, the *Monetary Gold* principle did not apply. The Court rejected both Guyana's claims on the admissibility of the preliminary objection (by a unanimous vote) and Venezuela's preliminary objection on the merits (by fourteen to one). In this context, the ICJ made two significant findings: First, the *Monetary Gold* principle does not concern the lack of jurisdiction, but rather constitutes a bar to the exercise thereof. Second, the *Monetary Gold* principle does not apply if the purportedly indispensable third state consents to the proceedings.

The ICJ's decision to entertain the preliminary objection, as well as its decision to reject it, were hardly dramatic. Nevertheless, the Court's reasoning in upholding the admissibility of the preliminary objection papers over the equivocal state of its prior case law and only partially answers the important question on the doctrinal basis of the *Monetary Gold* principle. Additionally, while the Court's reliance on the third state's consent is sound, it appears to diverge from earlier jurisprudence.

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The subject matter of the dispute in the case concerns the validity of an arbitral award from 1899 deciding a territorial dispute between Venezuela and the United Kingdom.[2] The arbitral tribunal awarded Venezuela territory on both sides of the Orinoco River and the United Kingdom—as sovereign of British Guiana—territory to the west of the Essequibo River. The parties subsequently adopted a demarcation agreement in 1905, based upon the 1899 award.

In 1962, Venezuela contested the validity of the 1899 award, claiming that the United Kingdom had colluded with arbitrators on the tribunal and obtained a more favorable award than should have been rendered. Venezuela and the United Kingdom, acting with the concurrence of the British Guiana government, engaged in both a fact-finding process and negotiations to settle the dispute, but these efforts were unsuccessful. Accordingly, in

[1] *See particularly* Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & N.I. & U.S.), Preliminary Question, 1954 ICJ Rep. 19, 32 (June 15); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 ICJ Rep. 240, para. 55 (June 26); East Timor (Port. v. Austl.), 1995 ICJ Rep. 90, para. 28 (June 30).

[2] Winston Anderson, Arbitral Award of 3 October 1899 (Guyana v. Venezuela), 116 AJIL 836 (2022).

February 1966, Venezuela and the United Kingdom adopted the Geneva Agreement[3]—to which Guyana would become a party upon attaining independence—the purpose of which was "to ensure a definitive resolution of the controversy between the Parties."[4] Under the Geneva Agreement, it eventually fell to the United Nations Secretary-General (UNSG) to choose for Guyana and Venezuela means of dispute settlement provided in Article 33 of the United Nations Charter for settling the territorial dispute. After a decades-long good office process failed to result in a settlement, in January 2018 the UNSG chose ICJ proceedings as the means for settling the dispute. On this basis, Guyana instituted proceedings against Venezuela at the ICJ. Venezuela refused to participate in the case on grounds that the UNSG lacked authority to refer the parties to the ICJ and thus that "the Court manifestly lacks jurisdiction."[5] The Court decided in June 2018 that "it must resolve first of all the question of the Court's jurisdiction," setting time limits for the parties to make written submissions on the matter.[6] In its judgment of December 18, 2020, the ICJ answered the question affirmatively, stating in the operative paragraphs of the judgment that "it has jurisdiction" to adjudicate the question of the validity of the arbitral award and the related issue of the border between the states.[7]

As is the Court's practice, after delivering the judgment, it proceeded to set time limits for the filing of Guyana's memorial and Venezuela's counter-memorial.[8] Guyana filed its memorial within the time limit; within three months of Guyana's filing, Venezuela submitted preliminary objections to the admissibility of Guyana's application—incidentally marking Venezuela's first formal participation in the case. Accordingly, pursuant to the Rules of Court,[9] the ICJ suspended proceedings on the merits of the case to first decide upon Venezuela's preliminary objections.[10]

The Court observed that Venezuela made "in substance only a single preliminary objection based on the argument that the United Kingdom is an indispensable third party without the consent of which the Court cannot adjudicate upon the dispute" (para. 27). The crux of Venezuela's objection was that "[t]o determine the validity of the [1899] Award, it would be necessary to evaluate the lawfulness of [the United Kingdom's] conduct."[11] For Guyana, Venezuela's preliminary objection was inadmissible since it sought to reopen the Court's 2020 judgment, which found with the force of *res judicata* that the Court had jurisdiction and because it was submitted after the time limits set by the Court in 2018.[12] On substance, Guyana contended that it was unnecessary for the Court to consider the legality

[3] Agreement to Resolve the Controversy Over the Frontier Between Venezuela and British Guiana, Feb. 17, 1966, 561 UNTS 321.

[4] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Jurisdiction of the Court, 2020 ICJ Rep. 455, para. 73 (Dec. 18) [hereinafter *Guy. v. Venez.*, Jurisdiction].

[5] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Order, 2018 ICJ Rep. 402, 403 (June 19).

[6] *Id.* Venezuela did file an informal communication to the Court laying out its arguments on jurisdiction.

[7] *Guy. v. Venez.*, Jurisdiction, *supra* note 4, para. 138(1).

[8] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Order, 2021 ICJ Rep. 188 (Mar. 8).

[9] ICJ Rules of Court (1978), Art. 79*bis* (entered into force July 1, 1978), *at* https://www.icj-cij.org/rules.

[10] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Order, 2022 ICJ Rep. 470 (June 13).

[11] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Public Sitting, Verbatim Record CR 2022/21, para. 22 (Nov. 17, 2022) (Espósito).

[12] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Public Sitting, Verbatim Record CR 2022/22, para. 34 (Nov. 18, 2022) (d'Argent).

of the United Kingdom's conduct for rendering a judgment on the merits,[13] and that in any event "the *Monetary Gold* principle is not engaged at all, because the United Kingdom has consented to these proceedings."[14]

On the question of the admissibility of Venezuela's preliminary objection, the Court held that when in previous cases addressing *Monetary Gold* principle objections, it "proceeded on the basis that the objection concerned the exercise of jurisdiction rather than the existence of jurisdiction" (para. 63). It further observed that "[o]nly an objection concerning the existence of the Court's jurisdiction can be characterized as an objection to jurisdiction" (para. 64). Noting that the operative paragraphs and its reasoning in its 2020 judgment "only address[ed] questions concerning the existence of the Court's jurisdiction" (para. 69), the Court concluded that Venezuela's *Monetary Gold* objection to the exercise of jurisdiction was not barred by the *res judicata* effect of its 2020 judgment. Similarly, the Court highlighted that its 2018 order on time-limits only directed the parties to submit arguments on its jurisdiction, meaning that Venezuela's present objection was not time-barred (paras. 72–73).

The ICJ proceeded to consider Venezuela's preliminary objection on its substance, finding it apt to first "consider the legal implications of the United Kingdom being a party to the Geneva Agreement" (para. 86). The Court observed that the relevant provisions of the Geneva Agreement do not stipulate any role for the United Kingdom in the settlement of the dispute, but solely refer to "British Guiana" or "Guyana" and Venezuela (paras. 90–93). For the Court, this proved that the United Kingdom accepted the dispute would be settled by Guyana and Venezuela, including by recourse to one of the means specified in Article 33 of the UN Charter (paras. 96, 102). Additionally, this acceptance occurred when "it was aware that such a settlement could involve the examination of certain allegations by Venezuela of wrongdoing by the authorities of the United Kingdom at the time of the disputed arbitration" (para. 97). On this basis, the Court concluded that "the Monetary Gold principle does not come into play in this case" (para. 107).

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The Court's two main conclusions—upholding the admissibility of the preliminary objection and the rejection thereof on its substance—contain significant developments in the ICJ's jurisprudence on the *Monetary Gold* principle. First, the Court explicitly recognized for the first time that a *Monetary Gold* objection is not an objection to the existence of jurisdiction. Second, it was the first time the ICJ recognized the inapplicability of the *Monetary Gold* principle due to the third state's consent. I shall consider each development in turn, highlighting certain implications and questions which follow.

While unequivocally recognizing for the first time that a *Monetary Gold* objection is not an objection to the existence of jurisdiction, the Court has not consistently adopted this approach, despite its reasoning in the present judgment appearing to suggest otherwise. For example, in *Israel v. Bulgaria*, the ICJ invoked the *Monetary Gold* case as authority for

[13] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Public Sitting, Verbatim Record CR 2022/24, para. 11 (Nov. 22, 2022) (Sands).

[14] Arbitral Award of 3 October 1899 (Guy. v. Venez.), Public Sitting, Verbatim Record CR 2022/22, para. 25 (Nov. 18, 2022) (Sands).

its statement that "the general scheme of the [United Nations] Charter and the Statute . . . founds the jurisdiction of the Court on the consent of States."[15]

Regardless of past inconsistencies, beyond the significance of this conclusion in the present judgment—namely, for delimiting the scope of the Court's 2020 judgment—the Court's approach in the present judgment does provide some clarity on its understanding of the doctrinal basis of the *Monetary Gold* principle, which is a matter of lingering controversy.[16] It has been hypothesized that the principle derives from Article 36(1) of the ICJ Statute; indeed, the only provision in the Statute suggested as a source of the principle. Article 36 explicitly governs the existence of the Court's jurisdiction by laying out the options for expressing consent to it. Article 36(1) requires that the "the parties refer" the case to the Court. As the argument goes, the "parties" in Article 36(1) are "those States whose international responsibility is concerned."[17] By rejecting the proposition that the *Monetary Gold* principle concerns the existence of jurisdiction, the Court effectively nullified the suggestion that the principle is found in this provision, and thus in the ICJ Statute.

This is a correct conclusion. Party status in a case is not determined by substantive considerations, which the aforementioned opinion would suggest, but instead depends on whether the state has been indicated as a party in the application or special agreement instituting proceedings.[18] This arises from Article 40(1) of the Statute, which stipulates that upon bringing a case to the Court, whether through an application or special agreement, "the subject of the dispute and the parties shall be indicated." The ICJ Rules of Court further elaborate that "the application shall indicate the party making it [and] the State against which the claim is brought."[19] Thus, "the parties" in the Statute are "the party making [the application]" and the "the State against which the claim is brought."[20] An indispensable third state is hence not a "party" within the meaning of the Statute.

Where, then, is the *Monetary Gold* principle found? The Court does not elaborate on this controversial issue, though several theories have been proposed by jurists—each compatible with the judgment. It seems that the Court's reasoning in the *Monetary Gold* case itself reflects an understanding that the principle derives from a general principle of law formed within the international legal system.[21] Yet, whether such a source of law exists in international law, in addition to general principles of law deriving from municipal legal systems, is controversial.[22]

[15] Aerial Incident of July 27th, 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 ICJ Rep. 127, 142 (May 26); *see also* Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 ICJ Rep. 6, para. 64 (Feb. 3); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 ICJ Rep. 3, paras. 116–17 (Feb. 3).

[16] *Cf.* Zachary Mollengarden & Noam Zamir, *The* Monetary Gold *Principle: Back to Basics*, 115 AJIL 41 (2021).

[17] *Cf.* D.H.N. Johnson, *The Case of the* Monetary Gold Removed from Rome in 1943, 4 Int'l Comp. L. Q. 93, 109–10 (1955); *see also* Shabtai Rosenne, Rosenne's Law and Practice of the International Court: 1920–2015, at 1181–82 (Malcolm N. Shaw ed., 5th ed. 2016).

[18] Juan José Quintana, Litigation at the International Court of Justice: Practice and Procedure 34 (2015).

[19] Rules of Court, *supra* note 9, Art. 38(1).

[20] *Id.*

[21] *Monetary Gold*, *supra* note 1, at 32; *cf.* Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK & N.I. & U.S.), Réplique de M. Perassi (Italie), 163 (ICJ May 13, 1954). *See also* Marcelo Vázquez-Bermúdez (Special Rapporteur), Second Rep. on General Principles of Law, para. 147, UN Doc. A/CN.4/741 (Apr. 9, 2020).

[22] *E.g.*, Imogen Saunders, General Principles as a Source of International Law 236 (2021).

I would argue that it is doubtful, since the existence of this purported source of international law has consistently been controversial among states,[23] thereby lacking the required "common consent" of states for it to constitute a source of international law.[24]

Some scholars consider the principle derives from the inherent powers of the Court.[25] Inherent powers are unwritten powers but which are necessary for the Court to exercise its functions and purposes.[26] While it is today uncontroversial international courts and tribunals have inherent powers,[27] any such power cannot contradict the text of the court or tribunal's constitutive instrument.[28] Given the ICJ Statute speaks in mandatory terms on the exercise of its jurisdiction once established,[29] it is difficult to consider there exist inherent powers to refuse exercising jurisdiction.

Rather, I have argued that the *Monetary Gold* principle is best understood today as a rule of customary international law. The principle enjoys widespread acceptance in the written and oral pleadings of states appearing before the ICJ and beyond, which express the principle using language reflecting its existence under general international law, thereby constituting *opinio juris*. This practice accepted as law also meets the requirements of representativeness, as it is shared by states of different geographical regions and with different interests in given cases.[30]

In any event, significantly, under each theory compatible with the present judgment, the *Monetary Gold* principle would not be limited to the ICJ but could potentially apply in other international courts and tribunals. Nevertheless, the extent of such applicability may vary depending on the theory. For example, if the principle derives from customary international law, there must be a great degree of similarity between the context where the customary rule developed—primarily, contentious proceedings where at least one party is a state—and the context where it would be applied.[31] Conversely, more liberal methodology would seemingly be available if the *Monetary Gold* principle is a general principle of law formed within the international legal system.[32]

Moving to the Court's second conclusion, it was the first time any international court or tribunal recognized the inapplicability of the *Monetary Gold* principle due to the third state's

[23] *See argument in* Ori Pomson, *General Principles of Law Formed Within the International Legal System?*, EJIL: TALK! (July 12, 2022), *at* https://www.ejiltalk.org/general-principles-of-law-formed-within-the-international-legal-system.

[24] *See* OPPENHEIM'S INTERNATIONAL LAW, VOL. 1, at 23 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

[25] Northern Cameroons (Cam. v. UK), Preliminary Objections, 1963 ICJ Rep. 15, 105–07 (Dec. 2) (sep. op., Fitzmaurice, J.).

[26] *See, e.g.*, Elihu Lauterpacht, *"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 465, 477–78 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

[27] *E.g.*, Sylvain Bollée, *Les pouvoirs inhérents des arbitres internationaux*, 418 RECUEIL DES COURS 9, 34 (2021).

[28] CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 80 (2007).

[29] ICJ Statute, Art. 38(1) ("function is to decide"); Nuclear Tests (Austl. v. Fr.), 1974 ICJ Rep. 253, para. 57 (Dec. 20).

[30] *See, in greater detail*, Ori Pomson, *Does the* Monetary Gold *Principle Apply to International Courts and Tribunals Generally?*, 10 J. INT'L DISPUTE SETTLEMENT 88, 117–24 (2019).

[31] The S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 21 (Sept. 7); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 ICJ Rep. 3, para. 79 (Feb. 20).

[32] Vázquez-Bermúdez, *supra* note 21, at 52–53.

consent. This is significant since it provides states a clear avenue for evading the application of the *Monetary Gold* principle without the relevant third state becoming a party to the case.

In principle, this approach is unproblematic. In the *Monetary Gold* case, the ICJ underlined that it "cannot, without the consent of [the] third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[33] However, it is questionable whether the Court's conclusion is compatible with *Jurisdictional Immunities*. In that case, the Court was, *inter alia*, asked to determine whether an Italian court's recognition of enforceability in Italy of a Greek domestic judgment, rendered against Germany, constituted a violation of Germany's immunity. Greece was authorized to intervene as a non-party in that case, under Article 62 of the ICJ Statute. Nevertheless, the Court noted that, if adjudication of Greece's legal interests were a prerequisite for determining Italy's responsibility, it would decline adjudication due to the *Monetary Gold* principle, highlighting that Greece was not a party to the case.[34] Yet, where a third state intervenes in a case under Article 62, it actively engages in the proceedings, albeit without the judgment being binding thereon if it is not a party.[35] If that state voices no objections,[36] despite the arguments of the parties to the case indicating that adjudication of the intervening state's legal interests may be a prerequisite for a decision on the merits, should that not also be considered consent to the adjudication by the third state?[37]

Admittedly, in *Guyana v. Venezuela*, the United Kingdom consented to adjudication through a treaty—not through mere behavior. Yet the Court has elsewhere recognized that a party which addresses the claims of another party to a case on their merits, without raising jurisdictional objections, implicitly consents to jurisdiction.[38] Accordingly, if the intervening state raises no objection to adjudication,[39] using the reasoning of the present judgment, intervention-without-objection should constitute consent for the non-applicability of the *Monetary Gold* principle.

In conclusion, the preliminary objections judgment in *Guyana v. Venezuela* marks a significant development in the ICJ's jurisprudence on the *Monetary Gold* principle. It ostensibly puts to bed a lingering controversy by confirming that a *Monetary Gold* principle objection is not a claim that the Court lacks jurisdiction but rather that the Court may not exercise jurisdiction it has. The judgment further clarifies that a third state's consent to a case provides a way around the principle. However, the Court's reasoning avoids identifying the source of the principle under international law. Additionally, the judgment is at tension with earlier jurisprudence, where implied consent of the third state existed but the Court considered the

[33] *Monetary Gold*, *supra* note 1, at 33.

[34] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 ICJ Rep. 99, para. 127 (Feb. 3).

[35] Territorial and Maritime Dispute (Nicar. v. Colom.), Application for Permission to Intervene, 2011 ICJ Rep. 420, para. 29 (May 4).

[36] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Public Sitting, Verbatim Record CR 2011/19 (Sept. 14, 2011) (Greece oral observations).

[37] *Cf.* Mariko Kawano, *The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes*, 346 Recueil des Cours 9, 305 (2011); *see also Territorial and Maritime Dispute (Nicar. v. Colom.)*, *supra* note 35, para. 33 (diss. op., Donoghue, J.).

[38] Rights of Minorities in Upper Silesia (Minority Schools) (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 15, at 24 (Apr. 26).

[39] *Contrast* Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Verbatim Record 1990/2, at 32 (June 5, 1990) (Remiro Brotóns/Nicaragua).

Monetary Gold principle could still apply. *Monetary Gold* lives on, but controversies over its scope remain.

Ori Pomson
University of Cambridge
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