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Martins Paparinskis

**REVISITING THE INDISPENSABLE THIRD  
PARTY PRINCIPLE**

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Estratto

## REVISITING THE INDISPENSABLE THIRD PARTY PRINCIPLE

*Abstract.* — *The article analyses the indispensable third party principle in international dispute settlement and does so in four parts. The first part puts the principle in its proper historical context, in particular by uncovering its rich and largely forgotten pre-World War Two history. The second and third parts explore the ambiguities of the source and character of this principle. The last part considers, in turn, four hard questions regarding the principle: its institutional and personal scope, its applicability to various kinds of tribunals and multilateral co-operation. The key claim is that deeper reflection on the rationale(s) of the third party principle contributes to both explaining and critiquing the apparently confused practice.*

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*SUMMARY:* 1. Introduction. — 2. Creation of the indispensable third party principle. — 3. (a) Pre-World War II. — 4. (b) *Monetary Gold*. — 5. Source of the principle. — 6. Character of the principle. — 7. Scope of the principle. — 8. (a) Tribunals. — 9. (b) Parties. — 10. (c) Other decision-makers. — 11. (d) Multilateral co-operation. — 12. Conclusion.

1. *Introduction.* — The story of international dispute settlement since the end of the Cold War is usually told in two parts. The first part optimistically relates the rise of formalised adjudication in the 1990s, with a nod to the creation of new institutions and reactivation of long-dormant ones at the universal level as well as regionally and in specialist fields <sup>1</sup>.

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<sup>1</sup> E.g. *The Oxford Handbook of International Adjudication* (Romano *et al.* eds.), Oxford, 2013; SANDS, *Reflections on International Judicialization*, *European Journal of Int. Law*, vol. 27,

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The second part is less optimistic. Already in the early 2010s, threads from various fields could be drawn together to suggest “an increasing perception that courts and tribunals are not at all well-equipped for dealing with certain kinds of international disputes”<sup>2</sup>. The dominant theme in contemporary discussion, expressed in various disciplinary terms, is one of backlash, withdrawal, and pushback<sup>3</sup>. The rise and fall of international adjudication, as it were. The sharpened political focus on international law manifests itself in many ways, some more problematic than others<sup>4</sup>, but one of the beneficial consequences is closer attention to classic foundational principles, which during the period of optimism were applied, on occasion, with a light touch. One such principle is consent: the bedrock of many international obligations<sup>5</sup> and institutions of international dispute settlement<sup>6</sup>, and perhaps even, for those of voluntarist inclinations (if not for the mainstream view), of international law more generally<sup>7</sup>. One manifestation of consent that is particularly illuminating for a discussion of both mechanics and values of international dispute settlement is the indispensable third party principle. It is expressed, atypically for the consent-driven international dispute settlement, by reference to actors *not* present in the curial setting, and is well

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2016, p. 885 ff.; BOISSON DE CHAZOURNES, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, *European Journal of Int. Law*, vol. 28, 2017, p. 13 ff.

<sup>2</sup> LOWE, *The Function of Litigation in International Society*, *Int. and Comparative Law Quarterly*, vol. 61, 2012, p. 209 ff. at p. 210.

<sup>3</sup> E.g. MADSEN, CEBULAK, WIEBUSCH, *Special Issue — Resistance to International Courts: Introduction and Conclusion*, *Int. Journal of Law in Context*, vol. 14, 2018, p. 193 ff.; PAUWELYN, HAMILTON, *Exit from International Tribunals*, *Journal of Int. Dispute Settlement*, vol. 9, 2018, p. 679 ff.; McLACHLAN, *The Assault on International Adjudication and the Limits of Withdrawal*, *Int. and Comparative Law Quarterly*, vol. 68, 2019, p. 499 ff.

<sup>4</sup> KOSKENNIEMI, *International Law and the Far Right: Reflections on Law and Cynicism*, The Hague, 2019.

<sup>5</sup> International Court of Justice, Judgment of 1 October 2018 on the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Merits), para. 91, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>6</sup> International Court of Justice, Judgment of 6 June 2018 on the *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections), para. 42, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>7</sup> International Court of Justice, Judgment of 8 November 2019 on the *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 (Ukraine v. Russia)* (Preliminary Objections), Separate Opinion of Judge Cañado Trindade, para. 6, available at [www.icj-cij.org](http://www.icj-cij.org); CORBETT, *The Consent of States and the Sources of the Law of Nations*, *British Year Book of Int. Law*, vol. 6, 1925, p. 20 ff.; PELLET, *The Normative Dilemma: Will and Consent in International Law-Making*, *Australian Yearbook of Int. Law*, vol. 3, 1988-1989, p. 22 ff.

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attuned to broader shifts in the international legal order. In time of uncertainty and change in international law, it is important to pause and revisit the foundational aspects of the legal order. This article will do so by revisiting the principle of indispensable third parties, both as an important technical principle of international dispute settlement, and as a case study for broader developments in contemporary international law.

It is natural to place an inquiry of this kind within the broader context of the Italian contribution to international law and dispute settlement. At the moment of writing, the judicial development of the principle is bracketed by two leading inter-State cases primarily shaped by Italy's arguments — the 1954 judgment of the International Court of Justice in *Monetary Gold Removed from Rome in 1943*<sup>8</sup>, and the 2016 and 2019 judgments of the International Tribunal on Law of the Sea in the *M/V "Norstar"* case<sup>9</sup>. It is also natural to approach the topic with a particular eye to the work and perspective of Angelo Piero Sereni, a Professor at the University of Bologna and a prolific scholar<sup>10</sup>, an author in two fields of international law helpful for refining my approach. The first is his book on the Italian contribution to international law<sup>11</sup>, an apt perspective for a topic where choices of Italy as a disputing party greatly influenced the landmark decisions that shape the content and structure of the rules at issue. The second topic is dispute settlement. In the field, of course, the key text is Sereni's 1955 monograph *Principi generali di diritto e processo internazionale*<sup>12</sup>, which together with Bin Cheng's 1953 *General Principles of Law as Applied by International Courts and Tribu-*

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<sup>8</sup> International Court of Justice, Judgment of 15 June 1954 on the *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, *I.C.J. Reports*, 1954, p. 19.

<sup>9</sup> International Tribunal for Law of the Sea, Judgment of 4 November 2016 on *The M/V "Norstar" Case (Panama v. Italy)* (Preliminary Objections), paras. 171-174, and Judgment of 10 April 2019 on *The M/V "Norstar" Case (Panama v. Italy)*, paras. 120-122, both available at [www.itlos.org](http://www.itlos.org).

<sup>10</sup> See, in addition to works noted below, SERENI, *La représentation en droit international*, *Recueil des cours*, vol. 73, 1948, p. 69 ff.; SERENI, *International Economic Institutions and the Municipal Law of the State*, *Recueil des cours*, vol. 96, 1959, p. 129 ff.; SERENI, *Diritto internazionale*, volumes 1-4, Milano, 1958-1962.

<sup>11</sup> SERENI, *The Italian Conception of International Law*, New York, 1943. This book still provides the point of departure for modern inquiries, MESSINEO, *Is There an Italian Conception of International Law?*, *Cambridge Journal of Int. and Comparative Law*, vol. 2, 2013, p. 879 ff.

<sup>12</sup> SERENI, *Principi generali di diritto e processo internazionale*, Milano, 1955.

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nals forms the canon of traditional scholarship in the area <sup>13</sup>. *Principi generali* still provides the starting point for modern debates <sup>14</sup>, as do Sereni's writings on more discreet aspects of international adjudication <sup>15</sup>. Finally, Sereni was also a practitioner, in particular a counsel for Belgium in the preliminary objections phase of *Barcelona Traction, Light and Power Company, Limited* <sup>16</sup>. While he passed away before the second phase of the case <sup>17</sup>, he is intellectually present in the 1970 judgment in a manner that illustrates the extent of his influence: Judge Ammoun, whose Separate Opinion is not at all friendly to Belgium's legal position, describes the 19th century States as "closed community", "as Sereni most conscientiously put it" <sup>18</sup>. The reference, most likely to a then-recent article <sup>19</sup>, is not footnoted, suggesting that Sereni was such a household name in the invisible college that further details were unnecessary — a position that academics in our impact-sensitive age can only regard with wonder.

I will draw upon Sereni's writings and also adopt what I take to be his broader perspective of a generalist international lawyer, which combines an appreciation of foundational concepts with engagement in different sub-fields, and sensitivity to broader normative debates with care to avoid conflation of undertheorized political and moral philosophy with juridical propositions <sup>20</sup>. I will develop my argument in four parts. The

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<sup>13</sup> CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 1953.

<sup>14</sup> KOLB, *General Principles of Procedural Law*, in *The Statute of the International Court of Justice: A Commentary*<sup>3</sup> (Zimmermann *et al.* eds.), Cambridge, 2019, p. 963 ff. at p. 968.

<sup>15</sup> SERENI, *Le opinioni separate dei giudici dei tribunali internazionali*, Milano, 1964, treated as expressive of the traditional position in MALENOVSKY, *L'indépendance des juges internationaux*, *Recueil des cours*, vol. 349, 2011, p. 9 ff. at pp. 238, 252 f.

<sup>16</sup> International Court of Justice, Judgment of 24 July 1964 on *The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, *I.C.J. Reports*, 1964, p. 6.

<sup>17</sup> Sereni was involved in the preparation of Belgium's position but passed away (1967) before the oral pleadings took place, International Court of Justice, *Pleadings, Oral Arguments, The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, *Documents*, vol. VIII (Oral Proceedings (second phase)), p. 9 (Déclaration de M. Devadder).

<sup>18</sup> International Court of Justice, Judgment of 5 February 1970 on *The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Separate Opinion of Judge Ammoun, *I.C.J. Reports*, 1970, p. 309, para. 17.

<sup>19</sup> SERENI, *Les nouveaux Etats et le droit international*, *Revue générale de droit int. public*, vol. 72, 1968, p. 305 ff. at p. 306.

<sup>20</sup> See a recent exploration of the tensions in international legal positivism, O'KEEFE, *Curriculum vitae: A Prequel, Current Legal Problems*, vol. 69, 2016, p. 199 ff.

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first will set out the key moments in development of the indispensable third party principle (para. 2). I will not deal in detail with key judgments, very well addressed elsewhere <sup>21</sup>, but will focus instead on the rich and almost entirely forgotten pre-War practice (para. 3) and certain less-appreciated aspects of *Monetary Gold* (para. 4). The rest of the paper will consider, in turn, three key questions that go to the legal and normative core of the indispensable third party principle: its source (para. 5), character (para. 6), and scope (para. 7). On the latter point, I will consider in a cross-cutting manner the hard questions about applicability of the principle in various tribunals (para. 8), to protection of various absent actors (para. 9), regarding other international decision-makers (para. 10), and finally to multilateral cooperation (para. 11), with a particular eye to the *Norstar* case.

The contribution of this paper is twofold. The first uncovers the largely unappreciated historical background of the principle, without which any legal or normative discussion runs the danger of being impoverished, inaccurate, or both. The second contribution is an articulation of an original claim that there are two different *and* internally consistent conceptions of the principle. The indispensable third party principle may be conceptualised either as a jurisdictional principle that flows from consent and is aimed at protecting actors that are capable in principle to appear before the inter-State adjudicator, or a principle of admissibility that flows from concerns about due process of actors of various kinds, absent from various proceedings. It is tempting to argue that the latter version of the principle is a better fit for the modern institutional and normative sensibilities, but the sounder view is that both versions have a role to play, depending on the character of the institution, its own conception of judicial function, and the type of legal issue presented. Further complicating factors, crucial for either reading of the principle and likely to arise in modern international disputes, are the plurality of

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<sup>21</sup> JOHNSON, *The Case of the Monetary Gold Removed from Rome in 1943*, *Int. and Comparative Law Quarterly*, vol. 4, 1955, p. 93 ff.; LAUTERPACHT, *The Development of International Law by the International Court*, Cambridge, 1958, pp. 342-344; COLLIER, LOWE, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford, 1999, pp. 158-161; LAUTERPACHT, *Principles of Procedure in International Litigation*, *Recueil des cours*, vol. 345, 2011, p. 387 ff. at pp. 465-479; THIRLWAY, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Oxford, 2013, pp. 715-719, 725-730 and 1658-1662.

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international tribunals<sup>22</sup> and application of State responsibility in complicated multilateral disputes, both very much works in progress<sup>23</sup>. In short, not everything turns on the competing conceptions, but a lot does.

2. *Creation of the indispensable third party principle.* — The key difference between judicial processes in domestic and international law is that the latter, and not the former, is entirely based on consent<sup>24</sup>. Mineichirō cannot impose international judicial process on Rafael without the latter's (and of course, without their own) consent. But what is the position if Dionisio and Ruy provide their consent, however the substance of the dispute within that consent relates to legal interests of Antonio (or indeed, eventually, Suzanne), who in turn has not provided consent? The indispensable third party principle addresses this tension between consent that has been given and consent that is lacking, and between interests of various actors present in the courtroom and those absent from it. The 1954 *Monetary Gold* judgment provides the point of reference for international tribunals and States contemplating the matter<sup>25</sup>. As I will return to the case throughout the paper, I set out here the key passages in full — which for the importance that they have had in the international legal process are surprisingly succinct:

“In order [...] to determine whether Italy is entitled to receive the gold, it is

<sup>22</sup> BOISSON DE CHAZOURNES, *supra* note 1; BOISSON DE CHAZOURNES, *Plurality in the Fabric of International Courts and Tribunals. The Threads of Managerial Approach: A Rejoinder — Fears and Anxieties*, *European Journal of Int. Law*, vol. 28, 2017, p. 1275 ff.

<sup>23</sup> *Principles of Shared Responsibility in International Law* (Nollkaemper and Plakokefalos eds.), Cambridge, 2014; *The Practice of Shared Responsibility in International Law* (Nollkaemper and Plakokefalos eds.), Cambridge, 2017.

<sup>24</sup> SERENI, *supra* note 12, p. 58.

<sup>25</sup> International Court of Justice, Judgment of 3 February 2015 on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *I.C.J. Reports*, 2015, p. 13, para. 116; International Centre for Settlement of Investment Disputes, Award of 30 April 2015, *Ping An Life Insurance Company of China, Limited and Or v. Belgium*, ICSID Case No. ARB/12/29, paras. 127-128, available at <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>; Permanent Court of Arbitration, Award on Jurisdiction and Admissibility of 29 October 2015, *Philippines v. China*, PCA Case No. 2013-19, para. 181, available at [pca-cpa.org/en/cases](http://pca-cpa.org/en/cases); *Norstar* (Preliminary Objections), *supra* note 9; United Kingdom Supreme Court, Judgment of 17 January 2017, *Belhaj and another v. Straw and others, Rahmatullah (No 1) v. Ministry of Defence and another*, [2017] UKSC 3, paras. 27 f. (Lord Mance) and 192 f. (Lord Sumption), available at [supremecourt.uk/decided-cases/index.html](http://supremecourt.uk/decided-cases/index.html); Court of Justice of the European Union, Opinion of Advocate General Wathelet of 10 January 2018, case C-266/16, *Western Sahara Campaign UK, the Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, EU:C:2018:1, para. 57.

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necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 9th, 1945, was contrary to international law. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania.

The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

[...] 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.

[...]

The Court accordingly finds that, although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy”<sup>26</sup>.

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The tension between the interests of those present in the courtroom and those absent from it did not materialise for the first time on 15 June 1954, despite the lasting influence of the textual expression of the principle on that day. Before considering the substance of the principle (paras. 5-11), it is helpful to first delve into its making, which I will do in two parts: first, set the background of the pre-World War Two international law; and secondly, explore the less remarked-upon aspects of *Monetary Gold*.

3. (a) *Pre-World War II*. — The pre-World War Two practice plays very little role in contemporary discussion of the indispensable third party principle. That seems surprising: States drafting the foundational instruments for the first universal tribunals took procedural issues very seriously. Quite a few of the early projects floundered precisely on these grounds, not only on major questions like compulsory jurisdiction (the first 1920 draft of the Statute of the Permanent Court of International

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<sup>26</sup> *Monetary Gold*, *supra* note 8, p. 32 f.



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Justice)<sup>27</sup> but also on seemingly more technical points like selection of adjudicators (1907 Court of Arbitral Justice)<sup>28</sup> and applicable law (1907 International Prize Court)<sup>29</sup>. The rise of international adjudication at the beginning of the last century was not smooth, and even the benefit of hindsight will not turn the intensely pragmatic governmental negotiators into naïve enthusiasts for international courts<sup>30</sup>. And, of course, many key procedural concepts and distinctions were elaborated precisely in the practice of inter-War tribunals<sup>31</sup>.

What did the founders of international courts and tribunals make of absent third parties? Three different things, it seems. First, the great foundational efforts at The Hague are unhelpful. The 1899 and 1907 Hague Conventions on Pacific Settlement of International Disputes deal with third parties only in the context of intervention in treaty disputes<sup>32</sup>. At least Russia's highly influential Frederic de Martens must have been conscious of legal issues raised by absent States from his concurrent position as the President of the arbitral tribunal in the (still-controversial) 1899 *Boundary between British Guiana and Venezuela* case<sup>33</sup>.

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<sup>27</sup> SPIERMANN, "Who Attempts too Much Does Nothing Well": the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice, *British Year Book of Int. Law*, vol. 73, 2002, p. 187 ff.

<sup>28</sup> *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1907* (Scott ed.), vol. I, New York, 1920, pp. 325-329; and further SIMPSON, *Great Powers and Outlaw States*, Cambridge, 2004, Chapter 5.

<sup>29</sup> *Oppenheim's International Law: Disputes, War and Neutrality*<sup>7</sup> (Lauterpacht ed.), London, 1952, p. 876.

<sup>30</sup> CARON, *War and International Adjudication: Reflections on the 1899 Peace Conference*, *American Journal of Int. Law*, vol. 94, 2000, p. 4 ff.

<sup>31</sup> BECKETT, *Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale*, *Recueil des cours*, vol. 39, 1932, p. 131 ff. at pp. 216-266; BECKETT, *Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale (juillet 1932-juillet 1934)*, *Recueil des cours*, vol. 50, 1934, p. 189 ff. at pp. 271-304; CHENG, *supra* note 13, Part IV ("General Principles of Law in Judicial Proceedings"); SERENI, *Principi generali*, *supra* note 12, chapter III ("Il processo internazionale").

<sup>32</sup> Convention for the Pacific Settlement of International Disputes, The Hague, 28 July 1899, in *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1899* (Scott ed.), New York, 1920, p. 235, Article 56; Convention for the Pacific Settlement of International Disputes, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: 1907*, vol. I, *cit.*, p. 599, Article 84 ("[w]hen [the award] concerns the interpretation of a Convention to which Powers other than those in dispute are parties, ... [e]ach of these Powers is entitled to intervene in the case").

<sup>33</sup> Arbitral tribunal, Award of 3 October 1899 on *the Boundary between the Colony of British Guiana and the United States of Venezuela*, *Reports of International Arbitral Awards* (RIAA), vol. 28, p. 331 ff. at p. 338 ("the line of delimitation fixed by this Award shall be subject and without prejudice to any questions now existing, or which may arise, to be

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Nevertheless, the discussion in both Peace Conferences was brief and unhelpful for the purposes of the present inquiry<sup>34</sup>. The jurisdiction of the (never-functioning) Prize Court contemplated cases that could proceed in the absence of interested States<sup>35</sup>, but the combination of revolutionary rights of non-State actors to appeal domestic court judgments internationally with powers of States to forbid those claims or appear before the Court<sup>36</sup> makes general inferences complicated<sup>37</sup>. The Permanent Court's Statute dealt with third parties in the context of intervention, but again in a manner throwing no light on this inquiry. The Advisory Committee's reliance on general principles of domestic law to formulate the right of third parties to intervene in the draft Statute<sup>38</sup> might have turned its members' minds to the implications of lack of joinder in international law<sup>39</sup>, but it did not<sup>40</sup>.

The judicial treatment by universal institutions is not more illuminating. The *compromis* for the 1904 *Venezuelan Preferential Claims* case provided that “[a]ny nation having claims against Venezuela may join as a party”, which they all did (unhelpfully for the academic observers), leaving open the question of how the tribunal would have dealt with their

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determined between the Government of Her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela”). As to the current controversy, see International Court of Justice, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>34</sup> *The Proceedings of the Hague Peace Conferences: 1899*, cit., p. 151; *The Proceedings of the Hague Peace Conferences: 1907*, vol. I, cit., p. 437; *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1907* (Scott ed.), vol. II, New York, 1920, pp. 131, 371.

<sup>35</sup> Convention Relative to the Creation of an International Prize Court, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: 1907*, vol. I, cit., p. 660, Article 33 (“If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph 3, the Government who has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Article 28”).

<sup>36</sup> *Ibid.*, Article 4, paragraph 2.

<sup>37</sup> *The Proceedings of the Hague Peace Conferences: 1907*, vol. II, cit., pp. 823, 840.

<sup>38</sup> *Procès-verbaux of the Proceedings of the Committee*, The Hague, 1920, pp. 592-594, 745 f.

<sup>39</sup> International Court of Justice, Judgment of 23 October 2001 on the *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Application for Permission to Intervene), *I.C.J. Reports*, 2001, p. 575, Separate Opinion of Judge Weeramantry, p. 630, para. 22.

<sup>40</sup> The Advisory Committee's discussion on the point has been described in rather uncharitable terms, MIRON, CHINKIN, “Article 62”, in *The Statute of the International Court of Justice: A Commentary*<sup>3</sup> (Zimmermann et al. eds), Oxford, 2019, p. 1686 ff. at p. 1690.

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absence<sup>41</sup>. The Permanent Court discussed consent of absent States in the 1923 *Status of Eastern Carelia* case in general terms but, even leaving aside peculiarities of institutional law of League of Nations and the perspective of advisory opinions, the issue was not characterised as relating to absent *third* parties — rather, Russia’s consent was lacking on the “actual dispute between Finland and Russia”<sup>42</sup>.

The more interesting developments took place at the bilateral and regional level, with sophisticated and rich treaty practice pulling in different directions. The trend-setting (and nowadays almost entirely forgotten) first general arbitration treaty<sup>43</sup>, concluded between the United Kingdom and France in 1903, provided for submission of disputes to the Permanent Court of Arbitration. However, consent was subject to qualifications, memorably regarding “vital interests, the independence, or the honour of two Contracting States”, but also where differences “concern the interests of third Parties”<sup>44</sup>. Most arbitral agreements of the following two decades included similar clauses<sup>45</sup>. A countervailing trend emerged in the mid-1920s, in the context of European post-war settlements. The four Locarno Arbitration Treaties, concluded in 1925 between Germany, on the one hand, and Belgium, France, Czechoslovakia, and Poland, on the other, provided for submission of disputes to an adjudicator with the proviso that “[t]he present Treaty continues applicable [*sic!*] as between the High Contracting Parties even when other Powers are also interested in the dispute”<sup>46</sup>. Building on this practice, the 1928 General Act, which provided for general submission of disputes,

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<sup>41</sup> Permanent Court of Arbitration, Award of 22 February 1904 on *the Venezuelan Preferential Case (Germany, Great Britain, Italy, Venezuela et al.)*, RIAA, vol. 9, p. 99 ff. at pp. 103, 106, Article VI.

<sup>42</sup> Permanent Court of International Justice, Advisory Opinion of 3 July 1923 on the *Status of Eastern Carelia, P.C.I.J., Publications, Series B, No. 5*, p. 27; further SPIERMANN, *International Legal Argument in the Permanent Court of International Justice*, Cambridge, 2005, pp. 160-175.

<sup>43</sup> OPPENHEIM, *War*<sup>7</sup>, *supra* note 29, p. 23 f.

<sup>44</sup> Agreement between Great Britain and France, providing for the settlement by arbitration of certain classes of questions which may arise between the two Governments, London, 14 October 1903, in *British and Foreign State Papers. 1902-1903*, vol. 96, p. 35, Article I.

<sup>45</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua, Pleadings*, vol. II, p. 81, para. 262 (Counter-Memorial of the United States); more generally, see WEHBERG, *Restrictive Clauses in International Arbitration Treaties*, *American Journal of Int. Law*, vol. 7, 1913, p. 301 ff. at pp. 304-306.

<sup>46</sup> Arbitration Treaty between Germany and Poland, Locarno, 16 October 1925, in League of Nations, *Treaty Series*, vol. 54, p. 328, Article 20.

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purported to “be applicable as between the Parties thereto, even though a Third Power, whether a party to the Act or not, has an interest in the dispute”<sup>47</sup>. However, the regional 1929 General Treaty of Inter-American Arbitration went in the other direction, excluding from submission to arbitration those disputes “which affect the interest or refer to the action of a State not a Party to this treaty”<sup>48</sup>. The driving force for the rule was the United States, which, “[i]nfluenced by the Central American Court [of Justice]’s attempt to adjudicate a matter affecting one of its treaties [with Nicaragua] despite United States absence, [...] subsequently insisted upon the exclusion from the jurisdiction of international tribunals of disputes involving the rights or obligations of absent parties”<sup>49</sup>. In short, the overall impression is of general protection of absent third parties in the pre-World War One practice, and a more complicated inter-War picture, divided between American, mostly US-driven continuation of the same approach and the more dominant, European-driven practice of setting aside third party interests.

Post-War international law has ignored this rich practice. The only invocation of pre-War authorities in contemporary litigation is by Australia, first in passing in the *Phosphates of Nauru* dispute<sup>50</sup> and then, more significantly, in the *East Timor* dispute, where the cases of the Central American Court of Justice, that had so upset the United States, were discussed by some of the Judges writing separately<sup>51</sup>, but not by the Court nor by any later litigant or tribunal. A bellwether case for the fading interest is the United States. Despite the strength of its sympathy for the interests of absent third States in the 1920s, references to that practice are conspicuous for their absence in its submissions in *Monetary*

<sup>47</sup> General Act for the Pacific Settlement of International Disputes, Geneva, 26 September 1928, in League of Nations, *Treaty Series*, vol. 93, p. 343, Article 35.

<sup>48</sup> General Treaty of Inter-American Arbitration, Washington, 5 January 1929, in League of Nations, *Treaty Series*, vol. 130, p. 135, Article 2 (b).

<sup>49</sup> *Military Activities*, *supra* note 45, para. 265, generally paras. 262-267 (Counter-Memorial). The cases that the United States took exception to were brought by Costa Rica and El Salvador against Nicaragua regarding the Bryan-Chamorro Convention with the United States, and the Court found Nicaragua to be responsible but refused to annul the treaty, see *American Journal of Int. Law*, vol. 11, 1917, p. 181 ff.; *ibid.*, p. 674 ff.

<sup>50</sup> International Court of Justice, *Certain Phosphate Lands in Nauru, Pleadings*, vol. I, para. 358 (Preliminary Objections of Australia).

<sup>51</sup> International Court of Justice, Judgment of 30 June 1995 on *East Timor*, *I.C.J. Reports*, 1995, p. 90, Separate Opinion of Judge Shahabuddeen, p. 119 ff. at pp. 124-126; Dissenting Opinion of Judge Weeramanatry, p. 139 ff. at pp. 160, 169; Dissenting Opinion of Judge *ad hoc* Skubiszewski, p. 224, para. 93.

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*Gold*<sup>52</sup>, as is any mention of third parties in the 1948 Pact of Bogotá, that replaced the 1929 treaty<sup>53</sup>. The pre-War practice thus fails the ultimate test of validity of an international legal argument — repeated and continued invocation by States in their practice, and endorsement by tribunals<sup>54</sup>. That seems surprising. New practice and reassessment of normative priorities may have pushed many specialist fields of international law in a different direction after World War II; criminal and human rights law are the more obvious examples. But on general issues of sources, State responsibility, and particularly dispute settlement there was a remarkable degree of continuity.

There are two reasons why the history of the rule was forgotten. First, the practice itself was divided, and it is not clear what particular elements stood for. Despite the number of treaties on the issue, as Paul Reichler noted on behalf of Nicaragua, “the standard clause excluding claims involving the rights of third States was never, as far as we can tell, construed or even applied”<sup>55</sup>. Was that clause, as one much-cited German author suggested, obviously superfluous<sup>56</sup>, or, as the American elder statesmen argued, addressed at a very important point of justiciability<sup>57</sup>? Was the whole concept a category error, as Hersch Lauterpacht mercilessly demonstrated regarding the sister reservation clause on “political questions”<sup>58</sup>? Does Locarno stand for the proposition that interests of absent third parties have to be balanced against broader communitarian values, giving way in genuinely multilateral projects like collective security? Or is it reflective of the peculiar parallelism of the bilateral Locarno Treaties, where all “other Powers [...] also interested in the

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<sup>52</sup> *Monetary Gold*, *supra* note 8, *Pleadings*, at pp. 92-94 (Statement of the United States).

<sup>53</sup> American Treaty on Pacific Settlement (Pact of Bogotá), Bogotá, 30 April 1948, in United Nations, *Treaty Series*, vol. 30, p. 84.

<sup>54</sup> The International Law Commission makes the point regarding decisions of courts and tribunals and custom but the proposition is applicable more generally in international legal process: “The value of such decisions varies greatly, however, depending [...] on the reception of the decision, in particular by States and in subsequent case law” (International Law Commission, *Draft Conclusions on Identification of Customary International Law*, Conclusion 13, point 3 of the Commentary, in *Report of the International Law Commission, Seventieth session*, UN Doc. A/73/10, p. 149).

<sup>55</sup> *Military Activities*, *supra* note 45, *Pleadings*, vol. III, at p. 95.

<sup>56</sup> NIPPOLD, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, Leipzig, 1907, p. 221 s.

<sup>57</sup> WILSON, *Reservation Clauses in Agreements for Obligatory Arbitration*, *American Journal of Int. Law*, vol. 23, 1929, p. 68 ff. at p. 72.

<sup>58</sup> LAUTERPACHT, *The Function of Law in the International Community*, Oxford, 1933, Part III.

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dispute” would have identical clauses in their own treaties, so that the instruments taken together were functionally equivalent to mutual waivers? How is either reading compatible with the General Act, created in the particular context of disarmament negotiations of 1927<sup>59</sup> but setting aside interests of all third States for all types of disputes<sup>60</sup>? And, to return to the old international law chestnut: were any of these clauses reflecting a broader principle, as the Locarno disposal of third parties’ rights would suggest, or departing from it, drafted as they were at the level of consent rather than institutional set-up? These are not rhetorical questions, and they suggest that the problem, paradoxically, is that the practice was too rich to easily crystallize into a clear statement of principle.

The second concern is that the context in which the practice was elaborated had not aged well. The demise of the Central American Court of Justice is a story with few redeeming character arches. The 1928 General Act fell into an odd twilight zone after the War<sup>61</sup>. Most importantly, the security and disarmament regimes of 1920s that arbitration was embedded in shifted in perception from an example of wise statecraft<sup>62</sup> and culmination of millennia of efforts on dispute settlement<sup>63</sup>, to one of many foolishly idealistic attempts to prevent World War II<sup>64</sup>. This was not a pedigree that post-War international community wanted to draw upon, and understandably so — but erasure is not

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<sup>59</sup> OPPENHEIM, *War*<sup>7</sup>, *supra* note 29, p. 92 f.

<sup>60</sup> The preparatory materials, *pace* LAUTERPACHT, *Principles, supra* note 21, p. 467 f., are unhelpful on the rationale of the rule. The discussion addressed the position of third parties only regarding intervention, which, to avoid confusion, was eventually addressed in separate provisions and synchronised with the language of the Permanent Court’s Statute, *League of Nations Official Journal*, vol. 64, 1928, at pp. 63, 102.

<sup>61</sup> International Court of Justice, Judgment of 21 June 2000 on the *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *I.C.J. Reports*, 2000, p. 12, paras. 26-28; MERRILLS, *The International Court of Justice and the General Act of 1928*, *Cambridge Law Journal*, vol. 39, 1980, p. 137 ff.; COLLIER, LOWE, *supra* note 21, p. 137.

<sup>62</sup> STEINER, *The Lights that Failed: European International History 1919-1933*, Oxford, 2005, Chapter 8 (“New Dawn? Stabilization in Western Europe After Locarno”).

<sup>63</sup> I hope that I am not the only one to have been confused by the punchline in the title of Ralston’s classic: Nuremberg to The Hague it is not, RALSTON, *International Arbitration from Athens to Locarno*, London, 1929.

<sup>64</sup> The chapters’ titles in Zara Steiner’s influential duology on inter-War diplomatic history speak for themselves: STEINER, *cit.*, Chapters 9 (“Faltering Reconstruction: Cracks in the Locarno Façade”), 10 (“Faltering Internationalism: Disarmament and Security after Locarno”); STEINER, *The Triumph of the Dark: European International History 1933-1939*, Oxford, 2011, Chapter 3 (“The Assault on Versailles and Locarno: Ethiopia and the Remilitarization of the Rhineland”).

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without costs. Rejection of complex failures by reframing the issue to flow from first principles can impoverish the discussion and squeeze the appreciation of the temporal, geographical, structural, and substantive nuances into a one-size-fits-all(disputes) solution.

4. (b) *Monetary Gold*. — I quoted key passages of the 1954 *Monetary Gold* judgment above, and I will return to it throughout the rest of the paper. In this section I will address three less appreciated aspects of the much-quoted judicial expressions of principle: first, the background of the case; secondly, the curious tactical choices in judicial proceedings; and thirdly, the substance of the underlying dispute. With the understandable possibility of projection, a contemporary reader accustomed to flicking through at least 50-page judgments of the International Court <sup>65</sup> may feel that the mere 20 pages of *Monetary Gold* dispose of a straightforward, perhaps even trivial dispute. Such is manifestly not the case: the judicial proceedings were directed at resolving a politically and legally complex situation, perhaps the most complicated multilateral dispute ever submitted to an international tribunal. The first part of the puzzle was reparation of gold looted by the Third Reich, addressed by the 1948 Agreement on Reparation from Germany <sup>66</sup> as part of the general post-War reparations regime <sup>67</sup>. The second part was disposition of gold of the National Bank of Albania removed in 1943, which the Tripartite Commission constituted by the United Kingdom, the United States and France was unable to resolve by agreement <sup>68</sup>. Thirdly, the question about “belonging” of the particular portion of the gold within the meaning of the 1949 Agreement <sup>69</sup> was submitted to arbitration, within which little consistency emerged: the United Kingdom argued that the gold was Albanian, Italy argued it was Italian, France argued it was neither, Albania did not argue anything, and the sole arbitrator Sauser-Hall concluded that the gold “belong[ed]” to Albania <sup>70</sup>. The fourth point

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<sup>65</sup> *Application of the ICSFT and of the ICERD*, *supra* note 7.

<sup>66</sup> Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, Paris, 14 January 1946, in United Nations, *Treaty Series*, vol. 555, p. 71, Part III.

<sup>67</sup> D'ARGENT, *Les réparations de guerre en droit international public*, Bruxelles, 2002; GATTINI, *Le riparazioni di guerra nel diritto internazionale*, Padova, 2003.

<sup>68</sup> *Monetary Gold*, *supra* note 8, p. 25 f.

<sup>69</sup> Agreement on reparation from Germany, *cit.*, Part III, Single Article, para. C.

<sup>70</sup> Sole Arbitrator, Arbitral Award of 20 February 1953 on *Affaire relative à l'or de la Banque nationale d'Albanie*, RIAA, vol. 12, p. 13 ff. at p. 51 f.

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was uncontroversial, if resolved with ruthlessness for the weaker actors: gold “belonging” to Albania was not going to be returned to it but rather used for reparation to other States. The fifth (multiple-choice) question was which States had such claims against Albania. Albania’s failure to comply with the Court’s judgment in favour of the United Kingdom in the *Corfu Channel* case certainly ticked one box <sup>71</sup>, but Italy took the view that confiscation of the same Albanian bank in 1945 had also been internationally wrongful, because it affected Italy’s shares <sup>72</sup>. The sixth question, assuming that both claims were valid, was how to coordinate them — there was only so much gold to go around. The Court was asked to resolve the latter two outstanding points <sup>73</sup>.

The second puzzle relates to Italy’s procedural tactics: why did it introduce the case and then itself challenge the jurisdiction of the Court? Legal commentators, even the usually well-informed ones, have been perplexed <sup>74</sup>. A historian of the dispute suggests that Italy may have been concerned that the Court would decide against it on the merits, just as the arbitrator had done <sup>75</sup>. But the legal issues in arbitration and in the Court were different: the meaning of “belonging” for the purposes of the 1946 Agreement in the former instance, and the international law of expropriation and coordination of the claims in the latter, with Sauser-Hall studiously avoiding taking a position on property rights <sup>76</sup>. At the end of the day, a plausible hypothesis for motivation of conduct is what its likely effects were. Reasoning backwards from what Italy achieved, its simultaneous submission of the claim to the Court and challenge of jurisdiction are consistent with the aim of precluding the transfer of gold to the United Kingdom, which would have happened both if the claim had not been brought in the first place and if Italy lost, either on Albanian’s responsibility or priority of its claim. Subsequent Italian conduct in

<sup>71</sup> *Monetary Gold*, *supra* note 8, pp. 21, 22, 26 and 33. See International Court of Justice, Judgment of 15 December 1949 in *The Corfu Channel case (United Kingdom v. Albania)* (Compensation), *I.C.J. Reports*, 1949, p. 244.

<sup>72</sup> *Monetary Gold*, *supra* note 8, pp. 21, 22, 26, 31 and 32.

<sup>73</sup> The dispute remained unresolved until the late 1990s, ROSSELLI, *Italy and Albania: Financial Relations in the Fascist Period*, London, 2006, Chapter 10, particularly pp. 143-145.

<sup>74</sup> JOHNSON, *supra* note 21, at p. 94 (“unusual”); LAUTERPACHT, *The Development*, *supra* note 21, pp. 103 (“not apparent why”), 342, footnote 17 (“puzzling”); COLLIER, LOWE, *supra* note 21, p. 158, footnote 158 (“unclear”); LAUTERPACHT, *Principles*, *supra* note 21, at p. 466 (“very unexpected”).

<sup>75</sup> ROSSELLI, *supra* note 73, p. 140.

<sup>76</sup> Sole Arbitrator, *supra* note 70, pp. 49-52.



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1950-60s, attempting to engage in negotiations<sup>77</sup>, is consistent with the aim of deformalizing means of dispute settlement. Whether it was wise is a different question. The usual assumption in international law is that the weaker party has an interest in relative formalization of the means of dispute settlement, so one would have expected the post-War Italy to choose judicial settlement over negotiations with the United Kingdom and the Tripartite Commission, which eventually resulted in Italy not receiving anything<sup>78</sup>. But hindsight is lucid, and Italy's judgement call may have been to prefer a mediocre negotiating position in a geopolitical environment that may change to its advantage over a weak judicial case to be resolved here and now. If that is the right reading of the tea leaves, Italy's choice, if ultimately not leading to success, was perfectly sensible.

The third point relates to the merits of *Monetary Gold*. The focus on indispensable third parties' aspect of the case has obscured the complexity and controversy of the underlying substantive issues. Of course, preliminary questions of jurisdiction and admissibility are conceptually autonomous from the claim on the merits in the technical sense of dispute settlement<sup>79</sup>. But it is not inconceivable that particular legal complexity or political controversy may have a bearing on the willingness of adjudicators to proceed to the merits<sup>80</sup>. In *Monetary Gold*, both elements were present. To answer the first question, the Court would have had to engage with "a question of the greatest juridical interest" regarding compensation for expropriation of foreign-owned property<sup>81</sup>, which was already heating up in post-War State practice<sup>82</sup> on its way to

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<sup>77</sup> ROSSELLI, *supra* note 73, p. 140 f.

<sup>78</sup> *Ibid.*, pp. 140-143.

<sup>79</sup> International Court of Justice, Judgment of 3 February 2006 on the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *I.C.J. Reports*, 2006, p. 6, para. 127.

<sup>80</sup> International Court of Justice, Judgment of 10 February 2005 on the *Certain Property (Liechtenstein v. Germany)*, *I.C.J. Reports*, 2005, p. 6, Dissenting Opinion of Judge *ad hoc* Berman, p. 70, para. 30 ("It is hard to resist the conclusion that the Respondent — and, dare one say it, in due course the Court itself — has allowed the difficulty it experiences in weighing the prospective legal merits of the claim to become transmuted into an issue *in limine*"); International Court of Justice, Judgment of 20 December 1974 on the *Nuclear Tests (Australia v. France)*, *I.C.J. Reports*, 1974, p. 253.

<sup>81</sup> As a Judge had observed in another recent case where the Court had declined jurisdiction, International Court of Justice, Judgment of 22 July 1952 in the *Anglo-Iranian Oil Co. case (UK v. Iran)*, *I.C.J. Reports*, 1952, p. 93, Dissenting Opinion of Judge Levi Carneiro, p. 31, at para. 11.

<sup>82</sup> GARCÍA-AMADOR, *Fourth Report on International Responsibility*, UN Doc. A/CN.4/119, paras. 39-92, in *Yearbook of the International Law Commission*, 1959, vol. II, pp. 10-24;

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becoming perhaps the most complicated and controversial legal issue of the Cold War<sup>83</sup>. The second question on the priority of claims was not particularly controversial in a political sense, but raised highly complicated legal issues. The only Judge to consider the substance of the question noted that “in all civilized countries there are laws governing the classification of creditors” and seemed to argue for a general principle of international law to base the priority of claims “on the nature of the right itself, its origin, or the specific relationship which may exist between it and the property of the debtor”<sup>84</sup>. That is a fascinating proposition *and* one which finds little reflection in subsequent developments, where States have been markedly unenthusiastic about analogising with insolvency law<sup>85</sup>.

To put the complexity in perspective: despite the great advances in law of State responsibility since 1954<sup>86</sup>, it is not obvious what answer a contemporary tribunal would give to a question about priority of claims of State responsibility, invoked against the same State by two different States for two entirely unrelated wrongful acts, and directed at implementation of compensation regarding the same property of the responsible State. When dealing with multiple actors and State responsibility, international law provides open-ended rules even for the more developed aspects of shared responsibility<sup>87</sup>. *Monetary Gold* takes that uncertainty three levels further, turning to multiple injured actors, introducing different and unrelated wrongful acts, and focusing on implementation of reparations. When faced with such a question, the Court may have grappled with *non liquet*, engaged in judicial law-making by reference to general principles — or perhaps repeated a point made in a then-recent case, that practicalities of implementation of responsibility fall outside

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FRIEDMAN, *Expropriation in International Law*, London, 1953; HYDE, *Permanent Sovereignty over Natural Wealth and Resources*, *American Journal of Int. Law*, vol. 50, 1956, p. 854 ff.

<sup>83</sup> DOLZER, *New Foundations on the Law of Expropriation of Alien Property*, *American Journal of Int. Law*, vol. 75, 1981, p. 553 ff.

<sup>84</sup> *Monetary Gold*, *supra* note 8, Dissenting Opinion of Judge Levi Carneiro, p. 31, at para. 8.

<sup>85</sup> See *Sovereign Debt Management* (Lastra and Buckheit eds.), Oxford, 2014, Part V.

<sup>86</sup> CRAWFORD, *State Responsibility: The General Part*, Cambridge, 2013.

<sup>87</sup> International Court of Justice, Judgment of 3 November 2003 on *Oil Platforms (Iran v. United States)*, *I.C.J. Reports*, 2003, p. 161, Separate Opinion of Judge Simma, p. 324, paras. 66-78; Permanent Court of Arbitration, partial award of 30 January 2007 on *The Channel Tunnel Group Limited. France-Manche SA v. United Kingdom, France*, paras. 173-187, available at [www.pca-cpa.org](http://www.pca-cpa.org).

judicial function and should be dealt with by negotiations<sup>88</sup>. This is what happened in *Monetary Gold* in any event. Overall, the indispensable third party principle pulled the Court in a direction similar to that which judicial caution on the merits might have achieved. Or, to make the same point in different terms, the common assumption that excessive sensitivity to their consensual underpinnings precludes international judicial bodies from performing a valuable function in resolving disputes and contributing to their legitimacy and broader developments is not always right: sometimes staying silent is the best solution for everybody.

5. *Source of the principle.* — Having complicated the historical picture, the rest of the paper will critically engage with the substance of the indispensable third party principle. A helpful first question is: what is the source of the principle? After all, to determine the existence and content of a rule of international law, it is important to know the background benchmark against which it is evaluated, which is different for different sources. *Monetary Gold* speaks about a “principle”. But that is not the end of the inquiry: even in the technical sense, principles may be derived from national legal systems or formed within the international legal system<sup>89</sup>, and in judicial practice a “principle” is commonly used to refer to the more abstractly formulated rules of customary and treaty law<sup>90</sup>. Before considering the reasoning of *Monetary Gold*, it is worth situating it in the more general context of international legal process regarding international procedural law. My key point here is to caution against dogmatism and *a priori* assumptions when discussing sources of procedural principles, since different principles may be derived from different sources of international law at different times, and even the same principle may be simultaneously shaped by various elements of the legal order.

I will give three examples, the first related to Sereni himself. In the academic setting, *Principi generali* was a powerful thesis against the

<sup>88</sup> International Court of Justice, Judgment of 13 June 1951 on *Haya de la Torre (Colombia/Peru)*, *I.C.J. Reports*, 1951, p. 71 ff. at p. 83.

<sup>89</sup> VÁZQUEZ-BERMÚDEZ, *First Report on General Principles of Law*, 5 April 2019, UN Doc. A/CN.4/732, Annex, Draft conclusion 3.

<sup>90</sup> E.g. Permanent Court of Arbitration, partial award of 18 February 2013 in the *Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, RIAA, vol. 31, p. 1, paras. 137 (“the Treaty’s general principles”), 446 (“the principles of Paragraph 15(iii)”) and 448 (“a foundational principle of customary international environmental law”).

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possibility of deriving general principles of procedural law from domestic legal orders, due to structural differences between domestic and international judicial procedure<sup>91</sup>. However, with his practitioner's hat on, Sereni argued with apparent success that a general principle could be derived from domestic legal traditions to the effect that discontinuance of a case, without more, did not signify a waiver of the right to bring another claim<sup>92</sup>. A second, recent example is the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, where Vaughan Lowe on behalf of Qatar and Michael Reisman on behalf of United Arab Emirates debated the source of *lis pendens*, demonstrating the variety of arguments of domestic analogy and international judicial function that skilful international lawyers may bring to bear to principles of procedural law<sup>93</sup>.

The third example goes to a related if somewhat distinct point: principles of international procedural law may be shaped by different sources at different points of development of international law. A good example is *res judicata*, which had its pre-War origins in general principles of law, but has since been shaped by international tribunals and is now firmly established at the level of international law<sup>94</sup>; outside the

<sup>91</sup> Summarized at SERENI, *Principi*, *supra* note 12, p. 78 f.

<sup>92</sup> International Court of Justice, Pleadings, Oral Arguments, Documents, *The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, vol. II (Oral Proceedings (second phase) (preliminary objections)), pp. 428-433 (Sereni on behalf of Belgium). Compare the response by Waldock, who did not challenge the apparent tension between Sereni's academic and practitioner's positions, *ibid.*, vol. III, pp. 750-752 (Waldock on behalf of Spain). The Court accepted the substance of Sereni's argument without reference to general principles, *Barcelona Traction*, *supra* note 16, p. 21 f.

<sup>93</sup> International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Pleadings, 7 May 2019, CR 2019/5, p. 29, para. 5 f. (Reisman on behalf of the United Arab Emirates), available at [www.icj-cij.org](http://www.icj-cij.org); *ibid.*, 8 May 2019, CR 2019/6, p. 22, paras. 30-33 (Lowe on behalf of Qatar); *ibid.*, 9 May 2019, 2019/7, p. 18, para. 6 (Reisman); *ibid.*, 9 May 2019, CR 2019/8, p. 13, para. 25 f. (Lowe). There is an interesting comparison between positions taken by international lawyers as advocates and scholars, with less tension than for Sereni, but the full discussion of academic-counsel double-hatting has to be left for another day. Cf. REISMAN, *Revision of the South West Africa Cases*, *Virginia Journal of Int. Law*, vol. 7, 1966, p. 3 ff. at p. 28; REISMAN, *The Constitutional Crisis in the United Nations*, *American Journal of Int. Law*, vol. 87, 1993, p. 83 ff. at p. 87; LOWE, *Overlapping Jurisdiction in International Tribunals*, *Australian Yearbook of Int. Law*, vol. 20, 1999, p. 191 ff. at p. 202.

<sup>94</sup> International Court of Justice, Judgment of 17 March 2016 on the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *I.C.J. Reports*, 2016, p. 100, Separate Opinion of Judge Greenwood, p. 177, paras. 2-4; International Centre for Settlement of Investment Disputes, decision on jurisdiction and admissibility of 13 July 2018, *Mobil Invest-*

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procedural field estoppel has travelled a similar normative route <sup>95</sup>. Of course, not every principle of procedural law will develop precisely along these lines but it is important to approach the inquiry without preconceptions about the “right” source, and be sensitive to diverse influences from domestic traditions, functions of international tribunals, and consensus in State practice.

The language of the Court in *Monetary Gold* provides the starting point for thinking about sources. The wording is curious: “a well-established principle of international law embodied in the Court’s Statute” (or, in the original French, “un principe de droit international bien établi et incorporé dans le Statut”) <sup>96</sup>. What is the technical significance of “embodied”? The Court certainly knew how to explain the development of procedural principles: in the first judgment of the *Nottebohm* case, rendered while *Monetary Gold* was pending, it spent two paragraphs to spell out the historical process by which its Statute “merely adopted, in respect of the Court, a rule consistently adopted by general international law in the matter of international arbitration” regarding competence-competence <sup>97</sup>. But that was not what the Court did in *Monetary Gold*. President McNair thought that the real problem was that the claim had not been brought against Albania as the right respondent <sup>98</sup>, which would have presumably made the rationale of dismissal about the Statute <sup>99</sup> — but again, the necessary implication of writing the declaration separately is that this was not the Court’s rationale. A more speculative way of probing the rationale would be to trace it to a particular pleading. The substantively closest fit seems to be Tomaso Perassi’s argument on behalf of Italy, referring to a number of recent decisions on consent as a foundation of jurisdiction in contentious cases as directly flowing from “[le] principe dont s’inspire le Statut de la Cour internationale de justice” <sup>100</sup>. Perassi does not use “principle” in a

*ments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, paras. 187-193, available at <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>.

<sup>95</sup> Permanent Court of Arbitration, award of 18 March 2015 on *The Chagos Marine Protected Area*, RIAA, vol. 31, p. 359, paras. 435-437.

<sup>96</sup> *Monetary Gold*, *supra* note 8, p. 32.

<sup>97</sup> International Court of Justice, Judgment of 18 November 1953 on the *Nottebohm case (Liechtenstein v. Guatemala)*, *I.C.J. Reports*, 1953, p. 111 ff. at p. 119.

<sup>98</sup> *Monetary Gold*, *supra* note 8, Declaration of President McNair, p. 35.

<sup>99</sup> See also *Monetary Gold*, *supra* note 8, Individual Opinion of Judge Read, p. 37 ff.

<sup>100</sup> *Monetary Gold*, *supra* note 8, Pleadings, p. 113. Perassi had been Sereni’s academic mentor.

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technical sense but as a generalised reference to consent as a basis for treaty obligations. But, again, the expression “embodied” used in the judgment may have technical connotations that the word “inspired” used in the pleading does not. Finally, standing tribunals often seek to be consistent in their use of terminology, so the technical meaning of “embodied” or “incorporé” could be revealed in other judgments of the same period. A brief perusal of the *Reports* does not, however, help: both terms were used widely but inconsistently in 1950-1960s<sup>101</sup>, and while after the 1969 *North Sea Continental Shelf* case “embodied” came to designate codification of custom by treaties<sup>102</sup>, this was not the settled meaning around 1954.

The best reading is that the Court consciously chose vague terminology to leave open the source of the principle. Some elements in the judgment and broader practice place the principle firmly within the consensual underpinning of the law of treaties and international adjudication. Whatever the ultimate juridical origin of the principle, the Court is clear that now it is “embodied” in its Statute; Perassi on behalf of Italy refers to the same, very basic law of treaties point, if expressed in flowery terms; and despite doubts about the substance of what the pre-War practice stood for, it was certainly delivered through the vehicle of treaties. There is also a role for general principles of international law properly speaking here, attuned to differences of judicial function of different international tribunals, partaking treaty interpretation and uncodified rules<sup>103</sup>. Conversely, it is harder to make the argument that the

<sup>101</sup> E.g. International Court of Justice, Judgment of 27 August 1952 on the *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports*, 1952, p. 176 ff. at p. 188 (“renunciation of capitulatory rights and privileges [...] embodied in the Convention”); *Nottebohm, cit.*, at p. 120 (“a jurisdictional clause embodied in a treaty”); Judgment of 26 May 1961 in the *Temple of Preah Vihear (Cambodia v. Thailand)*, *I.C.J. Reports*, 1961, p. 17 ff. at p. 29 (“a communication embodying her Declaration”), p. 30 (“a real consent ....., whether or not it was embodied in a legally effective instrument”). The translation was also not consistent, e.g. “incorporé” was used for both “embodied” and “incorporated” in *Rights of Nationals, cit.*, pp. 191, 202, 204.

<sup>102</sup> International Court of Justice, Judgment of 20 February 1969 in the *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)*, *I.C.J. Reports*, 1969, p. 3, para. 61; followed in *Military Activities, supra* note 45, para. 73, and more recently in the 2018 International Law Commission’s Conclusions on Custom, *supra* note 54, Conclusion 11, Commentary 4.

<sup>103</sup> Generally BROWN, *A Common Law of International Adjudication*, Oxford, 2007, Chapter 2; and a recent example regarding the International Criminal Court, AKANDE, TZANAKOPOULOS, *Treaty Law and ICC Jurisdiction over the Crime of Aggression, European Journal of Int. Law*, vol. 29, 2018, p. 939 ff. at p. 959.

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principle at issue derives from custom, not necessarily for dogmatic reasons, but rather because of the pragmatic expectation that customary law is best suited for fields of law where the juridical consensus is calibrated by reference to claims that States oppose directly to each other, which would not be the case regarding procedural principles<sup>104</sup>. Still, perhaps it is possible to see some role for State practice here: after all, custom also operates in fields of investment and human rights law, where involvement of non-State actors in judicial proceedings usually precludes inter-State opposition of claims<sup>105</sup>. Indeed, third parties have shown their ability to articulate practice by either protesting, e.g. against claimant States<sup>106</sup>, or conversely by indicating to the tribunal the lack of protest regarding jurisdiction<sup>107</sup>. Whether this practice is best read as going to custom<sup>108</sup> or, as seems more persuasive, as indicating general recognition of a principle of law formed within the international legal system<sup>109</sup>, it can be appropriately taken into account. Finally, an argument about general principles drawn from domestic legal orders would be the hardest to make, since the lack of joinder associated with the requirement of consent makes international law importantly different from domestic law<sup>110</sup>. Still, it is interesting to note how the United States' reliance on the notion of "indispensable parties" taken from its

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<sup>104</sup> A brave way of cutting through the conundrum would be to read the lack of objections to a string of judicial decisions as signifying support for a positive customary rule, Special Tribunal for Lebanon, decision of 10 November 2010 on appeal of Pre-Trial Judge's order regarding jurisdiction and standing, Case No. CH/AC/2010/02, para. 46, available at [www.stl-tsl.org](http://www.stl-tsl.org).

<sup>105</sup> WOOD, *Customary International Law and Human Rights*, EUI AEL, 2016/03, Distinguished Lectures of the Academy, available at <http://hdl.handle.net/1814/44445>; DUMBERRY, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge, 2018.

<sup>106</sup> *Military Activities*, *supra* note 45, *Pleadings*, p. 81, para. 264 (Counter-Memorial of the United States) ("The United States objected, in a letter to the Government of Costa Rica, that the [Central American] Court [of Justice] had exercised jurisdiction over the case despite the fact that the United States could not be made a party").

<sup>107</sup> *Philippines v. China*, *supra* note 25, para. 54 ("Viet Nam's position that it has 'no doubt that the Tribunal has jurisdiction in these proceedings'"), also para. 188 ("No argument has been made by [...] the neighbouring States that their participation is indispensable to the Tribunal proceeding with this case").

<sup>108</sup> POMSON, *Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?*, *Journal of Int. Dispute Settlement*, vol. 10, 2019, p. 88 ff. at pp. 117-124.

<sup>109</sup> VÁZQUEZ-BERMÚDEZ, *supra* note 89, paras. 171-175, 187.

<sup>110</sup> Permanent Court of Arbitration, arbitral award of 5 February 2011 in *Larsen v. Hawaiian Kingdom*, para. 11.20, available at [www.pca-cpa.org](http://www.pca-cpa.org).

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domestic law, while rejected in substance <sup>111</sup>, managed to shed the pedigree and content and still seep into the accepted jargon of international law — and, indeed, the title of this article <sup>112</sup>. The Court's purposive vagueness provides appropriate flexibility in adapting the principle to a changing international order, drawing upon treaty language, functional considerations, and consensus of the relevant community: what the arguments lack in clarity, they make up in adaptability to change.

6. *Character of the principle.* — What is the technical character of the indispensable third party principle? It is traditional to distinguish between two types of objections in international dispute settlement, that may preclude the consideration of a case on its merits: jurisdiction and admissibility <sup>113</sup>. The language of the Court in *Monetary Gold* is curious: “although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate” <sup>114</sup>. It is not that the Court does *not* have jurisdiction — a jurisdictional point —, nor that the Court has jurisdiction but *chooses* not to exercise it — how admissibility considerations are often described. Rather, the proposition in some sense straddles both categories, suggesting that properly conferred jurisdiction *cannot* be exercised <sup>115</sup>. For Judges writing separately, the dismissal of the case related to lack of jurisdiction <sup>116</sup> — but, again, by necessary implication, that was not what the Court had in mind.

Subsequent practice is inconsistent, if rarely focusing on the issue.

<sup>111</sup> *Military Activities*, *supra* note 45, paras. 86-88.

<sup>112</sup> *Oil Platforms*, Separate Opinion of Judge Simma, *supra* note 81, para. 79; *Certain Properties*, Dissenting Opinion of Judge *ad hoc* Berman, *supra* note 80, para. 25; Permanent Court of Arbitration, third interim award on jurisdiction and admissibility of 27 February 2012 in *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, Case No. 2009-23, para. 4.62, available at [www.pca-cpa.org](http://www.pca-cpa.org); *Philippines v. China*, *supra* note 25, para. 187. On another reading, the language was already present in the *Monetary Gold* itself, *supra* note 8, Individual Opinion by Judge Read, p. 38 (“Albania was a necessary and indispensable party to the proceedings”).

<sup>113</sup> See generally SHANY, *Questions of Jurisdiction and Admissibility before International Courts*, Cambridge, 2015.

<sup>114</sup> *Monetary Gold*, *supra* note 8, p. 33.

<sup>115</sup> Similarly THIRLWAY, *supra* note 21, p. 719.

<sup>116</sup> *Monetary Gold* McNair, *supra* note 98, p. 35 (“there is a fundamental defect in the Application and in the constitution of these proceedings”); *Monetary Gold*, Individual Opinion of Judge Read, *supra* note 112, p. 38 (“there was a fundamental defect in the Application by which these proceedings were commenced”).



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For some, *Monetary Gold* raises an issue of jurisdiction<sup>117</sup>: for example, the International Tribunal for the Law of the Sea considered Italy's objection under the heading "Jurisdiction *ratione personae*"<sup>118</sup>. Others treat it under the rubric of admissibility<sup>119</sup>. The influential 2001 International Law Commission's 2001 Articles on State responsibility for internationally wrongful acts note in the commentary to the (custom-reflecting) rule on aid and assistance<sup>120</sup> that "[t]he *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings"<sup>121</sup>. Yet other authorities follow *Monetary Gold* in using ambiguous language that does not resolve the technical distinction. For example, the *Philippines v. China* Tribunal's finding "that Viet Nam is not an indispensable third party and that its absence as a party does not preclude the Tribunal from proceeding with the arbitration" is agnostic on the matter<sup>122</sup>. The unsettled nature of the distinction is shown by the attitude of Judges in the most recent International Court's case where the argument was presented: Judge Xue quoted a disputing party's argument that the "Application is inadmissible and/or the Court lacks jurisdiction" and discussed generally "questions of jurisdiction and admissibility"<sup>123</sup>, while Judge Crawford spoke about "[t]he *Monetary Gold* ground of inadmissibility"<sup>124</sup>.

It is helpful to take two steps back and consider, first, what the distinction between jurisdiction and admissibility is, and, secondly, why the distinction is important. The Singapore Court of Appeal described the distinction in international dispute settlement in the following terms

<sup>117</sup> E.g. LAUTERPACHT, *Development*, *supra* note 21, p. 102 f.

<sup>118</sup> *Norstar* Preliminary Objections, *supra* note 9, paras. 171-175. Other commentators read the judgment as ambiguous on the distinction, FONTANELLI, *Reflections on the Indispensable Party Principle on the Wake of the Judgment on the Preliminary Objections in the Norstar Case*, *Rivista*, 2017, p. 112 ff. at p. 120.

<sup>119</sup> E.g. COLLIER, LOWE, *supra* note 21, pp. 155 f., 158-159; SHANY, *supra* note 113, p. 138 f.

<sup>120</sup> International Court of Justice, Judgment of 26 February 2007 on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports*, 2007, p. 43 at para. 420.

<sup>121</sup> International Law Commission, *Draft Articles on responsibility of States for internationally wrongful acts*, in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 67, Article 16, point 11 of the Commentary.

<sup>122</sup> *Philippines v. China*, *supra* note 25, para. 187.

<sup>123</sup> International Court of Justice, Judgment of 5 October 2016 on the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *I.C.J. Reports*, 2016, p. 833 ff., Declaration of Judge Xue, p. 1032, paras. 9-11.

<sup>124</sup> *Ibid.*, Dissenting Opinion of Judge Crawford, p. 1107, para. 33.

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in the recent *Swissbourgh Diamond Mines v. Kingdom of Lesotho* case, by reference to legal writings:

“[I]t is usefully observed that there are two ways of drawing the distinction between jurisdiction and admissibility (at 118):

‘[...] The more conceptual reading would focus on the legal nature of the objection: is it directed against the tribunal (and is hence jurisdictional) or is it directed at the claim (and is hence one of admissibility)? The more draftsmanlike reading would focus on the place that the issue occupies in the structure of international dispute settlement: is the challenge related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional), or is it related to the interpretation and application of another rule or instrument (and is hence one of admissibility)?’<sup>125</sup>.

There is reasonable disagreement in dispute settlement practice on the better approach<sup>126</sup>. But the key point for the present purpose is that neither question provides a clear-cut answer regarding the third party principle. Is the challenge related to the jurisdictional clause? The more immediate answer is likely to be “no”. But there are instances where the instrument of consent explicitly deals with the absent States: the pre-War practice in arbitration treaties provides many examples, and there is recent practice in particular fields<sup>127</sup>. Moreover, if the protection of third States is conceptualised as flowing from consent, then the absence of their consent from the jurisdictional clause could be said, in negative terms, to be functionally equivalent to its explicit consideration. What is the legal nature of the objection? On one view, it is the claim: in *Monetary Gold* States had “conferred jurisdiction upon the Court”, and in terms of contiguity of normative considerations the sense of certain impropriety about bringing such claims puts it next to abuse of process in

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<sup>125</sup> Singapore Court of Appeal, judgment of 27 November 2018 in the case *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho*, [2018] SGCA 81, para. 207.

<sup>126</sup> International Centre for Settlement of Investment Disputes, Award of 8 March 2016 in the case *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, para. 245, available at <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decision-s.aspx> (“the distinction between jurisdiction and admissibility is often a fine one, and reasonable arbitrators may reasonably disagree on how it should be made and in particular, on how it should be applied in a particular case”), cf. *ibid.*, paras. 235-247; with Partially Dissenting Opinion of Arbitrator Sands of 10 February 2016, paras. 3-11.

<sup>127</sup> Declaration of the United Kingdom recognizing the jurisdiction of the International Court of Justice as compulsory (22 February 2017), 1(vi) (excluding “any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question”), available at [www.icj-cij.org](http://www.icj-cij.org).

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the category of admissibility<sup>128</sup>. But equally, the effect of the objection that the Court “cannot exercise this jurisdiction” puts indispensable third parties in a different category from admissibility objections that may, in principle if not always in practice, be resolved by the claimant. For example, an objection to legal interest would not affect jurisdiction if the claim is brought by the right claimant; non-exhaustion of local remedies would not affect jurisdiction after exhaustion; and even mootness and abuse of process would not preclude claims if brought for proper reasons. But absent third parties will always preclude the Court’s jurisdiction, whatever a(ny) claimant does.

Another way to explore the characterisation is to reflect on why it is important. The Singapore Court of Appeal further notes that “[t]he conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-splitting endeavour”<sup>129</sup>. Of course, in a decentralised legal order such as international law, the value of linguistic hygiene across different disputes and mechanisms should not be understated, and harmonisation of practice through clarification of taxonomy has value on its own<sup>130</sup>. One practical consequence of the distinction, noted by the Singapore Court, is the extent of reviewability, often accepted regarding jurisdiction but not regarding admissibility<sup>131</sup>. But that is not relevant specifically for third parties, nor is the narrow point that a tribunal with jurisdiction that upholds an admissibility objection has the power to suspend proceedings<sup>132</sup>. The final distinction usually identified is more relevant: jurisdiction is a matter for the tribunal, to be determined *proprio motu* even if it is not challenged, while admissibility is a matter for the (responding) party, to be challenged or waived, explicitly or not. One example of the

<sup>128</sup> International Court of Justice, Judgment of 13 February 2019 in the case of *Certain Iranian Assets (Iran v. United States of America)*, paras. 113-115, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>129</sup> *Supra* note 125, para. 208.

<sup>130</sup> E.g. re-characterisation of objections in light of clarification of the distinction between abuse of rights and abuse of process, *Certain Iranian Assets*, *supra* note 128, para. 101.

<sup>131</sup> *Supra* note 125, para. 208; also International Centre for Settlement of Investment Disputes, decision on annulment of 9 March 2017, *Venezuela Holdings, BV and others v. Venezuela*, ICSID Case No. ARB/07/27, para. 110 (ICSID decisions are available at <https://icsid.worldbank.org/en/Pages/resources/Tables-of-ICSID-Decisions.aspx>).

<sup>132</sup> Cf. International Centre for Settlement of Investment Disputes, decision on objections to jurisdiction of 29 June 2004, *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, paras. 169-176, with International Centre for Settlement of Investment Disputes, award of 2 July 2013, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, para. 6.42.

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latter practice is the failure to challenge legal interest regarding claims for breaches of multilateral obligations in some recent cases before the International Court of Justice <sup>133</sup>.

Is the indispensable third party principle a matter for the tribunal or the respondent? This is the key question, in my view, which permits articulating the unease about the topic: the principle primarily protects the interests of a party, rather than the institution, but the party that is absent, rather than present. The respondent's waiver cannot dispose of the interests of the third State because they are juridically and normatively distinct, just as a State invoking responsibility on the grounds of a legal interest could not waive an injured State's right. The adjudicator's ability to appropriately exercise the judicial function is at play but it cannot be an issue solely for the judges: it would be odd if a tribunal were more protective of the absent party's rights regarding advancement of the case than the absent party itself <sup>134</sup>. The International Court of Justice in one (admittedly peculiar) case described the rationale of the principle as relating "to the right of a State not party to the proceedings" <sup>135</sup>, and the overall practice is consistent with viewing the absent party as the right-holder. Similarly, Albania's lack of intervention noted in *Monetary Gold* contrasts with more recent supportive conduct by non-parties in other disputes <sup>136</sup>.

To pull together these threads, the uncertainty of the answers is suggestive of the uniqueness of the third party principle in combining elements of both jurisdiction and admissibility and speaking to the tribunal, the claim, as well as those not present. This reading is consistent

<sup>133</sup> See lack of challenge of legal interest to bring the claim in International Court of Justice, Judgment of 31 March 2014 in the *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening)*, *I.C.J. Reports*, 2014, p. 226; *Obligations concerning Negotiations*, *supra* note 123, para. 44; *Application of the ICSFT and of the ICERD*, *supra* note 7. But see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, available at [www.icj-cij.org](http://www.icj-cij.org).

<sup>134</sup> But note that proper exercise of judicial function may sometimes require tribunals to be more protective of absent States than the States themselves, e.g. non-appearing respondents, *Philippines v. China*, *supra* note 25, paras. 112-123; FITZMAURICE, *The Problem of the "Non-Appearing" Defendant Government*, *British Yearbook of Int. Law*, vol. 51, 1980, p. 89 ff.

<sup>135</sup> *Genocide (Croatia)*, *supra* note 25, para. 116.

<sup>136</sup> Cf. *Monetary Gold*, *supra* note 8, p. 32, with *Philippines v. China*, *supra* note 25, para. 188, and another case against Italy where the third party intervened and *Monetary Gold* was applied in a lenient manner, International Court of Justice, Judgment of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, *I.C.J. Reports*, 2012, p. 99, paras. 10, 127.

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with the approach suggested by the *Chevron v. Ecuador* tribunal, which identified separate strands of consent, indispensability, and due process underpinning the principle <sup>137</sup>.

7. *Scope of the principle.* — What is the scope of the indispensable third party principle? A common way of delineating the principle is by means of the language used by the International Court of Justice, sorting those third party rights that “form the subject-matter of any decision which the Court might take” from those where judgments “might affect the[ir] legal interests” <sup>138</sup>. In my view, such analysis is not helpful, either for identifying the current state of the law, particularly for the hard cases, or for criticising it.

A more fruitful approach would address directly the four hard questions about the indispensable third party principle: first, what tribunals does it apply to? Secondly, what absent actors does it protect? Thirdly, how does it accommodate issues dealt with by other decision-makers? Fourthly, how does it deal with situations of multilateral cooperation? I will consider these questions in turn.

8. (a) *Tribunals.* — What tribunals does the indispensable third party principle apply to? It is helpful to first take stock of the dispute settlement practice and then reflect on the rationale. The principle is, of course, widely accepted as applicable in the proceedings before the International Court of Justice <sup>139</sup>. It is also accepted in inter-State disputes dealing with the law of the sea, somewhat more forcefully in the observation by the International Tribunal for the Law of the Sea that “the notion of indispensable party is a well-established procedural rule in international judicial proceedings” <sup>140</sup> than in inter-State arbitration <sup>141</sup>. Elsewhere, the practice is mixed. In the World Trade Organization (WTO), one (rather dated) panel’s report distinguished the International

<sup>137</sup> *Supra* note 112, paras. 4.60-4.64.

<sup>138</sup> International Court of Justice, Judgment of 30 June 1995 in the case concerning *East Timor (Portugal v. Australia)*, *I.C.J. Reports*, 1995, p. 90, para. 34.

<sup>139</sup> See the most recent application by the Court, *Genocide (Croatia)*, *supra* note 25, para. 116.

<sup>140</sup> *Norstar* (Preliminary Objections), *supra* note 9, para. 172.

<sup>141</sup> The tribunal distinguishes its case from other authorities without unambiguously confirming that *Monetary Gold* would apply in principle, *Philippines v. China*, *supra* note 25, paras. 181, 187.

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Court's practice from the case at hand. But it also added that there was no WTO concept of "essential parties" and that the allegedly absent party could have taken advantage of available procedures to represent its interests<sup>142</sup>; the last 20 years of practice do not display any further mention of the argument<sup>143</sup>. In the European Court of Human Rights, the *Monetary Gold* argument occasionally raised by the States has never been addressed explicitly<sup>144</sup>, but the Court does not seem troubled by its occasionally very detailed consideration of conduct of States not parties to its proceedings or, indeed, not members of the Council of Europe<sup>145</sup>. In arbitration between States and non-State actors, *Monetary Gold* has been applied by one tribunal in the most peculiar *Larsen v. Hawaiian Kingdom* case<sup>146</sup>, while the *Chevron v. Ecuador* tribunal provided the most sophisticated analysis of the principle in a judicial setting, but ultimately left its applicability open<sup>147</sup>. In European Union law, Advocate General Wathelet was certain that the principle neither existed nor could exist, since it would automatically preclude review of compatibility with EU law of international treaties concluded with third States<sup>148</sup>. Finally, the United Kingdom's Supreme Court in the *Belhaj and Rah-*

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<sup>142</sup> World Trade Organization, *Report of the Panel*, 31 May 1999, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34 R, paras. 9.8-9.13, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

<sup>143</sup> E.g. the comparable in relevant respects World Trade Organization, *Report of the Panel*, 12 August 2016, *Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

<sup>144</sup> European Court of Human Rights (Grand Chamber), Decision of 12 December 2001, in the case *Banković and Others v. Belgium and Others*, applic. No. 52207/00, paras. 31 and 83; European Court of Human Rights (Grand Chamber), Decision of 2 May 2007, in the case *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, applic. Nos. 71412/01, 78166/01, paras. 67, 84, 106 and 153 (the decisions of the European Court of Human Rights are available at <http://hudoc.echr.coe.int>).

<sup>145</sup> E.g. the many cases where the situation in the receiving country is evaluated, European Court of Human Rights, Judgment of 2 February 2010, in the case *Al-Saadon and Mufdhi v. United Kingdom*, applic. No. 61498/08, paras. 123-125, 129-145; and "war of terror" cases dealing with rendition involving the United States, European Court of Human Rights (Grand Chamber), Judgment of 13 December 2012, in the case *El-Masri v. "The Former Yugoslav Republic of Macedonia"*, applic. No. 39630/09, paras. 154-167, 186-194, 205-211, 215-222 and 238 f.; and Judgment of 31 May 2018, in the case *Abu Zubaydah v. Lithuania*, applic. No. 46454/11, paras. 484-576, 611-622, 634-644 and 655-658.

<sup>146</sup> *Larsen*, *supra* note 110, paras. 11.8-11.24, particularly para. 11.17 ("the Tribunal is not persuaded that the Monetary Gold principle is inapplicable. On the contrary, it can see no reason either of principle or policy for applying any different rule.").

<sup>147</sup> *Chevron*, *supra* note 112, paras. 4.60-4.71. Belgium raised but did not seriously pursue the argument in the case *Ping An*, *supra* note 25, paras. 127-128, 238.

<sup>148</sup> Opinion of Advocate General Wathelet, *supra* note 25, para. 57.

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*matullah* cases, which addressed alleged complicity by officials in torts committed overseas, rejected *Monetary Gold* on the facts but seemed divided on the principle: Lord Mance thought that the situation was nuanced, while for Lord Sumption the assumption of its applicability in domestic setting was a large one <sup>149</sup>.

Does dispute settlement practice stand for a broader principle? Perhaps the rationale is that indispensable third party principle is a creature of classic inter-State international law and as such it would apply in inter-State tribunals but not in other procedural mechanisms. Such a reading would explain, respectively, law of the sea disputes and human rights law; but the WTO practice and *Larsen* show otherwise. A different answer could be, as the latter tribunal suggested, that *Monetary Gold* applies where “the Tribunal is called on to apply international law to a dispute of a non-contractual character in which sovereign rights of a State not a party to the proceedings are called in question” <sup>150</sup>. But even leaving the old chestnut of “is European law international law” aside, trade and human rights tribunals should then be acting differently.

A better view is that this is fundamentally an institutional question, partaking elements of (self-perception of) judicial function, the extent to which the consensual underpinnings of traditional judicial architecture have been eroded in the multilateral architecture of trade and human rights, and pragmatic evaluation about whether due process rights of third parties are respected in practice. Various authorities point in this direction, including Wathelet’s “but of course” point that *Monetary Gold* would not work in the Court of Justice of the European Union, and the WTO panel’s note of various procedural avenues open under the Dispute Settlement Understanding to third parties. In less charitable terms, the consensual underpinnings of *Monetary Gold* provide particular incentives for those tribunals that have, as it were, a clientele attuned to interpretation and application of consent and that will in practice withdraw it entirely if dissatisfied — International Court of Justice, law of the sea dispute settlement tribunals, investor-State arbitrations <sup>151</sup> — and correspondingly less relevant for regime-supporting tribunals embedded in broader institutional setting where individual judgments will not drive

<sup>149</sup> *Belhaj*, *supra* note 25, respectively paras. 27, 193.

<sup>150</sup> *Larsen*, *supra* note 110, para. 11.17.

<sup>151</sup> HERNÁNDEZ, *The International Court of Justice and the Judicial Function*, Oxford, 2014, Chapter III.

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pushback on their own<sup>152</sup>. It does not mean, of course, that the absent parties will share this vision: the Central American Court's judgment lead to a strong United States' criticism "despite the fact that the United States could not be made the party"<sup>153</sup>. But this is a debate nevertheless best approached through the lenses of judicial function<sup>154</sup>.

9. (b) *Parties*. — What categories of absent parties are protected by the indispensable third party principle? The previous section on tribunals necessarily informs the answer, but this last question puts in sharper terms the rationale of the principle. To adopt the distinction of *Chevron*<sup>155</sup>, is the principle primarily consensual, directed at the protection of actors who could participate in the case or become parties to the tribunal, or primarily connected to due process, directed at a much broader spread of actors and proper exercise of judicial function? In other words, would *Monetary Gold* be decided in any way differently if, all else remaining the same, the absent party were not a State but an international organisation — or a non-State actor?

The consensual rationale is strongly reflected in the practice of the International Court of Justice, going back to *Monetary Gold* — "it is not contended by any Party that Albania has given her consent in this case"<sup>156</sup> — and clearly articulated in a recent case where the objection was rejected because a State no longer in existence "is incapable of giving or withholding consent to the jurisdiction of the Court"<sup>157</sup>. That may seem formalistic but has the not insignificant advantage of giving a clear answer to the question: in the alternative, if not (just) potential parties, then who? "States" seems a plausible answer in international law, and must be the presumed rationale of the United States' protest against judgments of a regional court from a different region<sup>158</sup>. International law analogises between States and international organizations on gener-

<sup>152</sup> SHANY, *Assessing the Effectiveness of International Courts*, Oxford, 2014, p. 43 f.

<sup>153</sup> *Military Activities*, *supra* note 45, Pleadings, vol. II, para. 264 (Counter-Memorial).

<sup>154</sup> LOWE, *The Function*, *supra* note 2; HERNÁNDEZ, *supra* note 151; SHANY, *Assessing*, *supra* note 152; ALVAREZ, *What are International Judges for? The Main Functions of International Adjudication*, in *The Oxford Handbook*, *supra* note 1.

<sup>155</sup> *Supra* note 112, paras. 4.61-4.63.

<sup>156</sup> *Monetary Gold*, *supra* note 8, p. 32.

<sup>157</sup> *Genocide (Croatia)*, *supra* note 25, para. 116.

<sup>158</sup> *Military Activities*, *supra* note 45, Pleadings, vol. II, para. 263 f. (Counter-Memorial).



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alist subjects of sources and responsibility; thus, protecting an absent organization would be a small extension of the traditional approach <sup>159</sup>.

But the argument becomes murkier when taken further. What about unrecognised *de facto* entities that are sufficiently similar to States for rules of State responsibility to apply <sup>160</sup>? Non-State actors may hold extensive international rights under human rights and investment law: how should one deal, for example, with an investment arbitration claim of restitution of property taken in a discriminatory manner in favour of another foreign investor, protected by a different treaty? What about due process guarantees for actors that may be affected by the eventual decision, whether they hold rights, individually or collectively, under international law or not? It is impossible to answer these questions on their own terms without going back to the rationale of the principle.

10. (c) *Other decision-makers.* — How does the indispensable third party principle accommodate decisions taken by other tribunals and other international bodies? The plurality of international courts is a key characteristic of current international law <sup>161</sup>. It is thus possible that some aspects of the dispute would have previously been dealt with by another tribunal. In fact, such was the situation already in *Monetary Gold*: the “belong[ing]” of the gold to Albania had been determined by an international arbitral tribunal, and Albania’s responsibility to the United Kingdom by the International Court of Justice itself in *Corfu Channel* <sup>162</sup>. Importantly, neither the Court nor the parties found those aspects of Albania’s rights and responsibilities problematic. The necessary implication must be that issues determined *res judicata* by an earlier decision of the International Court of Justice or an inter-State arbitral tribunal do not qualify for a third party’s protection.

What if the earlier decision-maker were not an international tribunal? That was a question raised in the *East Timor* case, where Portugal argued that various UN Security Council and General Assembly resolutions could be taken as “givens”. The Court rejected the argument on its

<sup>159</sup> Confirmed by necessary implication by considering the objection regarding NATO, International Court of Justice, Judgment of 5 December 2011 in the case concerning *Application of the Interim Accord of 13 September 1995 (the Former Republic of Macedonia v. Greece)*, *I.C.J. Reports*, 2011, p. 644, paras. 42-44.

<sup>160</sup> *Genocide (Bosnia and Herzegovina)*, *supra* note 121, para. 420.

<sup>161</sup> BOISSON DE CHAZOURNES, *supra* note 1.

<sup>162</sup> *Supra* note 71.

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merits — the resolutions did not go as far as Portugal suggested and State practice had been inconsistent —, but its language suggests acceptance of the underlying principle that there can be decisions “regarded as ‘givens’ which constitute a sufficient basis for determining the dispute between the Parties”<sup>163</sup>. Taken together, *Monetary Gold* and *East Timor* provide a helpful framework for thinking about relationships between tribunals and institutions in a decentralised order. But they still leave open questions for hard cases. For example, how do “givens” apply when determination is non-binding, like advisory opinions; when the content of “givens” is contested by the absent party<sup>164</sup>, when the tribunal is not an inter-State tribunal but an investor-State, human rights, or an otherwise specialised body; or when the institution in question is specialised or regional rather than universal?

11. (d) *Multilateral co-operation*. — The final cross-cutting question relates to multilateral interaction by States and other actors. By adopting the perspective of the law of State responsibility, let me propose a taxonomy of four situations where the indispensable third party principle does not preclude adjudication in multilateral disputes<sup>165</sup>. The first situation is where primary rules allegedly breached by the respondent and the absent party are different and in no way conditioned upon each other, e.g. *Jurisdictional Immunities* where wrongfulness of Italian courts’ allowance of the application for *exequatur* could be considered separately from the Greek judgment for which it was sought<sup>166</sup>. Secondly, primary rules allegedly breached by the respondent require it to prevent certain

<sup>163</sup> *East Timor*, *supra* note 51, para. 32. The characterisation of “givens” as a qualification is confirmed by Judge Shahabuddeen’s disagreement: for him, a point could be “given” and protected by *Monetary Gold* as involving determination of third party interests. *Ibid.*, Separate Opinion of Judge Shahabuddeen, p. 119 ff. at pp. 123-124. A possible technical answer is that submission to a tribunal or an organisation capable of making a determination acts as a waiver of a right to be protected from a future tribunal considering the matter.

<sup>164</sup> These two issues are likely to arise in the pending case of International Court of Justice, *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, available at [www.icj-cij.org](http://www.icj-cij.org), where interpretation of United Nations resolutions, inconsistencies in State practice, and an earlier advisory opinion may become relevant, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports, 2004, p. 136.

<sup>165</sup> PAPANINSKIS, *Procedural Aspects of Shared Responsibility in the International Court of Justice*, *Journal of Int. Dispute Settlement*, vol. 4, 2013, p. 295 ff. at pp. 308-311.

<sup>166</sup> *Jurisdictional Immunities*, *supra* note 136, para. 127. From the cases discussed in this article, in the same conceptual category fall *Military Activities*, *supra* note 45, paras. 86-88, and *Certain Properties*, Dissenting Opinion of Judge *ad hoc* Berman, *supra* note 80, para. 26.

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conduct by the absent State or the harm caused by that conduct, which would explain *Corfu Channel* and, with slightly more effort, human rights cases noted above <sup>167</sup>. Thirdly, the conduct of absent States becomes relevant as a matter of secondary rules of attribution. In *East Timor*, Judge Shahabuddeen explained *Corfu Channel* as a case where “by making Yugoslavia’s acts its own it would engage international responsibility” <sup>168</sup>. It seems to me that *Corfu Channel* is worth taking seriously as a pre-gloss to *Monetary Gold*, rendered by essentially the same Judges just five years before and even argued on behalf of the United Kingdom by the same counsel <sup>169</sup>. Fourthly, the breach having been committed jointly does not preclude the admissibility of the claim against one of the responsible actors, as in *Phosphates of Nauru* <sup>170</sup>, although may raise harder questions for determination of content of responsibility and particularly reparations. Conversely, if the responsibility of the absent State is directly engaged, as in *Monetary Gold*, then the same result follows and the case cannot proceed to the merits.

The guiding light of this paper has been the *Monetary Gold*, so it seems appropriate to conclude with another, very recent inter-State dispute that also involves Italy and raises the same point: *Norstar* in the Hamburg Tribunal. The case was brought by Panama against Italy and related to the seizure of the eponymous ship by Spanish authorities pursuant to a request by Italian authorities under the European Convention on Mutual Assistance in Criminal Matters <sup>171</sup>. Italy’s objection that Spain was an indispensable party was rejected, the Tribunal taking the view that Italy’s request for enforcement of seizure was central, the relationship between Italy and Spain fitted into the model of aid and assistance, and Italy was exercising legal control. Therefore, according to the Tribunal, Spain’s presence was not necessary <sup>172</sup>. Judges writing individually noted various State responsibility aspects, some considering that the key question was whether Spain’s or Italy’s act violated Pana-

<sup>167</sup> 2001 ILC Articles, *supra* note 121, point 4 of the Commentary to Chapter IV, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 64.

<sup>168</sup> *East Timor*, Separate Opinion of Judge Shahabuddeen, *supra* note 51, p. 122.

<sup>169</sup> Cf. International Court of Justice, Judgment of 9 April 1949 in *The Corfu Channel case (United Kingdom v. Albania)* (Merits), *I.C.J. Reports*, 1949, p. 4; *Monetary Gold*, *supra* note 8.

<sup>170</sup> International Court of Justice, Judgment of 26 June 1992 in *Certain Phosphate Lands in Nauru*, *I.C.J. Reports*, 1992, p. 240, para. 55.

<sup>171</sup> *Norstar* (Preliminary Objections), *supra* note 9, paras. 41-48.

<sup>172</sup> *Ibid.*, paras. 165-167, 173.

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ma's rights, and others suggesting than in cooperation cases the requesting State bore responsibility and that Spain had acted as a "delegated operative"<sup>173</sup>.

Where does the claim fit within the taxonomy sketched in the previous paragraph? Similarly to Fontanelli, let me suggest that the answer ultimately turns on interpretation of primary rules from the perspective of State responsibility<sup>174</sup>, with the key question whether they relate to connected but autonomous acts, like *Jurisdictional Immunities*, or joint conduct, similarly to *Nauru Phosphates* if exercised through various organs. The Tribunal's reasoning will not persuade everybody, and some will think that observations about aid and assistance and delegation conflate the distinct questions of conduct, which could at most affect circumstances precluding wrongfulness, with wrongfulness and attribution. States do not escape responsibility by acting pursuant to requests. But it does not mean that the conclusion on the point of principle was incorrect. If in this type of cooperation the requested State is expected to engage in some degree of review, similarly to *Jurisdictional Immunities*, then responsibility of Spain must be determined and the case is inadmissible. Conversely, if *Norstar* is a case of joint and several responsibility, then *Nauru Phosphates* applies and the case may proceed. In short, multilateral cooperation is best approached by taking full advantage of the sophisticated modern law of State responsibility, and *Norstar's* influence on further developments is likely to be curtailed by the Tribunal's light treatment of this part of the legal argument.

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12. *Conclusion.* — Let me conclude by summarising my argument and outlining future developments. First, the indispensable third party principle is, in its traditional form, here to stay. Its consensual underpinnings may be subject to cogent academic criticisms<sup>175</sup>, and it seems an ill-fitting relic in the world of advisory opinions that treat traditional consent in the lightest manner possible<sup>176</sup>. But it is taken seriously by

<sup>173</sup> *Ibid.*, respectively Joint Separate Opinion of Judges Wolfrum and Attard, para. 45; Separate Opinion of Judge Ndiaye at p. 25 f.; Separate Opinion of Judge Lucky, para. 34.

<sup>174</sup> FONTANELLI, *supra* note 118, pp. 118-120, 131 f.

<sup>175</sup> LAUTERPACHT, *The Principles*, *supra* note 21.

<sup>176</sup> International Court of Justice, advisory opinion of 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, paras. 83-91, available at [www.icj-cij.org](http://www.icj-cij.org); Declaration of Judge Tomka, paras. 6-9; Dissenting Opinion of Judge Donoghue, paras. 4-23 (*ibid.*).

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States, and is likely to be of increasing importance in the times ahead for international tribunals. Secondly, it is important to note two distinct readings of the rationale of the principle: a jurisdictional principle flowing from consent and aimed at protecting actors that are capable in principle to appear before the particular inter-State adjudicator; or, alternatively, a principle of admissibility flowing from concerns about due process of actors of various kinds, absent from various institutions. One permissible inference from the pre-War messiness is that a variety of rationales may co-exist, attuned to different policies and rationales.

Thirdly, the distinct readings of the principle inform the hard questions of applicability to tribunals and parties. The classic consensual model limits applicability to inter-State tribunals, like the International Court of Justice, and States as their potential clients; the due process model throws the net more broadly, but struggles with drawing the line by reference to differences of judicial functions and conceptions of legal personalities in international law. Fourthly, the indispensable third party principle is highly attuned to the key characteristics of modern dispute settlement: the concept of “givens” assists in navigating multiple tribunals and institutions, and a sharp sense of State responsibility law helps with multilateral disputes, which is likely to be highly relevant for international dispute settlement in both pending cases and the times ahead.

The contribution of this paper is two-fold. It puts the indispensable third party principle in its proper, up-to-now generally forgotten historical context, providing continuity to current debates, and unpacks principled disagreement underpinning key doctrinal controversies. It also situates the principle alongside other debates of general international law regarding judicial function and responsibility for wrongful acts. If the centrality of the indispensable third party principle in the most politically charged case pending at the moment before international judicial bodies is any indication<sup>177</sup>, this rule will play an important role in delineating individual, institutional, and communal interests in the changing international legal order. Perhaps the argument for deeper appreciation of historical (dis)continuities and pressure points of the principle put forward in this article will prove helpful to different actors in navigating the international legal process.

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<sup>177</sup> *Relocation of the United States Embassy*, supra note 164; TALMON, *The United States under President Trump: Gravedigger of International Law*, *Chinese Journal of Int. Law*, vol. 18, 2019, p. 645 ff. at pp. 647-648, 661, 667.