

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

### LONG LIVE *MONETARY GOLD* \*TERMS AND CONDITIONS APPLY

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Zachary Mollengarden and Noam Zamir want to take back to basics the principle associated with the *Monetary Gold Removed from Rome in 1943* (*Monetary Gold*) judgment of the International Court of Justice (ICJ). Their “categorical” and mostly doctrinal claim, underpinned by policy concern about “the tensions between the bilateral presuppositions of the Statute and the increasingly multilateral nature of international affairs and international disputes” is “that the *Monetary Gold* principle is irreconcilable with the ICJ Statute’s jurisdictional architecture.” The tension between bilateralism and community interests often provides an attractive analytical perspective,<sup>1</sup> and points raised by the authors might be relevant in calibrating certain aspects of the principle. But its wholesale critique, while skillfully put, is ultimately unpersuasive. Careful consideration of basic instruments and issues is commendable but an exclusive focus that does not engage with the broader international legal process will miss its unmistakable and widespread endorsement of the *Monetary Gold* principle. Even the concern about the multilateral context ultimately counts against rather than in favor of their argument. Multilateral sensitivities can already be articulated within the four corners of *Monetary Gold*, and *Mauritius/Maldives*, delivered just as the ink was drying on the first draft of this essay, is a perfectly timed example for that.<sup>2</sup>

#### *Long Live Monetary Gold*

A helpful starting point for doctrinal arguments about a procedural principle before an international tribunal is the jurisprudence of the tribunal itself. That judgments of the ICJ are “subsidiary means for the determination of rules of law” in the technical sense is not, as Mollengarden and Zamir suggest, a reason for downplaying them. The International Law Commission (ILC) recently noted, in a conclusion positively received by States,<sup>3</sup> that “[t]he term ‘subsidiary means’ denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law” but “does not, and is not intended to, suggest that such decisions are not important.”<sup>4</sup> Before exploring the subtleties of *Monetary Gold* jurisprudence, why not acknowledge the central point? In the past

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<sup>1</sup> Martins Paparinskis, *The Once and Future Law of State Responsibility*, 114 AJIL 618 (2020).

<sup>2</sup> [Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean](#) (Mauritius/Maldives), Preliminary Objections, Judgment, paras. 247–48 (ITLOS, Jan. 28, 2021).

<sup>3</sup> Int’l Law Comm’n, [Identification of Customary International Law: Statement of the Chair of the Drafting Committee Mr Charles Chernor Jalloh](#) 14 (May 25, 2018).

<sup>4</sup> Int’l Law Comm’n, Conclusions on Identification of Customary International Law, [Report on the Work of the Sixty-Eighth Session](#), UN Doc. A/73/10, at 119 (2018) (Conclusion 13, Commentary 2); also Int’l Law Comm’n, Draft Conclusions on Peremptory Norms of

30 years, the *Monetary Gold* principle has been routinely considered by the Court or a substantial number of judges writing individually,<sup>5</sup> and its wholesale rejection has found favor with, at most, one Judge.<sup>6</sup> There may be good reasons to argue that a particular reading of *Monetary Gold* does not fit within the broader structure and jurisprudence of the Court or other tribunals, that new developments require revisiting older consensus, or that the jurisprudence, while doctrinally persuasive, is normatively unappealing. But none of these is the claim made by Mollengarden and Zamir. Some readers will therefore not be immediately persuaded by the argument against the *Monetary Gold* principle *tout court*, when measured against the benchmark of crushing judicial consensus within living memory in its support.<sup>7</sup>

Judicial endorsement, of course, is not everything. *South West Africa* is an example of how a narrowly bilateralist approach to admissibility by the ICJ can get the issue very wrong indeed by failing to appreciate broader multilateral shifts in the international legal order.<sup>8</sup> Fortunately, public international law is an advanced legal order, identifying and calibrating rules by reference to the shifting consensus of relevant actors, and is not beholden to the whims of apex courts that primitive legal orders such as domestic or regional law may be subject to. What sorts of things would one expect to see if the *Monetary Gold* principle were on the verge of being swept away from the ICJ? With an eye to *South West Africa*, some examples of the approaching tempest would be severe criticisms in individual judicial opinions and the work of the ILC as well as disapproval in state practice, expressed in political bodies of international organizations, avoidance of submission of disputes or even creation of alternative judicial bodies excluding the principle. I do not immediately see any comparable hints of mistrust and disapproval; quite the contrary.<sup>9</sup> Indeed, Timor-Leste, the purported beneficiary of the only modern case stopped by a *Monetary Gold* objection, has both accepted the ICJ's jurisdiction in remarkably broad terms and successfully resorted to it.<sup>10</sup> A further layer of endorsement comes from outside the ICJ. While other tribunals and relevant actors take different views on how (well) the principle fits and applies within *their* regimes,<sup>11</sup> this otherwise diverse practice uniformly takes the

General International Law (*jus cogens*), [Report on the Work of the Sixty-Ninth Session](#), UN Doc. A/74/10, at 142 (2019) (Draft conclusion 9, Commentary 1).

<sup>5</sup> E.g., [Certain Phosphate Lands](#) (Nauru v. Austl.), Preliminary Objections, 1992 ICJ REP. 240 (June 26); [East Timor](#) (Port. v. Austl.), Judgment, 1995 ICJ REP. 90 (June 30); [Certain Property](#) (Liech. v. Guat.), Preliminary Objections, 2005 ICJ REP. 6 (Feb. 10); [Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea](#) (Nicar. v. Hond.), Judgment, 2007 ICJ REP. 659 (Oct. 8); [Application of the Interim Accord of 13 September 1995](#) (FYRM v. Greece), Judgment, 2011 ICJ REP. 644 (Dec. 5); [Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. U.K.), Preliminary Objections, 2018 ICJ REP. 833 (Oct. 5).

<sup>6</sup> Is the “[i]mpertinence of the so-called *Monetary Gold* ‘principle’” a doctrinal argument at all or its critique against jurnaturalist benchmarks? *Obligations*, *supra* note 5, at 907, paras. 128–131 ([Diss. Op. Cançado Trindade](#)). For balance, others think that more cases should have been dismissed on these grounds, *Certain Property*, *supra* note 5, at 70 para. 26 ([Diss. Op. Berman](#)).

<sup>7</sup> Martins Paparinskis, [Revisiting the Indispensable Third Party Principle](#), 103 *Rivista di Diritto Internazionale* 49, 83–84 (2020).

<sup>8</sup> [South West Africa](#) (Eth. v. South Afr.; Lib. v. South Afr.), Judgment, 1966 ICJ REP. 6 (July 1966).

<sup>9</sup> Int'l Law Comm'n, [Articles on Responsibility of States for Internationally Wrongful Acts](#), [2001] 2(2) Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at 26 (2001) (Article 16, Commentary 11). After the *Obligations* cases, *supra* note 5, all the respondents amended Optional Clause declarations to further limit consent in multilateral disputes, partly echoing the substance of their *Monetary Gold* objections: [United Kingdom](#) (February 22, 2017) 1(vi); [Pakistan](#) (March 29, 2017) f; [India](#) (September 27, 2019) 7.

<sup>10</sup> [Timor-Leste](#) (September 21, 2012); [Questions Relating to the Seizure and Detention of Certain Documents and Data](#) (Timor-Leste v. Austl.), Order, 2015 ICJ REP. 572, 574 (June 11).

<sup>11</sup> [Paparinskis](#), *supra* note 7, at 76–79.

ICJ's approach as the starting point and thus necessarily endorses it.<sup>12</sup> Far from undermining the overwhelming judicial consensus in support of the principle, the broader reactions to the *Monetary Gold* principle in judicial and state practice strengthen it yet further.

*\*Terms and Conditions Apply*

It is possible to remain unpersuaded by Mollengarden and Zamir's argument against the *Monetary Gold* principle and be sympathetic to their policy concerns about its possible implications for multilateral disputes. But a rejection of *Monetary Gold*, while sufficient, is not necessary for addressing these concerns, as the Court's jurisprudence reveals credible substantive and procedural avenues for engaging with complex multilateral disputes. I will sketch three sets of questions helpful for calibrating the *Monetary Gold* principle for the modern world, considering in turn its ambiguous foundations and character, interaction with state responsibility, and fit within the broader universe of tribunals and institutions.

*Source and Character*

The brevity of *Monetary Gold's* formula and its endorsement by the Court's jurisprudence noted above disguise genuine doctrinal uncertainties about its underpinnings, opening avenues for criticism and refinement, as it were, from within. First, what precisely is the source of the "well-established principle of international law embodied in the Court's Statute"? The Court's language is ambiguous, and not for a lack of ability to explain the pedigree of procedural principles, as it did brilliantly on competence-competence in the contemporaneous *Nottebohm* case.<sup>13</sup> The ambiguity is deepened by the backdrop practice on arbitration and third-party rights. This practice ranges from bilateral treaty exclusion of consent to arbitration where disputes "concern the interests of third Parties" (before World War One) to a sharp regional division between endorsement of that approach in the Inter-American setting and explicit rejection in the Locarno Treaties and the General Act of Arbitration (in the second half of 1920s).<sup>14</sup> Second, the question that divided even the Lauterpachts: does *Monetary Gold* relate to jurisdiction or admissibility?<sup>15</sup> In my view, the better answer is "both": the real debate is not about the right reading of *the* principle but rather between its two conceptions, with different policy goals of (rainmaking) protection of actors that are capable, in principle, of appearing before the particular inter-state adjudicator and (altruistic) concerns about due process treatment of actors of various kinds.<sup>16</sup> For the former reading, the enlightened self-interest of the adjudicator in increasing the docket motivates them to take seriously the perspective of absent actors because they are capable of modifying the general scope of their consent and choosing (not) to bring particular cases in the future. For the latter, concerns about propriety apply even if actors absent from various adjudicators are not potential parties. Ultimately, whatever view one takes on these questions, there are good doctrinal reasons for debating *Monetary Gold* less as a first-principles proposition to be particularized in an internally consistent

<sup>12</sup> In addition to *id.*, [Addiko Bank AG and Or v. Croat.](#), ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection, June 12, 2020 para 307; [Molla Sali v. Greece](#), App No. 20452/14, June 18, 2020, Joint Partly Dissenting Opinion, paras 50–52 (Eur. Ct. Hum. Rts., June 18, 2020); [Mauritius/Maldives](#), *supra* note 2, at para 97.

<sup>13</sup> *Cf.* [Monetary Gold Removed from Rome in 1943](#) (It. v. Fr., U.K. and U.S.), Judgment, 1954 ICJ REP. 19, 32 (June 15); [Nottebohm](#) (Liech. v. Guat.), Preliminary Objections, 1953 ICJ REP. 111, 119 (Nov. 18).

<sup>14</sup> [Paparinskis](#), *supra* note 7, at 58–59.

<sup>15</sup> *Cf.* HERSCH LAUTERPACHT, [THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT](#) 95, 102–03, 343–44 (1958); Eli Lauterpacht, [Principles of Procedure in International Litigation](#), 345 RECUEIL DES COURS 387, 504 (2011).

<sup>16</sup> [Paparinskis](#), *supra* note 7, at 71–84.

manner and more as an amalgam of rules pursuing tenuously related and sometimes even conflicting policies. In short, *Monetary Gold* is perfectly open to doctrinal elaboration for those dissatisfied with particular readings.

### *State Responsibility*

The *Monetary Gold* principle is not just about state responsibility.<sup>17</sup> But the *Monetary Gold* case itself was, as were most ICJ cases to address the principle in the last thirty years.<sup>18</sup> Thus, the fit of the principle with the modern law of state responsibility is a helpful starting point for discussing its compatibility with multilateral disputes. This relationship may be summarized in five propositions,<sup>19</sup> for the first four of which the *Monetary Gold* principle is not an obstacle to consideration of the case on the merits. First, the primary rules allegedly breached by the respondent and the absent party are different and in no way contingent.<sup>20</sup> Second, primary rules allegedly breached by the respondent require it to prevent certain conduct by the absent state or the harm caused by that conduct.<sup>21</sup> Third, the conduct of absent states becomes relevant as a matter of secondary rules of attribution.<sup>22</sup> Fourth, the breach having been committed jointly does not preclude the admissibility of the claim against one of the responsible actors.<sup>23</sup> In these scenarios, despite possible inference or implication as to the legal position of the third state, the claim can proceed—but the *Monetary Gold* principle does apply in the fifth scenario, where a determination of the legal position of the third state is a necessary prerequisite to the determination of the case before the Court.<sup>24</sup> There will be reasonable disagreement about the boundaries between these categories and their application to particular disputes,<sup>25</sup> and applicants will carefully draft claims and prayers for relief to skirt around the fifth category.<sup>26</sup> But it is hard to argue that this jurisprudence is insensitive to, or necessarily incompatible with, multilateral disputes.

### *Tribunals and Institutions*

How does the *Monetary Gold* principle operate in the world of plurality of tribunals and international organizations, where some aspects of the dispute may have already been addressed in a judicial or political setting, or indeed both? Three cases dominate the field. The first is *Monetary Gold* itself, standing for the proposition that rights and responsibilities of absent parties are not protected if they have been determined *res judicata* by an inter-state arbitral or judicial body.<sup>27</sup> Second, *East Timor* accepted in principle that decisions by the UN Security Council and General Assembly (UNGA) can also “be regarded as ‘givens’ which constitute a sufficient basis for determining the dispute

<sup>17</sup> *Territorial and Maritime Dispute*, *supra* note 5; *Mauritius/Maldives*, *supra* note 2.

<sup>18</sup> *Supra* note 5.

<sup>19</sup> See Martins Paparinskis, *Procedural Aspects of Shared Responsibility in the International Court of Justice*, 4 J. INT’L DISP. SETTLEMENT 295, 308–11 (2013); Paparinskis, *supra* note 7, at 81–83.

<sup>20</sup> Separate opinions in *Certain Property*, *supra* note 5; *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, at para. 204 (Dec. 19); *Interim Accord*, *supra* note 5, at para. 43; *Jurisdictional Immunities of the State* (Ger. v. It., Greece intervening), 2012 ICJ Rep. 99, para. 127 (Feb. 3).

<sup>21</sup> *Corfu Channel* (U.K. v. Alb.) Judgment, 1949 ICJ REP. 4, 15–23 (Apr. 9).

<sup>22</sup> *East Timor*, *supra* note 5, at 119, 122 (Sep. Op. Shahabuddeen).

<sup>23</sup> *Phosphates of Nauru*, *supra* note 5, at para. 55.

<sup>24</sup> *Obligations*, *supra* note 4, at 1093, para. 32 (Diss. Op. Crawford).

<sup>25</sup> See the different takes in separate opinions in *Obligations*, *supra* note 5.

<sup>26</sup> See discussion in separate opinions in *Certain Property*, *supra* note 5.

<sup>27</sup> *Monetary Gold*, *supra* note 13, at 26.

between the Parties,” albeit setting in its judgment a demanding test for content and consistency of organizational and state practice to satisfy that benchmark.<sup>28</sup> Third, *Mauritius/Maldives* evaluated the impact on the absent United Kingdom’s rights of an ICJ advisory opinion and a follow-up UNGA resolution.<sup>29</sup> For some, the rationale of *Monetary Gold* and the “givens” of *East Timor* was a waiver by the absent third party of the objection to admissibility, which could be provided only by accession to an instrument providing for binding determination, whatever the degree of political consensus or importance of rights at issue.<sup>30</sup> For others, the two key takeaways from *East Timor* were the lack of an explicit requirement for resolutions to be binding and the general ambiguity and inconsistency of practice discussed, suggesting by implication that even non-binding clear and consistent UN practice could operate as an exception to *Monetary Gold*. The Special Chamber of the International Tribunal for Law of the Sea (ITLOS) took the latter approach, emphasizing the authoritative determination by a judicial body in an advisory opinion, further strengthened by “Resolution 73/295 of the General Assembly, within the remit of which the modalities necessary for ensuring the completion of the decolonization of Mauritius fall.”<sup>31</sup> Reasonable people will disagree on whether the cumulative criteria of an ICJ advisory opinion and the law of decolonization make “this case . . . ring-fenced. . . literally, one of a kind”<sup>32</sup> or a how-to guide for sophisticated actors to fill in authoritative determinations of discrete points before approaching tribunals with limited jurisdiction (no doubt, a perspective that drafters of advisory opinions and those engaged in pending cases where opinions may have implications will carefully reflect upon). But for this essay, the key point is that *Monetary Gold* is hardly oblivious to the institutional realities of modern international law.

### Conclusion

Mollengarden and Zamir’s argument for complete rejection of the *Monetary Gold* principle is clear and important, and it was a pleasure to reflect upon the intricacies of their skillful reasoning. It is also, in my view, unpersuasive and aimed at correcting a mischief that is ultimately not there. The ICJ’s *Monetary Gold* principle is good law, endorsed by overwhelming judicial and state practice. If concerns about insensitivity to multilateral considerations is what drives the authors, they may be understating the sophistication of modern international dispute settlement law on these matters. The law of state responsibility and the jurisprudence on interactions between the adjudicators and determinations by other international actors, discussed above, equip international lawyers with the substantive and procedural tools for navigating multilateral disputes. And that is even before addressing general principles of *res judicata*, estoppel, and abuse of process for further granularity, or the international judicial function, e.g., the role played in the framing of *Mauritius/Maldives* by the foundational story of ITLOS as a reaction to *South West Africa* and the historically problematic relationship of international tribunals with decolonization.

Mollengarden and Zamir conclude with a nod to *Monetary Gold* as a case that meaninglessly delayed the settlement of the dispute. Let me add two wrinkles. The first relates to the underlying arrangements on settlement of disputes that, on one reading, heavily circumscribed the will of Italy and Albania,<sup>33</sup> putting in perspective their discomfort with the Court and the relative attractiveness of even lengthy negotiations. The second point relates

<sup>28</sup> *East Timor*, *supra* note 5, at paras. 31–32.

<sup>29</sup> *Mauritius/Maldives*, *supra* note 2, at paras. 140–230, considering [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#), Advisory Opinion, 2019 ICJ REP. 95 (Feb. 25); [GA Res 73/295](#) (May 24, 2019).

<sup>30</sup> By analogy, [Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait](#) (Ukr. v. Rus.), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of Russia, paras. 174–78 (Feb. 21, 2020).

<sup>31</sup> *Mauritius/Maldives*, *supra* note 2, at paras. 244, 246.

<sup>32</sup> *Id.*, [Verbatim Record](#), ITLOS/PV.20/C28/6, at 20 (Sands on behalf of Mauritius).

<sup>33</sup> ALESSANDRO ROSELLI, [ITALY AND ALBANIA: FINANCIAL RELATIONS IN THE FASCIST PERIOD](#) ch. 10, particularly 140–45 (2006).

to the merits. The Court was asked, first, to pronounce on expropriation of foreign corporate investment, *the* legal controversy of the Cold War, and, second, to advise on priority of enforcement of reparation claims regarding the same object of the wrongdoing state by two injured states regarding two entirely distinct wrongful acts, one of the hardest state responsibility questions ever posed in a judicial setting. Any answer to the first question would have been deeply regretted by a significant part of the international community, and little obviously helpful could be said on the second even in 2021: there, but for the grace of the eponymous principle, goes *Monetary Gold* into the “worst of” list with *Lotus* and *South West Africa*. Perhaps, after all, the *Monetary Gold* principle is for the best, for parties present and absent, the Court, and the international legal order more generally.