

# Reassessing State Consent to Jurisdiction

## *The Indispensable Third Party Principle before the ICJ*

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### Abstract

In *Monetary Gold Removed from Rome*, the International Court of Justice first articulated the “*Monetary Gold* rule”: the principle that it cannot rule on cases in which the conduct of a State not party to the proceedings forms the “very subject-matter” of the dispute. That principle is taken to be a fundamental rule of international law, deriving its force from the sovereignty of States and the nature of the international legal system.

This article will dispute that claim, and will argue that the principle of consent underpinning *Monetary Gold* is an empty formalism. Through a comparison of the Court’s approach in its contentious and advisory jurisdictions, it will ask *to what* States consent and *for what purpose* they do so, when they “consent to jurisdiction”, and no satisfactory answer will be found. It will conclude that the focus on consent in international adjudication is discretionary.

### Keywords

adjudication – advisory opinions – *Certain Phosphate Lands – Chagos Archipelago* – consent – *East Timor* – indispensable third party principle – International Court of Justice (ICJ) – jurisdiction – *Monetary Gold*

## 1 Introduction

On the 15th of June 1954, the International Court of Justice (ICJ) handed down its judgment on the preliminary question in *Monetary Gold*.<sup>1</sup> There it established the *indispensable third party principle*; the rule that a court cannot pronounce on a question which would require it to determine the legal position of a State not party to the proceedings. The ICJ noted that the legal interests of a third State—Albania—“would not only be affected by the decision, but would form the *very subject-matter* of the decision”.<sup>2</sup> In such cases, the “well-established principle of international law” that “the Court can only exercise jurisdiction over a State with its consent” operates to protect the absent party, preventing the progress of the complaint.<sup>3</sup>

Subsequent judgments have in parts upheld, broadened,<sup>4</sup> and qualified<sup>5</sup> the rule, and there can be no doubt that it has been enshrined in international law both as a governing principle and as an item of conventional wisdom. Textbooks frame the rule as absolute; an essential corollary of an international legal order founded in State sovereignty. Crawford declares that where the legal interests of a third State are the “very subject-matter of the claim or at least a necessary element in its determination ... the claim is inadmissible unless the necessary third state is joined as a full party to the proceedings.”<sup>6</sup> Hernández, similarly, notes that “State consent remains the lynchpin of the Court’s jurisdiction”;<sup>7</sup> Thirlway names it “a truism that international judicial jurisdiction is based on and derives from the consent of States”;<sup>8</sup> O’Connell notes that “[c]onsent is key to a Court’s authority”;<sup>9</sup> and Shaw describes it as “an uncontroversial principle of general international law that no State is obliged to ...

1 *Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v. France, UK, and USA)*, 1958 ICJ Reports, 19.

2 *ibid.*, at 32. (Emphasis added).

3 *ibid.*

4 *East Timor (Portugal v. Australia)*, 1995 ICJ Reports 90.

5 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 1992 ICJ Reports 240; *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, 2012 ICJ Reports 99.

6 James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, Oxford University Press 2019) p. 672.

7 Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) p. 47. Note that this is a descriptive statement, and not an endorsement. Hernández criticises the Court’s deification of consent at, e.g., p. 288.

8 Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, I (Oxford University Press 2013) p. 691.

9 Mary Ellen O’Connell, *International Dispute Resolution: Cases and Materials* (Carolina Academic Press 2006) p. 233.

give an account of itself to any international tribunal”, absent its consent.<sup>10</sup> Such statements could be multiplied almost at will.<sup>11</sup>

In other words, these authors—and in this they accord entirely with the Court in *Monetary Gold*—treat the need for consent to jurisdiction in international adjudication as fundamental; it necessarily derives from the State-centric nature of the international legal system. The Court’s jurisdiction “depends on the will of the parties ... and is a corollary of the sovereign equality of States”.<sup>12</sup> Such a claim is, indeed, entirely uncontroversial.<sup>13</sup>

Nevertheless, it is this claim that this article will dispute.<sup>14</sup> I identify an inconsistency in the approach of the Court between its advisory and contentious jurisdictions, specifically concerning the requirement of State consent. I argue that third parties are in all relevant respects in a closely analogous position to those States whose legal interests are at stake in advisory opinions. If the fundamental nature of the international legal system bars contentious adjudication because of the absence of the consent of third States, a similar bar should operate to prevent the progress of advisory proceedings. Several factors which could explain this difference—including that advisory opinions are not binding in contrast to decisions in contentious cases<sup>15</sup>—are examined below,<sup>16</sup> but none is found that satisfactorily justifies the tri-polar dissimilarity of treatment between parties to contentious cases, affected States in advisory

10 Malcolm Shaw, *Rosenne’s Law and Practice of the International Court: 1920–2015*, II (5th edn, Brill/Nijhoff 2016) p. 571.

11 See e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Ltd 1953) pp. 262–66; Anne Peters, ‘International Dispute Settlement: A Network of Cooperational Duties’ (2003) 14 *European Journal of International Law* 1, pp. 17–21; John Dugard, *International Law: A South African Perspective* (4th edn, Jutta & Co, Ltd 2011) p. 462; JG Merrills, *International Dispute Settlement* (5th edn, Cambridge University Press 2011) p. 116 et seq.

12 Crawford, *supra* note 6, p. 697.

13 Note, however, that such a position is not unanimously accepted. In their recent contribution to this debate, Mollengarden and Zamir have argued that the understanding of *Monetary Gold* as tied to State consent is based on a logical fallacy: Zachary Mollengarden and Noam Zamir, ‘The *Monetary Gold* Principle: Back to Basics’ (2021) 115 *American Journal of International Law* 41, *passim*, e.g. p. 43.

14 Importantly, this article does not argue that consent or its place within the international legal system is changing; rather it identifies a conflict in the interpretation of consent that has existed at least since the decision in *Monetary Gold* in 1958. It therefore asks a different question to that posed by Nico Krisch in ‘The Decay of Consent: International Law in an Age of Public Goods’ (2014) 108 *American Journal of International Law* 1.

15 See, for example, Peters, who locates the necessity of consent to jurisdiction in the binding quality of Court decisions, motivated by the “traditional concept of sovereignty”: Peters, *supra* note 11, p. 17.

16 See below, section 3.1.

proceedings, and “indispensable” third States. That no such distinction can be identified indicates the discretionary nature of consent: either a choice has been made *to* apply the rule in contentious cases, or *not to* apply it in the advisory jurisdiction. In either case, that inconsistency demands a re-examination of the role played by consent in international adjudication as a whole, in order to reassess whether either its centrality or its absence is justified. That an inconsistency is identified calls into question the *Monetary Gold* rule.

The examination begins in section 2, which briefly sets out the Court’s reasoning in *Monetary Gold*, and traces the development of the principle through the subsequent case law. Section 3 then takes a purposive approach to the principle, examining a number of functions the rule could serve. An eliminative approach is taken, and each potential function is examined with reference to other areas of the Court’s work, in order to show that none offers a satisfactory explanation of the rule. Section 4 turns to consent, asking *to what* States consent and *for what purpose*, questions to which no satisfactory answer can be found. The article will conclude that the principle of consent underpinning *Monetary Gold* is an empty formalism, and that its dominant role in international adjudication is in need of re-evaluation. The final section begins that task.

## 2 The *Monetary Gold* Precedent

The term “precedent” is here used intentionally. Though disagreement persists concerning whether the ICJ can be said to have a “system of precedent” in the common law sense, the Court ascribes considerable authority to its prior decisions (and those of its predecessor). It will rule in line with its previous pronouncements in the absence of significant countervailing considerations:

To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.<sup>17</sup>

Though the Court denied the binding quality of its previous jurisprudence, this nevertheless amounts to a fairly strong principle of *stare decisis*, and one

<sup>17</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, 2008 ICJ Reports 412, at para 53.

that is amply borne out in the Court's practice.<sup>18</sup> Moreover, this practice goes significantly beyond the habitual citation of its own cases as authorities; Pellet and Müller note that the Court "commonly formulates new rules under the cover of interpretation",<sup>19</sup> something they characterise as a "de facto legislative power".<sup>20</sup> Hernández, indeed, calls the sharp-line distinction between interpretation and law-creation a "fallacy" that should be "dispense[d] with", noting that "a court's interpretation ... contributes to the creation of what it finds".<sup>21</sup>

The point is significant for the present enquiry. Although motivated and sustained by Articles 36(1) and (2) of the Statute of the Court—that the Court's jurisdiction comprises those matters which the parties refer to it by special agreement, for which jurisdiction is established by treaty, or where the parties accept the Court's compulsory jurisdiction—the third party principle has no direct basis in the Court's Statute; it is present only by interpretation.<sup>22</sup> Instead, it is judge-made law, originally expounded in the *Monetary Gold* case.<sup>23</sup> Put another way: that the 'problem' of the indispensable third party was solved in *this* way (through exclusion of the case) is a choice made by the bench in *Monetary Gold*, and ratified by subsequent Courts through citation of and adherence to the precedential authority of that decision. It is for this reason that the term 'rule in *Monetary Gold*' is preferred to 'the indispensable third party principle' in what follows.

The *Monetary Gold* case concerned the fate of monetary gold which had been removed from Italy by Germany during the Second World War. Though taken from Italy, an Arbitral award of 20th February 1953 declared Albania to be the owner of the gold, which had been held in Rome as the property of the National Bank of Albania.<sup>24</sup> The victorious powers (France, the United Kingdom, and the United States) proposed to transfer the gold directly to the United Kingdom, in partial satisfaction of the ICJ's judgment in *Corfu Channel* (in which Court had ordered Albania to pay £843,947.00 in compensation to the UK).<sup>25</sup> Italy challenged the proposed action, arguing that it had a prior

18 For a comprehensive discussion see Hernández, *supra* note 7, pp. 157–93.

19 Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) p. 956.

20 *ibid* p. 957; see further pp. 946–60.

21 Hernández, *supra* note 7, p. 90.

22 Statute of the International Court of Justice, opened for signature 26 June 1945, in force 24 October 1945, art 36(1–2).

23 Indeed, Hernández uses the *Monetary Gold* decision as a paradigmatic example of the Court's precedential reasoning; see, *supra* note 7, pp. 175–77.

24 *Affaire relative à l'or de la Banque nationale d'Albanie* (1953) 12 RIAA 13.

25 *Corfu Channel Case (UK v. Albania)* 1949 ICJ Reports 4, at 36; *Corfu Channel Case (UK v. Albania)* 1949 ICJ Reports 244, at p. 250.

claim to the gold in partial satisfaction “for the damage caused to Italy by the Albanian law of January 13th, 1945”,<sup>26</sup> before subsequently submitting a preliminary question by which it invited the Court to consider whether the absence of Albania as a party to the proceedings presented a barrier to the exercise of its jurisdiction.<sup>27</sup> Albania did not intervene in the case, and made no submissions.<sup>28</sup>

The Court began by noting that Italy’s claim to a prior interest in the gold was dependent on a finding that Albania had committed an internationally wrongful act against Italy, for which the gold would be appropriate compensation.<sup>29</sup> It followed that it would be necessary to assess whether the relevant conduct—the passage of the Albanian law of 13th January 1945—was a breach of international law; a question in which “only two States, Italy and Albania, are directly interested.”<sup>30</sup> In other words, “[t]o go into the merits of such a question would be to decide a dispute between Italy and Albania”, something the Court could not do absent Albania’s consent.<sup>31</sup> The Court then made the statement which has come to be regarded as the test for the application of the *Monetary Gold* principle:

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.<sup>32</sup>

Leaving aside the question of whether some form of third party rule *should* apply in international dispute settlement, it must be noted that this first occurrence was an extreme example of the type: Italy claimed an interest in the gold on the basis of a wrong which it alleged had been committed by Albania. For the Court to hold that Italy had a better claim to the gold than the UK, it would have needed to determine whether Albania had committed an internationally wrongful act against Italy, and what the appropriate compensation would be. Albania’s rights and obligations were not present in the case by implication, by reference, or as matters incidental to the main question before the Court: Albania’s legal position vis-à-vis Italy was the entire content—the “very

26 *Monetary Gold*, *supra* note 1, at p. 22.

27 *ibid.*

28 *ibid.*, at p. 26.

29 *ibid.*, at p. 32.

30 *ibid.*

31 *ibid.*

32 *ibid.*

*subject-matter*”—of the question the Court was asked to answer. That this first exposition was such a clear-cut case has meant, however, that the boundaries and edges of the principle were left unexplored, and it has been left to subsequent cases to define more clearly the threshold at which the interests of a third State will bar the proceedings. Of particular interest are *Certain Phosphate Lands* (1992) and *East Timor* (1995).<sup>33</sup>

It is not within the remit of this paper to assess the *Monetary Gold* precedent, nor whether subsequent cases represented a development of that precedent. This task must be left to others.<sup>34</sup> For present purposes it suffices to identify the core principle it articulates: it applies, at a minimum, to those cases in which the outcome of the claim *logically depends* upon a prior finding of international wrongfulness by a State not party to the proceedings. In such a case, the precedent holds that the involvement of the third State requires that the Court decline to exercise jurisdiction over the case.<sup>35</sup>

### 3 A Purposive Analysis of *Monetary Gold*

This section will consider the purpose served by the *Monetary Gold* rule in the broader context of the Court's activities, and in particular will contrast the application of the rule in contentious cases with the Court's advisory jurisdiction. It will conclude that the principle serves purely and only to safeguard State consent as a prerequisite to being subject to the Court's jurisdiction; a finding that accords entirely with the Court's own account of the principle.

33 *Certain Phosphate Lands*, *supra* note 5; *East Timor*, *supra* note 4; and discussion in Iain Scobbie and Catriona Drew, 'Self-Determination Undetermined: The Case of East Timor' (1996) 9 *Leiden Journal of International Law* 185; Rebecca Kavanagh, 'Oil in Troubled Waters: The International Court of Justice and East Timor' (1996) 18 *Sydney Law Review* 87, p. 91; Manooher Mofidi, 'Prudential Timorousness in the Case Concerning East Timor (Portugal v. Australia)' (1998) 7 *Journal of International Law and Practice* 35, pp. 47–51, esp. pp. 48–49.

34 I refer, in particular, to Martins Paparinskis' excellent exposition of the subject on the occasion of the inaugural Angelo Piero Sereni Lecture in Bologna, April 2019. The revised text is available as: Martins Paparinskis, 'Revisiting the Indispensable Third Party Principle' [2020] *Revista di Dritto Internazionale* 59. See also Tobias Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle' (2014) 57 *German Yearbook of International Law* 321, pp. 325–28.

35 Note that there is, as Paparinskis discusses, a long-running debate over whether the principle should be construed as one relating to the Court's jurisdiction, or to the admissibility of a case (see Paparinskis, *ibid.*, at pp. 71–6). Paparinskis argues that it should be understood as combining elements of both. The reference to jurisdiction here is not intended to take a position on this question.

Nevertheless, it is valuable, I submit, to eliminate other possible (partial) explanations for the principle's existence and operation. Section 4 will then examine the coherence of consent as a justification for the *Monetary Gold* rule.

The Court's advisory jurisdiction is a revealing—if perhaps unintuitive—comparator in the matter of indispensable third parties. There are, of course, numerous differences between the contentious and advisory work of the Court. Advisory opinions are not binding. Nor are they backed by the force of a Court order. Most relevantly, no State needs to consent before a matter can be considered by the Court in the form of an advisory process.<sup>36</sup> And yet there are also marked similarities between the contentious and advisory functions. It is undeniable, for example, that the Court can assess the legality of States' conduct in the course of answering an advisory request; and its opinions in this area of its work can have legal consequences for States, in that its interpretations may alter their understanding of how their international obligations are to be performed (to put it no more strongly).<sup>37</sup> The significance of the Court's advisory opinion in *Interpretation of Peace Treaties* for Bulgaria, Hungary and Romania is self-evident,<sup>38</sup> for example, as is that in *Namibia* for the legal situation of South Africa,<sup>39</sup> and in *Kosovo* for Serbia.<sup>40</sup> In the *Wall* advisory opinion,<sup>41</sup> the legal rights and duties of Israel in occupied Palestine were undoubtedly at the heart of the question before the Court, and to such an extent that it can only be concluded that Israel's rights and duties were the *very subject-matter* of the question before the Court.

It is this tension between similarities and differences that makes the advisory jurisdiction a revealing comparison on the question of indispensable

36 A distinction is sometimes drawn on this point which asserts that States have *tacitly* consented to the advisory jurisdiction through their status as parties to the Statute of the Court. On this point see further section 4, where it will be shown that tacit consent is *not* required for the operation of the advisory jurisdiction, even where the interests of particular States are central, and that the Court has expressly found itself to be competent to opine in its absence. See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 ICJ Reports 65.

37 Thirlway, *supra* note 8, p. 202; Hernández, *supra* note 7, pp. 74–76.

38 *Interpretation of Peace Treaties*, *supra* note 36.

39 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 ICJ Reports 16.

40 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 ICJ Reports 403.

41 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Reports 136.



third parties. The Court's *Chagos* advisory opinion is an excellent—though by no means unusual—example of these contrasts.

### 3.1 *The Chagos Advisory Opinion*

In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*<sup>42</sup> the Court was asked by the General Assembly to opine on whether the decolonisation of Mauritius was lawfully completed in 1968. At issue was the detachment of the Chagos archipelago from that territory in 1965, as well as the consequences arising under international law from the UK's continued administration of the Chagos islands.

Before 1965, the colonial territory of Mauritius (including the Chagos archipelago) had been administered by the UK since 1814.<sup>43</sup> In 1964 talks began between the UK and the USA, which sought access to the largest island of the archipelago (Diego Garcia) for use as a military installation, and shortly thereafter the UK approached the Premier of Mauritius in an attempt to gain Mauritian consent to the separation of the Chagos Islands from the remainder of the territory. An agreement was reached—though one that represented some of the worst tactics of a colonial power to coerce and manipulate the people of its dependencies, and which the Court concluded did not represent “the free and genuine expression of the will of the people concerned”<sup>44</sup>—which gave Mauritius's apparent consent to the separation of Chagos.<sup>45</sup> The separation was effected in 1965 and thereafter, from 1967–1973, the Chagos archipelago was wholly depopulated through a combination of preventing residents abroad from returning and forcible removals.<sup>46</sup> These events drew the strong condemnation of the UN General Assembly in its resolutions 2066 (XX) and 2232 (XXI), as well as the Committee of Twenty-Four.<sup>47</sup>

The Court considered this history at length, before turning to the applicable law. It relied heavily on General Assembly resolution 1514 (XV) (the “Declaration on the Granting of Independence to Colonial Countries and Peoples”). The Court found that by the time of the detachment in 1965, the

42 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, (2019) ICJ Reports 95.

43 *ibid*, at paras 28–29.

44 *ibid*, at para 172.

45 *ibid*, at paras 98–112.

46 *ibid*, at para 114.

47 Report of the Committee of Twenty-Four, 15, 17 and 19 June 1967; see also Chagos, *supra* note 43, at para 39; and further Thomas Burri and Jamie Trinidad, ‘Introduction’ in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation* (Cambridge University Press 2021) pp. 2–4.

resolution's denunciation as 'incompatible with the purposes and principles of the Charter of the United Nations' any action "aimed at the partial or total disruption of the national unity and the territorial integrity of" a colonial territory had entered customary international law.<sup>48</sup> Moreover, it found that colonial territories had a right to self-determination exercisable through full independent sovereignty, "free association" with another State, or incorporation into an existing State.<sup>49</sup> Most significantly, the exercise of that choice "must be the expression of the free and genuine will of the people concerned."<sup>50</sup> For these reasons, the Court held that the detachment was unlawful and that the decolonisation of Mauritius had not been lawfully completed in 1968.<sup>51</sup>

In themselves, these findings were significant for the present question, though not in the least unusual in the advisory context. Of greater salience, the Court expressly assessed the conduct of a State (the UK), to determine whether its actions complied with international law. It gave an abundantly clear answer, finding that the UK had failed to comply with the law applicable at the time, and that its actions were unlawful both under customary international law and the UN trusteeship system. There is a clear parallel to the position of Albania in *Monetary Gold*, in which case the Court would have been required to determine the legality or otherwise of Albania's actions—importantly without direct consequences for or binding force upon Albania—before it could determine the legal position applying to the gold removed from Rome. Here the Court, to determine the present-day legal situation of the Chagos archipelago, was required to assess the past conduct of the UK.

The Court went much further, however. The second question posed by the General Assembly asked the Court to consider the present-day consequences under international law that arose from the UK's continued administration of Chagos. In other words, the Court was asked to consider whether the UK is presently in breach of international law. It was strikingly forthcoming. The consequence of its finding that the decolonisation of Mauritius was not lawfully completed is that:

[T]he United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the responsibility of that State. ... It is an unlawful act of a continuing character[.]<sup>52</sup>

48 UNGA Res 1514 (xv), at para 6; *Chagos*, *supra* note 42, at paras 152–153.

49 *Chagos*, *supra* note 42, at para 154–156.

50 *ibid*, at para 157.

51 *ibid*, at para 174.

52 *ibid*, at para 177.

Though the Court declined to rule on the “modalities” of ending the UK’s administration of Chagos, noting that this question fell within the General Assembly’s competence,<sup>53</sup> it made the unambiguous declaration that “the United Kingdom is under an obligation to bring an end to its administration of Chagos as rapidly as possible”.<sup>54</sup> It fired a volley, too, seemingly aimed at the USA’s use of Diego Garcia as an air and naval base, noting that “[s]ince respect for the right to self-determination is an obligation *erga omnes*, ... all Member State must co-operate with the United Nations to put those modalities into effect.”<sup>55</sup>

On each of these substantive points, Judge (now President) Donoghue was the lone dissenting voice.<sup>56</sup> Her dissent stemmed from her objection to the exercise of the Court’s jurisdiction. She held that the

[P]resent request places before the Court the lawfulness of past United Kingdom conduct, the present-day consequences of that conduct for the rights of that State and the adjudication of sovereignty over territory. The Court gives a comprehensive answer.<sup>57</sup>

There can be no question that Judge Donoghue is correct in this assessment and, indeed, the majority did not appear to reject the truth of that assertion. Rather they viewed the question with a different emphasis. While Donoghue concluded that the advisory request “circumvent[ed] the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent”, the majority saw the centrality of the UK’s conduct as secondary. In their view, the question was not whether State conduct would be assessed, but rather whether the request *in fact* disguises a bilateral dispute. They recalled the General Assembly’s mandate to bring an end to colonialism in order to find that the question lies within the General Assembly’s area of “particular concern”,<sup>58</sup> and concluded that

53 *ibid*, at para 179.

54 *ibid*, at para 178.

55 *ibid*, at para 180.

56 Though note that the extent to which the Court entered into questions of State responsibility was criticised by some Judges who nevertheless voted with the majority, particularly Judges Tomka and Gevorgian. For discussion see Fernando Lusa Bordin, ‘State Responsibility in Advisory Proceedings: Thoughts on Judicial Propriety and Multilateralism in the *Chagos* Opinion’ in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation* (Cambridge University Press 2021) pp. 99–104.

57 Dissenting Opinion of Judge Donoghue, in *Chagos*, *supra* note 42, at para 18.

58 *Chagos*, *supra* note 42, at para 88.

[T]he fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute.<sup>59</sup>

This would seem rather to miss Judge Donoghue's point; or perhaps better, implicitly to deny its relevance. For the majority of the Court, it is the (non-) bilateral character of the dispute, and not whether a conclusion would need to be reached on the legality of a State's actions, that is relevant. In other words, this is a substantively different admissibility test to that formulated in *Monetary Gold*, not an equivalent doctrine.<sup>60</sup>

### 3.2 *The Rationale of Monetary Gold*

Comparing the operation of the advisory and contentious jurisdictions casts fresh light on the *Monetary Gold* rule. The contrast between *Chagos* and *Monetary Gold* highlights three potential explanations for the differences in the Court's treatment of the conduct of respectively the UK and Albania, and these will form the starting points for the examination here. First, it may be that the UK's participation in the advisory opinion process served to "cure" the lack of consent. Secondly, it may be that the Court's attitude to the rights and obligations of third States in relation to norms *erga omnes* has shifted in the years since *East Timor*, and that this shift is the differentiating factor. Finally, it may be that there is something unique about the advisory jurisdiction which means that the third party rule *should not* apply here—in which case it will be necessary to ask both what that difference is and to what extent it is justified. This section will briefly examine each in turn and will find that only this third possibility is convincing. It will point—unsurprisingly—to the necessity of consent as the factor differentiating the jurisdictions. Section 4 will then proceed to analyse the operation of consent in the practice of the Court, in

59 *ibid.*, at para 89. Burri and Trinidad comment that the resolution was "carefully crafted to emphasise the General Assembly's role in overseeing the decolonisation process and to protect against the suggestion that the Court was being asked to resolve a bilateral territorial dispute": Burri and Trinidad, *supra* note 47, p. 4; and further Zeno Crespi Reghizzi, 'The *Chagos* Advisory Opinion and the Principle of Consent to Adjudication' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation* (Cambridge University Press 2021) pp. 63–65.

60 Though note the PCIJ's Opinion in *Eastern Carelia*, sometimes said to represent an equivalent doctrine in the advisory jurisdiction. See discussion below, notes 101–113 and accompanying text.

order to argue that it does not offer a consistent or convincing basis for the *Monetary Gold* rule.

### 3.2.1 Participation

If the rule in *Monetary Gold* were to be construed as a requirement on the Court not to come to any conclusion on (in that case) Albania's responsibility without having first heard Albania, then participation could serve to explain the difference. Under such an interpretation, the UK's participation in *Chagos*—it submitted a written statement, a written comment, and made oral submissions—would contrast with the positions of Albania in *Monetary Gold*, Indonesia in *East Timor* or its own conduct in *Certain Phosphate Lands*, in all of which cases the third State did not appear before the Court either as party or intervenor. Little needs to be said about such a contention, which is (mostly) excluded both by the Court's reasoning and its practice. A telling example is *Jurisdictional Immunities*, concerning the attempted exercise of jurisdiction over Germany by the Italian courts, to enforce the judgment of a Greek court. The Court was asked to find that it lacked jurisdiction over the complaint on the grounds that answering the question would necessarily involve a corollary finding that Greece had also violated Germany's sovereign immunity, but the Court declined to do so. In line with *Certain Phosphate Lands*, it asked only whether it would be logically necessary as a prior matter to consider whether Greece violated Germany's sovereignty, and held that the questions were fully separable.<sup>61</sup> Moreover, and of pertinence to the question of participation, the Court clearly stated that it could not assess the conduct of Greece, "which does not have the status of party to the present proceedings."<sup>62</sup> That observation is clearly significant, given that Greece had intervened in the proceedings and made both oral and written submissions to the Court.

The approach in *Jurisdictional Immunities* coheres well with the Court's wider treatment of third parties. Nevertheless, the *Namibia* advisory opinion offers a counter-example.<sup>63</sup> There, the Court's competence was challenged by South Africa, which contended that the request disguised a bilateral dispute. Among a number of reasons given for rejecting South Africa's challenge, the Court made a comment implying that South Africa's participation in the proceedings had vitiated its objection to the Court's jurisdiction. "It has appeared before the Court," it noted, "participated in both the written and oral proceedings and, while raising specific objections against the competence of the

61 *Jurisdictional Immunities*, *supra* note 5, at para 127.

62 *ibid*, at paras 127, 132.

63 *Namibia*, *supra* note 39.

Court, has addressed itself to the merits of the question.”<sup>64</sup> The observation is not elaborated but seems ill-situated unless conceived as a factor contributing to the Court’s jurisdiction.<sup>65</sup> No clear precedent can be drawn from the comment, however. No similar statement has been made in other advisory opinions; notwithstanding that the Court was invited to reprise its consideration of the topic by Israel in the *Wall* proceedings. There Israel carefully distinguished its conduct from South Africa’s in *Namibia*, noting repeatedly that it “is not putting forward a case on the substance”.<sup>66</sup> Its non-participation (on questions of substance), it argued, both served to demonstrate its lack of consent,<sup>67</sup> and meant that the Court would inevitably lack indispensable factual information.<sup>68</sup> Though the Court addressed this latter argument (and found that it had ample sources of information on which to base its conclusions),<sup>69</sup> Israel’s conscious non-participation on the merits passed largely without comment, and *Namibia* was not invoked by the Court on this point. Moreover, and to the extent that participation in the contentious and advisory jurisdictions can be equated, the Court’s apparent link between participation and consent in *Namibia* contrasts directly with its approach in contentious cases.<sup>70</sup> In *Nicaragua*, for example, the Court confirmed that non-participation does not affect the Court’s jurisdiction:

64 *ibid*, at para 31.

65 It should be noted that the Court made the comment in direct response to South Africa’s invocation of the PCIJ’s decision in *Eastern Carelia*, discussed below, section 4.1, in which that Court found it “impossible for it to give its opinion” because to do so would be “substantially equivalent to deciding the dispute between the parties”: *Status of Eastern Carelia*, PCIJ Series B, No. 5, at pp. 28–29. South Africa argued that the principle enunciated in *Eastern Carelia* barred the consideration of the dispute because the substance of the question before the Court “directly related” to a pending inter-State dispute (*Namibia*, *supra* note 40, at para 30.). The focus of the Court’s reply—on participation—is not, however, well suited to addressing the *Eastern Carelia* principle, which concerns the existence of a bilateral dispute rather than the participation or otherwise of the States most closely affected. Some nuance is required however because, as discussed below (p. 22), the *Eastern Carelia* decision also concerned the availability of factual information in circumstances in which one State declines to participate, and the ICJ has interpreted the burden of the precedent as falling on this factor rather than non-participation in its *Western Sahara* opinion. Though apparently at odds with the submission of South Africa it is directed against, a reference to participation would follow more logically from such a reading of *Eastern Carelia* than from that concerned with consent.

66 Written Statement of the Government of Israel on Jurisdiction and Propriety, 30 January 2004, in *Wall*, *supra* note 41, at para 8.8.

67 *ibid*, at para 7.11 *et seq*.

68 *ibid*, at para 8.5.

69 *Wall*, *supra* note 41, at para 55–58.

70 Christine Chinkin, *Third Parties in International Law* (Clarendon Press 1993) p. 200.

[T]he Court is bound to emphasize that the non-participation of a party in the proceedings at any stage cannot, in any circumstances, affect the validity of its judgment.<sup>71</sup>

That position has been followed by other courts and tribunals, most notably in the *South China Sea* arbitration.<sup>72</sup> Participation can, therefore, safely be disregarded as a factor.

### 3.2.2 Norms Erga Omnes

A second possible point of divergence is the central role played in the *Chagos* advisory opinion of norms *erga omnes*. As the Court in *Chagos* reiterated, the primary legal norm applicable to the situation of the islands and Islanders, the right of peoples to self-determination, is “an obligation *erga omnes*”.<sup>73</sup> The finding that self-determination has an *erga omnes* character followed the *East Timor* decision,<sup>74</sup> where the Court judged the claim to be inadmissible under the *Monetary Gold* rule.<sup>75</sup> It came to that conclusion, moreover, even despite its strong recognition of the *erga omnes* character of self-determination:

[T]he Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.<sup>76</sup>

In other words, the procedural propriety of giving a ruling will be examined prior to any consideration of the nature of the norms involved, and the necessity of State consent will prevent even a case based upon *erga omnes* norms from proceeding.

That holding has rightly been criticised by commentators as an enervation of *erga omnes*—Simma argues that the Court thereby forced the concept into a “procedural straitjacket” that paid “lip-service” to the “manifestation of

71 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, 1986 ICJ Reports 14, at para 27.

72 *South China Sea Arbitrations (Philippines v. China)*, PCA Case No. 2013–19 (October 29, 2015), at para 11.

73 *Chagos*, *supra* note 42, at para 180.

74 *East Timor*, *supra* note 4, at para 29.

75 See above, section 2.

76 *East Timor*, *supra* note 4, at para 29.

community interest” while “subject[ing] it to the procedural rigours of traditional bilateralism”<sup>77</sup>—but it nevertheless represents a close analogy to the situation in *Chagos*. As in *East Timor*, self-determination was at issue in *Chagos*, and it is arguable that the legal rights and responsibilities of a State that had not consented to its jurisdiction would be implicated to an even greater extent. In order, therefore, for the *erga omnes* nature of the rights concerned to be the factor enabling the Court’s exercise of jurisdiction, it would need to be shown that the Court’s attitude towards norms *erga omnes* vis-à-vis the procedural requirements of jurisdiction had shifted significantly in the intervening years. Such a shift is hard to substantiate, because few (contentious) cases in that period have discussed either the application of self-determination or the interaction of norms *erga omnes* and the *Monetary Gold* rule. Some indication may be drawn from the *Jurisdictional Immunities* decision of 2012, however. There the Court drew the same distinction between rules of international law bearing a high status (in that case, norms *ius cogens*) and procedural rules (State immunity), and reached the same conclusion:

The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.<sup>78</sup>

It concluded that “even on the assumption that the proceedings in the Italian courts involved violations of *ius cogens* rules, the applicability of the customary international law on State immunity was not affected”.<sup>79</sup>

The context of the two cases was significantly different. *Jurisdictional Immunities* concerned *ius cogens* rules set against the immunity of the State from the Courts of its peers, as opposed to a conflict between norms *erga omnes* and the *Monetary Gold* principle. Nevertheless, it serves to show that, in 2012, the Court continued its approach of first assessing jurisdiction and

77 Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, p. 298; see also C Antonopoulos, ‘Effectiveness v. the Rule of Law Following the East Timor Case’ (1996) 27 *Netherlands Yearbook of International Law* 75, pp. 86–87; Iain Scobbie and Catriona Drew, ‘Self-Determination Undetermined: The Case of East Timor’ (1996) 9 *Leiden Journal of International Law* 185, pp. 197–207.

78 *Jurisdictional Immunities*, *supra* note 5, at para 93.

79 *ibid.*, at para 97.



admissibility, before any account is taken of the status of the norms involved at the merits stage. It indicates that the Court still regards procedural questions as logically prior to substantive considerations, as applied in *East Timor*. It is therefore unlikely that the *erga omnes* character of the relevant norms is the differentiating factor sought.

### 3.2.3 Fundamental Differences? The Contentious and Advisory Jurisdictions

As expected, then, the search for the point of differentiation leads to the differences between the advisory and the contentious jurisdictions, though it remains to be seen what the differentiating factor is. The validity of this factor will be shown if some feature of the advisory jurisdiction can be found that marks it out as different, indicating not only that the *Monetary Gold* rule does not apply, but that it *should* not. Numerous differences have already been discounted:

To begin with, it is clear that the differentiating factor is not found in participation, as argued above.<sup>80</sup> Moreover, the distinction is not in *subject-relevance*; or whether the Court would need to reach a conclusion on the legality or otherwise of a State's actions. The legality of the UK's actions in relation to the Chagos archipelago was the be-all and end-all of the *Chagos* opinion, arguably to a higher degree than were the actions of Indonesia in *East Timor*. Nor is *Chagos* unusual among advisory opinions in having such a close connection to the actions of particular States. The same observation could be made of opinions such as *Kosovo* and *Wall*, and also of earlier opinions such as *Interpretation of Peace Treaties*, *Namibia*, and *Western Sahara*.<sup>81</sup>

Nor does the distinction concern whether a statement by the Court would attract legal consequences. Not only was such reasoning specifically rejected in *Certain Phosphate Lands*,<sup>82</sup> but the legal consequences for the UK in *Chagos* are not fundamentally different in extent to those that would have resulted for Indonesia had *East Timor* proceeded to a determination in favour of Portugal, and most certainly are not of a lesser kind. Even when viewed at a macro scale, there is no significant difference between the authority of the Court's pronouncements in contentious versus advisory proceedings. Thirlway notes that "it is universally accepted, if not self-evident, that *every decision* the Court hands down will have an influence (to put it no higher) on how the law in the

<sup>80</sup> See above, section 3.2.1.

<sup>81</sup> *Western Sahara*, Advisory Opinion, 1975 ICJ Reports 12.

<sup>82</sup> See above, Section 2.

relevant field will thereafter be understood.”<sup>83</sup> Hernández goes further, noting that even in contentious proceedings, “[i]f one accepts the normative potential of judicial decisions, then, every time the Court gives a reason, in principle it is giving an advisory opinion.”<sup>84</sup> He goes on to note that the Court “does not distinguish in any way between advisory opinions and contentious cases in the manner in which it uses them to support an argument”;<sup>85</sup> a point broadly confirmed by the quantitative study of Alschner and Charlotin.<sup>86</sup>

Finally, the contentious/advisory distinction does not derive from whether the Court’s pronouncements are binding. Indonesia would not have been bound by any holding in *East Timor*, any more than Greece was in *Jurisdictional Immunities* or—formally, at least—than the UK is by the advisory opinion in *Chagos*. The States involved may be bound by international law as authoritatively interpreted by the Court, but are not bound by the Court’s decision directly. The same distinction applies to the status of the judgment as *res judicata*.<sup>87</sup> Although the Court’s decision would amount to a settled question between the parties to the case, a judgment *qua res judicata* generates neither rights nor obligations for third States (however closely connected): third States cannot invoke the judgment against one of the Parties, and the judgment cannot ground a claim against them.<sup>88</sup> That much has been explicitly recognised by the Court in the context of intervening States.<sup>89</sup> Taking the fact pattern of

83 Hugh Thirlway, *The International Court of Justice* (Oxford University Press 2016) p. 202. [Emphasis added.]

84 Hernández, *supra* note 7, pp. 74–75.

85 *ibid.*, p. 76.

86 Wolfgang Alschner and Damien Charlotin, ‘The Growing Complexity of the International Court of Justice’s Self-Citation Network’ (2018) 29 *European Journal of International Law* 83, p. 91.

87 Though see, *contra*, Thienel, who concludes that the *Monetary Gold* principle should be construed as an aspect of *res judicata*: Thienel, *supra* note 34, *passim*, e.g. pp. 351–352.

88 The SFRY cases are a particularly striking and well-known example of this principle in action: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, 1996 ICJ Reports 595; *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, 2004 ICJ Reports 279 [see also connected cases]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ Reports 43, at paras 121–138; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, 2008 ICJ Reports 412, at para 53. See also discussion in: Chester Brown, ‘Article 59’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) pp. 1578–80; Thirlway, *supra* note 83, pp. 137–38.

89 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, 1990 ICJ Reports 92, at para 102; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*, 1992 ICJ Reports 351, at para 424.

*Monetary Gold* as an example, the principle of *res judicata* would not have prevented a subsequent action by Albania against Italy for recovery, had a decision been rendered in Italy's favour.<sup>90</sup> Although the conclusions of the Court on the state of the law give a strong indication that the Court would rule in a similar way when presented with a similar case, the Court's judgment on the facts and the law's application to the parties does not bind third States, and does not have the character of *res judicata*. Vis-à-vis third States, the judgment has a character closely analogous to an advisory opinion.

What, then, remains? The present author finds only one possibility convincing: the principle of consent.<sup>91</sup>

#### 4 Consent

But consent to what, and for what? It is not sufficient merely to refer to consent in the abstract, especially in light of the foregoing. It is, as has been discussed above, the heart and soul of the *Monetary Gold* rule and, as the analysis has demonstrated, is its sole and singular purpose and justification. Absent that principle, in other words, the rule would lack all validity and applicability. Yet doubt has already been cast on a number of the factors typically seen as mitigated by State consent, and a good deal of uncertainty remains. As Judge Oda remarked in his separate opinion in *East Timor*: "When it refers to the 'consent' of Indonesia the Court itself seems to be uncertain as to what this 'consent' of Indonesia would have meant."<sup>92</sup> In light of the foregoing, it is appropriate to ask what is meant by *consent to the jurisdiction* of the Court. This section will pose the questions of consent *to what* and *for what purpose*, but these will go unanswered. Consent is treated in a purely formal manner, and falls significantly short as a justification. Its role in all aspects of the Court's work is ripe for re-examination.

90 A separate question arises concerning whether a Court would be willing to give opposite rulings on the same (or a similar) set of facts in two cases, but as a wholly practical question with no systemic implications such a question cannot influence the legal analysis of this point. Notwithstanding that, the SFRY cases (cited above, note 88) demonstrate that the Court has in the past been willing to adopt conflicting factual conclusions in parallel cases.

91 Note, however, Mollengarden and Zamir's conclusion that to ground the principle in the consent of States is based on a logical fallacy. The analysis here broadly agrees with Mollengarden's and Zamir's analysis, albeit by a different route. See Mollengarden and Zamir, *supra* note 13, *passim*, e.g. p. 43.

92 Separate Opinion of Judge Oda, in *East Timor*, *supra* note 4, at para 1.

#### 4.1 *Distal and Specific Consent*

Before embarking on a functional analysis of consent—seeking to answer the questions of *to what* and *for what* States consent—it is necessary to dispose of a preliminary issue. It has sometimes been argued that States consent to the advisory function at a remove (hereafter: “distal” consent). That is to say, that through their ratification of the Statute,<sup>93</sup> States give a general consent to the advisory function, and in so doing they authorise the Court to consider their conduct (and to pronounce on their rights and obligations) to the extent that it is relevant to this area of its work.<sup>94</sup> In ratifying the Statute, so the argument runs, the parties endorsed Article 65(1), which notes that it “may give an advisory opinion on *any legal question* at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request”—principally, the General Assembly and the Security Council. That endorsement of the Article 65(1) power is claimed to serve as blanket consent.

Such an argument, however, is less than fully satisfying. The Court has, on multiple occasions, come to legal conclusions in advisory proceedings with direct relevance (at greater or lesser remove) for the legal positions of State at that time not a party to the Statute, and for whom therefore this distal consent was entirely absent. The most striking example is *Interpretation of Peace Treaties*, in which the Court was asked to interpret peace treaties between Bulgaria, Hungary and Romania and the allied powers which had been concluded in the aftermath of the Second World War. At the time of the opinion, in March of 1950, none of Bulgaria, Hungary and Romania were members of the UN, and all vociferously objected to the Court’s treatment of their peace treaties.<sup>95</sup> Nevertheless, the Court held that “no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion”.<sup>96</sup> In other words, that these States not only did not tacitly consent, but manifestly withheld consent, could not prevent the Court from authoritatively determining their legal position.<sup>97</sup> Other, though less dramatic, examples of the Court issuing advisory opinions with implications for the legal positions of non-party States can be seen in the 1948 *Conditions of Admission* and 1950 *Competence*

93 Article 65(1) gives the court power to “give an advisory opinion on *any legal question*”.

94 This was cited by the Court as a basis for its jurisdiction in *Western Sahara vis-à-vis Spain*, for example: *Western Sahara*, *supra* note 81, at para 30.

95 *Interpretation of Peace Treaties*, *supra* note 36, at p. 70.

96 *ibid*, at p. 71.

97 It held that “the [three States] are obligated to carry out the provisions of those articles referred to in Question I”: *ibid*, at p. 77.

of the General Assembly for the Admission of a State advisory opinions;<sup>98</sup> in *Reservations to the Genocide Convention*;<sup>99</sup> and perhaps also in the 2004 *Wall* advisory opinion, which directly concerned the legal position of Palestine, granted the status of a “Non-Member Observer State” to the United Nations in 2012.<sup>100</sup>

The Court’s treatment of consent to jurisdiction in these cases contrasts with the approach of its predecessor in *Status of Eastern Carelia*.<sup>101</sup> There are divergent views on the appropriate interpretation of the PCIJ’s dictum in that proceeding, both in the literature and within the Court itself. The PCIJ was confronted with a request from the Council of the League of Nations to advise whether the Treaty of Dorpat creates legal obligations for Russia (then not a member of the organization) vis-à-vis Finland (a member State and the instigator of the advisory request) concerning Eastern Carelia.<sup>102</sup> The PCIJ observed that “[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement,”<sup>103</sup> and there is no doubt that the lack of Russia’s consent was the motivating factor in its holding that it “[found] itself unable to pursue the investigation which [...] would require the consent and co-operation of both parties.”<sup>104</sup>

98 *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ Reports 57; *Competence of the General Assembly Regarding the Admission of a State to the United Nations*, Advisory Opinion, 1950 ICJ Reports 4.

99 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Reports 15. Eight of the (then) twenty-five parties to the Convention were non-parties to the Court’s Statute, though it should be noted that none had relevant reservations.

100 This last is, admittedly, more speculative. If Palestine was already a (non-UN-member) State in 2004, then it should be considered a directly interested State for which no Statute-based consent was present (though it seemed to welcome the proceedings, and so consent may have been expressed through other means). If it remained an entity aspiring to statehood, then its position would be more closely analogous to that of the East Timorese people in *East Timor*, who were not treated by the Court as a third party: Manooher Mofidi, ‘Prudential Timorousness in the Case Concerning East Timor (Portugal v. Australia)’ (1998) 7 *Journal of International Law and Practice* 35, p. 51.

101 *Eastern Carelia*, *supra* note 65.

102 *ibid*, at pp. 27–28.

103 *ibid*, at p. 27.

104 *ibid*, at p. 29. See, for a contrasting view, Crespi Reghizzi, who argues that the reference to “any dispute” referred to the Court in Article 14 of the Covenant (later “any legal question” in Article 65 of the Statute) would allow it to deal with contentious matters if properly referred to it: Crespi Reghizzi, *supra* note 59, p. 52; and further pp. 54–55.

The precise link between the observation and decision is, however, disputed. The strong view, for which I take Judge Oda's dissenting opinion in *Western Sahara* as representative,<sup>105</sup> holds that the PCIJ not only declined to give an opinion because of the lack of consent, but that the lack of consent vitiated its jurisdiction. Judge Oda maintained that the PCIJ "declined to give an opinion but not because it exercised its discretionary power in so doing [...], the consent of States in dispute was required for an advisory opinion to be rendered."<sup>106</sup> In other words, the lack of consent was not a question of judicial propriety or a matter for the Court's discretion: the lack of consent was fatal to its jurisdiction and could not be overcome.

A strikingly different interpretation is given by the majority in *Western Sahara*. There the Court held that "the non-participation of a State concerned in the case was a secondary reason for the refusal to answer."<sup>107</sup> Primarily, it was a matter of practicality. Absent the active participation of Russia, the PCIJ lacked vital factual information, and it was this "actual lack of 'materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact' [...]" which was considered by the [PCIJ], for reasons of judicial propriety, to prevent it from giving an opinion."<sup>108</sup>

Notwithstanding the Court's own interpretation of the PCIJ's refusal as having been a matter of practicalities rather than principle, most observers adopt a position between these two extremes. Thirlway is representative of this line of interpretation, when he argues that the PCIJ treated Russia's non-consent as a factor affecting "not [...] its jurisdiction to render an opinion, but [...] the question whether as a matter of its discretion it should exercise that jurisdiction."<sup>109</sup> If Thirlway is correct in this interpretation (and I am inclined to concur), it would already be telling that the lack of consent played no stronger role. More significantly, however, it is clear that the ICJ has, if such was the PCIJ's approach, decisively broken with the practice of its predecessor.<sup>110</sup> Thirlway identifies the Court's *Western Sahara* opinion as making explicit a divergence

105 Dissenting Opinion of Judge Oda, in *Western Sahara*, *supra* note 81.

106 *ibid*, at para 48.

107 *Western Sahara*, *supra* note 81, at para 45.

108 *ibid*, at para 46. See also discussion in Pierre d'Argent, 'Article 65' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) p. 1804.

109 Thirlway, *supra* note 8, p. 823; for a similar approach see also Shaw, *supra* note 11, p. 1001; Hernández, *supra* note 7, p. 79.

110 Shaw argues that the "*Eastern Carelia* doctrine, and with it the protection given in Article 68 of the Statute, are at most given lip service" by the present Court: Shaw, *supra* note 10, p. 1003.

already implicit in its practice, that “the consent creative of jurisdiction to give advisory opinions *in general* must be that conferred by the consent of States given by accession to the Statute”.<sup>111</sup>

Such a conclusion falls some way short of a satisfactory explanation, however, and in particular is incapable of explaining the source of the Court’s authority to opine in matters directly affecting States not party to the Statute. Several such cases were noted above, of which *Interpretation of Peace Treaties* is the most striking example. That matter, which involved a set of circumstances notably similar to the constellation in *Eastern Carelia*, directly concerned three States which were not then parties to the Statute, and which objected to the Court’s exercise of its jurisdiction. Distal consent is clearly incapable of explaining the Court’s jurisdiction in that instance, and it seems to be for this reason that Hernández departs from the distal consent thesis, relying instead on the institutional position of the Court within the United Nations system and stressing the addressee of the opinion—the requesting organ—rather than the States which may be interested in the matter before it.<sup>112</sup> This, the “duty of cooperation” is discussed in what follows.<sup>113</sup>

Even leaving aside that the argument from distal consent seems doubtful, however, it would nevertheless be incapable of offering the differentiation sought between the advisory and contentious jurisdictions. As has been argued above, the analogy in position and effect between an affected third State in a contentious case and that of a State the interests of which are at issue in an advisory proceeding is close, overlapping at many points. If it were held (contrary to the argument here) that distal consent is a sufficient basis for the advisory jurisdiction, would a similar distal consent not suffice to permit the Court to treat the concerns of third States in contentious cases? Here, too, there is a basis in the Statute for the Court to rule on “all cases which the parties refer to it”,<sup>114</sup> and explicit provision is made for intervention by any “state [which] consider[s] that it has an interest of a legal nature which may be affected by the decision”,<sup>115</sup> and parties to any multilateral convention at issue.<sup>116</sup> Moreover,

111 Thirlway, *supra* note 8, p. 824. [Emphasis in original]. Thirlway’s reference is to paragraph 30 of the Court’s opinion, in which it declares that “Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction.” *Western Sahara*, *supra* note 81, at para 30.

112 Hernández, *supra* note 7, pp. 81–82, 175.

113 See below, section 4.3.1.

114 *Statute*, *supra* note 22, at art 36(1).

115 *ibid*, at art 62.

116 *ibid*, at art 63.

their interests are safeguarded by the unambiguous declaration that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”<sup>117</sup> In order to answer why distal consent is adequate in the advisory but inadequate in the contentious jurisdiction, therefore, it would nevertheless be necessary to pose the questions of *to what* and *for what purpose* consent is required. In what respect is consent lacking, where the *Monetary Gold* rule applies? The next section turns to these questions.

#### 4.2 *Functional Consent*

The *to what*- and *for what*-questions require an examination of the function consent plays in international adjudication, in an attempt to identify an element of the contentious proceedings for which consent is given that is absent from the advisory jurisdiction. There are three possibilities: that States must consent to the *process*, that they must consent to the Court’s treatment of the *subject matter*, or that they must consent to *be bound*, either passively or actively. None of these factors will be found to be convincing.

It is clear, to begin with, that States do not consent to the *process*. That conclusion is unambiguously demonstrated by *Nicaragua* (and other instances of non-appearance discussed above),<sup>118</sup> in which the Court took the view that despite the USA’s clear repudiation of the process, the necessary consent to jurisdiction pertained. The Court held that a “State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation.”<sup>119</sup>

Nor does it appear to be necessary for States to consent for a particular *subject matter* to be brought before the Court. Parties to multilateral conventions cannot prevent the interpretation of those instruments by the Court, and in the advisory jurisdiction, as discussed, the clear interest of a State in the subject matter under consideration does not affect the competence of the Court. That was the case in the *Chagos* proceedings, and was also a feature of *Namibia* (South Africa), *Western Sahara* (Morocco), and *Wall* (Israel). And the same set of advisory opinions (among others) show that the consent of these States was not necessary in order for the Court to *assess State conduct*, and to make a *finding of law*. *Chagos*, again, is the most striking example, containing the declaration that “the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible.”<sup>120</sup>

117 *ibid*, at art 59.

118 See above, section 3.2.1.

119 *Nicaragua*, *supra* note 71, at para 27.

120 *Chagos*, *supra* note 42, at para 178.



Self-evidently, moreover, the consent required is not consent to be bound, whether that consent is construed as being passive or active; distal or specific. The *Monetary Gold* rule applies exclusively where a third State would not be bound by a judgment. Yet notably, bindingness is the factor to which the Court has referred as differentiating the treatment of consent between the contentious and advisory jurisdictions. In *Interpretation of Peace Treaties*, the Court pointed to the fact that its opinion has no binding force as the substance of a meaningful distinction.<sup>121</sup> That the three States concerned not only did not tacitly consent, but vociferously refused consent was not relevant, because the opinion would not bind them. According to the Court's reasoning, the same principle should straightforwardly apply to the situation of third parties which are, whatever the outcome, not be bound by any ruling of the Court. That logic should, in other words, render the *Monetary Gold* rule defunct.

Slight further support for the irrelevance of consent to be bound can be found in those areas of the Court's work in which it considers itself capable of binding States in the express absence of their consent: provisional measures orders. The Court has made clear that it considers itself able to bind States through its provisional measures orders, even before it reaches any conclusive finding on whether it has jurisdiction to hear a case (a finding of *prima facie* jurisdiction suffices), and though States may be loudly protesting that it has none.<sup>122</sup> In its judgment on the merits in *LaGrand*, the court was called upon to determine the legal status of its prior provisional measures order in those proceedings. It held that "[i]t follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding".<sup>123</sup> It has subsequently issued binding orders in cases in which one party disputes its jurisdiction; including in *Georgia v. Russia*,<sup>124</sup> *Immunities and Criminal Proceedings*,<sup>125</sup> *Ukraine v. Russia*,<sup>126</sup>

121 *Interpretation of Peace Treaties*, *supra* note 36, at p. 71.

122 *LaGrand (Germany v. USA)*, 2001 ICJ Reports 466, at paras 98–110.

123 *ibid*, at para 102.

124 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, Provisional Measures, 2008 ICJ Reports 353; Preliminary Objections, Judgment, 2011 ICJ Reports 70.

125 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, 2016 ICJ Reports 1148; Preliminary Objections, Judgment, 2018 ICJ Reports 292.

126 *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)*, Provisional Measures, 2007 ICJ Reports 104; Preliminary Objections, Judgment, 2019 ICJ Reports 558.

*Qatar v. UAE*,<sup>127</sup> and *Violations of the Treaty of Amity*<sup>128</sup> (all of which cases subsequently yielded a judgment on preliminary objections); and in *The Gambia v. Myanmar*<sup>129</sup> and *Ukraine v. Russia (Genocide Convention)*<sup>130</sup> (both of which seem likely to do so). Though the circumstances are doubtless particular,<sup>131</sup> the Court's provisional measures jurisdiction thus offers numerous examples of the Court binding a State in the absence of its active consent to be bound.

The question that was posed was what function consent serves in the contentious jurisdiction; in other words, *to what* do State parties to a case consent to which third parties have not consented, and to which affected States in advisory proceedings need not consent? Though the factors discussed above—process, subject matter, binding effect—seem to exhaust the major possibilities, nevertheless the relevant element has not been found.

#### 4.3 Formalistic Consent

Consent to the process, consent to the subject matter, and consent to be bound: none seems to offer a satisfactory explanation for the *Monetary Gold* rule. In default of all of these factors, a conclusion suggests itself: that consent is prized in the procedural law of the Court for consent's sake. Consent is an empty formalism.

Despite the foregoing, that conclusion will seem extreme to some. Some additional nuance is perhaps required. It may be more accurate to say that in

127 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE)*, Provisional Measures, Order of 14 June 2019, 2019 ICJ Reports 361; Preliminary Objections, Judgment of 4 February 2021.

128 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA)*, Provisional Measures, Order of 3 October 201, 2018 ICJ Reports 623.

129 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, 2020 ICJ Reports 3.

130 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, ICJ General List No. 182.

131 It may be that here distal consent *does* have explanatory force. Though it is invariably the position of the Court that it cannot rule on the merits of a case unless its jurisdiction (in the form of the consent of the parties) is established over the specific question, it may be that pending such a determination the Court has the competence to bind the parties before it to the limited extent necessary to preserve the substance of the case as a result both of the parties' general consent to the Court's provisional measures function in Article 41 of its Statute, and of its own "inherent powers". See Hernández, *supra* note 7, pp. 51, 56–58; citing Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 *British Yearbook of International Law* 195.

the practice of the Court, taken as a whole, consent is *treated as if it were* an empty formalism. Though it is repeated tantrically by the Court in its contentious jurisdiction, it has been shown to have very little relevance to the advisory process, and it has not been possible here to identify any substantive content to the principle. In submitting to the Court's jurisdiction, it does not seem as though States consent *to anything*; they merely consent.

That is, in itself, no argument against consent, nor its role in international adjudication. Legal systems, as with all social systems, are governed by forms and symbols which have or acquire significance because of the significance that social agents regard them as having.<sup>132</sup> These elements *enable and constrain* social forms and social orderings,<sup>133</sup> and thus may, even if not justified by necessary implication or in other transcendental terms, perform socially useful functions. Such formalism becomes problematic only when it is forgotten that such structures are “made and imagined”; when “they appear to us as though they were *things*—as if they were a *fate* rather than what they really are which is our own creations naturalised.”<sup>134</sup> Rather, scholars and practitioners engaged with the Court should retain sight not only of the variable importance of the principle as it appears in the Court's practice—where it is applied, and where it is not—but should view it in its social setting. That it is discretionary, rather than fundamental, necessary or inherent, indicates above all that it *must be justified*.

In that vein, this section will briefly consider a negative and a positive argument concerning the application of consent in the work of the Court. The first argues that it is derogable in the advisory jurisdiction because of the higher duty of cooperation owed to the UN; the second argues in favour of consent's role in the contentious jurisdiction on the basis of its capacity to support the Court's (still vulnerable) authority. At the end of each section, the analysis will return to *Monetary Gold*, to ask whether either explains the third party rule.

132 Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Polity Press 1984) passim, esp. 17, p. 25; see also Emile Durkheim, ‘Religion and Ritual’ in Anthony Giddens (ed), *Emile Durkheim: Selected Writings* (Cambridge University Press 1972); John Searle, ‘Social Ontology and Political Power’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003).

133 Giddens, *supra* note 132, p. 25.

134 Nigel Warburton, Interview with Roberto Mangabeira Unger, ‘Roberto Mangabeira Unger on What is Wrong with the Social Sciences Today - SocialScienceBites’ (January 2014).

#### 4.3.1 The Duty of Cooperation

Hernández has identified, drawing on the work of Abi-Saab,<sup>135</sup> a “duty of cooperation” in the advisory work of the Court,<sup>136</sup> which may serve to displace consent insofar as it applies to this area of the Court’s work.

Abi-Saab noted an oddity in the Court’s reasoning when it constructs its authority to accept or to decline advisory requests. Though it recalls the permissive, discretionary construction of its advisory function in Article 65 of the Statute (“[t]he Court *may* give an advisory opinion on any legal question...”<sup>137</sup>), it invariably construes its discretion as narrowly as possible. It routinely—even ritualistically—incants that it will exercise its discretion to take up the request if at all possible, using a form of words formulated first in *Interpretation of Peace Treaties*:

The Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an “organ of the United Nations”, represents its participation in the activities of the Organization, and, in principle, should not be refused.<sup>138</sup>

To this, it adds the catechism that “only compelling reasons” should lead the Court to decline to answer a request over which its jurisdiction has been established.<sup>139</sup> This form of words “is intriguing, for what is compelling constrains or exerts compulsion which, by definition, negates choice. How can a course of action dictated by such ‘compelling reasons’ then be considered as an exercise of discretion”?<sup>140</sup> This leads Abi-Saab to characterise the Court’s faculty to give advisory opinions not as a *right* conferred by the Statute—“which is a power or faculty that its holder can exercise or not exercise, keep or abandon”—but instead as a *function*, for “a function combines a power with a charge or obligation to exercise it in pursuit of a specific finality.”<sup>141</sup>

<sup>135</sup> Georges Abi-Saab, ‘On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice’ in Laurence Boisson de Charzournes and Phillipe Sands (eds), *International Law, the International Court of Justice, and Nuclear Weapons* (Cambridge University Press 1999) p. 48.

<sup>136</sup> Hernández, *supra* note 7, p. 78.

<sup>137</sup> Statute, *supra* note 22, at art 65(1). (Emphasis added).

<sup>138</sup> *Interpretation of Peace Treaties*, *supra* note 36, at p. 71; see further discussion in Abi-Saab, *supra* note 135.

<sup>139</sup> This phrase first appeared in *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion, 1956 ICJ Reports 77, at p. 86.

<sup>140</sup> Abi-Saab, *supra* note 135, p. 49.

<sup>141</sup> *ibid.*, p. 44.

It is this charge or obligation that Hernández calls the *duty of cooperation*. In its position as the principal judicial organ of the United Nations, the Court is under an obligation—of collegiality, if not of law—to assist it in the furtherance of the functions its States members have ascribed to it.<sup>142</sup> So strong is the Court's conception of this duty, indeed, that it will not be dissuaded even by an argument to the effect that its opinion would *not* assist the requesting organ. Faced with such an objection in the *Chagos* advisory opinion (the most recent in a long line of opinions in which such an argument has been raised and rejected), the Court held simply that “it is not for the Court itself to determine the usefulness of its response to the requesting organ.”<sup>143</sup> That the General Assembly had posed the question was enough.

There is no doubt that *Invert order* (*Abi-Saab and Hernández*) have identified something important in the way in which the Court understands its place in the international legal order. Concerning consent's absence, however, it can offer only a proximate, and not a fundamental explanation. It serves to corroborate the overall observation here: that consent does not have the status of a basic rule in the international legal system. Though the duty of cooperation may be the principle that has displaced consent in the advisory jurisdiction, that highlights primarily that consent *can be displaced*. The Court cannot, to fulfil its duty to cooperate, disregard fundamental principles of the international legal order: that a principle is displaced, whether explicitly or by “necessary intendment”,<sup>144</sup> must indicate that it is, at a minimum, derogable. And nor, unless the powers of the UN are interpreted broadly indeed, could the States parties to the Charter and Statute sign over to the Court a power greater than that which they themselves possess: the power to adjudicate on the actions of States non-members of the organisation. The duty to cooperate, then, serves to reinforce rather than explain the weakness of consent, and offers no firmer foundation to the *Monetary Gold* rule.

#### 4.3.2 Consent as Politics

Consent may, alternatively, be justified instrumentally. Such is the approach of Tomuschat, for example, who explains that consent's primary function in international adjudication is not legal, but political. Though the insistence on consent can “appear to be anachronistic”, it remains relevant because of the

142 Hernández, *supra* note 7, pp. 78–79.

143 *Chagos*, *supra* note 42, at para 76.

144 *Effect of Awards of Compensation made by the UN Administrative Tribunal*, Advisory Opinion, 1954 ICJ Reports 47, at p. 57; see further Crespi Reghizzi, *supra* note 59, pp. 64–69.

lack of an enforcement architecture that could safeguard compliance with Court judgments. “If”, he says, “States were forced to submit their disputes to the jurisdiction of the Court, the record of actual compliance with judgments rendered would be abysmal. It is therefore unavoidable that developments should take place cautiously, step by step.”<sup>145</sup>

A broader version of this argument is made by Hernández, who notes the Court’s restraint as instrumental to its own construction of authority. It is an institution given “judicial functions but no judicial power”:<sup>146</sup>

The Court’s restraint is a natural corollary following from its consensual jurisdiction, which imposes a natural “judicial caution” on the Court to avoid strained or difficult constructions as a ground for seeking to impose its jurisdiction upon unwilling States.<sup>147</sup>

The need to win and retain authority within an “essentially voluntarist” legal system leads the Court to interpolate and reproduce a “bias”

[T]owards the preservation of an international legal system based on the consent of States ... and on a minimalistic concept of the international legal community it serves.<sup>148</sup>

In other words, consent in the Court serves two roles. It is given a part to play in the Statute—no State can be compelled to submit its disputes to binding settlement—but is employed also as a form of rhetoric that seeks to maintain and bolster the Court’s image as a forum aligned with the interests of States. The logic of what Peters calls the “Westphalian approach in which nothing goes without consent”<sup>149</sup> conceives of the Court’s jurisdiction as a narrow exception—justified only where consent, strictly construed, supports it—to the fundamental right of sovereigns to be the judge in their own cause.<sup>150</sup> Conceiving

145 Christian Tomuschat, ‘Article 36’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) pp. 728–29.

146 Hernández, *supra* note 7, p. 45.

147 *ibid* p. 50. (References omitted).

148 *ibid* p. 288.

149 Peters, *supra* note 11, p. 33.

150 The statement of this principle can be found in many early textbooks and treatises in absolute terms, and survives (albeit with additional nuance) in the most recent edition of *Oppenheim*: Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law. A Treatise - Volume 1: Peace* (9th edn, Oxford University Press 2008) pp. 341–42. Compare: Lassa Francis Lawrence Oppenheim, *International Law. A Treatise - Volume 1: Peace* (2nd edn, Longmans, Green and Co 1912) p. 169.

of the legal order, as it seems to do, as laid on these foundations, it would be unsurprising if the Court's approach to consent occasionally appears overzealous; reasoning from consent even where it may not be necessary to do so.

There is no doubt that Tomuschat is correct to point to the lack of an effective enforcement mechanism as a factor restricting the development of international adjudication, and that the Court has sought actively to safeguard its authority through its reasoning—and its conservatism—as Hernández describes. Whether either factor justifies the perpetuation of an “anachronistic”<sup>151</sup> dogma of consent is a question upon which reasonable observers can disagree, and it is unnecessary to enter into that discussion here. Regardless, it is clear that neither of these accounts explains the validity or justifiability of the *Monetary Gold* rule. To begin with, judgments are, as noted above, in any case not binding upon non-Parties, and questions of enforcement do not therefore arise. Nor is it clear *in what way* consent safeguards sovereignty: the consent-based construction of authority still demands that the questions *to what* and *for what purpose* posed above be adequately and consistently answered across the Court's activities.

## 5 Final Thoughts

This article has examined the rule in *Monetary Gold* and has concluded that the strong principle enunciated by the Court, that it must decline to exercise jurisdiction over a contentious case where the legal rights or interests of a third party form the *very subject-matter* of the question submitted to it, has no firm or consistent basis. I employed a comparison with the Court's advisory jurisdiction—the *Chagos* advisory opinion was taken as an example—to examine the purposes served by the *Monetary Gold* rule. I argued, in line with the justification the Court gives for the rule, that it finds its roots purely in the necessity of State consent to jurisdiction. The final section then took up the observation of Judge Oda in *East Timor*, that the Court does not appear to have any clarity about what it means by “consent”. Consent is totemic: it is invoked monolithically and without showing *to what* States need to consent, nor for what purpose. The final section asked these questions, but was unable to locate any meaningful factor rendering consent relevant to contentious cases that is absent from the advisory jurisdiction. Consent, in other words, cannot explain *Monetary Gold*.

151 Tomuschat, *supra* note 145, p. 728.

And that is worth remembering, because *Monetary Gold* is Judge-made law, and has no strong basis in the statute. The reliance on consent in the *Monetary Gold* principle is an absolutism of its time. It is not a necessary or inevitable principle of the legal order, and nor is it even very consistently applied. The *Chagos* opinion especially seems to highlight that it is essentially contingent, and that in turn poses the question not only of whether something similar should apply in relation to the Court's advisory jurisdiction, but also whether the application of the strong form of the rule still serves the interests of the Court and the legal order in contentious cases. In short: it is a choice, and one that deserves to be interrogated more fully. Whether the Court chooses *to* care about consent in contentious cases, or chooses *not to* care about consent in relation to advisory proceedings, either formulation demonstrates that consent is not an essential principle. It can be displaced. And that it is discretionary means that it is necessary to interrogate *why* the choices have been made in the direction that they have.

Those choices are not only conceptually relevant; they have real consequences. As globalisation and the proliferation of global problems continue to draw the world closer together, "traditional bilateralism"<sup>152</sup> in international judicial institutions threatens to render these institutions irrelevant to the solutions of the legal problems of our time or, more problematic still, actively to impede a resolution. It has been noted, for example, that the *Monetary Gold* rule could present a significant obstacle for any State seeking to bring the harms associated with catastrophic climate change before the ICJ or other international Courts. Benoît Mayer raises the concern that harms such as climate change, which result from the actions of a multiplicity of States, could be impeded, particularly when it comes to decisions on the apportionment of climate-related harms.<sup>153</sup> Maiko Meguro puts forward a similar concern, noting that the collective nature of the Paris Agreement goal of limiting global temperature rise to 2°C could, similarly, mean that any case against a single State or a small group of States would fall foul of *Monetary Gold*. "Legally speaking",

152 This phrase is Simma's: Simma, *supra* note 77, p. 298; see also Chinkin's reference to 'a rigid adherence to bilateralism' as a factor impeding 'the clarification and meaningful application of norms suggested to be of community interest': Chinkin, *supra* note 70, pp. 211–12.

153 Benoît Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13 Chinese Journal of International Law 539, pp. 556–57; for the same concern in a broader environmental context see A Neil Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1998) 10 Georgetown International Environmental Law Review 551, pp. 566–67.



Maguro comments, “such an inseparable obligation by its very nature does not allow for causal investigation into who contributes to what, or to what extent”.<sup>154</sup> At the least in relation to the strong form of the principle (as articulated in *East Timor*), and perhaps also that discussed in *Certain Phosphate Lands*, these must be taken as very credible concerns.

In the broader context of shared obligations, Andre Nollkaemper and Dov Jacobs have raised the concern that a broad reading of the *Monetary Gold* principle “impose[s barriers] for a workable system of shared responsibility” in general terms.<sup>155</sup> They further note the specific challenge of shared obligations involving entities which cannot appear before the Court, asking whether the *Monetary Gold* rule would exclude jurisdiction over cases concerning obligations shared between States and international organisations, for example. Such an application of the principle would “seriously impair the role of the ICJ” in cases concerning shared obligations, “given that most attribution operations involve, at some level or another, discussion of the acts (and legality thereof) of individual or organs acting as de jure or de facto organs of the state.”<sup>156</sup> These concerns are not prospective or academic: Nollkaemper highlights the effect of procedural to bar effective realisation of collective obligations in existing cases, citing the example of the provisional measures phase of *Bosnia v. Serbia Application of the Genocide Convention*. The Court rejected Bosnia’s requests for provisional measures addressed to all parties to the 1948 Convention, leading Nollkaemper to conclude that “[t]he goal of protecting the values of procedure prevailed over the goal of protecting the public good.”<sup>157</sup>

As most authors acknowledge, careful construction of claims can, to some extent, prevent the invocation of public goods from falling foul of the *Monetary Gold* principle. Mayer argues that a focus on the no-harm rule could allow climate cases to be brought before the Court even despite *Monetary Gold*, by putting emphasis on the transboundary aspect of the harms involved.<sup>158</sup> A similar

154 Maiko Meguro, ‘Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy’ (2020) 33 *Leiden Journal of International Law* 933, p. 948.

155 André Nollkaemper and Dov Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 *Michigan Journal of International Law* 359, p. 435; see also André Nollkaemper, ‘International Adjudication of Global Public Goods: The Intersection of Substance and Procedure’ (2012) 23 *European Journal of International Law* 769, p. 819.

156 Nollkaemper and Jacobs, *supra* note 155, p. 436.

157 Nollkaemper, *supra* note 155, p. 784.

158 Mayer, *supra* note 153, p. 557; see also Benoît Mayer, ‘Climate Change Reparations and the Law and Practice of State Responsibility’ (2017) 7 *Asian Journal of International Law* 185, p. 188.

observation is made in general terms by Nollkaemper, who concludes that “the indispensable parties rule will thus preclude the exercise of jurisdiction only in narrow situations”.<sup>159</sup> No doubt Nollkaemper is correct in this analysis, but as he goes on to note:

[T]he fact that in instances of shared responsibility a court can exercise jurisdiction irrespective of the position of other co-responsible states, does not exclude the possibility that on normative grounds it would be preferable if a court could rely on factual and legal determinations pertaining to such co-responsible parties that the court itself cannot make.<sup>160</sup>

Even if cases relating to matters of global concern such as climate change can—at least much of the time—be prepared in such a way as to avoid falling foul of the *Monetary Gold* rule, it would be legitimate to conclude that they should not need to be. Court decisions will have only a limited potential to contribute to active global debates if the applications with which Courts are faced deal only with fragments of the issues involved. The route to rigorous decision-making is to ensure that Courts are able to consider all of the factual and legal issues involved, and to do so in the round. At a time when issues of a global scale—climate change foremost—are dominating public discourse at national and international levels, it is appropriate that the *Monetary Gold* principle be re-examined, and its utility to the international legal order reassessed.

Further scholarship will be needed to take up that task in the coming years. It is not the primary purpose of this article to engage in such a substantive reassessment and nor would it be practical or desirable to pre-empt that analysis here. Some initial comments may, however, be offered.

The analysis here has given rise to three primary conclusions. First, I have argued that the central and totemic position held by consent in international adjudication is, contrary to many long-held assumptions, not the result of the application in this area of a fundamental principle of the international legal system. That suggests, secondly, that the Statute’s limitation of contentious cases to instances where consent is given—through special agreement, a treaty relationship, or reciprocal Article 36 declarations—is a restriction on the (potentially broader) jurisdiction of the Court, rather than a reflection of that same principle. There is no doubt that the Court, as a matter of its founding

159 André Nollkaemper, ‘Concerted Adjudication in Cases of Shared Responsibility’ (2014) 46 *New York University Journal of International Law and Politics* 809, p. 821, and further pp. 818–822.

160 *ibid.* p. 822.

Statue, is bound to apply that consensual logic in those cases, but those restrictions need have no necessary implications for constellations outwith those specified. It follows, thirdly, that the decision to apply a strict exclusionary rule to cases involving, at whatever level of centrality, the legal interests of third States is a choice.

What those conclusions do not indicate, as yet, is whether that choice was appropriate, nor whether it remains so in the changing circumstances of international law and in light of subsequent developments in the advisory jurisdiction. Three questions in particular demand the attention of scholarship: i) whether, as a matter of law, alternative means exist to protect the interests of third States in litigation when their actions (or inactions) are implicated in cases submitted to the Court; ii) whether, as a matter of legal policy and political science, the authority of international litigation is likely to be enhanced or damaged by a relaxation of the *Monetary Gold* rule; and iii) whether, in particular, if the conclusion is reached that the *Monetary Gold* rule must be retained, the *Eastern Carelia* principle should regain its parallel role in the advisory work of the Court.

In my opinion, the first of these questions can be answered affirmatively. Even absent the *Monetary Gold* rule, the Statute contains strong protections for the rights and interests of affected third States. Most basic, but not to be underestimated, is the Article 59 recognition that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”<sup>161</sup> Although a State may—as with the advisory jurisdiction—receive an adverse precedent which may bear on any future legal proceedings in which it is engaged, it is at no direct legal risk from the judgment itself. Nor, as discussed above, would such a judgment render any factual issues treated by the Court *res judicata* for the third State concerned.<sup>162</sup> As the Court’s practice in the *SFRY* cases amply shows,<sup>163</sup> and as it has explicitly confirmed,<sup>164</sup> the force of *res judicata* applies only to those States party to the proceedings. Nevertheless, if the State concerned considers that to do so best serves its interests, it has the option to involve itself in the proceedings and to seek to affect the outcome. Article 62 gives any State which “considers that it has an interest of a legal nature which may be affected by the decision in the case” the right to request to intervene, and the same opportunity is offered by Article 63

161 Statute, *supra* note 22, at art 59.

162 See above, section 3.2.1.

163 See above, note 88.

164 *Genocide Convention (Croatia v. Serbia)*, *supra* note 88, at paras 121–138.

to all States parties to any convention the construction of which is at issue in a case.<sup>165</sup> Although Article 63(2) requires States intervening under part 1 of that provision to accept as binding the construction given by the Court, the Court's practice has confirmed that a State intervening under Article 62 is not under such an obligation.<sup>166</sup>

The Statute, then, not only directly provides for third States; it leaves them in a significantly powerful position. Irrespective of their choice to intervene or not to intervene in a case, they will be not be bound by the legal conclusion, nor by the Court's construction of the facts. Although a decision may prove a persuasive precedent in any subsequent case, the Court will be required to assess the legal and factual situation anew, and it has shown itself to be willing to depart from its own factual conclusions in previous cases.<sup>167</sup> The risk associated with premising an argument on the factual or legal position of a third State seems, therefore, almost entirely to attach to the State seeking so to found its argument; a risk it can be considered to have consciously accepted in bringing suit on this basis.

With those protections in mind, and viewed in the light of the comparison to the advisory jurisdiction, the *Monetary Gold* rule appears to me to be unnecessary, and to present an undue bar to international public interest litigation. At least, it has the potential to do so when interpreted over-broadly. Certainly, the *East Timor* version of the principle seems to be sufficiently wide-ranging to block litigation when a variety of legal interests and relationships are engaged. As a matter of policy, as much as of pure statutory interpretation, such a reading should be excluded. A separate question, however, asks whether there is nevertheless a role for a much narrower *Monetary Gold* principle; one that would effectively confine it to its original facts. It was noted above that *Monetary Gold* was an extreme example of its type. So it was: Italy's claim to the gold, which it sought to press vis-à-vis France, the UK and the US, was premised on an alleged internationally wrongful act by Albania. The risk presented by such a constellation to public interest litigation seems to be minimal, and so the force of the policy argument for rolling back the principal is reduced. Even here, however, and in light of the statutory protections already in place, it is difficult to ascertain which party was put at risk by the case being pressed to a decision.<sup>168</sup>

165 Statute, *supra* note 22, at art 62–63.

166 *Jurisdictional Immunities*, *supra* note 5, at para 127; and discussion above, section 3.2.1.

167 *Genocide Convention (Croatia v. Serbia)*, *supra* note 88, at paras 121–138; and further text to note 88.

168 The party with most to lose seems, in many ways, to be Italy, which would suffer a bar to international satisfaction if the Court found—let us say, for the sake of argument,

Ultimately, the question of whether a strictly limited and narrow incarnation of the *Monetary Gold* principle can serve a valuable purpose in the international legal order will depend on a more extensive analysis. In my opinion, however, such a principle adds little to the regime established by the Statute, and risks perpetuating an essentialised understanding of consent that is at best distorting and at worst actively restricts the emancipatory potential of law. Rather, the social value of the Court and its role in the international legal order is maximised where questions of international public interest, in which specific States or all States may be legally interested and implicated, can be brought under both the advisory and contentious jurisdictions. The Statute makes specific provision for the role of consent in the work of the Court, and it must therefore continue to play a central role in jurisdictional questions in contentious cases. But consent under the Statute is best conceived as *consent to be bound* and, as a creation of the Statute, it should be restricted to that meaning.

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incorrectly—that Albania had committed no wrongful act. In such a scenario it would have a claim against Albania which it must press by other means; but this is precisely the position in which it was left by the Court's decision that it could not rule on the case. The allies were in possession of the gold, and Italy brought suit to recover it. Moreover, given Italy's decision to bring suit and to premise its case on Albania's wrongdoing, there is a question of policy concerning whether it ought to be entitled to protection from its own decision: the principle of *volenti* would seem to apply.