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REFLECTIONS ON THE INDISPENSABLE PARTY PRINCIPLE IN THE WAKE OF THE JUDGMENT ON PRELIMINARY OBJECTIONS IN THE NORSTAR CASE

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1. In the pending case M/V “Norstar” (1), before the International Tribunal for the Law of the Sea (ITLOS), Panama has invoked Italy’s responsibility for a breach of the United Nations Convention on the Law of the Sea (UNCLOS) (2) in relation to the arrest and detention of an oil tanker registered under the Panamanian flag (3). An Italian court, investigating the possible commission of tax fraud (4), ordered the seizure of the vessel. Since the tanker was anchored in the bay of Palma of Mallorca, the seizure was carried out by Spanish authorities, acting upon a request for assistance made by the Italian enforcement officials under the European Convention on Mutual Assistance in Criminal Matters (5).

Italy raised some preliminary objections, seeking to have the case dismissed at the jurisdictional stage. Essentially, Italy noted that Panama’s claim was directed at the arrest and seizure of the vessel, which were carried out by Spanish authorities. Panama rebutted that these acts were ordered by an Italian court, and that their material execution

Questo scritto è stato sottoposto a referaggio.

(1) International Tribunal for the Law of the Sea, Case No. 25, The M/V “Norstar” Case (Panama v. Italy).
(4) The vessel was suspected to have supplied oil to yachts on the high seas, to avoid Italian customs law.
by a third State, required under a cooperation agreement, did not affect Italy's responsibility for their commission.

Hence, Italy tried primarily to refute the attribution of the acts challenged, and divert the whole claim to Spain, negating its involvement in the dispute or the wrongfulness of the seizure order considered on its own (6). In the event that the Tribunal would find that Panama had indeed a claim against Italy, Italy argued that the adjudication of such claim would be barred because it would encroach on the rights of another party to the dispute (Spain) which was not party to the proceedings. Italy pled the so-called Monetary Gold objection as an alternative to the objection that, owing to a false attribution of the relevant conduct, it had been wrongly identified as respondent. Had the main objection been upheld, the alternative one would have been absorbed.

Instead, the Tribunal rejected Italy's objection on non-attribution (as well as the other preliminary objections raised) and ultimately allowed the case to proceed to the merits (7). Therefore, Italy's assertion that Spain was an indispensable party to the proceedings had to be analysed — and was dismissed — on its own merit. This article uses the opportunity of analysing this dispute, and in particular the Tribunal's cavalier analysis on the Monetary Gold objection, to take stock of some elusive features of the relative doctrine in international adjudication.

2. As foreshadowed above, Italy invoked in its preliminary objections the indispensable party principle to bar the exercise of the

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(6) This objection relied on a distinction between the preparatory act of the order of seizure and the “completing” acts of arrest and seizure, see Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports, 1997, p. 7, at p. 54, para. 79. Since only the latter could be considered wrongful under the UNCLOS, in Italy's view, the former would have been irrelevant to the dispute at bar. Consequently, Italy would simply not be a respondent to Panama's claim. In Italy's view, Spain was the right defendant, having exercised enforcement jurisdiction; Italy had no role in the dispute, having — at most — exercised prescriptive and adjudicative jurisdiction, which do not amount to a breach of UNCLOS. In international parlance, the notion of locus standi or standing is normally referred to one party's right to appear in court as claimant, rather than to the other party's duty to appear as defendant, see Del Vecchio, Standing, International Courts and Tribunals, in Oxford Encyclopaedia of Public International Law (2010). In this sense, Italy's objection on attribution is correctly characterised as one hinging on the mistaken identification of the defendant (difetto di legittimazione passiva).

jurisdiction of the Tribunal (8). In essence, Italy held that the seizure order was “inextricably linked” (9) to the arrest and detention acts. As a result, an analysis of the former’s wrongfulness under UNCLOS would have implicated a determination of Spain’s responsibility for the latter. The objection, which the Tribunal characterised as going to the question of “whether [the Tribunal] ha[d] jurisdiction ratione personae” (10), was rejected in a single paragraph of the judgment. The Tribunal reasoned that Spain had simply executed Italy’s request for seizure of the vessel and that, accordingly, “it [was] the legal interests of Italy, not those of Spain, that form[ed] the subject matter of the decision to be rendered by the Tribunal” (11). In addition, ITLOS argued that the prior determination of Spain’s rights and obligations was not required in the proceedings, and that Spain’s participation therein was “not necessary, let alone indispensable” (12).

In the following sections, after a short overview of the Monetary Gold principle, three questions arising from this dictum are briefly explored. First, whether the Tribunal convincingly disposed of Italy’s objection. Second, whether the indispensable party principle relates to the jurisdiction of a tribunal or to the admissibility of the claim. Third, whether the priority element has a chronological or logical connotation.

3. The principle of the indispensable party (13) was formulated by the International Court of Justice in the judgment in the Case of the Monetary Gold removed from Rome in 1943 (14), after some hesita-

(8) Italy’s pleading was ambiguous on whether the “indispensable party principle” affects the jurisdiction of the Tribunal or the admissibility of the claim. In the Italian briefs, the principle is said in different passages to determine the Tribunal’s “lack of jurisdiction” (Italy’s Preliminary Objections of 10 March 2016, para. 24; Italy’s Written Observations of 8 July 2016, paras. 82, 93) or to lead to a situation where the Tribunal “should not” exercise it (Written Observations, para. 92; see a similar language in the Preliminary Objections, para. 22). This oscillation is congenital to the blurry notions of jurisdiction and admissibility, and is inevitable with respect to the “indispensable party” objection, which partakes in both. See below, para. 5.

(9) Written Observations, supra note 8, para. 86.

(10) Norstar, supra note 7, para. 160.

(11) Norstar, supra note 7, para. 173.

(12) Ibid.

(13) But note the disparaging words of judge Cançado Trindade in his dissenting opinion in the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports, 2015, pp. 373-374, para. 519, who challenged the framing of the doctrine as a genuine general principle, and argues that it is “nothing more than a concession to State consent, within an outdated State voluntarist framework”.

tion (15) in the cases Corfu Channel (16) and Rights of U.S. Nationals in Morocco (17).

The dispute in Monetary Gold concerned the redistribution of some Albanian gold removed from Rome during the German occupation. After it was determined in arbitration that Albania had title to the gold, the United Kingdom sought to seize it in satisfaction of the unpaid damages awarded in 1946 in the Corfu Channel case. Italy, however, laid a competing claim to the gold and challenged the determination made in the arbitral award before the ICJ. The Court was asked to declare that Italy could apprehend the gold — in reparation of certain acts of confiscation concerning Italian property committed by Albania in 1945 — with priority over the attempt of the United Kingdom to do the same. Whereas the application before the Court related to the competing claims of Italy and United Kingdom, the main legal determination concerned the responsibility of Albania vis-à-vis Italy. Deciding on a preliminary objection raised by Italy itself (18), the Court declared that Albania’s “legal interests would not only be affected by a decision, but would form the very subject-matter of the decision” (19). As a result, the Court declined to exercise jurisdiction, yet without suggesting that it lacked it altogether. This judgment was explicitly premised on the principle of consent, in application of which the Court cannot adjudicate upon the responsibility of parties that have not agreed to be subject to its jurisdiction (20).

In most subsequent cases in which the respondents invoked this principle, the Court did not apply it (21). When the interests of the

(15) On the pre-Monetary Gold case law, see Forlati, The International Court of Justice. An Arbitral Tribunal or a Judicial Body?, Heidelberg, 2014, pp. 144-146.
(16) I.C.J. Reports, 1949, p. 4.
(19) I.C.J. Reports, 1954, p. 32.
(20) Ibid. The subsequent East Timor case saw the Court applying the same principle. Like in the Monetary Gold dispute, the main determination that the Court was asked to make (whether Australia could conclude a delimitation treaty with Indonesia with respect to the continental shelf between Australia and East Timor) depended on the prior resolution of a competing claim between two States, one of which was not party to the proceedings (i.e., whether Portugal or Indonesia was entitled to conclude treaties on behalf of East Timor at the relevant time). See I.C.J. Reports, 1995, p. 102, para. 28.
third State are affected by the outcome of a dispute, but do not form its subject-matter, the Court’s jurisdiction is not barred (22). In any event, the Court will make sure not to encroach directly on the right of third States in formulating the operative part of the decision (23). This is a particular concern in delimitation cases, when the remedy sought might entail the drawing of delimitation lines or the identification of tripoints which involve or could involve third parties’ claims (24).

In the case on Certain Phosphate Lands in Nauru (25), critically, the Court found that the Monetary Gold principle did not operate. The case is crucial for the analysis of the Norstar judgment of ITLOS. Nauru sought from Australia, which had jointly administered the island with the United Kingdom and New Zealand before its independence, the payment of damages for failure to rehabilitate worked-out phosphate lands. A finding against Australia would have logically determined the concurrent responsibility of the United Kingdom and New Zealand. However, the determination of Australia’s responsibility did not depend on a prior finding regarding the other two parties. The Court could therefore pronounce on Australia’s alleged wrongful act, notwithstanding the inevitable externality of the decision, i.e., the incidental determination of the United Kingdom and New Zealand’s Australia).

The limited precedential value of the Monetary Gold case, and the virtual inapplicability of its reasoning in other cases, was noted by Rosenne, The Law and Practice of the International Court, Dordrecht, 1965, p. 431. Likewise, Orakelashvili, op. cit. supra note 18, p. 375, praises the post-Monetary Gold case law until East Timor, and criticises this latter judgement as ill-conceived.

(22) See Nicaragua (I.C.J. Reports, 1984, p. 431, para. 88). The Court rejected the attempt of the United States to invoke a doctrine relating to the “indispensable parties” of the case, in particular Honduras (whose territory, in Nicaragua’s view, had been used as staging ground for the forcible attacks against it). The same was held in Boundary Dispute (Burkina Faso v. Mali), I.C.J. Reports, 1986, p. 579, para. 49.

(23) Forlati, op. cit. supra note 15, p. 149.

(24) Pellet, Land and Maritime Tripoints in International Jurisprudence, in Coexistence, Cooperation and Solidarity (Hestermeyer and others eds), Leiden, 2011, p. 245, p. 246. The Court, trying to abide by the duty to preserve the right of third States and fix a boundary, normally indicates “the general direction of the boundary line between the Parties up to the (undetermined) point where it reaches the jurisdiction of a third State”. An insightful discussion of how the Court has approached these cases, and how they relate to the indispensable party principle, is in Forlati, op. cit. supra note 15, p. 150 ff.

responsibility in connection with the same conduct, the same obligations and the same breach (26). President Jennings (27) and Judge Ago dissented vigorously (28). The latter noted succinctly that “c’est précisément en se prononçant sur ces griefs adressés à la seule Australie [par Nauru] que la Cour affectera, inévitablement, la situation juridique des deux autres Etats, à savoir leurs droits et leurs obligations” (29).

The dissenting criticism over the restricted scope of the Monetary Gold principle, as well as its minimal use in the case law of the Court (and of other international tribunals (30), lend credence to its exceptional character. As stated in the Nicaragua case, “[t]he circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction” (31). To be “truly indispensable” (32) to the continuation of proceedings, the third party must be in the same position of Albania or Indonesia in the cases Monetary Gold and East Timor, respectively. The review of their responsibility must be a “prerequisite” for the adjudication of the respondent’s responsibility (33). The strictness of the approach is explored in the next few sections, starting with the judgment of ITLOS in the Norstar case.

4. The Tribunal gave short shrift to the Monetary Gold objection, in paragraph 173 of the judgment. It listed the conditions for the

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(26) The same reasoning was applied in Croatia v. Serbia (a finding against Serbia would have entailed a similar conclusion with respect to the other successor States of the Socialist Federal Republic of Yugoslavia): see judgment of 3 February 2015, para. 116. See also Armed activities in the territory of the Congo (DRC v. Uganda), I.C.J. Reports, 2005, p. 238, para. 204.


(28) Ibid., p. 326.

(29) Ibid., p. 328.

(30) One notable exception is the application of the principle in the arbitral case Lance Larsen v. the Hawaiian Kingdom, PCA, case No. 99-001, under the UNCITRAL 1976 Rules, Award of 5 February 2001, Int. Law Reports, vol. 119, p. 566. This case is exceptional because it deals with a fabricated claim in which both parties had no interest in raising procedural objections. Both parties’ goal, in fact, was to obtain from the tribunal a pronouncement on the unlawfulness of the United States’ occupation of Hawaii. The Tribunal (at para. 13.2) raised proprio motu an admissibility objection and dismissed the case, noting that the United States were absent from the proceedings. An overview of the sparse use of the indispensable party principle in cases of maritime delimitation, where the tribunals refused to make determinations that would prejudice the rights of third parties, is contained in Forlati, op. cit. supra note 15, p. 135, see notes 131-132.


(32) Ibid.

doctrine to apply and simply observed that they were not met. In the Tribunal’s view, the legality of Italy’s conduct can be determined without the prior determination of the legality of Spain’s acts (34). This conclusion is plausible, but is largely pre-determined by the finding on attribution, and would in any event have benefitted from a clearer elaboration on the test of “priority” employed.

Paragraph 173 contains a cross-reference to the Tribunal’s previous finding on the attribution of the wrongful acts to Italy (35). This renvoi suggests looking at the interplay between the acts of Italy and Spain from an angle other than the chronological one. The judgment noted that “the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy [and that it] merely provided assistance [to Italy] in accordance with its obligation under the [cooperation Convention]” (36). In essence, the Tribunal highlighted that the conduct of Spain, far from being a precursor to Italy’s act (temporally or logically), was just an accessory thereto (37). This spill-over of the reasoning of the Tribunal on attribution over the treatment of the Monetary Gold objection deserves a brief comment.

Italy’s Monetary Gold objection was pleaded only as an alternative to the objection on non-attribution (38). It seems therefore odd that the Tribunal used its finding on attribution (i.e., Italy is the right respondent to Panama’s claim) to reject the Monetary Gold argument, which is not undermined by attribution, but is precisely premised on it. Evidently, the indispensable party objection did not postulate that Italy is the wrong respondent in the proceedings. To the contrary, it posited that, alongside Italy, another respondent could be identified, whose participation in the proceedings was indispensable lest the Tribunal exercise its mandate in breach of the principle of consent. Whereas Judges Wolfrum and Attard aptly characterised Italy’s objection (39),

(34) Norstar, supra note 7, para. 173.

(35) Ibid., para. 167.

(36) Ibid.

(37) Judge Lucky, in his separate opinion, calls Spain a “delegate operative”, see para. 35. This conclusion is challenged by Judges Attard and Wolfrum, who wrote a joint separate opinion. In their view, Spain had acted independently from Italy’s order, and possibly in contradiction of the acts of the Italian court (ibid., para. 45). Consequently, Spain’s act had to be assessed autonomously, and not as a mere accessory to Italy’s conduct.

(38) Preliminary Objections, supra note 8, para. 22; Written Observations, supra note 8, para 82.

(39) See joint separate opinion cit., para. 44. The judges noted that the starting point to assess the Monetary Gold objection was whether “Italy alone is responsible for any infringements of freedom or Italy and Spain together”. Accordingly, they criticised
the brevity of the Tribunal’s reasoning on this point makes it difficult to ascertain whether this aspect was pondered adequately.

A critical point in the judgment is the Tribunal’s conclusion that Spain’s conduct “fit[ted] into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State” (40). The situation described is governed by the principle set out in Article 16 of the ILC Articles on State Responsibility for Internationally Wrongful Acts. The aiding State shares in the responsibility of the aided one when it has knowledge of the circumstances of the wrongful act, and it is bound by the same obligation which renders the act wrongful for the aided State. The responsibility of the aiding State, therefore, must be assessed in each case. The ILC Commentary makes a tell-tale reflection on the operation of the Monetary Gold principle in situations of aid and assistance (41). Since the responsibility of the aiding States depends on that of the aided one, any judicial claim directed exclusively at the ascertainment of the aiding State’s responsibility might be hindered by the Monetary Gold principle (42). The responsibility of the aided (and third) party, indeed, is often a “pre-requisite” for the adjudication of the main claim in the strict sense outlined above. Conversely, it can be argued that ascertaining the responsibility of the aiding State (in casu, Spain) is irrelevant to the determination of the responsibility of the aided State (Italy) (43). This remark is true even if, as seen above, the former determination is inextricably linked to the latter, precisely because the wrongfulness transmits from the aided to the aiding State (44).

In this light, the better argument made by the Tribunal is that Italy’s responsibility could be determined without considering at all the issue of Spain’s responsibility. At first glance, the Tribunal’s reference to the non-priority of the potential determination of Spain’s legal position seems to have given some weight to the chronology of the

the Tribunal for overlooking the autonomous role of Spanish authorities in the commission of the asserted breach of UNCLOS, which exceeded mere aid and assistance to Italy (ibid., para. 45).

(40) Norstar, supra note 7, para. 166.


(42) The Commission is not categorical on this point, and noted that “the Monetary Gold principle may not be a barrier to judicial proceedings in every case”. See ibid.

(43) For a similar conclusion, see PAPARINSKIS, op. cit. supra note 21, p. 310.

(44) Provided that the two conditions of Article 16 of the Draft Articles on State responsibility are met.
events underlying the dispute: since the Italian seizure order preceded
the arrest and detention, intuitively its wrongfulness could be assessed
without reviewing that of the subsequent acts attributable to Spain.
However, since Spain’s responsibility might be incidentally affected by
the decision on the merits, the conclusion might be difficult to square
with the established view that the Monetary Gold doctrine seeks to
safeguard the principle of consent in international adjudication. Nev-
evertheless, the extraordinary application of this objection and the ap-
propriate notion of “priority” that it entails (both analysed below)
justify the Tribunal’s conclusion. In particular, what underlies this
decision is a distinction between express and tacit legal determinations;
only the former are deemed to encroach on the third party’s consent —
or, better, to challenge a tribunal’s power to pass decision in a given
dispute. This point is elaborated in the next paragraphs.

5. Both Italy and the Tribunal characterised the Monetary Gold
objection, interchangeably, as one that would either point to a lack of
jurisdiction or to the inappropriateness of exercising it in the circum-
stances of the dispute (45). The distinction might seem irrelevant for
practical purposes: however framed, the goal of the objection was to
prevent the case from proceeding to the merits. In this light, if the
objection had been successful it would have not mattered whether the
Tribunal was incompetent to rule on the merits or, instead, could not
exercise a jurisdiction that it had in the abstract.

The distinction, however, mirrors the divide between objections
directed at the jurisdiction of a tribunal and those challenging a claim’s
admissibility. Even if this distinction is controversial and there are areas
of uncertainty in the practice (46), it is well established that the admis-
sibility of a claim is considered only when (and if) a tribunal is satisfied

(45) For other examples, the ICJ framed the discussion of the principle as one of
admissibility in Nicaragua, in line with the pleadings of the United States (I.C.J. Reports,
1984, p. 430, para. 86); Judge Schwebel argued as follows in his dissenting opinion to
the Nauru judgment (I.C.J. Reports, 1992, p. 335): “The question is one of balancing the
propriety of the Court’s exercising to the full the jurisdiction which it has been given
against the impropriety of determining the legal interests of a third State not party to
the proceedings”; President Tomka, while discussing the principle, referred to the
admissibility of Croatia’s claim in Croatia v. Serbia: see separate opinion, I.C.J. Reports,
2015, p. 165, para. 28.

(46) A recent critique of the distinction, which suggests a new taxonomy, is
contained in SHAMY, Questions of Jurisdiction and Admissibility in International Courts,
Cambridge, 2015, p. 49. See also HEIKANEN, Jurisdiction v. Competence: Revisiting a
of its own competence (47). If an objection to admissibility is upheld, it follows, the claim is rejected because the tribunal refrains to exercise on the claim, for reasons specific thereto, the jurisdiction that it would have in the abstract (48). Several heuristics are commonly suggested to distinguish the two kinds of objections. Jurisdictional objections challenge the scope of the tribunal’s mandate over certain categories of disputes. In other words, they assert the parties’ failure to consent to the adjudicator’s power to hear certain categories of claims. Admissibility objections, instead, refer to defects of the specific claim or claimant. The claim would fall in the abstract under the tribunal’s jurisdictional rationes (materiae, temporis, personae, loci). However, the exercise of jurisdiction would be barred for the sake of further considerations and interests, normally relating to the integrity of the judicial function and the jurisdictional process.

The Monetary Gold principle is difficult to frame consistently with this taxonomy, despite its direct bearing on consent (49). That a tribunal is unable to hear a dispute involving the determination of the responsibility of a third party seems to be a principle flowing from the limits of its jurisdiction and the pacta tertii rule (50). Alternatively, the principle can be regarded as one of admissibility, designed to ensure the propriety of the judicial function: a tribunal should refrain from exercising its (existing) jurisdiction if a decision would undermine the fundamental rule of consent to international obligations and international adjudication (51). Consider how this ambiguity is reflected in the words of the


(49) I.C.J. Reports, 1954, p. 32: “To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent”.


(51) SHANY, Jurisdiction and Admissibility, in Oxford Handbook of International Adjudication (Romano and others eds.), Oxford, 2013, p. 798; Id., op. cit. supra note 44. Kolb talks about a “matter of general admissibility”: see KOLB, op. cit. supra note 18, p.
Chevron v. Ecuador investment tribunal (52). Firstly, the tribunal noted that the “indispensable party” principle prevents a court from exercising its validly established jurisdiction (pointing to an objection relating to admissibility): “although a tribunal may have jurisdiction over a dispute it must not or should not exercise that jurisdiction if the very subject-matter of the decision would determine the rights and obligations of a State which is not a party to the proceedings” (53).

In the next paragraph, however, the tribunal considered the Monetary Gold principle as one flowing from consent, and accordingly (but contradictorily) situated it among the requirements of jurisdiction: “no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the ‘consent’ principle, and it goes to the question of the tribunal’s jurisdiction” (54).

The conceptual confusion is perhaps only apparent, and can be ascribed to the reasoning of the Court in Monetary Gold, which blurred the notions of adjudication (of the main claim) and incidental legal determinations, to make its point more vividly: “To go into the merits of [the lawfulness of Albania’s actions vis-à-vis Italy] would be to decide a dispute between Italy and Albania. The Court cannot decide such a dispute without the consent of Albania. [...] To adjudicate upon the international responsibility of Albania without her consent would run counter to [the principle of consent]” (55).

Note that the Court did not state, more cautiously, that the legal determination of the obligations of Albania would be comparable, or tantamount to, adjudication over Albania. It said that such determination would be just that: adjudication (56). This equation is not obvious; Article 59 of the Court’s Statute would have protected Albania from any legal effect of such determination. In other words, even if the Court

569. See also ABE-SAAB, Les exceptions préliminaires dans la procédure de la Cour internationale, Paris, 1967.


(53) Ibid., Part IV, para. 4.60 (emphasis added).

(54) Ibid., para. 4.61 (emphasis added).

(55) I.C.J. Reports, 1954, p. 32 (emphasis added).

(56) Contrast this framing with the more precise characterisation made by Judge Schwebel in his dissenting opinion to the Nauru judgment (I.C.J. Reports, 1992, p. 337), where he wondered whether “for the Court to adjudge Australia would entail its effectively adjudging the absent States” (emphasis added). See also ibid., p. 342: “a judgment by this Court upon the responsibility of Australia would appear to be tantamount to a judgment upon the responsibility of New Zealand and the United Kingdom” (emphasis added).
had exercised its jurisdiction there still would have been a reliable distinction between adjudication of the Italian claim against the United Kingdom and the other respondents (in which the dispositif of the decision would have bound the parties) and other legal determinations made en route to the resolution of the main claim (which would have not been opposable to third parties, and could have been treated as facts in the proceedings), such as those relating to the responsibility of Albania (57). The Court rejected the argument based on Article 59 of the Statute. It claimed that the safeguard of that provision only applies to decisions validly made by the Court, whereas a decision concerning the responsibility of a third party exceeds its jurisdiction also when it binds only the parties of the proceedings. In other words, the pronouncements of the Court over a third party cannot have only inter partes effects (58). It seems that the underlying concern of the Court, besides the protection of the third party, is the possibility of acting ultra vires. The Monetary Gold principle defuses the risk of the Court carrying out incidental adjudication without the requisite and unobjectionable jurisdictional support.

Ultimately, it seems that the Court’s inability to determine the legal position of a third party is twofold. Insofar as it cannot hand down a binding decision on that issue (irrespective of which States are bound by it), the Court simply lacks the jurisdiction to decide without the concerned State’s consent. Alternatively, one could reject on technical grounds the “transubstantiation” of incidental legal determinations into adjudication stricto sensu, invoking the safeguard of Article 59 and noting that the lack of jurisdiction over the third party does not automatically invalidate the Court’s jurisdiction conferred by the States that are parties to the proceedings over their dispute (59). Even then, however, the exercise of such jurisdiction should be barred as it would

(57) For a different view, see ORAKHELASHVILI, op. cit. supra note 18, p. 381, who argues that the decision of the Court would have formally adjudicated upon Albania’s rights, by allocating its gold with binding force: “In Monetary Gold, the Court risked directly disposing of those interests through its judgment; in the two other cases [Nauru and East Timor] it did not”. What seems to lack from this analysis is the fact that Italy’s claim was based on an asserted wrongdoing of Albania and that its gold had already been allocated to the United Kingdom. In other words, the gold would have not reached Albania at any rate, and the main dispute had arisen about the priority of the creditors’ claim, not about the existence of Albania’s debt. The author, however, shares the view that Article 59 is sufficient to prevent “adjudication” of third parties’ interests, in all cases other than Monetary Gold, see ibid., p. 385.

(58) I.C.J. Reports, 1954, p. 34.

(59) As the Court concluded in Monetary Gold, “although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate” on the Italian claim. See ibid., p. 33.
amount, de facto rather than by identity, to adjudication without consent (60), at least in the narrowly confined scenario of the Monetary Gold doctrine.

The Court’s refusal to confide only in Article 59 of the Statute to protect third parties (61), however, raises a practical question. The Court carved out a gap in its own jurisdiction, based on the assumption that any incidental legal determination over third parties, contained in a binding decision, entails an intolerable harm to the principle of consent (and a possible instance of excess of power). Albania would have not been bound by a hypothetical judgment in the Monetary Gold case, but the ICJ’s pronouncement on its responsibility would have harmed that State, effectively, as if it had been unwillingly subjected to compulsory adjudication. If this is the applicable principle, though, it is not obvious why it should not operate similarly in the Nauru scenario (or, possibly, in the Norstar dispute). If the critical harm to the principle of consent is not the binding character of the pronouncement on the third party (which can never occur), but the mere fact that the Court assessed its responsibility in absentia, it is harder to distinguish between the two scenarios (62). The only difference, it seems, would be that in the Monetary Gold case the determination of Albania’s respon-

(60) The possibility that a circumstance could at the same time support a jurisdictional objection and an objection to the admissibility of the claim does not challenge the conceptual distinction between the two. For another example consider the reasoning of an investment arbitration tribunal, concerning the requirement to exhaust local remedies. In the tribunal’s view, the investor’s claim “would fall to be dismissed in any event, on the additional basis that Apotex has failed to exhaust all local judicial remedies, and the Tribunal therefore lacks jurisdiction ratione materiae [...] In the alternative, and for the same reasons, all such claims would be inadmissible in any event”. See Apotex, supra note 50, paras. 258 and 298-299 (emphasis added).

(61) PAPARINSKIS, op. cit. supra note 21, p. 317, likened the situation of a third State on whose responsibility the Court has pronounced in absentia to that of a State whose conduct has been reviewed in an advisory opinion of the Court. The purpose of the parallel is to highlight the acceptability of both scenarios, and suggest that the Monetary Gold principle has no reason to apply in most cases. On the insufficiency of Article 59 of the Statute in this respect, see PALCHETTI, Opening the International Court of Justice to Third States: Intervention and Beyond, Max Planck Yearbook of United Nations Law, vol. 6, 2002, p. 139, pp. 140-141.

(62) This is the core critique of Judge Schwebel to the Nauru judgment. See his dissenting opinion (I.C.J. Reports, 1992, p. 342), where he speculated about a possible subsequent claim, brought by Nauru against the United Kingdom: “[c]an it be seriously maintained that if, arguendo, the Court were to hold on the merits against Australia, the other States with which it jointly composed the Administering Authority would enjoy a consideration whose very subject-matter would not have been passed upon by the Court in the current case? [...] the protection afforded the absent States by Article 59 in the quite exceptional situation of this case would be notional rather than real”.
sibility would have been necessarily *expressed* in the decision, whereas in the *Nauru* hypothetical judgment (63) the responsibility of the United Kingdom and New Zealand would have been determined *tacitly*, by extension (64).

*Mutatis mutandis*, it seems that the responsibility of Spain can flow directly, if only by extension, from a judgment of ITLOS against Italy in the *Norstar* case, subject to the rules of Article 16 of the Draft Articles on State responsibility (65). The meaning and import of this formalistic distinction are further explored below, with respect to the “priority” requirement. For the moment, it is sufficient to note that the Court’s concern is indeed formalistic, and seeks to police the exercise of its own jurisdiction, rather than the consequences of its rulings.

6. The definition of the *Monetary Gold* objection is often over-inclusive. Perhaps in an involuntary echo of the wording of Article 62, paragraph 1, of the Statute (66), the doctrine is commonly said to apply when the legal interests of a third party are engaged, involved, affected (67), or tightly linked to the main dispute. However, the institute of intervention governed by Article 62 is not perfectly complementary to the *Monetary Gold* doctrine: not every party entitled to intervene is an indispensable party to the proceedings; normally, the proceedings can continue whether or not a State exercises its right to intervene. Conversely, all indispensable parties for the purpose of the *Monetary Gold* doctrine, by definition, satisfy the requirements of Article 62, paragraph 1, of the Statute (68).

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(64) This is also the approach of the Court in the *Croatia v. Serbia* case, where the Court rejected Serbia’s argument that a finding on the merits against the SFRY would have inevitably entailed, by extension, the responsibility of the successor States other than the Respondent. See p. 52, para. 117: “So far as concerns the position of the other successor States to the SFRY, it is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim”.

(65) Imagine this simple counterfactual: Panama could sue Spain before ITLOS (or an UNCLOS tribunal) for the breach of UNCLOS connected to the arrest and detention of the m/v *Norstar*, after a judgment against Italy in the pending case. In such scenario, it is difficult to say that the position of Spain is not prejudged by the *Norstar* precedent, which will have been decided on the merits.

(66) Which reads, in the relevant part: “Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene”.


(68) Nicaragua tried to argue that it was an indispensable party to strengthen its application for intervention in the *Land Island and Maritime Frontier Dispute* (El
The Court in *Nicaragua* commented upon the implications of extending the *Monetary Gold* principle to all third parties affected by a decision on the merits of the main claim, as proposed by the United States. It noted that, if that extensive construction were accepted, the Court would be prevented from pursuing proceedings in several scenarios, without at the same time being able to order the participation of the third party to break the deadlock: “[t]here is no trace, either in the Statute or in the practice of international tribunals, of an ‘indispensable parties’ rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings” (69).

Since the *Monetary Gold* ruling the Court tried to describe the principle as a safeguard operating in exceptional circumstances. The emphatic wording is revealing: the case cannot proceed when the “vital” (70) issue to be determined regards the third party’s responsibility, and when such determination would form the “very subject-matter” (71) or a “prerequisite” of the decision. The Court further referred to the third party as “truly indispensable” (72) when the determination of its responsibility is “needed as a basis” (73) for the decision on the main claim. These expressions convey the impression of exceptionality, resorting to absolute concepts that do not bode well with qualifiers: concepts like necessary, vital, requisite, and indispensable do not accept gradients. Based on these semantic characterizations of the principle, it is easy to justify all cases in which it was not applied.

In particular, the “very subject-matter” (74) test has gained currency in the case law, as a litmus test to discard instances of peripheral involvement of third parties’ interests. The problem with this formula, however, is that it indicates a concept wider than its literal meaning. Perhaps it is true that there were “no other pertinent claims” (75) at stake in *Monetary Gold* than the allocation of the Albanian gold. In *East Timor*, however, it was hardly so. Taking cognizance of Indone-

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*Salvador/Honduras), see Application by Nicaragua to Intervene, I.C.J. Reports, 1990, p. 92. The Court granted the right to intervention but refused to acknowledge that Nicaragua was an indispensable party. See Chinkin, East Timor Moves into the World Court, European Journal of Int. Law, vol. 4, 1993, p. 206, p. 220.
(70) I.C.J. Reports, 1954, p. 33.
(71) Ibid., p. 33.
(72) Nicaragua, I.C.J. Reports, 1984, para. 88.
(74) In French: “l’objet même”.
(75) Orakhelashvili, op. cit. supra note 18, p. 378.
sia’s right would have been indispensable *en route* to the decision on the actual (very) subject-matter of the dispute, i.e., the claim of Portugal. At the most, it could be said that the determination of the third party’s position is one of the multiple subject-matters of the dispute (76), alongside the main claim. Still, the formula seems to suggest that the determination of the third party’s responsibility would not have to be just indispensable, but also the sole real centre of gravity of the dispute. Because of the apparent absurdity of this suggestion, the operative core of the *Monetary Gold*, as filtered through *East Timor*, must be found elsewhere.

Indeed, the hinge of the *Monetary Gold* principle is the concept of priority. The use of this notion is appropriate insofar as it signals that the review of the third party’s responsibility is indispensable to determine the responsibility of the respondent. The notion certainly refers at least to logical priority: the legal syllogism required to assess the conduct of the respondent could not be concluded without first making the intermediate conclusion with respect to the third party’s responsibility.

Whether temporal sequencing is also part of the “priority” analysis was discussed in the *Nauru* case. Australia conceded that, had the Court decided the case on the merits, the determination of the third parties’ responsibility would not be “previous” to the determination of its own responsibility. Nevertheless, Australia argued that “the fundamental reasons underlying the *Monetary Gold* decision” would preclude such decision on the merits, as it would entail a “*simultaneous* determination of the responsibility” of the respondent and of the third parties (77). In other words, Australia maintained that the essential purpose of the *Monetary Gold* principle was to prevent any legal determination of the responsibility of third parties, irrespective of the timing of such determination (i.e., during the proceedings or upon their conclusion). The Court rejected the Australian reading of the *Monetary Gold* principle in an odd fashion, noting that the link between the determination of the third party’s responsibility and the main decision “was not purely temporal but also logical” (78), which was precisely Australia’s point. The Court acknowledged that its decision on the merits “might well have [had] implications for the legal

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(76) Certainly Indonesia stood to suffer prejudice from a hypothetical decision on the merits. See Judge Shahabuddeen’s separate opinion on this point, *I.C.J. Reports*, 1995, p. 265.


situation” of the third parties, but “no finding in respect of that legal situation [would have been] needed as a basis for the Court’s decision” on the main claim (79). Compare this statement to the reasoning of the Court in the case on Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening). The Court, confronted with the task of ascertaining the wrongfulness of the Italian court’s _exequatur_ of certain Greek judgments against the German State, hinted at the limits of its own jurisdiction: “it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany’s jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity — something, moreover, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings” (80).

In other words, the Court refused to make the determination of Italy’s responsibility dependent on a prior finding of Greece’s responsibility. If it had done so, the former decision would have incorporated the latter, creating the “adjudication without consent” scenario that the Court fathomed in 1954.

The element of priority, in sum, refers to the logical reasoning that the Court must follow to adjudicate the main claim (81). The chronological order of the wrongful acts involved is often mirrored in this logical sequencing but is not relevant _per se_. Sequencing, however, matters even in the realm of legal logics: the determination of the third party’s responsibility cannot be a premise of the legal syllogism of the

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(79) Ibid., pp. 261-262.


(81) As noted by Thirlway, however, the Court did not shy away from deciding the _Corfu Channel_ case on the merits, even if the wrongful act attributed to Albania implicated the prior determination that illegal minelaying had occurred, of which Yugoslavia had been explicitly accused. THIRLWAY, _The Law and Procedure of the International Court of Justice 1960-1989: Part Nine_, British Yearbook of Int. Law, vol. 69 (1998), p. 1, at p. 35. The decision was cited by Judge Schwebel in his dissenting opinion in the _Nauru_ case. He considered that the Court was justified in finding against Albania on the basis that it had connived with an unknown third State — and the Court did in fact find that the authors of the minelaying remained unknown (_I.C.J. Reports_, 1992, p. 330). Likewise, as noted by Judge Weeramantry in his dissenting opinion in the _East Timor_ case (_I.C.J. Reports_, 1995, pp. 166-167), the fundamental point was that the Court had not addressed the practical responsibility of Yugoslavia: “The Court held, in fact, that ‘the authors of the minelaying remain unknown’ (_I.C.J. Reports_, 1949, p. 17). Had the Court accepted the United Kingdom’s submissions, it would have been making a clear finding of the commission of an illegality by Yugoslavia. The fact that such a wrongful act was alleged against a third party did not deter the Court from considering the alternative argument placed before it”.
main claim (82). Conversely, the outcome of the main claim could “very well” be a premise to another syllogism, whose conclusion concerns the third party’s responsibility (83). The distinction between the two scenarios appears arbitrary, not so much because it seems to fall back on temporal considerations (84), but because it discounts the comparable effects that the decision would have on the third party in each case.

At a closer look, however, the distinction is non-arbitrary (even if it could be deemed unreasonable) insofar as the unintended extension of responsibility arising in the Nauru scenario for the third State would occur outwith the remit of the Court’s exercise of jurisdiction. Although it would certainly “colour the de facto position” (85) of the third parties, no legal conclusion would be determined conclusively, let alone automatically. For instance, the third party could rely on a circumstance precluding wrongfulness, or — taking the example of the Norstar dispute — Spain might escape responsibility even if ITLOS were to find against Italy on the merits, by virtue of one of the non-attribution circumstances under Article 16 of the Draft Articles on State responsibility. In essence, the Court has held that its primary concern is to safeguard the principle of consent by not attributing responsibility to third parties while discharging its mandate. This concern stops at the outer limit of its jurisdiction; the Court is not hindered by the prospect that, after its mandate is exhausted, somebody else might envisage using the Court’s decision as a support to establish the responsibility of the third party.

A good heuristic to determine under which scenario a dispute falls is to ask whether the hypothetical final decision would need to pronounce on the rights and duties of the third State. If so, the Monetary Gold principle applies. If the judgment could be silent on the point, it

(82) In the words of Kolb, op. cit. supra note 18, p. 569, it must be “a condition sine qua non of the Court’s ability to take cognisance of the principal dispute”.

(83) As noted in Forlati, op. cit. supra note 15, p. 147, the finding of responsibility “by extension” might have practical consequences: part of the settlement paid by Australia to Nauru was in fact reimbursed by the United Kingdom. The cost of the out-of-court settlement eventually reached by Australia with Nauru was in part refunded by the United Kingdom: see Australian Yearbook of Int. Law, vol. 15, 1995, p. 544 and British Yearbook of Int. Law, vol. 65, 1994, p. 625.

(84) Thirlway, op. cit. supra note 78, p. 50: “The difference relied on by the Court is thus not a question of logic, but either a difference of degree [...] or temporal after all: on the basis of the Nauru decision, it may not decide first that a third State has committed a breach of its obligations, and then that the claim before it must be upheld; but it may decide that the claim before it is to be upheld even if it thereby and simultaneously rules on the behaviour of an absent State. Seen in this light, the distinction is unconvincing”.

(85) Kolb, op. cit. supra note 18, p. 568.
can also be validly delivered, come what may in its wake. In short, the Court is very careful not to be on record pronouncing on the legal rights and duties of third parties. It cares about the form, more than the substance; it worries about its judgments being objectionable and illegitimate, not about being speaking ill in the absence of some State. One dictum of the Court in East Timor apparently challenges this conclusion. The Court, indeed, held that “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” (86). Seemingly, the reference to an implicit evaluation of the third party’s responsibility could attract under the Monetary Gold doctrine scenarios such as those in the Nauru, Nicaragua, Genocide (Croatia) and possibly Norstar cases, where a decision on the merits might tacitly affect the third party’s responsibility, de facto and by extension.

There is, however, a significant difference, which relates to the concept of priority and the notion that the determination of the indispensable party’s position must necessarily be a “prerequisite” of the main decision. In the East Timor case, a decision on the merits would have presupposed a decision over Indonesia’s rights, by necessary implication. In this case, implicit is not just the contrary of express, but denotes a process of logical inference (87). In the Nauru scenario, instead, a decision against Australia would not contain in its folds any necessary conclusion regarding the responsibility of the United Kingdom and New Zealand. It would (tacitly) point to a likely determination of shared responsibility by extension, but not by logical implication.

Ultimately, there seems to be at least three gradients of the effects that a decision can have on the rights and duties of a third parties. First, the decision might pronounce on them, as a necessary step to the operative part (the Monetary Gold, East Timor, Larsen scenario). Second, the determination of the third party’s responsibility would follow inescapably from the decision, but would not have to be made to reach it (the Nauru or Nicaragua scenario). Third, the responsibility of the third party would not derive inescapably from the decision, but it would be de facto strongly prejudged by it, owing to the close link between the respondent in the proceedings and the third State (the

(86) I.C.J. Reports, 1995, p. 102, para. 29 (emphasis added).
(87) See LUCE, Logic, London, 1958, p. 65: “The inference in the facts is often called implication. [...] The logical inference is viewed as enfolded in the facts, and unfolded by the activity of inferring mind” (emphasis in the original).
Norstar scenario). As far as the consent of the third party is concerned, the prejudice is clear in each scenario. The third party’s responsibility is prejudged through adjudication carried out without its consent. However, the Monetary Gold principle only operates in the first scenario, because only in the first scenario can the external effect on the third party affect the validity of the decision in the proceedings (that is, the legal capability of the tribunal of passing a binding judgment).

7. In conclusion, it seems that the Tribunal’s take on the indispensable party’s objection in Norstar — in light of the ICJ’s treatment of the principle — is correct, if perhaps perfunctorily reasoned (88). This conclusion was made easier by the convenient finding that Spain’s contribution could be framed as aid and assistance. A different reasoning, taking into account the relative autonomy of Spain’s acts, could have led to a different finding on attribution, moving the Norstar scenario closer to the liminal — and virtually unmatchable — Monetary Gold precedent.

Whether framed as an objection to a tribunal’s jurisdiction or the claim’s admissibility, the indispensable party objection can only succeed in exceptional circumstances. In its established construction, the objection stipulates that exercise of jurisdiction should be barred only if a decision on the merits would incorporate (rather than just implicate by extension) a finding on the responsibility of a third party. The Tribunal, applying the notion of “priority” in line with the case law of the ICJ, deemed that the circumstances of the Norstar case did not elicit such exceptional response.

From the analysis above, however, it emerged that the Monetary Gold principle, as applied in East Timor and disapplied in several other cases, is not related primarily to the safeguard of State consent. From the point of view of the third State, indeed, the distinction between a prior determination of responsibility (which is barred) and one that transpires from the decision de facto (which is not) is rather arbitrary (89). The linchpin of the indispensable party’s doctrine is the preservation of a tribunal’s legitimacy in the exercise of its conferred

(88) This conclusion is premised on the Tribunal’s finding on attribution, whose analysis is outside the scope of this comment. Another point of the judgment which would have required elaboration is the asserted role of Spain as mere aider to Italy’s measures, in light of the margin of discretion that it had in deciding whether to execute Italy’s request (see articles 2, 19, 26(2) of the Convention on Mutual Assistance in Criminal Matters).

(89) Orakhelashvili, op. cit. supra note 18, p. 389: “the principle of consent either does or does not prevent the Court from adjudication in cases where it does not
jurisdiction. Whereas the principle certainly protects the interest of some third parties, its essential purpose is to ensure that international tribunals discharge their mandate *infra vires* (90).

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*Abstract.* — In the *Norstar* case, ITLOS dismissed Italy’s attempt to invoke the indispensable party objection at the jurisdictional stage. The Tribunal’s finding that Spain (which did not partake in the proceedings) merely aided or assisted Italy in the execution of the acts under review largely prejudged this conclusion. The Tribunal’s statement that the responsibility of Spain did not have to be assessed in order to determine Italy’s position is consonant with the established treatment of this objection in the case law of the ICJ, since the *Monetary Gold* case. An analysis of the judicial tests and heuristics used to apply this objection reveals two aspects about its nature and function. First, the objection could equally go to the jurisdiction of a tribunal or to the admissibility of the claim. Hence, it is not surprising that parties and judges use both characterisations interchangeably. Second, and in spite of the Court’s own proclamations, the principle is used to preserve the legitimacy of the Court’s consensual jurisdiction, rather than the legal position of third parties. The latter undoubtedly benefit from the principle’s sparse application, but cannot count on it to safeguard their interests from judicial interference in all instances.

enter a judgment against a third State but nevertheless prejudices its legal interests. The approach adhered to in *East Timor* has not satisfactorily led to either conclusion”.

(90) A similar conclusion is reached by Oraikhelashvili, *op. cit. supra* n. 18, p. 380, who underlined the Court’s uneasiness in exercising jurisdiction on the basis of the Washington Statement: “the principal problem in *Monetary Gold* related to inherent defects in establishing the Court’s jurisdiction rather than the potential impact on the rights and interests of an absent third State as such”.

**NOTE E COMMENTI**