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

ADJUDICATIVE BILATERALISM AND COMMUNITY INTERESTS

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The purpose of this essay is to explore the two main ways in which community interests have been taken into account in international adjudication. First, special procedural tools have been devised in order to accommodate the multilateral dimension of certain disputes into the traditionally bilateral scheme of international adjudication. It will be shown that such tools have been of little use for the protection of community interests. Second, legal relations engendered by community interests have been conceptualized in a bilateral manner so that they could fit adjudicative bilateralism. It may seem counterintuitive, but it will be maintained that this second avenue offers the most concrete, yet not entirely satisfactory, means to adjudicate community interests. Finally, the essay argues that the *Monetary Gold* rule proves a useful test to properly understand the different logic of these two avenues.

Background Framework

The *bilateral* character of international adjudication will not be investigated here but the main reasons for it must be briefly recalled. Legal scholars have emphasized the traditional bilateral (applicant-respondent) scheme of international arbitration and adjudication, that adjudication is premised on the principle of consent, and that state responsibility has essentially a bilateral nature.[1] It must be added that international legal relations are typically conceptualized as bilateral relations, such as those between the holder of a right and the bearer of a duty. For centuries, international law has regulated *private* relations between equally sovereign states (which largely justified recourse to "private law sources and analogies").[2] Adjudicative bilateralism does not exclude the existence of multilateral disputes that involve the private interests of a plurality of subjects.

On the other hand, the *public* dimension of international law is very recent. This dimension entails the elaboration of rules for the protection of the interests of the international community as such (or that of narrower international groups) and of procedural rules for their adjudication and enforcement, the latter not being automatically derived from the former.[3] Thus, the *multilateral* character of a dispute has to be distinguished from the *community* character of certain rules that may be adjudicated. For the sake of simplicity, rules for the protection of community interests are regarded here as corresponding to *erga omnes* obligations.

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[1] Christine Chinkin, Third Parties in International Law 147 (1993). *See* Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/49(Vol. I)/Corr.4 (2001).

[2] *See* Hersch Lauterpacht, Private Law Sources and Analogies in International Law (1927).

[3] Bruno Simma, *From Bilateralism to Community Interests*, 250 Recueil des Cours 285 (1994).

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Procedural Tools for the Multilateralization of the Dispute: The Logic of Inclusion

A number of procedural tools that are increasingly applied before various international courts and tribunals have been devised to deal with multilateral disputes. These tools attempt to multilateralize adjudication by allowing international courts to consider legal positions beyond those put forward by the parties. They correspond to a logic of inclusion because actors other than the two original parties can take part in the proceedings. Two examples, among many, are particularly telling.

Joinder is a procedural instrument that facilitates the transformation of a bilateral case (or even two or more cases) into a genuine multilateral case: claims that on a bilateral level the parties have already consented to submit to adjudication can be settled in a unique, joint, contentious proceeding. In principle, international courts have the role of deciding whether joinder is necessary to better appraise the multilateral dispute and thereby serve the interests of justice.[4] In practice, decisions to join separate cases are exceptional, mainly because the parties oppose joinder. The case law of the ICJ shows that—with the exception of the joinder of two cases between Costa Rica and Nicaragua[5]—the objection of one of the parties is sufficient to prevent joinder.[6]

Intervention is premised on a similar logic of inclusion. Possibly affected third parties can take part in the proceedings between other parties to define their legal interests, present their views so that these interests are protected, and in certain circumstances even advance their own claims for adjudication. The different forms of intervention (that should not be confused) can be very important in dealing with multilateral disputes and potentially protecting community interests.[7] However, they are seldom used in practice, and a jurisdictional link with the third party is required if its claims are to be decided by the court.[8] The protection that can be afforded by intervention should not be overestimated and third parties may decide not to ask to intervene without any negative consequences attached to non-intervention.[9]

The logic of inclusion—developed to litigate multilateral disputes—could also offer an appropriate avenue for considering community interests because it permits consideration of the interests of the various subjects involved. However, this logic inevitably broadens the powers of adjudicating bodies and so it should not be made dependent on the acceptance of the (original) parties to the case. That is, the decision to join cases, admit intervention, receive *amicus curiae* briefs, and so forth, cannot be left to the parties. They usually oppose it. If adjudication has to pursue a real logic of inclusion and become truly multilateralized, the Court must be able to use the necessary procedural powers even against the objection of the parties. This involves limiting the impact of the original parties' consent and thereby furthering judicial institutionalization.

The logic of inclusion seems to be more effective when the dispute settlement body has compulsory jurisdiction. For instance, intervention is widely used before World Trade Organization panels, not to introduce new claims but

[4] *See* ICJ, Rules of the Court art. 47.

[5] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), 2013 ICJ Rep. 166 (Apr. 17); Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), 2013 ICJ Rep. 184 (Apr. 17).

[6] *See* Appeal Relating to the Jurisdiction of the ICAO Council Under Article II, Section 2, of the 1944 International Air Service Transit Agreement (Bahr., Egypt & U.A.E. v. Qatar) Judgment, para. 11 (ICJ, July 14, 2020); Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia & U.A.E. v. Qatar) Judgment, para. 11 (ICJ, July 14, 2020).

[7] *See* Beatrice Bonafè, La protezione degli interessi degli Stati terzi davanti alla Corte internazionale di giustizia (2014).

[8] Territorial and Maritime Dispute (Nicar. v. Colom.) 2011 ICJ Rep. 432 (May 4).

[9] See *contra* Zachary Mollengarden & Noam Zamir, *The Monetary Gold Principle: Back to Basics*, 115 AJIL 27, 34 (2021).

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for absent member states to be heard when they have substantial interests in the dispute.[10] In international human rights adjudication, courts have developed procedural tools to coordinate individual and inter-state proceedings being brought on the same multilateral dispute, for instance by staying individual complaints.[11]

Protecting Community Interests Through Bilateralization: The Logic of Isolation

An alternative way in which community interests can be litigated before international courts is to conceptualize them as far as possible in bilateral terms so that they can fit into the traditional scheme of international adjudication. According to this logic of isolation, the legal relationship between the entire community and the author of the breach is dissolved into a bundle of relations between each member of the community and the latter.[12]

In practice, bilateralization makes litigation of community interests possible for two main reasons. First, it means that every member of the community can invoke the responsibility of the author of the breach and act in the protection of the public interest. This claim does not need the presence of the entire community before the court, or that of every other member whose interest is affected by the breach. Litigation can be limited to the member of the community invoking responsibility and the author of the breach. This obviates the need for a body entrusted with the protection of community interests—an exceptional phenomenon—to become a party to the proceedings.

The second aspect is procedural: bilateralization means legal standing of every member of the community. To make a long story short, the ICJ has held that every state has an interest in the protection of community interests, and, following from that, that every state has standing to invoke the responsibility of the author of the breach.[13]

But the price to be paid for the bilateralization of community interests is respect for the principle of consent. The position of the ICJ is clear in this regard: adjudication of the breach of community interests remain voluntary in character and a jurisdictional link is required between the parties.[14] When consent is present, the logic of isolation would seem to offer effective possibilities to ensure the judicial protection of community interests, provided that they can be bilateralized, as exemplified by the genocide case recently instituted by Gambia against Myanmar before the ICJ. The Dutch *Urgenda* case shows that a similar logic of bilateralization can be pursued at the domestic level.[15]

The Monetary Gold *Rule and Community Interests*

Turning to the *Monetary Gold* rule, it is assumed here that such a rule exists. If it did not, discussing its scope or consistency with or derogation from other international law rules would make little sense.[16] Evaluating the salience of this rule in the context of the multilateralization and bilateralization of adjudication discussed above is not an

[10] John P. Gaffney, *Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System*, 14 Am. U. Int'l L. R. 1212 (1999).

[11] Elena Carpanelli, *Il rapporto tra ricorsi interstatali e ricorsi individuali dinanzi alla Corte EDU* (forthcoming).

[12] Simma, *supra* note 3, at 293.

[13] Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 ICJ Rep. 32 (Feb. 5); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 ICJ Rep. (July 20); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.) (ICJ, Jan. 23, 2020).

[14] East Timor (Port. v. Austl.), 1995 ICJ Rep. 90 (June 30).

[15] Hoge Raad, Urgenda, n. 19/00135, para. 5.7.5. (Dec. 20, 2019): "each State is responsible for its part [in reducing green gas emissions] and can therefore be called to account in that respect."

[16] The position of Mollengarden & Zamir is unclear: their search for a legal basis of the *Monetary Gold* rule conflicts with findings concerning its inconsistency with a number of rules (Mollengarden & Zamir, *supra* note 9, at 16–18, 31). For a diverging view, see Ori Pomson, *Does the Monetary Gold Principle Apply to International Court and Tribunals Generally?*, 10 J. Int'l Disp. Settlement 88 (2019).

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easy task. Indeed, the *Monetary Gold* rule was not formulated to deal with community interests but rather a special type of multilateral disputes in which the claims of the opposing parties cannot be settled without first ruling on the legal position of an absent third party (which constitutes the "very subject-matter" of the dispute).[17]

The typical scenario in which the *Monetary Gold* rule could apply is when there is a mismatch between the dispute submitted for adjudication and consent expressed by the parties before the court. Because consent is given on a bilateral basis by the applicant and the respondent, there may be situations in which this consent does not cover the entire dispute.

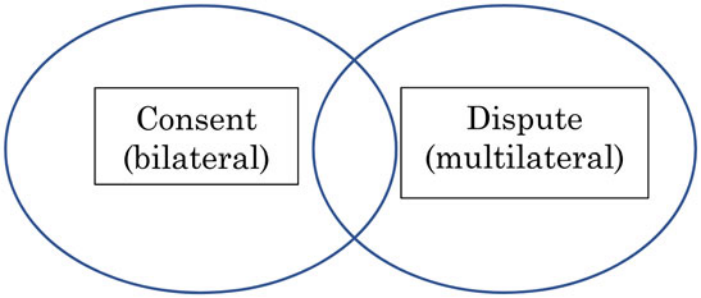


Figure 1 Indispensable party rule

The idea that it is impossible for the ICJ to adjudicate claims concerning absent third states is based on the principle of consent that underlies Article 36 of its Statute. Consent must cover all claims that are adjudicated by the Court in the operative part of the judgment.[18] The dispute and consent must align perfectly. If they don't, three solutions are possible, all premised on the goal of reestablishing a perfect match between them.

The first option is to obtain the consent of involved third parties so that they can take part in the proceedings. As discussed above, the procedural tools that can multilateralize contentious proceedings cannot derogate from the principle of consent. But by obtaining consent from third parties, the entire dispute will be covered by consent, and the Court will be able to rule on all claims. The logic is one of inclusion. However, the Court has no power to direct the participation of third parties.

Two options remain that do not involve absent third parties. If the dispute can be narrowed down to the claims of the original parties (the overlapping part in Figure 1), the Court can exercise its jurisdiction over these claims and leave aside the claims involving third parties. This corresponds to litigating community interests through the logic of isolation described above.

Alternatively, if the original claims are not severable from those of third parties, jurisdiction has to be declined. The Court would not be able to exercise jurisdiction over claims not based on the consent of all parties. This is the *Monetary Gold* rule. It covers exceptional cases in which the logic of isolation cannot apply, and third parties have to be included in litigation.

It comes as no surprise that this option has been strongly criticized. It offers an imperfect solution because the multilateral character of the dispute deprives the court of its jurisdiction. But it remains inspired by the logic of inclusion, despite its outcome. It identifies the extreme circumstances in which bilateralization does not work. Or,

[17] Monetary Gold (It. v. Fr., U.K. & U.S.) 1954 ICJ Rep. 19 (June 15).

[18] Institut de droit international, *Judicial and Arbitral Settlement of International Disputes Involving more than Two States* (1999). *See also* the Report of Special Rapporteur Rudolf Bernhardt, 68(I) Annuaire IDI 60 (1999). *See contra* Mollengarden & Zamir, *supra* note 9, at 18.

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rather, it shows the limits of voluntary jurisdiction when applied to a dispute whose multilateral character cannot be broken up into bilateral legal relations. Because, again, consent cannot be left out of the picture.

The question then is whether community interests justify a different solution, especially a derogation from the requirement of consent. In *East Timor* the Court's answer was unmistakable. The *erga omnes* character of the obligation (allegedly) breached did not create an exception to the consent requirement.[19] The same distinction between the character of the primary obligation and the principle of consent was restated in *Congo v. Rwanda*.[20]

Nevertheless, apart from denying the existence of the rule attempts have been made to justify a derogation from the principle of consent in order to avoid declining jurisdiction when the *Monetary Gold* rule applies to the breach of *erga omnes* obligations. According to the "balancing argument," when the protection of absent third parties is in conflict with that of community interests, the latter should be prioritized, thus overriding the principle of consent.[21] In other words, the logic of isolation should prevail over that of inclusion. This confirms the paradox of the beneficial effects of bilateralization pointed out above. But it seems unlikely that the ICJ would change its mind and embrace this argument.

Alternatively, the "effectiveness argument" is premised on the recognition of a special purpose of *erga omnes* obligations: that of ensuring litigation when their breach does not occur in the framework of a typical bilateral responsibility relationship between the author state and affected state. As a consequence, the principle of consent should be set aside precisely in order to ensure the effective protection of these obligations.[22] But the argument seems self-fulfilling.

The crux of the matter lies elsewhere in the multilateral character of the dispute submitted for adjudication. The hard question concerns the *severability* of the claims of the original parties from those of third parties so that the logic of isolation can apply. Does the Court really have to adjudicate claims between the parties and absent third states in order to resolve the case? Different interpretations of whether claims were severable explain the opposite conclusions international courts have reached in two very similar situations: The Central American Court of Justice in the *Bryan-Chamorro Treaty* cases decided that it was not necessary to rule on the validity of that treaty (concluded between one of the parties and an absent third state),[23] while the ICJ in *East Timor* declined jurisdiction precisely because Portugal's claims required ruling on the validity of the Timor Gap treaty (concluded between one of the parties and an absent third state).[24] One can argue that the way in which the court conceives its judicial function may have an impact on the interpretation of severability of claims. The broader the mission of the court, the narrower the probability that it would decline jurisdiction.[25]

While the Court retains a margin of discretion in determining when severability applies, this notion may also depend on the way in which the primary obligation is conceptualized. A good example is provided by the *Marshall Islands* case.[26] It was a hard case because the special character of the disarmament obligation (allegedly) breached seemed to recommend a logic of inclusion, even if not the application of the *Monetary Gold* rule.[27] Interestingly, it

[19] *East Timor*, *supra* note 14, at 102.

[20] Armed Activities on the Territory of the Congo (New Application 2002) (Dem. Rep. Congo v. Rwanda), 2006 ICJ Rep. 32 (Feb. 3).

[21] Christine Chinkin, The East Timor Case *(Portugal v. Australia)*, 45 Int'l & Comp. L.Q. 717 (1996).

[22] Peter D. Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 German Y.B. Int'l L. 285, 301, 311 (1996).

[23] Costa Rica v. Nicar., CACJ, Judgment of Sept. 30, 1916, 11 AJIL 229 (1917); El Sal. V. Nicar., CACJ, Judgment of Mar. 9, 1917, 11 AJIL 674 (1917).

[24] *East Timor*, *supra* note 14, at para. 35.

[25] Beatrice Bonafè, *Indispensable Party*, Max Planck Encyclopedia of International Procedural Law (Hélène Ruiz Fabri ed., 2018).

[26] See the three decisions rendered in the Marshall Islands cases, 2016 ICJ Rep. (Oct. 5).

[27] *Id.*, Separate Opinion of Judge Tomka (at 898–899) and Declaration of Judge Xue (at 1031).

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has been shown that much depended on whether the disarmament obligation was one of conduct or one of result. Only in the latter case would the *Monetary Gold* rule be applicable.[28]

Conclusion

The main conclusion to be drawn is that litigation of community interests requires one not to lose sight of the applicable judicial framework. Judicial institutionalization arguably remains the most appropriate avenue to protect community interests. However, the bilateralization of these interests and the underlying logic of isolation do represent a viable second-best option to effectively litigate them when recourse is made to traditional, voluntary adjudication, except when their multilateral character cannot be circumvented.[29]

[28] Laura Magi, *L'obbligo di disarmo nucleare quale obbligo a realizzazione progressiva*, 101 RIVISTA DI DIRITTO INTERNAZIONALE 76 (2018).

[29] Andreas Paulus, *Whether Universal Values Can Prevail over Bilateralism and Reciprocity*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 97 (Antonio Cassese ed., 2012).

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