Beiträge zum Transnationalen Wirtschaftsrecht

Christian Tietje/Andrej Lang

The (Non-)Applicability of the Monetary Gold Principle in ICSID Arbitration Concerning Matters of EU Law

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The (Non-)Applicability of the *Monetary Gold Principle* in ICSID Arbitration Concerning Matters of EU Law

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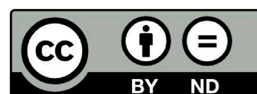

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A. Introduction[1]

In multi-layered governance structures, the decisions of the judicial body of one legal regime regularly have an impact upon the interests of other legal regimes. Given that the institutions representing international legal regimes prefer to manage their legal and political affairs autonomously, this external impact is typically not welcomed and can give rise to regime conflicts.[2] A manifestation of such a regime conflict is the tenuous relationship between the European Commission ("Commission") and the European Court of Justice ("ECJ") on the one hand and international investment tribunals on the other hand that has culminated in the recent *Achmea* judgment of the ECJ.[3] The cardinal concerns of the Commission with regard to international investment law pertain to bilateral investment treaties ("BITs") by EU member states, particularly those between EU member states. The concerns are, amongst others, that member states BITs impair the functioning of the internal market, the principle of nondiscrimination between EU citizens and the role of the ECJ as the ultimate arbiter of EU law.[4]

A possible solution to this regime conflict that addresses those concerns would be for investment tribunals to decline their jurisdiction on the basis of the so-called *Monetary Gold* principle in matters in which substantial interests of the EU are concerned. The *Monetary Gold* principle, developed by the International Court of Justice ("ICJ"), provides that an international court or tribunal should not exercise its jurisdiction in a particular case if the legal interests of a third state would constitute the very subject-matter of the decision "unless the necessary third state is joined as a full party to the proceedings".[5] It has been noted that "the idea that the *Monetary Gold* principle could be applicable outside the realms of the ICJ and into the sphere of international arbitration has been gaining grounds".[6] Respondents in several arbitration proceedings, including those administered under ICSID, have already invoked the *Monetary Gold* principle in order to challenge the jurisdiction of the respective tribunal.[7]

Against this background, the *Monetary Gold* principle could arguably play a procedural role in ICSID arbitrations involving EU member states and concerning matters

1 Der Beitrag wurde bereits in der Festschrift zu Ehren von Herbert Kronke veröffentlich. Siehe *Tietje/Lang*, The (Non-)Applicability of the Monetary Gold Principle in ICSID Arbitration Concerning Matters of EU Law, in: Huber, Stefan/Benicke, Christoph (Hrsg), National, International, Transnational: Harmonischer Dreiklang im Recht. Festschrift für Herbert Kronke zum 70. Geburtstag, Bielefeld 2020, 1607–1620.

2 For a thorough analysis of the phenomenon of regime conflicts in public international law, see *Pulkowski*, The Law and Politics of International Regime Conflict; *Fischer-Lescano/Teubner*, Michigan Journal of International Law 25 (2004), 999.

3 For an analysis of the *Achmea* judgment in light of the regime conflict between EU law and international investment law, see *Lang*, Europarecht 53 (2018), 525–560.

4 For more detail, see *Basener*, Investment Protection in the European Union.

5 *Crawford*, Brownlie's Principles of Public International Law, 672.

6 *Zamir*, Arbitration International 33 (2017), 523 (537).

7 See *Bridgestone Licensing Services Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections from 13 December 2017, para. 352 f.; *Ping An Life Insurance Company v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award from 30 April 2015, para. 127 f.

of EU law. One could argue that in a procedural situation in which a foreign investor sues an EU member state, the EU is a third party in the sense of *Monetary Gold* and thus a respective ICSID Tribunal would have to decline jurisdiction. So far, the Commission has played an active role in ICSID proceedings and in other international investment proceedings as *amicus curiae*.[8] It is not clear, however, whether this limited procedural role sufficiently accommodates the EU's legal interests. This raises the question whether ICSID tribunals should go one step further and dismiss cases of EU member state that involve substantial legal interests of the EU on the basis of the *Monetary Gold* principle. We will analyze this question in honor of *Herbert Kronke* who has devoted so much of his professional career to legal questions of dispute settlement in a multilayered system of national, EU and international law.

B. The *Monetary Gold* principle in the case-law of the ICJ

The ICJ held in *Monetary Gold Removed from Rome in 1943* that it must decline jurisdiction if the legal interests of a third state "would not only be affected by a decision, but would form the very subject-matter of the decision".[9] The Court has based the *Monetary Gold* principle on the doctrine of state consent. Its rationale is to safeguard the consensual nature of the Court's jurisdiction.[10] According to Article 59 of the Statute of the International Court of Justice, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". The *Monetary Gold* principle is intended to prevent that the ICJ issues binding decisions on absent third states that have not consented to jurisdiction of the Court.[11] So far, the ICJ has only refused to exercise its jurisdiction on the basis of the *Monetary Gold* principle in two cases: the *Monetary Gold* case and the *East Timor* case. In both of these cases, it otherwise would have been required to adjudicate the international responsibility of an absent third state which was not subject to the ICJ's jurisdiction.

[8] See i.a. *Eureko v. Slovakia*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction from 26 October 2010, para. 175 ff.; *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction from 24 September 2008, para. 316 ff.; *EURAM v. Slovakia*, PCA Case No. 2010-17, Award on Jurisdiction from 22 October 2012, para. 61; *AES v. Hungary*, ICSID Case No. ARB/07/22, Award from 23 September 2010, para. 8.2; *Blusun v. Italy*, ICSID Case No. ARB/14/3, Award from 27 December 2016, para. 206 ff.; *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction from 30 November 2012, para. 5.8 ff.; *Charanne v. Spain*, SCC Case No. 062/2012, Final Award from 21 January 2016, para. 60.

[9] Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America,15 June 1954, Judgment on Preliminary Question, ("the *Monetary Gold* case"), ICJ Reports 1954, 19, 32.

[10] See ICJ, *Monetary Gold* case, 15 June 1954, Judgment on Preliminary Question "the *Monetary Gold* case", ICJ Reports 1954, 19, 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." Emphasis added.

[11] Cf. *Orakhelashvili*, Journal of International Dispute Settlement 2 (2011), 373 (389 et. Seq).

I. The *Monetary Gold* case

In the *Monetary Gold* case, the international responsibility of Albania would have formed "the very subject-matter" of an ICJ decision because the monetary gold removed by the Germans from Rome in 1943, which was at the heart of the dispute, belonged to Albania. Italy argued, however, that it was entitled to the gold as Albania had incurred international responsibility vis-à-vis Italy because Albania had passed the Law of 13th January 1945 whereby it confiscated without any compensation the assets of the national Bank of Albania, the shares in which were for the most part held by the Italian Government. Italy sought that the gold be transferred to Italy. The UK, the United States and France agreed in the Washington Statement that the gold would be delivered to the UK in satisfaction of the judgment debt due to it from Albania in the *Corfu Channel* case unless either Italy or Albania made an application to the ICJ and submitted themselves to its jurisdiction in order to resolve certain legal issues pertaining to the gold, including Albania's international responsibility. However, Albania decided not to appear before the ICJ, while Italy filed a "Preliminary Question" to the Court, challenging its jurisdiction as insufficient without the consent of Albania. Against this background, the ICJ held that "[w]here, as in the present case, *the vital issue to be settled concerns the international responsibility of a third State*, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[12]

The decision is based on two central factors. First, the key actor in this factual framework is Albania and the case could not possibly be decided without determining Albania's international responsibility. The ICJ itself affirmed this understanding, stating that in order to adjudicate on the *Monetary Gold* case "it [was] necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation".[13] Second, the Washington Statement signed by the UK, the United States and France, but neither by Italy, nor by Albania, is as such insufficient to establish the Court's jurisdiction over Italy and Albania.[14]

[12] ICJ, *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Judgment on Preliminary Question from 15 June 1954, ICJ Reports 1954 (19), 33. Emphasis added.

[13] *Ibid.*, 32.

[14] This has been pointed out by Sir McNair, at that time the President of the ICJ, in a declaration made after the Judgment: "In my opinion, there is a fundamental defect in the Application and in the constitution of these proceedings. The Court is asked to adjudicate upon an Italian claim against Albania arising out of an Albanian law of January 13th, 1945. Albania is therefore an essential respondent. But these proceedings are not brought against Albania, nor does the Application name Albania as a respondent, although there is nothing in the Washington Statement which could preclude the Italian Government from making Albania a respondent. I cannot see how State A, desiring the Court to adjudicate upon its claim against State B, can validly seise the Court of that claim unless it makes State B a respondent to the proceedings–however many other States may be respondents." Declaration of *Sir Arnold McNair*, 1954 ICJ Reports, 35. Emphasis added.

A careful analysis of the *Monetary Gold* decision therefore suggests that the ICJ did not intend, at least not at that time, to develop a "generally applicable doctrine of indispensable parties".[15] Instead, the Court's approach in *Monetary Gold* is "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".[16]

II. The *East Timor* case

In the *East Timor* case, the other case in which the ICJ has accepted the jurisdictional objection of the *Monetary Gold* principle, the ICJ did not exercise its jurisdiction because this would have required making determinations regarding the international responsibility of Indonesia.[17] In that case, Portugal, as the administering power of East Timor, brought claims against Australia, which had concluded the Timor Gap Treaty with Indonesia concerning the exploitation of the maritime resources of East Timor's continental shelf. Indonesia had forcibly acquired control over East Timor in the 1970s. Portugal complained that Australia had breached East Timor's right to self-determination by entering into treaty relations with Indonesia regarding East Timor over which Indonesia had no valid title and therefore no treaty-making power. Australia objected to the jurisdiction of the Court, arguing that the real dispute was between Portugal and Indonesia and that adjudicating on the treaty between Australia and Indonesia would require determining Indonesia's international responsibility and thus fall under the *Monetary Gold* principle. The ICJ agreed, and declined its jurisdiction: "[T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. *Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment* made in the absence of that State's consent".[18] Against this background, the ICJ concluded that it could not exercise its jurisdiction because "it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent".[19] Hence, the ICJ declined to exercise its jurisdiction because the determination of the international responsibility of Indonesia, an absent third state, would have formed "the very subject-matter" of the Court's decision and constituted a prerequisite for deciding the dispute between Portugal and Australia. Put differently, the question whether Australia could lawfully conclude a treaty with Indonesia hinged inevitably on whether Indonesia's presence in East Timor was lawful or unlawful.

[15] *Orakhelashvili*, Journal of International Dispute Settlement 2 (2011), 373 (373).
[16] *Ibid.*, 380.
[17] ICJ, *East Timor* (Portugal v. Australia), 30 June 1995, ICJ Reports (1995), 90.
[18] *Ibid.*, 105. Emphasis added.
[19] *Ibid.*

III. The *Certain Phosphate Lands in Nauru* case

In contrast to its decisions in *Monetary Gold* and in *East Timor*, the ICJ rejected the application of the principle in its decision in *Certain Phosphate Lands in Nauru*.[20] In this case, the respondent, Australia, had sought dismissal of an application brought by Nauru against Australia alone, but in relation to acts which were essentially carried out by Australia, the UK and New Zealand acting together in their administration of Nauru. Although the Court acknowledged that the determination of international responsibility of Australia would effectively determine the same question in relation to the UK and New Zealand, it found that their contributions would not form the very subject-matter of the decision as they would not be determined by that decision.

The ICJ distinguished the facts in *Nauru* from the facts in *Monetary Gold*, noting that "the determination of Albania's responsibility [in Monetary Gold] was a *prerequisite* for a decision to be taken on Italy's claims" and that, as a result, "the *link* between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was *not purely temporal but also logical*". By contrast, "the determination of the responsibility of New Zealand or the United Kingdom [in the *Nauru* case] is not a prerequisite for the determination of the responsibility of Australia" and while "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru *might well have implications* for the legal situation of the two other States concerned, […] no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia".[21]

The logical link required by the ICJ is that the determination of the absent third state's international responsibility is "a prerequisite for the determination of the responsibility" of the respondent state. As Judge *Shahabuddeen* clarified in his separate opinion to the *Nauru* case, "the [Monetary Gold] test is not merely one of sameness of subject-matter, but also one of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-party State".[22] In other words, it is not sufficient that the international responsibility of the third party might be inferred "by implication". Instead, a finding on the international responsibility of an absent third State must be a prerequisite for a decision in the case before the Court.

C. The *Monetary Gold* principle in international arbitration

The *Monetary Gold* principle has also been addressed in some detail in the field of international arbitration by the Permanent Court of Arbitration in the matters *Larsen v. Hawaiian Kingdom* and *Chevron v. Ecuador*.

[20] ICJ, *Certain Phosphate Lands in Nauru* (Nauru v. Australia), 26 June 1992, ICJ Reports (1992), 240.

[21] ICJ, *Certain Phosphate Lands in Nauru* (Nauru v. Australia), 26 June 1992, ICJ Reports (1992), 261 et seq. Emphasis added.

[22] Separate opinion of Judge *Shahabuddeen*, ICJ Reports (1992), 296.

I. The *Larsen v. Hawaiian Kingdom* case

Larsen v. Hawaiian Kingdom is the only other case – in addition to *Monetary Gold Removed from Rome in 1943* and *East Timor* – in which an international court or tribunal has actually declined to exercise its jurisdiction due to the *Monetary Gold* principle.[23] At the same time, the tribunal explained that the legal standard set forth by the ICJ should also be applied in the context of those international arbitration proceedings to which the *Monetary Gold* principle was applicable, noting that "[i]t is not [...] persuaded that it should apply a test different from that laid down in the *Monetary Gold* case and subsequent decisions of the International Court",[24] given that "it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice".[25]

The decision of the Permanent Court of Arbitration ("PCA") tribunal needs to be considered against the background of the peculiar and very specific set of facts underlying the case. In that case, *Lance Larsen*, a resident of the state of Hawaii sought redress from the Hawaiian Kingdom for its failure to protect him from the United States and the State of Hawaii. At the heart of the dispute on the merits lay the issue of legality of the annexation of Hawaii by the United States in 1898 and the claim that the Hawaiian Kingdom had continued its existence as an independent State in public international law. Against this background, *Larsen* argued that the Hawaiian Kingdom had not fulfilled its duty to protect his rights as a Hawaiian subject because it had failed to prevent the "unlawful imposition and enforcement of American municipal laws within the territorial jurisdiction of the Hawaiian Kingdom".[26] However, the proceedings had "raised a red flag concerning the nonparty legal interests of the United States"[27] from the outset as both parties to the arbitration, *Larsen* and the Hawaiian Kingdom, had accused the United States of unlawfully imposing its laws within the territory of the kingdom. In other words, both parties had fabricated the dispute to bring the issue of the legality of the American annexation of Hawaii before an international tribunal even though the United States had "repeatedly refused to consent to international arbitration" on this issue.[28] Accordingly, the Tribunal observed that "the gist of the dispute submitted to the Tribunal was a dispute not between the parties to the arbitration agreement but a dispute between each of them and a third party": the United States of America.[29] Hence, the Tribunal dismissed the case on two grounds, the absence of a real dispute between the parties and to protect the sovereign rights of a nonparty state within the meaning of the *Monetary Gold* principle, concluding that it would not "ignore the fundamental requirements of international law that there must be a real

[23] *Larsen v. Hawaiian Kingdom*, PCA Case No. 1999-01, Award from 5 February 2001.
[24] *Ibid.*, para. 11.19.
[25] *Ibid.*, para. 11.21.
[26] *Ibid.*, para. 2.3.
[27] *Bedermann/Hilbert*, American Journal of International Law 95 (2001), 927 (932).
[28] *Ibid.*, (933).
[29] *Larsen v. Hawaiian Kingdom*, para. 12.7.

dispute between the parties and that the Tribunal must not make a decision which evaluates the legality of the conduct of a State not party to the proceedings."[30]

II. The *Chevron v. Ecuador* case

In *Chevron v. Ecuador*,[31] a case that must be considered against the background of the serious human rights allegations against oil companies and the lack of voice and redress of the indigenous people of *Lago Agrio*, the Tribunal explicitly did *not* decide whether the *Monetary Gold* principle should be applicable in "mixed (State/Non-State) arbitrations under bilateral investment treaties".[32] Instead, the Tribunal ruled that the *Monetary Gold* principle did not "prevent the Tribunal from exercising jurisdiction over the Parties' dispute".[33] As a result, the Tribunal considered the applicability of the *Monetary Gold* principle in the case at hand only "for the sake of argument".[34]

A central issue in that case was the legal effects of a settlement agreement. The Tribunal noted that "a decision by the Tribunal in this arbitration that the 1995 Settlement Agreement releases *Chevron* from all liability […] might be said to decide the legal rights of the *Lago Agrio* plaintiffs".[35] The Tribunal found that the question whether it would make determinations concerning the legal rights of the *Lago Agrio* people would "depend upon the form and content of the decision of this Tribunal".[36] It stated that the relevant "question for this Tribunal is in essence whether the Respondent has or has not violated rights of the Claimants under the BIT".[37] Against this background, the Tribunal concluded that this "question is one of the rights and obligations existing between the Claimants and the Respondent; and the *Lago Agrio* plaintiffs, who are not parties to the settlement agreements or to the BIT, do not have rights that are directly engaged by that question".[38]

The reasoning of the Tribunal reveals that it is difficult to imagine a case in which the *Monetary Gold* principle would preclude an ICSID Tribunal's jurisdiction due to the interests of a non-state third party, for a tribunal "has only to decide upon questions of the Respondent's liability to the Claimants under the BIT".[39] This inquiry, however, would not decide the question of the legal effects for a third party because, as the Tribunal in *Chevron v. Ecuador* noted, "it is clear that this Tribunal does not have jurisdiction over the [third party] *Lago Agrio* plaintiffs themselves".[40]

[30] *Ibid.*, para. 12.6.
[31] *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility from 27 February 2012 ("*Chevron v. Ecuador*").
[32] *Ibid.*, para. 4.60.
[33] *Ibid.*, para. 4.60.
[34] *Ibid.*
[35] *Ibid.*, para. 4.66.
[36] *Ibid.*
[37] *Chevron v. Ecuador*, para. 4.70.
[38] *Ibid.*
[39] *Ibid.*, para. 4.67.
[40] *Ibid.*, para. 4.65.

D. A narrow application of the *Monetary Gold* principle

A careful analysis of the decisions in *Monetary Gold Removed from Rome in 1943*, *East Timor*, *Nauru*, *Larsen v. Hawaiian Kingdom* and *Chevron v. Ecuador* shows that the ICJ and arbitral tribunals under the PCA system apply the *Monetary Gold* principle narrowly. They require that the international responsibility of an absent third state would have formed "the very subject-matter" of the Court's decision and constituted a prerequisite for deciding the case at hand.[41] The Tribunal in *Larsen v. Hawaiian Kingdom* explained that "the mere fact that a State not party to the proceedings might be *affected by the decision of the Court was not enough* to preclude the exercise of jurisdiction".[42] Instead, the subject-matter test only precluded a tribunal from ruling on the lawfulness of the conduct of a respondent "if the decision would entail or require, as a necessary foundation for the decision between the parties, an evaluation of the lawfulness of [...] the conduct of any other State which is not a party to the proceedings before the Tribunal."[43]

Hence, the relevant case-law suggests that a "logical relationship [is required] between the exercise of jurisdiction over the participating State and the exercise of jurisdiction over the absent State".[44] In other words, "the court or tribunal must determine whether the exercise of jurisdiction over the participating State requires a *prior* determination on the legal responsibility of the absent State [...]."[45] Under this legal standard, "if and only if the exercise of jurisdiction over the participating State requires a *prior* determination on the legal responsibility of the absent State, then the court or tribunal may not exercise jurisdiction over the dispute".[46]

For a better understanding of the circumstances under which the requirements of the subject-matter test set forth within the framework of the *Monetary Gold* principle are met, it is illuminating to study the circumstances in the only three international judicial decisions that declined to exercise jurisdiction over a case due to the *Monetary Gold* principle: *Larsen v. Hawaiian Kingdom*, *Monetary Gold*, and *East Timor*. In *Larsen v. Hawaiian Kingdom*, these requirements were met because the issue presented to the Tribunal of whether the Hawaiian Kingdom had discharged its duty of protection towards the Claimant could not "be addressed unless the Tribunal first determines that there is something against which the Respondent should have acted to protect the Claimant",[47] i.e., "without ruling on the legality of the acts of the United States".[48] In *Monetary Gold*, the question whether Italy was entitled to the monetary gold removed by the Germans from Rome in 1943 could not possibly be decided without a prior determination on whether "Albania has committed any international wrong against

[41] See *Larsen v. Hawaiian Kingdom*, para. 11.8.; *Chevron v. Ecuador*, para. 4.60. See also Separate Opinion of Judge *Tomka*, ICJ Reports 2016, 300, para. 38.

[42] *Larsen v. Hawaiian Kingdom*, para. 11.10. Emphasis added.

[43] *Larsen v. Hawaiian Kingdom*, para. 11.23.

[44] *Tzeng*, New York University Journal of International Law and Politics, 50 (2018), 447 (460).

[45] *Ibid.*

[46] *Ibid.*

[47] *Larsen v. Hawaiian Kingdom*, para. 12.14.

[48] *Ibid.*, para. 12.15.

Italy, and whether she is under an obligation to pay compensation".[49] In *East Timor*, the question whether Australia could lawfully conclude a treaty with Indonesia required a prior determination of whether Indonesia's presence in East Timor was lawful or unlawful.[50]

The rationale behind this narrow construction of the *Monetary Gold* principle was laid out by the ICJ in its Nicaragua decision.[51] In that case, the respondent, the USA, had argued that the Court should not exercise jurisdiction as its decision would have practical effects on the right of non-party states such as Honduras and El-Salvador, which would be precluded from obtaining lawful military assistance from the USA for safeguarding their vital security interests such as territorial integrity, sovereignty and independence that was threatened by armed attacks allegedly attributable to Nicaragua. However, the Court denied the application of the *Monetary Gold* principle to the case, arguing that the "circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to [as indispensable parties to the proceedings] can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings".[52] Hence, the ICJ followed the argument put forward by the claimants in that case that if the Court failed to adjudicate the case because not all affected states were parties to the proceedings, "the result would be a severe and unwarranted constriction of the Court's ability to carry out its functions".[53]

E. The *Monetary Gold* principle does not apply to the EU in the context of ICSID arbitration

In principle, the *Monetary Gold* doctrine may also apply to an international or supranational organization such as the EU and in the context of international arbitration. There is nothing that lies in the nature of international organizations *per se* that would preclude the application of *Monetary Gold*. In addition, the tribunal in *Larsen v. Hawaiian Kingdom* stated that it sees "no reason either of principle or policy" for not applying the *Monetary Gold* principle in the context of international arbitration.[54] At the same time, the tribunal also does not suggest that *Monetary Gold* is generally applicable to international arbitration. Instead, it notes more cautiously that the applicability of *Monetary Gold* would depend on the specific character of the dispute at hand.[55] The Tribunal provides a hint where the limits of the application of the *Monetary Gold* principle in the context of international arbitration might lie, distinguishing two different types of disputes, acknowledging that the applicability of the *Monetary Gold* principle

[49] ICJ, *Monetary Gold* Case, ICJ Reports (1954), 32.

[50] ICJ, *East Timor* Case, ICJ Reports (1995), 105.

[51] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 26 November 1984, ICJ Reports (1984), 392.

[52] *Ibid.*, 431.

[53] Memorial of Nicaragua, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility from 30 June 1984, para. 248.

[54] *Larsen v. Hawaiian Kingdom*, para. 11.17.

[55] *Ibid.*

"might conceivably be different",[56] namely "dispute[s] of a non-contractual character in which the sovereign rights of a State not a party to the proceedings are clearly called in question"[57] and "contractual disputes governed by some system of private law and involving the rights of a third party".[58] In *Larsen v. Hawaiian Kingdom*, a non-contractual dispute involving the sovereign rights of the United States was at issue. In our opinion, it seems reasonable to invoke the *Monetary Gold* principle in the context of territorial disputes regardless of whether they are litigated before the ICJ or an international tribunal.

However, the contractual nature of international investment arbitration and the particular legal regime set forth by the ICSID Convention speak against the applicability of the *Monetary Gold* principle to the EU in the context of ICSID arbitrations that are based on EU member state BITs for three different reasons that we will lay out on more detail below. First, the EU cannot give its consent to ICSID arbitration because it is not entitled to be a party and it therefore cannot be, under any circumstances, subject to the jurisdiction *ratione personae* of an ICSID tribunal (1.). Second, it is not possible to establish the international responsibility of the EU under a member state BIT (2.). Third, the ICSID Convention provides no legal basis for declining jurisdiction because of the rights or legal interests of third parties (3.).

I. The *Monetary Gold* principle only requires a finding of inadmissibility with respect to third parties which, in principle, are entitled to be a party

As we have seen above, the ICJ has based the *Monetary Gold* principle on the doctrine of state consent. However, the absence of consent of a third party is not in itself sufficient to trigger the application of the *Monetary Gold* principle. What is required, in our view, is that i) the absent third party *could have given consent* to the jurisdiction of an international court or tribunal, and ii) *chose not to give its consent*. These cumulative requirements can be derived from the ICJ judgment in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia).[59] In that case, Serbia had requested the Court not to exercise its jurisdiction to adjudicate upon Croatia's application because this would have been contrary to the rights of the Socialist Federal Republic of Yugoslavia (SFRY). However, the Court did not apply the *Monetary Gold* principle, clarifying that "[i]n both Monetary Gold and East Timor, the Court declined to exercise its jurisdiction to adjudicate upon the application, because it considered that to do so would have been contrary to *the right of a State not party to the proceedings not to have the Court rule upon its conduct without its consent*. That rationale has no application to a State which no longer exists, as is the case with the SFRY, since such a State no longer possesses any rights and *is incapable of giving or withholding consent to the jurisdiction of the Court*."[60] It follows that the *Monetary Gold*

[56] *Ibid*.
[57] *Ibid*.
[58] *Ibid*.
[59] ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia) 3 February 2015, ICJ Reports (2015), 3.
[60] *Ibid*., 57. Emphasis added.

principle only applies to entities that are capable of giving their consent to the exercise of jurisdiction by the ICJ.

As a consequence, the *Monetary Gold* principle does not apply to the EU in the context of ICSID proceedings because the EU cannot give its consent to ICSID arbitration as it is not entitled to be a party and it therefore cannot be subject to the jurisdiction *ratione personae* of an ICSID tribunal. Article 25(1) ICSID provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre". While an ICSID tribunal could have jurisdiction over a third State if that State was a party to a relevant international investment agreement and had thereby consented to the jurisdiction of the Tribunal, an international organization, by contrast, cannot put itself in that position because Article 25(1) ICSID excludes international organizations from being a party in an ICSID proceeding. In other words, it is precisely because an ICSID tribunal may adjudicate on the interests of a Contracting State if there is consent that the interests of States absent from the proceedings, i.e. those States that have not consented, must not be affected.

The following considerations support this standpoint: A jurisdictional rule which requires consent only applies to entities (in neutral terms) that are entitled to give their consent. Put differently, the application of the *Monetary Gold* principle depends on the potential presence of the third party as a litigant; it is the very reason why its absence may require an international court or tribunal to decline to exercise its jurisdiction over the case. In fact, this is precisely the situation that existed in all three cases in which an international court or tribunal declined to exercise their jurisdiction due to the *Monetary Gold* principle. In the *Monetary Gold* and in the *East Timor* case, the absent third parties, Albania respectively Indonesia would have been entitled to participate in those proceedings as parties under Article 34(1) of the ICJ Statute but they chose instead not to give their consent. In *Larsen v. Hawaiian Kingdom*, the United States could have become a party before the PCA Tribunal under the UNCITRAL Arbitration Rules but it refused to consent to international arbitration on the issue of the legality of the annexation of Hawaii. As a matter of fact, the actual parties in all three cases had unsuccessfully sought to include Albania, Indonesia, and the United States as parties to settle the underlying issue before an international court or tribunal. It was against this background that the ICJ and the PCA Tribunal dismissed the cases due to the *Monetary Gold* principle in order to protect the principle of consensual jurisdiction over states.

By contrast, a broad application of the *Monetary Gold* principle regardless of whether a third party was entitled to consent to the jurisdiction of an ICSID tribunal in the first place must be rejected for two reasons. First, it would lead the principle of consensual jurisdiction *ad absurdum* because it would frustrate the consent of the parties that have actually consented to the arbitration proceedings. Consent-based jurisdiction means first and foremost that an international court or tribunal is required to exercise its jurisdiction over a dispute to which the parties to the proceedings have consented. Declining jurisdiction notwithstanding the consent of the parties only constitutes a narrow exception to the duty to exercise jurisdiction.[61] Second, it would have significant

[61] *Zamir*, Arbitration International 33 (2017), 523 (536).

policy consequences for ICSID proceedings. As *Noam Zamir* has pointed out: "[A]pplying the *Monetary Gold* principle in international arbitration will require international tribunals to consider the principle in almost every arbitration and could significantly hamper the consensual arbitral mechanism".[62] Against this background, it is our view that the *Monetary Gold* principle only applies if, and to the extent that, that an absent third party was entitled to but chose not to give its consent to the jurisdiction of an international court or tribunal.

II. The responsibility of the EU cannot be established under a Member State BIT in an ICSID arbitration

The application of the *Monetary Gold* principle requires, as was shown above, that the international responsibility of an absent third party would have formed "the very subject-matter" of a court's or tribunal's decision and constituted a prerequisite for deciding the case. However, it is not possible to establish the international responsibility of the EU under a member state BIT in ICSID arbitration proceedings because neither such a BIT, nor the award of an ICSID tribunal would have any legal effect on the EU. The jurisdiction of an ICSID tribunal is confined to the applicable BIT that only regulates the responsibility of the host state *vis-à-vis* a foreign investor. The *res inter alios acta* principle limits the BIT's legal effects, providing that international treaties only bind their parties and stipulate legal effects only between them. Accordingly, the ICJ holds that "[a] third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect [...] it is *res inter alios acta*."[63]

Article 53(1) of the ICSID Convention provides that "[t]he award shall be binding on the parties". As an expression of the *res inter alios acta* principle, Article 53(1) ICSID implies, as a corollary, that an ICSID tribunal does not have the competence to rule on the unlawfulness of the actions of a third party that is neither a contracting party to a BIT, nor to the ICSID Convention. As a result, the determinations of an ICSID tribunal are neither binding on the EU, nor do they have *res judicata* effect on the EU, nor do they give rise to any legal consequences aside from the settlement of the investment dispute between an investor and the host state in a particular case.

Against the background of the bilateral character of international investment arbitration proceedings, the Tribunal in *Chevron v. Ecuador* observed that it "does not have jurisdiction over the *Lago Agrio* plaintiffs themselves",[64] and therefore "has no legal authority over the *Lago Agrio* plaintiffs and cannot order them to do or to abstain from doing anything".[65] However, the same holds true for the EU in ICSID proceedings. An ICSID tribunal does not have the "legal authority" to "order [the EU] to do or to abstain from doing anything",[66] and therefore cannot establish the EU's international responsibility.

[62] *Ibid.*, 523 (538).
[63] ICJ, *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran) 22 July 1952, ICJ Reports (1952), 109.
[64] *Chevron v Ecuador*, para. 4.65.
[65] *Ibid.*
[66] *Ibid.*

There are also important policy considerations against applying the *Monetary Gold* principle to protect the third-party interests of the EU in ICSID arbitration. Given the central importance of the EU's single market and the EU's contentious relationship with the international investment regime (i.e. state aid law, intra-EU-BITs, Energy Charter Treaty), the application of the *Monetary Gold* principle in this context would likely end international investment arbitration against EU member states. However, such an outcome seems highly inequitable: It would not only "cancel [investor] rights created by a valid treaty"[67] and enable EU member states to avoid responsibility only due to their membership in the European Union but it may even incentivize EU member states to breach their obligations towards foreign investors under investment treaties. It follows that the *Monetary Gold* principle does not apply to the EU in the context of ICSID arbitration because an ICSID Tribunal does not have the competence to rule on the rights and obligations of the EU in the context of a BIT concluded by an EU member state.

III. ICSID arbitration provides no legal basis for declining jurisdiction because of the rights or legal interests of third parties

Furthermore, there is no basis in international investment law for an ICSID tribunal not to exercise its jurisdiction because of the rights or legal interests of third parties.[68] The legal sources that an ICSID tribunal may rely upon in order to determine questions of jurisdiction are confined to the legal instruments from which the tribunal derives its *prima facie* jurisdiction and within which consent originated, namely the BIT and the ICSID Convention.[69] Of course, a BIT and the ICSID Convention should be interpreted in the light of general rules and principles of international law. But the consideration of general public international law should also not displace the primary sources of law for an ICSID tribunal. Accordingly, the Tribunal in *Vattenfall v. Germany* held that it would not be proper if the consideration of principles of international law in the context of determining a Tribunal's jurisdiction would have the effect "to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms."[70]

BITs, as far as we can see, and the ICSID Convention do not provide for an exception to an investment tribunal's jurisdiction based on third-party interests. In fact, the notion that an investment tribunal should decline to exercise its jurisdiction because its decision would affect the legal interests of third parties is anomalous to the context of international investment arbitration. It is recognized in international investment law that the rights and legal interests of non-parties do "not provide an independent basis

[67] *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension from 26 October 2010, para. 267.

[68] Cf. *Zamir*, Arbitration International 33 (2017), 523 (533 et. Seq).

[69] *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/05/1, Award from 22 August 2012, para. 50; *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue from 31 August 2018, para. 128.

[70] *Vattenfall AB v. Federal Republic of Germany*, para. 154.

of non-enforcement of an arbitral award".[71] In international investment arbitration, third party interests are considered in the form of third party interventions and *amicus curiae* submissions only. Accordingly, Rule 37(2)(c) of the ICSID Arbitration rules requires a tribunal to allow a written submission from a non-disputing party that has, amongst others, "a significant interest in the proceeding". Hence, the rule presupposes that the participation as *amicus curiae* is an appropriate way to accommodate a third party's significant interest.

F. Conclusion

The *Monetary Gold* principle holds strategic promise for respondents before international courts and tribunals, including EU member states, as it may be invoked to challenge jurisdiction. However, an analysis of the relevant case-law shows that *Monetary Gold* does not amount to a generally applicable necessary third party rule. While the principle is often cited or invoked,[72] international courts and tribunals only decline to exercise their jurisdiction on the basis of *Monetary Gold* under very strict requirements, requiring that the international responsibility of an absent third party would have formed "the very subject-matter" of the decision and constituted a prerequisite for deciding the case at hand. It is this restrictive standard that should also be applied to ICSID arbitration concerning matters of EU law, and, as a result of which, there are no sufficient grounds for ICSID tribunals to decline to exercise their jurisdiction based on the *Monetary Gold* principle in cases involving EU member states even if substantial interests of the EU are concerned. Otherwise, ICSID tribunals would overly impair their primary function, which is to adjudicate cases to which the parties to the proceedings have consented.

[71] *Zamir*, Arbitration International 33 (2017), 523 (534).

[72] According to *Alschner/Charlotin*, European Journal of International Law 29 (2018), 83 (101 f.), the relevant paragraph in the ICJ's *Monetary Gold* judgment is the most cited paragraph of the ICJ with 15 self-citations, suggesting that respondents "may have pointed to this precedent strategically to achieve an early dismissal of a case".

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