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Threats to the International Peace and Security: Who Decides? Its Possible Valuation by Arbitral Tribunals in International Investment Arbitration

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ABSTRACT

According to the Monetary Gold principle, an international adjudicator cannot exercise its jurisdiction when the legal interests of a third State 'would form the very subject matter of the decision'. This paper will study this principle in the context of international investment arbitration. In particular, it will focus on acts taken by a State that, at least in the eyes of another State, threaten the international peace and security. In response, the international community at large, or at least a particular State, may take measures in order to condemn the threat to the international peace and security. These measures may incidentally cause prejudice to a foreign investor protected by an investment protection treaty, motivating it to pursue a claim against the State, recipient of its investment, who implemented the measures. If present in the investment treaty, a State may invoke a 'non-precluded measure' clause in order to dismiss the investor's claim. However, for an arbitral tribunal to decide whether the measures taken by the respondent State fall within the scope of the treaty's exception clause, it must first determine whether the third State's act is internationally wrongful. Hence, this paper will analyze whether an arbitral tribunal may decide upon the legality of a third State act that, in the eyes of the respondent State, threatens the international peace and security.

I. INTRODUCTION

In the paradigmatic *Monetary Gold* case, the International Court of Justice ("ICJ" or "the Court") held that it did not have jurisdiction to hear the dispute as the rights and obligations of a necessary non-party[1] to the proceedings would not only be affected by the decision, but would form the very subject matter of the Court's decision.[2] In this way, the Monetary Gold principle was born.[3]

The questions concerning the Monetary Gold principle are related to the admissibility of a claim before an international tribunal, as defining the responsibility of a third State becomes a pre-condition for invoking the responsibility of the State party to the proceedings.[4]

We intend to evaluate the *Monetary Gold* ruling in the context of international investment law, which is understood as the set of rules and substantive rights that protect the investment of a foreign investor against the host State, recipient of the investment.[5] The source of these rules and rights are found in investment protection treaties, namely, Bilateral Investment Treaties ("BITs") and multilateral treaties such as the North American Free Trade Agreement ("NAFTA").

Several investment protection treaties contain what is called a non-precluded measures ("NPM") clause, which limits the applicability of investor protections under the BIT in exceptional circumstances.[6] If the State's measures fall within the permissible

[1] This doctrine will also be referred to in this paper as the 'essential parties' or 'indispensable parties' doctrine.

[2] *Case of the Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, ICJ Reports 1954*, 32 [hereinafter "*Monetary Gold*"].

[3] In this paper, the doctrine of necessary parties will be equated with the Monetary Gold principle. It is not relevant to this study whether one considers the Monetary Gold principle and the doctrine of indispensable parties as two distinct doctrines or not. The important point is that the ICJ and other international tribunals applied the doctrine of indispensable parties in light of the Monetary Gold principle (Noam Zamir, "The applicability of the Monetary Gold principle in international arbitration," *Arbitration International*, 2017, 1-2, doi:10.1093/arbint/aix013).

[4] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, United Kingdom: Cambridge University Press, 2002), 46.

[5] Jürgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis," *International and Comparative Law Quarterly* 59, no. 02 (April 2010): 331, doi:10.1017/S0020589310000047.

[6] William Burke-White and Andreas Von Staden, "Investment Protection in Extraordinary Times: Interpreting Non-Precluded Measures Provisions," Opinio Juris, January 30, 2008,

objectives of the NPM provision, acts that would otherwise be contrary to the treaty do not constitute a breach of the BIT.[7] Thus, the State would not be liable for any damage inflicted upon the investor's investment.[8]

Pursuant to the NPM provision, a respondent State[9] may argue in the context of an investor-State dispute that it took measures 'necessary for the maintenance of international peace and security' in response to an internationally wrongful act committed by a third State, non-party to the proceedings. For instance, a State may prohibit commercial transactions with parties from a third State, whose conduct, at least in the eyes of the State enacting the measure, is deemed to be affecting the international peace and security. The investor, on the other hand, would argue that the prejudice caused to its investment is both justiciable before an arbitral tribunal and worthy of a remedy in damages.[10]

A typical dispute in international investment law is strictly bilateral: it involves a foreign investor and the host State. The third State, on the other hand, is not a party to the proceedings. However, when the host State raises the NPM clause as a defense, it is essentially requesting the tribunal to consider that the third State's act is internationally wrongful. Thus, defining the international responsibility of the third State becomes a prerequisite for the analysis of the lawfulness of the measures taken by the respondent State.

This paper evaluates whether an arbitral tribunal may rule on the legality of a third State's conduct that allegedly threatens the international peace and security. This raises an array of issues in connection with the *Monetary Gold* ruling. For instance, is it necessary for the acts wrongfulness to be previously determined by a United Nations ("UN") Security Council resolution? Does the arbitral tribunal's analysis change if the third State's conduct has not been condemned by the Security Council? Is there any other

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http://opiniojuris.org/2008/01/30/investment-protection-in-extraordinary-times-interpreting-non-precluded-measures-provisions/.

[7] *Ibid.*

[8] *Ibid.*

[9] The term 'respondent State' will be used in this paper to identify the State party to the international arbitration proceedings.

[10] Zachary Douglas, "Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID," ed. James Crawford, Alain Pellet, and Simon Olleson, in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 821.

organ or organization that could rule on the legality of the third State's conduct? If the act's legality has not been determined by any entity – not even by express acknowledgment of the acts illegality by the State itself – will the tribunal's analysis vary if the NPM provision is self-judging? Most importantly, may the arbitral tribunal *itself* decide upon the legality of the third State's act?

This paper will have a theoretical relevance as although NPM provisions – and in particular self-judging clauses – appear frequently in various contexts of international law, they have not been fully treated by international tribunals or authors.[11] Even more, to date no tribunal in international investment arbitration has decided upon the legality of measures taken in order to maintain or restore the international peace and security within the scope of an NPM provision.

In order to analyze whether an arbitral tribunal may decide upon the legality of a third State's act, this paper begins in Part II by outlining the general concepts related to BITs and NPM provisions. In Part III, the Monetary Gold principle will be studied in depth by observing the case law of the Court and that of arbitral tribunals. In Part IV, the ability of an arbitral tribunal in investment arbitration to decide upon the legality of an absent third State act will be studied. Within this section, the role of the UN, the ICJ and other regional organizations to decide upon the legality of State acts will be explored. Additionally, the role of the arbitral tribunal itself will be studied if it is faced with no previous determination whatsoever of the acts legality. In this case, the analysis of the self-judging or non-self-judging nature of the NPM provision will be relevant.

Notably, however, the substantive analysis of potentially wrongful international acts will not be studied in this paper.[12] Rather, it will only explore whether an arbitral tribunal has the ability to decide upon the legality of an international act.

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[11] Stephan Schill and Robyn Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement," *Max Planck Yearbook of United Nations Law* 13, no. 1 (2009): 65, doi:10.1163/18757413-90000037; Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", 326.

[12] The question of wrongfulness must be assessed by the primary rules of international law, which define the content and subsequent interpretation of the international obligations of States.

II. BILATERAL INVESTMENT TREATIES, NON-PRECLUDED MEASURES AND THE MAINTENANCE OR RESTORATION OF INTERNATIONAL PEACE AND SECURITY

Individuals need their property to be protected from possible violations from other individuals in the private sector but also from the State itself. Consequently, BIT's emerged with the intent to treat the specific challenges faced by foreign investors.[13] Broadly speaking, BITs are investment protection agreements[14] signed by two States that establish the terms and conditions for private investment by nationals and companies of one State in the other State.[15] Among its many virtues, BITs protect investors who are nationals of the Contracting Parties' to the treaty in order to mitigate the risk of investment operations in the host State.[16]

BITs are relevant to our paper to the extent that they contain two distinct provisions. The first, a dispute resolution clause that allows the investor to refer the dispute to arbitration, as it is in the context of this proceeding that a foreign investor may allege the host State's violation of the BIT. The second, an NPM provision, as the respondent State may invoke this clause in order to neutralize the remaining provisions of the BIT. In this section, these elements will be briefly introduced before delving into the core of our analysis in Part IV.

1. International Investment Arbitration

Despite some variations, BITs are broadly similar in their provisions. They typically determine the scope of the application of the treaty, define which investments and investors qualify for protection, provide substantive protections, and create procedures for the settlement of disputes.[17]

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[13] Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", 345.
[14] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (New York, New York: Oxford University Press, 2010), 5.
[15] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford, United Kingdom: Oxford University Press, 2012), 13.
[16] Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", 331.
[17] Christopher F. Dugan et al., *Investor-State Arbitration* (New York, New York: Oxford University Press, 2008), 52.

Following the BITs substantive protections, the treaty usually contains a dispute resolution clause where the Contracting Parties' consent to the arbitration of investment disputes with the investor.[18] Generally, the clause first defines what types of dispute are within the Contracting Parties' consent, as the tribunal's jurisdiction is limited by the consent of the parties to the treaty.[19] Second, it specifies the means by which the dispute should be settled, and often refer the dispute to arbitration through the International Centre for Settlement of Investment Disputes ("ICSID").[20]

Arbitration is the submission of a dispute to an unbiased third person, or a plurality of arbitrators, designated by the parties in order for the dispute to be settled outside of local courts while providing at the same time a binding decision based on law.[21] In particular, ICSID arbitration concerns the settlement of investment disputes between States and foreign investors pursuant the ICSID Convention.[22]

If, for instance, the host State implements measures that causes prejudice to a foreign State in the context of the imposition of a lawful countermeasure,[23] these measures would not be internationally wrongful between the host State and the national State of the investor. However, the countermeasure could cause prejudice to a private investor protected by a BIT in the State enacting the countermeasure.

A foreign investor could initiate an investor-State dispute settlement proceeding alleging that the host State violated the applicable BIT to the dispute. Hence, the investor would contend that the prejudice caused to its investment is both justiciable before an arbitral tribunal and worthy of a remedy in damages.

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[18] Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, 6.
[19] *Ibid.,* 433.
[20] *Ibid.,* 434; Dugan, *Investor-State Arbitration*, 52; Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", 332.
[21] Cornelis G. Roelofsen, "International Arbitration and Courts," ed. Anne Peters, in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender, 1st ed. (Oxford, United Kingdom: Oxford University Press, 2012), 151.
[22] Antonio R. Parra, *The History of ICSID*, 1st ed. (Oxford, United Kingdom: Oxford University Press, 2012), 8.
[23] Countermeasures are: "measures that would otherwise be contrary to the international obligations of the State taking the measures if they were not taken in response to an internationally wrongful act by the State against which they have been imposed" (Donald McRae and Esther Van Zimmeren, "Chapter 35: Countermeasures and Investment Arbitration," in *Building International Investment Law: The First 50 Years of ICSID*, comp. Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, and Mairée Uran Bidegain (Kluwer Law International, 2015), 495).

In turn, the respondent State could argue that the countermeasure was taken pursuant the BIT's NPM provision. However, as stipulated by the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"), [24] countermeasures must fulfill certain conditions in order to preclude the wrongfulness of the State's conduct. Most importantly, Art. 49(1) of the ILC Articles stipulates that a countermeasure must be taken in response to an internationally wrongful act.[25]

A State that resorts to countermeasures based on a unilateral assessment of the situation does so at its own risk. If its view of the acts legality turns out to be unfounded (or utterly mistaken) it may incur in responsibility for its own wrongful conduct for an incorrect assessment that led to the imposition of an internationally wrongful countermeasure.[26] A tribunal faced with a countermeasure defense in a purely bilateral arbitration proceeding (between the State taking the countermeasures and the foreign investor), would find it difficult to adjudge on the respondent's countermeasure defense. It would first have to determine whether the third State's act was internationally wrongful in order to establish the existence of one of the requirements of a valid countermeasure. According to the Monetary Gold principle, the tribunal would lack jurisdiction to ascertain whether the allegations of the respondent State against the third State are well founded, as the third State is not a party to the proceedings.

2. Non-Precluded Measures provisions in Investment Treaties

Conduct inconsistent with investment obligations may be lawful to the extent provided for by the applicable treaty itself. In this way, faced with an investors claim, the respondent State could argue that its actions were taken pursuant the BITs NPM provision.

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[24] Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session on November 2001.
[25] Art. 49(1) of the ILC Articles reads: "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two".
[26] United Nations Legislative Series, *Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts* (New York: United Nations, 2012), 309-10.

NPM provisions set forth certain general exceptions to the State's conduct, not mere justifications or excuses for breach.[27] As such, an NPM provision constitutes an exception and when it applies, it prevails over the obligations of the BIT.[28] If an NPM defense is successful, the remaining provisions of the BIT are rendered practically null.[29] In this sense, a measure that falls within the exception may be lawful, notwithstanding its inconsistency with the protections awarded in the BIT.[30]

For instance, Art. XXI of the General Agreement on Trade and Tariffs ("GATT") is an NPM provision, which reads:

> Nothing in this Agreement shall be construed
>
> […]
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[27] William Burke-White and Andreas Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties," *Virginia Journal of International Law* 48, no. 2 (2007): 386-7.
[28] Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, 181.
[29] *Ibid.*, 178.
[30] *Ibid.*, 178; Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 311.

As shown, Art. XXI of GATT limits the applicability of the protections of the treaty in certain exceptional circumstances.[31] In this way, States that sought to preserve an exit-valve from the BITs obligations have done so by incorporating NPM provisions.[32]

However, a State's acts will only constitute an exception to the protections offered by the BIT if the State's measures fall within the scope of the NPM provision, that is, its 'permissible objectives'. Measures taken pursuant a NPM provision are not internationally wrongful if they are are taken to achieve one of the permissible objectives mentioned in the clause.[33] In other words, if the host State's conduct falls within the provisions permissible objectives, it does not breach the BIT and thus does not result in liability for compensation.[34]

This paper will focus on one of these permissible objectives: the maintenance or restoration of international peace and security.[35] Unfortunately, this permissible objective has not been thoroughly interpreted by legal scholars and tribunals. This issue is aggravated by the fact that the BIT does not tend to define what constitutes a State's obligations with respect to the maintenance or restoration of the international peace and security. In fact, while analyzing the NPM provision of the 1991 US-Argentina BIT, the tribunal in *Enron* held that the treaty did not contain a definition concerning the maintenance of international peace and security and that, as such, its definition had to be found elsewhere.[36]

Notwithstanding, this permissible objective has been generally understood by the international community to allow States to take actions mandated by the UN Security Council,[37] whose primary responsibility is the maintenance of international peace and

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[31] Schill and Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 64.
[32] Catherine H. Gibson, "Beyond Self-Judgment: Exceptions Clauses in US Bits," *Fordham International Law Journal* 38, no. 1 (2015): 17, http://ir.lawnet.fordham.edu/ilj/vol38/iss1/13; Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 311.
[33] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 387.
[34] Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, 181.
[35] This terminology has been included, for instance, in Art. 18(2) of the 2004 US Model BIT, which reads: "Nothing in this Treaty shall be construed: […] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests".
[36] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para 333 [hereinafter "*Enron*"].

security according to Art. 24(1) of the Charter of the United Nations ("UN Charter" or "Charter").[37]

As such, Art. 39 of the Charter states that it is the Security Council who shall "determine the existence of any threat to the peace, breach of breach, or act of aggression and […] decide what measures shall be taken […] to maintain or restore international peace and security".[38] As Art. 25 of the UN Charter requires all UN Member States to "accept and carry out the decisions of the Security Council", States are reassured that they will not be held in breach of their obligations under the BIT if they act in compliance with a Security Council resolution.[39] For instance, in 1993 Norway prohibited all imports from Iraq and Serbia/Montenegro in accordance to UN resolutions.[40] In this way, the permissible objective transfers the risk of State action that pursues a UN mandate to the investor.[41]

In this same line, this permissible objective has been understood to refer specifically to a State's obligations under the UN Charter.[42] As the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The importance of this treaty, as reflected in Art. 103 of the Charter,[43] derives from its express provisions as well as from the virtually universal membership of States in the UN.[44]

For instance, GATT Art. XXI(c) identifies the source of the obligations to maintain the international peace and security as those identified by the Charter. Similarly, in its Letter of Submittal to the US-Bahrain BIT, the US stated that the obligations regarding the maintenance of international peace and security included the obligations

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[37] Art. 24(1) of the UN Charter reads: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf".
[38] Letter of Submittal of the US-Bahrain BIT, 24 April 2000.
[39] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 355.
[40] Analytical Index of the GATT, "Article XII: Security Exceptions", 605. Available at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf
[41] *Ibid.*
[42] *Ibid.*
[43] Art. 103 of the UN Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".
[44] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 128.

contained in Chapter VII of the UN Charter. The same was held in the Protocol to the 1991 US-Argentina BIT, which clarified that the terminology of the NPM provision regarding the maintenance or restoration of international peace or security meant obligations under the UN Charter.[45] Accordingly, the generally accepted interpretation regarding this particular permissible objective is that the State is limited to fulfilling its obligations arising out of the UN Charter.

Even so, this permissible objective has been linked to actions mandated by regional organizations. In the negotiations of the Organisation for Economic Co-operation and Development's Multilateral Agreement on Investment, some parties suggested adding a provision that measures taken pursuant 'regional security arrangements' were permitted under the general exceptions clause, although this suggestion was not added as of the May 1998 drafting session.[46] Nevertheless, according to Burke-White, an expert in international law and Professor at University of Pennsylvania, and Von Staden, an Assistant Professor at University of Hamburg, if the regional action is taken pursuant Chapter VIII of the UN Charter, which regulates regional arrangements, and is considered necessary to preserve or restore the international peace and security, the NPM provision could be presumably applicable.[47]

However, this permissible objective has not generally gone so far as to allow a State's unilateral considerations regarding the legality of the international act to prevail. According to Burke-White and Von Staden, unilateral actions would not fall within the general consensus of the meaning of this permissible objective.[48] Notwithstanding, the arbitral tribunal would have to analyze whether the Contracting Parties' to the applicable treaty had intended for the NPM provision to encompass unilateral actions.[49]

[45] Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed 14 November 1991, Protocol, para 6 [hereinafter "1991 US-Argentina BIT"].
[46] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 356.
[47] *Ibid.*
[48] *Ibid.*
[49] This would have to be interpreted according to the Vienna Convention on the Law of Treaties, Art. 31(4), to see whether the parties intended for the provision to have a 'special meaning'.

As shown, NPM clauses specify the policy domains where State action is permissible even if it violates the standards of protection contained in the BIT.[50] However, since the interpretation of a State's 'obligations with respect to the maintenance or restoration of international peace and security' is varied and has received little treatment by legal scholars and international tribunals, an arbitral tribunal would have to carefully analyze whether the respondent State's actions fall within the exception.

For instance, if the tribunal finds that the permissible objective encompasses only actions mandated by the UN Security Council, and in that particular case the respondent State condemned the third State's act based on its unilateral considerations, then the tribunal would find it difficult to pronounce itself on the legality of the third State's act. As we know, this pronouncement is a necessary prerequisite to determine the responsibility of the respondent State. In this sense, the application of the Monetary Gold principle – which will be studied in detail in the upcoming section – could block the tribunal from declaring itself competent to hear the case, as the legal interests of a third party could be the very subject matter of the tribunal's decision.

III. THE MONETARY GOLD PRINCIPLE

The Monetary Gold principle is concerned with the admissibility of claims in international judicial proceedings and thus reflects the broader principle of international dispute settlement that jurisdiction of the international adjudicator derives from the parties' consent. The traditional development of international law is based on the notion that a State may only restrict its sovereignty through its express consent.[51] As such, the Court has often favored an approach that confines disputes bilaterally in order to protect State sovereignty.[52] In this sense, the cornerstone of an arbitral tribunal's jurisdiction, much like that of the ICJ, is consent.[53]

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[50] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 332.
[51] Dugan, *Investor-State Arbitration*, 219.
[52] Natalie S. Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case," *Yale Journal of International Law* 21, no. 2 (1996): 310.
[53] Gilles Cottereau, "Resort to International Courts in Matters of Responsibility," in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 1117; Dugan, *Investor-State Arbitration*, 219; Dolzer and Schreuer, *Principles of International Investment Law*, 254; *Monetary Gold*, 17. The general principle enshrined in Art. 36(1) of the Statue of the ICJ is that if the Court

The Monetary Gold principle denies the tribunal's jurisdiction when there is an 'essential party' in play that is unaccounted for in the proceeding. The term 'essential party' refers to an entity[54] whose interests and rights are the very subject matter of the decision. A State may be a necessary party in three cases: if it possesses evidence, if its responsibility must be determined as a preliminary step to hearing the merits of the dispute or if it must receive a portion of the fault.[55] This paper will focus on the determination of international responsibility of a third State as an essential step prior to the finding against the State party to the proceedings.

The Monetary Gold principle has been interpreted in various of the Court's decisions and in recent years it has spread to the context of international arbitration. In this way, this section will explore how the Monetary Gold principle has been applied by the ICJ and by arbitral tribunals.

A. THE MONETARY GOLD PRINCIPLE IN THE INTERNATIONAL COURT OF JUSTICE

The Monetary Gold principle was first developed by the Court in its paradigmatic *Monetary Gold* case, and was subsequently analyzed in other decisions. In the following subsection, this paper will showcase the treatment of the Monetary Gold principle in five cases submitted to the ICJ.

1. Case of the Monetary Gold Removed from Rome in 1943

The Court in *Monetary Gold* had been requested to determine certain legal questions upon which depended the delivery to Italy or to the United Kingdom of a quantity of monetary gold removed by the Germans from Rome in 1943, recovered in Germany and found to belong to Albania.

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has the consent of the parties to the dispute, it will be able to hear the merits of the case and thus decide upon the legality of State action.

[54] Traditionally, the definition of necessary parties only extends to States (Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case", 309).

[55] *Ibid.*, 310.

The United Kingdom pointed out that an arbitrator[56] found that Albania was under obligation to pay partial compensation to the United Kingdom for the Judgment on the *Corfu Channel* case[57] that had been delivered by the ICJ in 1949.

Italy contended, on the other hand, that she had a claim against Albania arising out of the measures of confiscation allegedly taken by the Albanian Government in 1945, and that her claim should have priority over that of the United Kingdom.[58] In other words, Italy alleged that she possessed a right against Albania for the redress of an international wrong committed against her.[59]

The question at hand was whether the Court could pass upon the international responsibility of Albania to Italy regarding the Albanian law of January 13, 1945.[60] According to the United Kingdom, Albania's consent in the proceedings – which it had not given – was not necessary as:

> [T]he only issue raised […] is the question of whether Albania's shares should go to the United Kingdom or to Italy; and both those countries, as well as the two remaining Washington Governments, have given their consent and are before the Court.[61]

The Court, however, was unconvinced. It held that the problem it was called to resolve did not only encompass the delivery of the gold to either State but rather, it was first requested to determine legal questions upon which depended the delivery of the gold.[62] In this sense, the Court was faced with the task of defining whether Albania had contravened international law with the implementation of the Albanian law of 1945.[63] As such, the Court stated that the only two States directly interested in the determination of

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[56] The issue arose when the gold of the National Bank of Albania, removed from Rome in 1943, was claimed by Albania and Italy. The three governments that were part of the Tripartite Commission (France, the United Kingdom and the United States) that had been entrusted to implement the provisions of Part II of the Paris Agreement (Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold), signed the Washington Agreement by which they decided to submit to an arbitrator to decide whether the gold belonged to Albania, Italy or neither State (*Monetary Gold*, 25-6). The opinion of the arbitrator stating that the gold belonged to Albania was given on 20 February 1953 (*Monetary Gold*, 21).
[57] *Corfu Channel case, Judgment of April 9th, 1949: ICJ Reports 1949*.
[58] *Monetary Gold*, 22.
[59] *Ibid.*, 32.
[60] *Ibid.*, 22.
[61] *Ibid.*, 31.
[62] *Ibid.*
[63] *Ibid.*, 32.

these questions were Italy and Albania.[64] In this sense, the dispute was not between Italy and the respondents (France, the United Kingdom, and the United States ("US")[65]), but between Italy and Albania.

The Court held that it could not decide the dispute without Albania's consent, and as Albania had not consented to the Court's jurisdiction, the Court could not exercise its jurisdiction as the very subject matter of the Court's decision would be the rights, obligations or international responsibility of a non-consensual third State.[66]

The Court held that as Albania's interests were the 'very subject-matter of the dispute', the Statute of the ICJ ("the Statute") could not be interpreted to authorize proceedings to continue in the absence of Albania.[67] Interpreting the contrary would violate a well-established principle in international law embodied in the Statute, namely, that the Court can only exercise its jurisdiction over a State with its consent.[68] Moreover, the Court emphasized that although Albania could, pursuant Art. 62 of the Statute, intervene in the proceeding if it had an "interest of a legal nature which may be affected by the decision in the case",[69] Albania had chosen not to do so.

Even so, the United Kingdom contented that the decision of the Court would not be binding to Albania, only upon Italy and the three respondent States.[70] Although the Court acknowledged this fact, as envisaged in Art. 59 of the Statute,[71] it held that the rule rested on the assumption that the Court itself is even able to render a binding decision.[72] It held that when the vital issue is to define the international responsibility of a third State, the Court could not, without that third States' consent, give a binding decision upon any State, either a party or non-party to the proceedings.[73]

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[64] *Ibid.*
[65] France and the United States did not submit and Application to the Court (*Ibid.*, 25).
[66] *Ibid.*, 32.
[67] *Ibid.*
[68] *Ibid.*
[69] Art. 62(1) of the Statute reads: "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".
[70] *Monetary Gold*, 33.
[71] Art. 59 of the Statute reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case".
[72] *Monetary Gold*, 33.
[73] *Ibid.*

In this way, the Monetary Gold principle was born, and the ICJ continued to study the principle in other cases where it was alleged that the Court did not have jurisdiction to hear the dispute.

2. Case Concerning East Timor

In this case, the Court was faced with the determination of questions concerning Portugal's capacity as administering power of the territory of East Timor. East Timor was a former Portuguese colony[74] that was occupied by Indonesia and later incorporated into its territory.[75]

Following Indonesia's armed intervention, the Security Council and the General Assembly condemned Indonesia's presence in East Timor. For instance, Security Council resolution 384 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination".[76] It also stated that Indonesia should withdraw its forces from the territory, and further called upon Portugal as administering power to cooperate with the UN in order to enable the people of East Timor to exercise their right to self-determination. Furthermore, Security Council resolution 389 reaffirmed resolution 384 and called upon "all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution".[77]

On its part, the General Assembly passed eight resolutions regarding the status of East Timor. It passed its first resolution immediately after the invasion and then passed resolutions yearly until 1982 calling Indonesia to respect the right of the East Timorese to self-determination. In resolutions 31/53[78] and 32/34,[79] the General Assembly rejected the claim that East Timor had been incorporated into Indonesia as the people of East Timor could not exercise their right to self-determination. Even more, resolution 3485 "strongly deplore[d] the military intervention of the armed forces of Indonesia in Portuguese Timor".[80]

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[74] *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, para 11 [hereinafter "*East Timor*"].
[75] *Ibid.*, para 13.
[76] *Ibid.*
[77] Security Council resolution 384 (1975).
[78] General Assembly resolution 31/53 (1976).
[79] General Assembly resolution 32/34 (1977).
[80] General Assembly resolution 3485(XXX) (1975).

Despite the UN's efforts to condemn the occupation, Australia *de facto* recognized the incorporation of East Timor as part of Indonesia. The Minister for Foreign Affairs condemned Indonesia's intervention but also acknowledged Indonesia's effective control over the territory, stating that this was "a reality with which we must come to terms".[81] Australia went on to celebrate a treaty with Indonesia in 1989 called the Timor Gap Treaty,[82] which established a zone of cooperation that allowed for the exploration and exploitation of petroleum resources in the Timor Gap, the coast between northern Australia and East Timor.

Following this, Portugal brought a claim before the Court against Australia over the Timor Gap Treaty. It contended that Australia had breached international law by failing to observe the right of the East Timorese to self-determination, territorial integrity and sovereignty over its natural resources.[83] Additionally, Portugal claimed that Australia failed to respect the duties and powers of Portugal as administering power of East Timor.[84] Portugal went even further and alleged that Australia had contravened Security Council resolutions 384 and 389.[85]

Australia's main defense, on the other hand, rested on the inability of the Court to decide upon the issues presented by Portugal.[86] Australia argued that hearing the case would imply that the Court should rule on the rights and obligations of a third party, namely, Indonesia, and cited as support the *Monetary Gold* case.[87]

Portugal, however, argued that the dispute was limited to the objective conduct of Australia, which consisted in the negotiation, conclusion and initiated performance of the Timor Gap Treaty. Portugal held that the question was separable from any question regarding the lawfulness of Indonesia's armed intervention.[88] In this sense, it alleged that

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[81] *East Timor*, para 17.
[82] Treaty between Australia and the Republic of Indonesia on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia, signed on 11 December 1989 [hereinafter "Timor Gap Treaty"].
[83] Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case", 306.
[84] *East Timor*, para 1.
[85] *Ibid.,* para 10.
[86] *Ibid.*
[87] *Ibid.*, para 20.
[88] *Ibid.*, para 25.

the Court could not be prevented from hearing the case as its decision would not be binding on Indonesia.[89]

In fact, Judges Skubiszewski and Weeramantry, both in a dissenting opinion, agreed that Australia's acts could be separated from that of Indonesia's.[90] Judge Skubiszewski advocated for a higher degree of understanding of the situation in order to address the issue of self-determination of the East Timorese,[91] much like Judge Weeramantry stated that a narrow approach would prevent the Court from deciding the case.[92] According to Weeramantry, the duty of the Court to decide a dispute had to be taken into account,[93] and even further stated: "it is a matter of common sense that too rigid an attraction to that principle will paralyze any international tribunal".[94]

Even so, the Court dismissed Portugal's claim and held that in order to determine the legality of the Timor Gap Treaty, it would first have to determine the lawfulness of Indonesia's military invasion and incorporation of East Timor:

> [T]he very subject-matter of the Court's decision would necessarily be a determination of whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor […] The Court could not make such a determination in the absence of the consent of Indonesia.[95]

Indonesia, however, was not a party to the dispute and refused to accept the ICJ's jurisdiction.[96]

Faced with the rejection of most of its defenses, Portugal presented a final defense: that *Monetary Gold* was inapplicable to the dispute as the legality of Indonesia's actions had already been decided by both the Security Council and the General Assembly.[97] In this way, it held that the Court would only have to interpret those

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[89] *Ibid.*
[90] Dissenting opinion of Judge Skubiszewski, *East Timor*, para 60; Dissenting opinion of Judge Weeramantry, *East Timor*, pt. A, § 1 (iii-iv).
[91] Dissenting opinion of Judge Skubiszewski, *East Timor*, para 47.
[92] Dissenting opinion of Judge Weeramantry, *East Timor*, pt. A, § 1 (iv).
[93] *Ibid.*, pt. A, § 2 (v).
[94] *Ibid.*
[95] *East Timor*, para 28.
[96] Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case", 306.
[97] *East Timor*, para 30.

decisions, not decide *de novo* on their content. Australia, on the other hand, argued that said resolutions did not go so far, and that they were not binding or framed in mandatory terms.[98]

The Court was once more unconvinced by Portugal's defense. It contended that the UN resolutions did not go so far as to impose an obligation on States not to recognize Indonesia's authority over the territory.[99] Even more, it pointed out that the General Assembly, who reserves itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the UN Charter, has treated East Timor as a non-self-governing territory.[100] In this sense, the Court concluded that it could not be inferred from the resolutions that Portugal had to be treated by other States as the sole governing power of East Timor.[101]

In this way, the Court dismissed Portugal's claim and accepted Australia's jurisdictional objection based on the Monetary Gold principle.

3. Military and Paramilitary Activities in and against Nicaragua

In this case, Nicaragua brought a claim against the US alleging that US support for paramilitary forces, known as the *contras*, who were seeking to overthrow the Nicaraguan government, violated the 1956 Nicaragua-US Treaty of Friendship, Commerce and Navigation.

The US, however, argued that the Court could not exercise its jurisdiction as the adjudication of Nicaragua's claims would implicate the rights and obligations of Honduras, Costa Rica and El Salvador with respect to collective self-defense.[102] Nicaragua, on the other hand, argued that it asserted a claim only upon the US, not against any absent State.[103]

On its part, the Court rejected the US's contention. It stated that *Monetary Gold* was inapplicable to the proceeding as neither Honduras, El Salvador nor Costa Rica could

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[98] *Ibid.*
[99] *Ibid.*, para 31.
[100] *Ibid.*
[101] *Ibid.*, para 32.
[102] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, para 86 [hereinafter "*Nicaragua*"].
[103] *Ibid.*

be considered truly indispensable parties, as Albania was.[104] Moreover, it considered that the US's defense would only make sense if there was a parallel rule requiring a State to intervene or submit to its jurisdiction.[105] Although the Court did not have the power to make a third state a party to the proceedings,[106] it bypassed the multilateral aspect of the dispute by stating that all three countries had accepted the compulsory jurisdiction of the Court. If any wished to reclaim their interests, then separate proceedings could be filed.[107]

Additionally, the Court emphasized that its decision would have binding effect only to the parties in accordance to Art. 59 of the Statute.[108] It held that when legal claims are put forth against a respondent in proceedings before the ICJ, the Court must in principle, merely decide upon those submissions.

4. Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)

In *Frontier Dispute*, the determination of a tripoint between Niger and two disputing States – namely, Burkina Faso and Mali – led to the Court to analyze the Monetary Gold principle.[109]

Mali argued that the Court did not have jurisdiction as the rights of Niger, a third State and non-party to the proceedings, would be affected.[110] Burkina Faso, on the other hand, claimed that there would not be any dispute regarding the jurisdiction of the Court as the rights of Niger were a consequence but not the object of the dispute.[111]

The Court considered that its jurisdiction was not restricted, even though the end-point of the frontier lied on the frontier of a third State. In fact, it held that Art. 59 of the Statute safeguarded Niger's rights.[112] In order to illustrate this, the Court made an

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[104] *Ibid.*, para 88.
[105] *Ibid.*; Christine M. Chinkin, "East Timor Moves into the World Court," *European Journal of International Law*, 1993, 219.
[106] *Nicaragua*, para 88.
[107] *Ibid.*, para 74. In fact, soon after the decision on the merits in *Nicaragua* was disclosed, Nicaragua instituted simultaneous proceedings against both Costa Rica and Honduras.
[108] *Ibid.*, para 88.
[109] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, ICJ Reports 1986* [hereinafter, "*Frontier Dispute*"].
[110] *Ibid.*, para 44.
[111] *Ibid.*
[112] *Ibid.*, para 46.

analogy between a private agreement between Burkina Faso and Mali and a judicial decision:

> The Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle of *pacta sunt servanda*, would not be opposable to Niger. A judicial decision, which 'is simply an alternative to the direct and friendly settlement of the dispute between the Parties' (P.C.I.J., Series A, No. 22, p. 13), merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted […] the court's jurisdiction.[113]

In this way, the Court emphasized the importance of Art. 59 of the Statue, and was thus able to constrain the dispute bilaterally.

5. Case Concerning Certain Phosphate Lands in Nauru

In *Nauru*, Nauru submitted a claim against Australia regarding the administration of certain phosphate lands. Nauru claimed that Australia's role as administering power of the phosphate lands violated Art. 76 of the UN Charter and Arts. 3 and 5 of the Trusteeship Agreement. Nauru claimed that Australia failed to ensure that the Nauruans would benefit appropriately from the exploitation of the phosphates and that during the Australian administration, a portion of the island had been overworked and rendered useless.[114] Thus, Nauru sought reparations on the damage it suffered as a result of Australia's failure to remedy the environmental damage it had caused.

On its part, Australia raised the essential third party defense in the admissibility phase of the proceedings. It claimed that it was not the sole administrator in Nauru and that the United Kingdom and New Zealand, who were designated with Australia as members of the Joint Authority over Nauru under the Trusteeship Agreement created by

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[113] *Ibid.*
[114] Keith Highet and George Kahale III, "International Decisions: Certain Phosphate Lands in Nauru," *The American Journal of International Law* 87, no. 2 (April 1993): 284, doi:10.2307/2203821.

the General Assembly in 1947, should also be before the Court.[115] Otherwise, it alleged, the Court would be pronouncing on the responsibility of parties that had not consented to its jurisdiction.[116]

However, the Court rejected Australia's essential parties defense[117] and held that it had jurisdiction to hear the case. In fact, it analyzed Australia's 'special' and 'true' role in the administration of the phosphate lands. In fact, it found that Australia had "exclusive authority to administer Nauru for all practical purposes".[118] Furthermore, it stated that the Trusteeship Agreement did not preclude the Court for considering the liability of any one of the governments constituted as Administering Authority by the Trusteeship Agreement.[119] In this way, the Court held that the United Kingdom and New Zealand were not necessary parties to the dispute, making it unnecessary to determine their responsibility.[120]

Much like Court in *Nicaragua* and *Frontier Dispute*, the ICJ also held that a finding against the absent parties would not entail any legal consequences upon them, as Art. 59 of the Statute stipulates that any decision made by the Court is binding only upon the parties before it. In fact, it held that it would not decline its jurisdiction just because of the convenience of making a decision with all the potentially affected parties present.[121] Rather, the Court stated that would have to be proven that the absent State is central to the dispute, making it impossible for the Court to decide the case without it.[122]

In this way, the Court rejected the application of the Monetary Gold principle by analyzing the role of Australia, the United Kingdom and New Zealand under the trusteeship system, as well as recognizing that the third States to the dispute would not be affected by the Court's decision.

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[115] Chinkin, "East Timor Moves into the World Court", 220.
[116] Highet and Kahale III, "International Decisions: Certain Phosphate Lands in Nauru", 286.
[117] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, paras 53-5 [hereinafter "*Nauru*"].
[118] Separate opinion of Judge Shahabuddeen, *Nauru*, 278-9.
[119] Highet and Kahale III, "International Decisions: Certain Phosphate Lands in Nauru", 287.
[120] *Nauru*, para 54.
[121] Separate opinion of Judge Shahabuddeen, *Nauru*, 293.
[122] *Ibid.*

B. THE MONETARY GOLD PRINCIPLE IN INTERNATIONAL ARBITRATION

The past decade has seen the importance of international law in investment disputes grow.[123] As investment treaty awards multiply, it seems likely that most tribunals will routinely test host State actions against standards of international law.[124] In this context, the Monetary Gold principle, which developed in the realm of public international law, has been studied by tribunals in international arbitration proceedings.

The first tribunal to analyze the Monetary Gold principle was the Permanent Court of Arbitration ("PCA") in *Larsen*, where it was stated that the principle was applicable to international arbitrations.[125] In this case, the PCA was requested to determine whether the government of the Hawaiian Kingdom had violated its international obligations by allowing the imposition of American municipal laws over Larsen within its territorial jurisdiction. However, this request entailed a determination of the legality of the acts of the US.

The Monetary Gold principle was also taken into account in three investment arbitration cases against Mexico, namely, *ADM,*[126] *Corn Products*[127] and *Cargill*.[128] In all three cases, Mexico argued that the imposition of a tax was a countermeasure directed at the US for breaching its obligations owed to Mexico under NAFTA. The tribunal was required to determine whether the countermeasure was a valid defense for precluding

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[123] Dugan, *Investor-State Arbitration*, 213. The tribunal can apply the rules of international law as Art. 42 of the ICSCID Convention allows it. Art. 42 of the ICSID Convention reads: "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree".

[124] *Ibid.*, 213.

[125] *Lance Paul Larsen v. The Hawaiian Kingdom*, PCA, Award, 5 February 2001, para 11.17 [hereinafter "*Larsen*"].

[126] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 [hereinafter "*ADM*"].

[127] *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 [hereinafter "*Corn Products*"].

[128] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 [hereinafter "*Cargill*"].

Mexico's wrongfulness, but in order to do so it first had to consider whether the US had in fact violated its obligations under NAFTA.

Moreover, the principle was analyzed in *Chevron*[129] and *Niko Resources*,[130] although in both cases the tribunal's concluded that the Monetary Gold principle did not exclude its jurisdiction under the specific circumstances of the case. However, these cases will not be studied as they deal with non-State third parties.

Even though arbitral tribunals have studied the application of the Monetary Gold principle, none have done so in the context of an NPM provision with regards to measures taken to maintain the international peace and security. Nevertheless, the case law studied below serves the showcase the treatment given by arbitral tribunals to this principle.

1. Larsen v. Hawaiian Kingdom

Larsen, a resident of Hawaii, sought redress from Hawaii for its failure to protect him from the US and the State of Hawaii.[131] Larsen alleged that the Hawaiian Kingdom was in continual violation of its 1849 Treaty of Friendship, Commerce and Navigation with the US, as well as the principles of international law reflected in the Vienna Convention on the Law of Treaties ("Vienna Convention") and the principles of international comity, for allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of Hawaii. In other words, Larsen requested the tribunal to address the question of the international legal status of Hawaii. At the center of the PCA proceeding was the argument that Hawaiians never directly relinquished to the US their claim of inherent sovereignty either as a people or over their national lands.

Both parties in *Larsen* argued that the Monetary Gold principle was confined to proceedings under the ICJ and that it did not extend to arbitral proceedings.[132] However, the PCA rejected this argument. Since the case related to a non-contractual dispute where

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[129] *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, paras 4.59-71.
[130] *Niko Resources (Bangladesh) Limited v. Bangladesh and other*, ICSID Case No. ARB/10/11, Decision on Jurisdiction, 19 August 2013, paras 516–24.
[131] *Larsen*, para 5.6.
[132] *Ibid.*, para 11.16.

the tribunal had to apply international law and where the sovereign rights of a State non-party to the proceedings was called into question, the PCA found that the principle was applicable to arbitration proceedings.[133] However, it did note that if faced with a contractual dispute under private law involving the rights of a third party, the principle might not apply.[134]

Even so, the respondent State held that the tribunal should not ask itself if the interests of the US were the 'very subject matter of the dispute' but rather, whether there was a substantial risk of prejudice to the absent State.[135] Given that the case would be binding only to the parties of the dispute, it argued, the US would not find itself damaged by the result of the award.[136] Furthermore, the claimant argued that the US had no rights in Hawaii, and that as such it would not be prejudiced by the PCA's decision.[137]

However, the PCA applied the Monetary Gold principle for two reasons. First, it held that doing otherwise would violate the principle of consent in international law.[138] Second, because even though there is no binding precedent in international law, it considered that only in 'compelling circumstances' should a tribunal depart from a principle laid out in various decisions of the ICJ.[139] As such, the PCA stated that it would be precluded from addressing the merits because the absent US was an indispensable third party.[140] Accordingly, the PCA could not rule on the lawfulness of the conduct of Hawaii as that decision would require an evaluation of the lawfulness of the conduct of the US.

Even so, the PCA stated that there was an exception to the Monetary Gold principle:

[133] *Ibid.*, para 11.17.
[134] *Ibid.*
[135] *Ibid.*, para 11.18.
[136] *Ibid.*
[137] *Ibid.*, para 11.22.
[138] *Ibid.*, para 11.20.
[139] *Ibid.*, para 11.21.
[140] *Ibid.*, para 11.23.

> [T]here may well be exceptions to the Monetary Gold principle. For example, if the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point), the principle may well not apply.[141]

As such, the PCA admitted an exception to the principle based on the Security Council's ability to decide upon the legality of international acts. When a legal finding against the absent third party could be taken as 'given', the tribunal would have jurisdiction to hear the case. Although the tribunal expressly mentions the decision of the Security Council, it is clear that the list is non-exhaustive as it uses the terminology 'for example'.

This award is relevant to our study for two main reasons. First, because it applies the Monetary Gold principle to arbitration proceedings, suggesting in this way that the principle should not be confined to proceedings under the ICJ. Second, and most importantly, because it states an exception to the Monetary Gold principle which takes into account the role of the Security Council as the organ empowered by the UN Charter to determine the legality of international acts that constitute a threat to the international peace and security. In an arbitration proceeding, a tribunal could take the Security Council's resolution as indicative of the illegality of the third State's act. Moreover, as the terminology used by the PCA is merely indicative, it suggests that determinations made by other entities could be taken as given, such as that of regional organizations, or even other international dispute settlement bodies.

2. Application of the Public International Law Regime of Countermeasures to Investment Arbitrations Against Mexico

The application of the public international law regime to countermeasures received widespread attention when it was raised as a defense by Mexico in three investment arbitrations. Mexico alleged that it had taken a countermeasure in order to condemn an alleged US violation of NAFTA. As recognized by the ILC Articles, the host State is in principle entitled to enact a countermeasure if the conditions for its legality are met. The first question regarding the lawfulness of the countermeasure is the existence of

[141] *Ibid.*, 11.24.

a prior wrongful act of the third State pursuant to Art. 49(1) of the ILC Articles. By virtue of the Monetary Gold principle, the very subject matter of the decision regarding the lawfulness of the countermeasure is the prior responsibility of the third State. As such, in this context, the Monetary Gold principle was raised regarding whether the tribunals had jurisdiction to determine whether the US had in fact breached its obligations under NAFTA.

ADM, Corn Products and *Cargill* are all based on the same set of facts. The Mexican government had imposed a 20% tax on soft drinks and syrups that used any other sweetener other than cane sugar, such as high fructose corn syrup ("HFCS"), a sweetener used in soft drinks.[142]

The claimants – US manufacturers and distributors of HFCS with investments in Mexico –[143] alleged that Mexico had violated the protections granted by NAFTA by the imposition of a tax on HFCS.[144] The claimant's in *ADM* held that the tax was deliberately designed to discriminate in favor of the Mexican cane sugar industry and that it penalized severely the use of HFCS.[145] The claimant in *Corn Products* argued that the tax caused soft drink bottlers to switch from HFCS to sugar cane, thereby eviscerating the market for HFCS.[146] Similarly, the claimant in *Cargill* argued that the tax was discriminatory as, while HFCS was produced and distributed entirely by US-owned companies, cane sugar was produced by Mexican-owned companies and by the Mexican government.[147]

Mexico, however, maintained that the tax was a type of countermeasure taken in response to the US's prior violation of NAFTA.[148] Mexico submitted that the US had restricted exports of Mexican sugar to the US and blocked the operation of inter-State

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[142] *Corn Products*, paras 1-3; *Archer Daniels*, para 2.
[143] In *Corn Products*, the claimant was a major producer of HFCS in the US and owned facilities in Mexico through its subsidiary, as well as through a joint venture in a Mexican company (para 27). In *ADM*, the claimants were two of the largest corn refining companies in the world that manufactured and distributed HFCS (paras 39, 41). In *Cargill*, the claimant was a food company incorporated in the US that, through its Mexican subsidiary, sold HFCS in Mexico (para 1).
[144] The tax was passed in December 2001 by the Federal Congress of Mexico. The amendment of the *Impuesto Especial Sobre Producción y Servicios* required bottlers of soft drinks to pay a tax of 20% on the full price of each drink. The result was that the tax was payable only on soft drinks made using HFCS (*Corn Products*, para 40); *ADM*, para 80.
[145] *ADM*, para 100.
[146] *Corn Products*, para 4.
[147] *Cargill*, para 106.
[148] *Corn Products*, para 6. In 1995, Mexico became a surplus producer of sugar, but these producers saw themselves prejudiced in the imbalance of commercial flows of sugar and HFCS (*ADM*, paras 69, 71).

dispute settlement mechanism under Chapter XX of NAFTA.[149] For instance, in *Corn Products*, Mexico argued that the countermeasure extinguished the claimant's rights as Mexico had the "genuine and reasonable belief"[150] that the US had breached its obligations under NAFTA. However, in all three proceedings, Mexico's countermeasure defense was rejected.[151]

In *ADM*, the tribunal acknowledged that it could not decide whether the US breached any of its international obligations under NAFTA,[152] and that they were under a Chapter XI investment dispute, not a Chapter XX dispute.[153] Although the tribunal held that it did not have jurisdiction to decide whether the US had committed an internationally wrongful act that justified a countermeasure, it did state that there were other requirements for the legality of countermeasures over which it did have jurisdiction. It argued that in order to reach Mexico's request for a stay of the proceedings until a Chapter XX procedure between Mexico and the US could be completed, it would first have to analyze the other requirements for a valid countermeasure.[154] If they were not met, it argued, it would not have to stay the proceedings. After an extensive analysis, the tribunal considered that the tax did not amount to a valid countermeasure as it was not adopted to induce US compliance with NAFTA nor did it meet the proportionality requirement set out in the ILC Articles.[155] In this way, it held that: "even if the United States breached any of its NAFTA obligations vis-à-vis the Respondent, the Tax would still not amount to a legitimate countermeasure".[156]

In *Corn Products*, the tribunal went on to admit that it did not have jurisdiction – as both parties accepted[157] – over the dispute between the US and Mexico as the US was not a party to the proceedings.[158] Additionally, the tribunal held that since the burden of establishing the elements of the countermeasure defense rested upon Mexico – and even

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[149] *Corn Products*, paras 6, 37-9, 60; *ADM*, paras 106, 110.
[150] *Corn Products*, para 67.
[151] *ADM*, para 304; *Corn Products*, para 192; *Cargill*, para 429.
[152] *ADM*, para 131.
[153] *Ibid.*, para 128. A Chapter XX dispute refers to the dispute settlement procedures between NAFTA Parties, while Chapter XI refers to investment disputes between investors and the Parties to NAFTA.
[154] *Ibid.*, para 131.
[155] *Ibid.*, para 180.
[156] *Ibid.*, para 183.
[157] *Corn Products*, paras 67, 72.
[158] *Ibid.*, para 75.

if the doctrine of countermeasures were applicable to Chapter XI proceedings, which the tribunal did not consider so, – Mexico's defense would fail if it could not prove the existence of one of the fundamental requirements of a countermeasure.[159] In this way, the tribunal rejected the countermeasure defense because Mexico had not been able to prove that the US had committed an earlier wrongful act.[160]

In *Cargill*, however, Mexico presented a different defense to the essential parties' principle. First, that the tribunal had 'incidental jurisdiction' as Art. 1131 of NAFTA required the tribunal to decide the 'issues of the dispute' in accordance with NAFTA and the rules of international law.[161] Second, that the tribunal could determine that Mexico's tax was a 'potentially' lawful countermeasure without deciding whether the US had breached its obligations to Mexico under NAFTA.[162] However, the tribunal found that countermeasures could not preclude the wrongfulness of an act in breach of obligations owned to nationals of the offending State.[163] Even more, it denied Mexico's request for a stay in the proceedings until it could obtain a definitive determination of its NAFTA rights regarding the US.[164]

As shown, Mexico's countermeasure defense was unanimously rejected as each tribunal considered that it did not have jurisdiction to decide whether the countermeasure had been taken in response to a prior wrongful international act made by the US. Considering the presence of State-State dispute settlement clauses in various treaties, such as NAFTA, it would of have been ideal for the countermeasure to be applied only after the failure of the formalized methods of dispute settlement.[165] It would ensure, at least, an objective appreciation of the international wrong, avoiding in this way the risk of subjective appreciations taken by the respondent State. However, this does not tend to occur, as emphasized by the failure of the dispute settlement requested by Mexico against the US for its alleged breach of NAFTA.

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[159] *Ibid.*, para 189.
[160] *Ibid.*
[161] *Cargill*, para 406.
[162] *Ibid.*, para 407.
[163] *Ibid.*, para 429.
[164] *Ibid.*, para 430.
[165] Martins Paparinskis, "Investment Arbitration and the Law of Countermeasures," *British Yearbook of International Law* 79, no. 1 (November 01, 2009): 302, doi:10.1093/bybil/79.1.264.

Moreover, unfortunately the tribunals failed to thoroughly discuss the possible implications of the Monetary Gold principle.[166] Even so, these cases showcase that if faced with the need to determine the international responsibility of a third State, an arbitral tribunal would most likely apply the Monetary Gold principle. Although case law in investment arbitration is theoretically non-binding, arbitral tribunals rely on previous case law whenever they are able.[167]

IV. THE ABILITY FOR AN ARBITRAL TRIBUNAL TO DECIDE UPON A PRIOR BREACH OF INTERNATIONAL LAW BY A THIRD STATE

This section will focus on whether an arbitral tribunal has the competence to decide upon the legality of a potentially internationally wrongful act taken by a third State. In determining its jurisdiction,[168] an arbitral tribunal would have to take into account a series of factors that will be explored in this section.

While adopting the terminology employed by the *Larsen* tribunal, this section will explore two distinct scenarios. First, if the acts legality is 'given' either by a Security Council resolution or by actions mandated by other entities, namely, the General Assembly, the ICJ and regional organizations. Exceptionally, the State itself could recognize the unlawfulness of its act and that too could be taken as a 'given' by the tribunal. Second, and most importantly, if the acts legality is not 'given'. That is, when there is a complete lack of determination over the legality of the third State's act. In this case, it is the arbitral tribunal alone who is faced with the determination of the acts legality in the context of the invocation of an NPM provision by the respondent State. It will be crucial to analyze whether the NPM clause is self-judging or not as the tribunal's analysis of the prior breach to international law by a third State will vary accordingly.

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[166] Inna Uchkunova, "In Someone Else's Shoes: Are the Investor's Rights His Own or Those of the Home State?" *Kluwer Arbitration Blog* (web log), April 15, 2013, http://kluwerarbitrationblog.com/2013/04/15/in-someone-elses-shoes-are-the-investors-rights-his-own-or-those-of-the-home-state/.

[167] Dolzer and Schreuer, *Principles of International Investment Law*, 33.

[168] As we know, an arbitral tribunal has the ability to decide upon their own competence according to the well-established principle *Kompetenz-Kompetenz* reflected in Art. 41(1) of the ICSID Convention, which reads: "The Tribunal shall be the judge of its own competence".

A. THE ACTS LEGALITY IS 'GIVEN'

1. Determination of the Acts Legality Pursuant a Security Council Resolution

The Security Council plays an important role in fulfilling the UN's primary mandate of maintaining the international peace and security.[169] In this subsection, the Security Council's role as an institutional safeguard for the determination of the legality of international acts will be explored.

If the international community is faced with violations to the international legal order, it is the Security Council who must decide upon the legality of said act. In this sense, Art. 39 of the Charter states that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.[170]

The Security Council has decided upon the illegality of State acts on various occasions. For instance, it considered that the policies of racial segregation infringed the right to self-determination of the majority of the inhabitants of South Africa in 1977 in relation to its apartheid policies.[171] Similarly, it reaffirmed that any taking of territory by force in the context of the conflict regarding the former Yugoslavia was unlawful and unacceptable.[172] Moreover, it characterized the wars in Bosnia, Kosovo and the Somali civil war as threats to international peace and security.[173]

The Security Council must determine the acts illegality prior to the enactment of measures to restore the international peace and security as it cannot impose binding measures on all Member States without a prior determination of a threat or breach to the

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[169] Art. 1 of the UN Charter enshrines its primary purpose: the maintenance of international peace and security through peaceful means; Mary Ellen O'Connell, "Peace and War," in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters, 1st ed. (Oxford, United Kingdom: Oxford University Press, 2012), 291.

[170] Art. 39 of the UN Charter reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

[171] Vera Gowland-Debbas, "Responsibility and the United Nations Charter," ed. James Crawford, Alain Pellet, and Simon Olleson, in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 128.

[172] *Ibid.*

[173] Ruth Wedgwood, "Unilateral Action in the UN system," *European Journal of International Law* 11, no. 2 (2000): 356.

peace.[174] Once the act's legality has been determined, the Charter gives the Security Council the authority to decide upon the measures necessary to restore the international peace and security. The measures which follow the qualification under Art. 39 function as sanctions, as they deny all legal effects to the illegal acts of the entity against which they are applied.[175]

For instance, after declaring that the Iraqi occupation of Kuwait was contrary to Iraq's obligations under the Charter,[176] the Security Council imposed a near-total financial and trade embargo on Iraq. When the coalition war had ousted Iraq from Kuwait the following year, the Council did not lift the sanctions, keeping them in place as leverage to press for Iraqi disarmament and other goals. It also imposed economic sanctions which banned all trade and financial resources,[177] which was later extended to include the linkage to remove the weapons of mass destruction.[178] In this sense, the Security Council is allowed to lawfully resort to sanctions in order to maintain or restore the international peace and security.

Once the act's legality has been determined and measures decided upon, the Charter further states that all Member States agree to accept and carry out the decisions of the Security Council.[179] Pursuant to Art. 49 of the Charter, all Member States must act in furtherance of the Security Council resolutions.[180] The Member States are thus released from pre-existing treaty obligations by virtue of Art. 103 of the Charter, and as such are free to apply sanctions within the framework of the Security Council decision.[181] Once the Security Council occupies itself with the adoption of mandatory sanctions,

[174] Derek Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures," *European Journal of International Law*, 1994, 96.
[175] Gowlland-Debbas, "Responsibility and the United Nations Charter", 130.
[176] *Ibid.*, 128.
[177] Security Council resolution 661 (1990).
[178] Security Council resolution 687 (1991).
[179] Art. 25 of the UN Charter reads: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".
[180] Art. 49 of the UN Charter reads: "The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council".
[181] Gowlland-Debbas, "Responsibility and the United Nations Charter", 130.

Member States become agents for the execution of these sanctions, and they must implement them in good faith without undermining their effective application.[182]

As such, a UN Member State – as well as an arbitral tribunal, according to the PCA in *Larsen* – is entitled to assume that the decision taken by the Security Council is valid and will in fact uphold the international peace and security.[183] Following this, Member States can justify their actions based on a Security Council resolution. For instance, the United Kingdom justified the legality of their invasion of Iraq in 2003 on a supposed authorization by the Security Council.[184] In accordance to the terminology adopted by the PCA in *Larsen*, a Security Council resolution can make a legal finding against an absent third party 'given'. Once the acts legality is established, the tribunal can go on to analyze whether the measures taken by the respondent State in order to maintain the international peace and security fall within the scope of the NPM provision.

2. The Possibility for Other Entities to Determine the Legality of Potential Threats to the International Peace and Security

Responsibility for matters of peace and security do not reside exclusively in the Security Council. According to the ICJ, Art. 24 of the Charter, which deals with the powers and functions of the Security Council, refers to a primary but not exclusive competence.[185] Accordingly, the Security Council's responsibility for the maintenance of the international peace and security is not total.[186]

In this way, there are other entities who have a role in the maintenance of the international peace and security, and whose determinations may also be taken as 'givens' by an arbitral tribunal.

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[182] Linos-Alexandre Sicilianos, "Countermeasures in Response to Grave Violations of Obligations Owed to the International Community," ed. James Crawford, Alain Pellet, and Simon Olleson, in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 1142.
[183] Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", 90.
[184] Michael Wood, "International Law and the Use of Force: What Happens in Practice?" *Indian Journal of International Law* 53 (2013): 353.
[185] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory opinion, ICJ Reports 2004*, para 26 [hereinafter "*Palestine*"].
[186] General Assembly resolution 677 (2009), para 63.

a. The United Nations General Assembly

The General Assembly is the UN's main deliberative and policymaking organ, and as such it has a distinct role with regards to the maintenance of the international peace and security. For instance, it may emit non-binding recommendations regarding the international peace and security.[187] It cannot, however, authorize measures or make lawful what otherwise is not.[188] Although Art. 12 of the Charter prohibits the General Assembly from recommending measures while the Security Council is deciding on the same matter,[189] the ICJ has held that the prohibition of simultaneous action by the General Assembly and the Security Council has been superseded by practice.[190]

In this way, the General Assembly has passed various resolutions regarding the maintenance of international peace and security. For instance, it delivered eight resolutions regarding the annexation of East Timor. In them, it called Indonesia to respect the right of the East Timorese to self-determination and strongly condemned Indonesia's military intervention.[191] Similarly, it adopted resolution 68/262 in the context of the annexation of Crimea, where it reaffirmed its commitment to the territorial integrity of Ukraine within its internationally recognized borders.[192]

[187] Art. 10 of the UN Charter reads: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters"; Art. 11(2) of the UN Charter reads: "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion"; Art. 14 of the UN Charter reads: "The General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations".

[188] Wood, "International Law and the Use of Force: What Happens in Practice?", 352.

[189] Art 12(1) of the UN Charter reads: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests".

[190] *Palestine,* paras 27-8.

[191] General Assembly resolution 3485(XXX) (1975); General Assembly resolution 31/53 (1976); General Assembly resolution 32/34 (1977); General Assembly resolution 33/39 (1978); General Assembly resolution 34/40 (1979); General Assembly resolution 35/27 (1980); 36/50 (1981); General Assembly resolution 37/30 (1982).

[192] General Assembly resolution 68/262 (2014).

The General Assembly has often gone even further, and even criticized the Security Council. For instance, with regards to the Syrian conflict, the General Assembly not only 'strongly condemned' the human rights violations imposed by the Syrian authorities, but it also went on to publicly criticize the Security Council's failure to act.[193]

Even more, criticism surrounding the Security Council's role in the UN motivated the Uniting for Peace resolution. This resolution was passed in 1950 in an effort to solve the issues related to a blocked Security Council, where the veto power of a permanent member prevented the organization from taking action. Accordingly, it stated:

> [I]f the Security Council […] fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of force when necessary, to maintain or restore international peace and security.[194]

For instance, when the Security Council was blocked by France and Britain's use of their veto power, the Uniting for Peace resolution allowed the General Assembly to deploy the first set of UN peacekeepers in order to supervise the cessation of hostilities in the Suez conflict of 1956.[195] In this way, the Uniting for Peace resolution gave the General Assembly a more active role regarding issues of international security.[196]

Furthermore, this 'active role' was recognized in the drafting of the 1967 Organization for Economic Co-Operation and Development Draft Convention on the Protection of Foreign Property, which included a NPM provision that expressly referred to decisions taken by both the Security Council and the General Assembly:

> A party may take measures in derogation of this Convention only if:

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[193] General Assembly resolution 66/253 (2012).
[194] General Assembly resolution 377 (1950), para 1.
[195] General Assembly resolution 1000 (1956).
[196] Cóman Kenny, "Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security," *Journal on the Use of Force and International Law* 3, no. 1 (June 14, 2016): 4, doi:10.1080/20531702.2016.1183970.

> […]
>
> (ii) taken pursuant to decisions of the Security Council of the United Nations or to recommendations of the Security Council or the General Assembly […] relating to the maintenance or restoration of international peace and security.[197]

At first light, it appears as though the the General Assembly, much like the Security Council, has the ability to determine the legality of international State acts. In this way, an arbitral tribunal could take General Assembly recommendations as 'givens' over the legality of a State's conduct. Even so, the Charter awards the General Assembly a subsidiary responsibility with respect to the maintenance of the international peace and security.[198]

b. The International Court of Justice

The ICJ is the principal judicial organ of the UN and was established in 1945 by the Charter in order to settle legal disputes and emit advisory opinions in accordance with international law.[199] It too has its own role regarding the maintenance of international peace and security as it may examine a State's responsibility for the commission of an unlawful act.[200]

As such, the Court may determine the existence of a 'crime' and then settle the dispute arising from the commission of said 'crime'.[201] Accordingly, Art. 36(2)(c) of the Statute states the Court has jurisdiction to determine "the existence of any fact which, if established, would constitute a breach of an international obligation". Following this, Art. 36(2)(d) of the Statute states that the jurisdiction of the Court encompasses "the nature or extent of the reparation to be made for the breach of an international obligation". In this

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[197] Art. 6 of the Organization for Economic Co-Operation and Development Draft Convention on the Protection of Foreign Property, 12 October 1967.
[198] Kenny, "Responsibility to recommend: the role of the UN General Assembly in the maintenance of international peace and security", 13. Also see UN Charter Arts. 10, 11, 12, 14, 24.
[199] The principle function of the Court is to provide international security through the rule of law in the resolution of controversies. This has been held in various General Assembly resolutions such as: 2627 (XXV) (1970), 2734 (XXV) (1970), 3283 (XXIX) (1989) and 44/23 (1989).
[200] Gilles Cottereau, "Resort to International Courts in Matters of Responsibility", 1117.
[201] *Ibid.*, 1120.

way, the Court has a statutory basis for adopting decisions regarding questions of State responsibility.

Paparinskis, a Professor of public international law at University College London, held that if a Security Council decision can be taken as 'given', arguably, the same logic could apply to an international judgment given against a State.[202] In fact, this occurred in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*.[203] In this case, Mexico requested the ICJ to interpret a paragraph from its 2004 *Avena* judgment.[204] In *Avena*, the Court held that the US had breached its obligations under the Vienna Convention on Consular Relations for its treatment of various Mexican nationals that were sentenced to death in the US. The Court in *Avena* stated that the US was required to review and reconsider the sentences of the remaining Mexican nationals. Although the Court rejected Mexico's subsequent request for interpretation of the *Avena* judgment,[205] the ICJ's interpretation of its earlier judgment confirmed a breach of the obligations owed to Mexico by the US. In this sense, the breach of the Vienna Convention on Consular Relations by the US was taken as a 'given'.[206]

In this way, much like a decision by the Security Council, a judgment emitted by the ICJ could be considered as 'given' of a legal finding against a State.

c. Regional Organizations

Some States have been reluctant to award a relevant role regarding peace and security matters to the UN, as they understand that its role is limited to the international sphere and that local matters are often better solved by regional arrangements.[207] In this

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[202] Paparinskis, "Investment Arbitration and the Law of Countermeasures", 338.
[203] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America), Judgment, ICJ Reports 2009* [hereinafter "*Request for Interpretation of Avena*"].
[204] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, ICJ Reports 2004* [hereinafter "*Avena*"].
[205] The Court found that the matters claimed by Mexico to be at issue were not matters decided in the 2004 *Avena* case.
[206] *Request for Interpretation of Avena*, paras 52-3.
[207] Andrés Serbin, "The Organization of American States, the United Nations Organization, Civil Society, and Conflict Prevention," *Regional Coordination for Economic and Social Research*, March 2009, 15. This particularly true for Latin American States and, for this reason, some international lawyers have justified

way, it has been argued that regional organizations may decide upon the lawfulness of international State acts if they act in accordance with the purposes and principles of the UN Charter.[208] Accordingly, Art. 52(1) of the Charter of the UN reads:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Art. 52(1) allows us to draw an analogy between the ability of regional organizations to deal with matters relating to the international peace and security and the ability of the Security Council to do the same. In this sense, an arbitral tribunal could, if faced with the need to determine the legality of a third State act, take the resolutions and measures taken by regional organizations as 'givens' of the act's legality.

NATO, for instance, has decided upon the legality of international State acts as well as the measures necessary to condemn internationally wrongful acts. NATO is an alliance of North American and European States created in 1949 in order to bind States seeking to counter the risk of the spreading of the Soviet Union. However, when the Soviet threat dissipated after the end of the Cold War, NATO shifted its focus towards operations concerning with crisis-management.[209]

When undertaking its missions, NATO acts in conformity with the purposes and principles of the UN Charter, as the North Atlantic Treaty establishes that the Charter is the framework within which the Member States operate.[210] However, NATO's operations may also be carried out under Art. 5 of the North Atlantic Treaty, which reads:

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the US response to the Cuban missile crisis in 1962 as acting upon a 'recommendation' by the Organization of American States (Wedgwood, "Unilateral Action in the UN system", 355).

[208] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 356.

[209] Ivo H. Daalder, "NATO, the UN, and the Use of Force," Brookings, March 1, 1991, 3, https://www.brookings.edu/research/nato-the-un-and-the-use-of-force/.

[210] Art. 1 of the North Atlantic Treaty reads: "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations".

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Under Art. 5, NATO is able to take the measures 'it deems necessary' to restore or maintain the security of the North Atlantic area, including the use of armed force. However, these measures must be reported to the Security Council, and ultimately terminated once the Security Council takes its own measures to resolve the conflict. This final provision is aligned with Art. 54 of the Charter,[211] which states that the Security Council must be informed at all times of the activities that regional agencies implement in furtherance of the maintenance of international peace and security. However, NATO has been reluctant to be categorized under Art. 54 of the Charter.[212] In fact, nowadays Art. 54 of the Charter is a mere procedural requirement.[213]

NATO has acted in furtherance of the international peace and security under a UN mandate on various occasions.[214] However, it has also taken measures to uphold the

[211] Art. 54 of the UN Charter reads: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security".
[212] YF Reykers, "The Hazards of the Peculiar UN-NATO Relationship," Global Peace Operations Review, October 15, 2015, 2, http://peaceoperationsreview.org/thematic-essays/the-hazards-of-the-peculiar-un-nato-relationship/.
[213] *Ibid.*
[214] For instance, it was involved in operations to counter piracy in the Gulf of Aden and off the Horn of Africa in response to a request to intervene from UN Secretary-General Ban Ki Moon. In October 2008, NATO deployed ships to deter piracy and escort merchant ships carrying World Food Programme cargo. Moreover, NATO contributed to the Security Council Committee established under Security Council resolution 1540 (2004), which addressed the threat to international peace and security posed by the proliferation of nuclear, chemical and biological weapons and their means of delivery. Similarly, NATO

international peace and security lacking a Security Council resolution. In doing so, it has decided upon the legality of acts taken by sovereign States.

In particular, the US has argued that NATO has the right to use force whenever the interests of its members so require.[215] The Clinton administration argued that if all Member States deemed that the threat or use of force is necessary to right a wrong, then that is enough justification for the use of force.[216] This perspective was implemented during the crisis in Kosovo, where NATO had to consider whether to threaten air strikes against Serbia.[217] The US argued that UN authorization was welcome but not entierly necessary.[218] The North Atlantic Council voted to activate NATO forces and commence air strikes as it considered that the action had been taken in the spirit of the UN Charter.[219] The Security Council did not authorize – but neither did it condemn – the US air strikes against Yugoslavia, and even rejected Russia's draft resolution to condemn the NATO bombing.[220]

As such, it could be argued that a State may adopt measures mandated by regional organizations and still operate within the scope of the NPM provision. Arguably, if regional action is taken pursuant to Chapter VIII of the UN Charter, which regulates regional arrangements, and is considered necessary to preserve or restore the international peace and security, the NPM provision could be presumably applicable. Therefore, an arbitral tribunal may regard actions mandated by a regional organization as 'givens' of the legality of the third State's act.

3. Express Acknowledgment of the Acts Illegality by the State Itself

Exceptionally, but less likely, an express acknowledgement of the breach by the State itself could also be taken as 'given'.[221] In *Request for Interpretation of Avena,* the US had expressly conceded that an execution without the required review would not be in

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was involved in Bosnia and Herzegovina when it enforced the UN arms embargo on weapons in the Adriatic Sea and enforced a no-fly-zone declared by the Security Council.

[215] Daalder, "NATO, the UN, and the Use of Force", 2.

[216] *Ibid.*, 14.

[217] *Ibid.*

[218] *Ibid.*, 15.

[219] *Ibid.*, 16.

[220] Belarus, India and Russian Federation: Draft Resolution, UN Doc. S/1999/328 (1999) printed in the UN Press Release SC/6659 (26 March 1999).

[221] Paparinskis, "Investment Arbitration and the Law of Countermeasures", 338.

compliance with the *Avena* judgment.[222] In this sense, if Mexico chose to apply a countermeasure against the US by suspending NAFTA obligations in order to preclude further executions before review pursuant to *Avena*, the wrongfulness of the conduct of the US could be taken as given.[223]

Similarly, the government of the Federal Republic of Germany[224] was faced with an allegation that it had participated in an armed attack by allowing US military aircrafts to use airfields in its territory in connection with the US intervention in Lebanon. Allegedly, the Federal Republic of Germany had breached the obligation regarding the non-use of force by permitting the use of its territory for a State to carry out an armed attack against a third State.[225] Although the Federal Republic of Germany denied that the measures taken by the US constituted an intervention in Lebanon, it seemed to accept that placing its own territory at the disposal of another State was in itself an internationally wrongful act.[226] The Monetary Gold principle applies to cases such as this, where a State aids another in the commission of an internationally wrongful act as "the wrongfulness of the aid or assistance given by the former is dependent […] on the wrongfulness of the conduct of the latter".[227]

Having a State recognize that its acts are internationally wrongful is exceptional and unlikely. For instance, neither Albania in *Monetary Gold* nor Indonesia in *East Timor* were interested in joining the proceedings pursuant Art. 62(1) of the Statute as it would entail a finding on their international responsibility. However, if it does occur, the arbitral tribunal could take its statement as a 'given' of the acts illegality.

[222] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Request for the Indication of Provisional Measures, ICJ Reports 2008,* para 76.
[223] Paparinskis, "Investment Arbitration and the Law of Countermeasures", 339.
[224] Otherwise known as West Germany from 1949 to 1990.
[225] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 150. Today, these actions would contravene Art. 16 of the ILC Articles.
[226] *Ibid.*
[227] *Ibid.*, 151.

B. THE ACTS LEGALITY IS NOT 'GIVEN'

If the legality of the third State act is not 'given', then the arbitral tribunal is faced with the following question when deciding its competence: is it entitled to decide upon the legality of the absent third State's act?

In order to answer this question, the tribunal would have to analyze whether the BITs NPM provision is self-judging or not. If the provision is self-judging, then the State's unilateral considerations regarding the legality of the other State's will most likely prevail. However, if the provision is not self-judging, then the arbitral tribunal would have to decide whether it could by itself decide upon the legality of the third State's act.

1. Allowing Unilateral Considerations to Prevail: Self-Judging Non-Precluded Measures Clauses

As studied in Part II of this paper, NPM provisions allow a State to retain the power to escape from its international obligations under certain exceptional circumstances.[228] In other words, a self-judging clause affords a State discretion, within the scope of application of the provision, to decide whether it gives primacy to the content of an international obligation or pursues its own interests.[229]

States are thus able to act unilaterally by choosing to either cooperate or make use of the exit-valves of international cooperation.[230] For instance, in *Nicaragua (Merits)*, the US argued that its support of the *contras* was necessary to protect its essential security interests and thus not a violation of the applicable treaty.[231] It further argued that the essential security interest's exception was self-judging, which meant that a party's invocation of that exception was conclusive upon any tribunal and rendered non-justiciable any claim with respect to which the exception has been invoked.[232] Accordingly, the US contended that the Court was without jurisdiction to hear

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[228] Schill and Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 67.
[229] *Ibid.*, 65.
[230] *Ibid.*, 68.
[231] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. ICJ Reports 1986*, para 281 [hereinafter "*Nicaragua (Merits)*"].
[232] *Ibid.*, para 34.

Nicaragua's claim.[233] Similarly, after the financial collapse of late 2001 and early 2002, Argentina contended in various ICSID cases that Art. XI of the 1991 US-Argentina BIT was self-judging.[234]

When self-judging, the State invoking the NPM clause is able to decide unilaterally which measures *it considers* appropriate to take within the scope of the clause. In this sense, self-judging clauses contain a specific terminology, such as the language 'which it considers necessary' or 'if the State considers' in order to afford the State discretion. For instance, Art. XIV(1) of the US-Mozambique BIT,[235] is self-judging as it states that the Party may take measures 'it' considers necessary. Moreover, in its Letter of Submittal, the US stated: "[m]easures to protect a Party's essential security interests are self-judging in nature".[236] According to Gibson, US officials have even held that:

> The phrase 'it considers' clarifies the intent of the Parties: the determination of what is necessary for the fulfillment of its obligations with respect to the maintenance and restoration of international peace and security […] is within the discretion of that party.[237]

Thus, self-judging clauses are incredibly broad exceptions to investment treaty protections.[238] The presence of a self-judging clause would make explicit and compulsory the grant of a margin of appreciation that would otherwise simply be a question of the

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[233] In this case, the Court concluded that the treaty's language was not self-judging and compared it to that of GATT, which was considered self-judging (*Ibid.*, para 222).

[234] *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras 349-52 [hereinafter "*CMS*"]; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras 208-9 [hereinafter "*LG&E*"]; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras 366-68 [hereinafter "*Sempra*"]; *Enron*, paras 324-26; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para 183 [hereinafter "*Continental Casualty*"].

[235] Art. XIV(1) of the Treaty between the Government of the United States of America and the Government of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment, signed on 1 December 1998 [hereinafter "US-Mozambique BIT"] reads: "This Treaty shall not preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests".

[236] Letter of Submittal of the US-Mozambique BIT, 1 May 2000. Also see Letter of Submittal of the US-Bahrain BIT, 24 April 2000.

[237] Gibson, "Beyond Self-Judgment: Exceptions Clauses in US Bits", 31.

[238] *Ibid.*, 27.

tribunal's discretion.[239] In this sense, the respondent State is able to take the measures it considers necessary to maintain or restore the international peace and security. As such, in the arbitration proceeding, the respondent State would be the judge of the legality of third State's act.

However, self-judging clauses cannot be read as a prohibition for the arbitral tribunal to review the acts taken by the State. In fact, the limitation on the self-judging nature of the clause is the good faith review.[240] In *Djibouti*, the ICJ held that although self-judging clauses grant a State a considerable amount of discretion, their actions are still subject to the good faith review.[241] Similarly, although the tribunal in *LG&E* found that the NPM provision in the US-Argentina BIT was not self-judging, it stated:

> Were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to the good faith review anyway.[242]

As such, the limits to the State's discretion are found in the general principle of performance of treaty obligations in good faith, as required by Art. 26 of the Vienna Convention.[243] Although the good faith principle has been long-standing in international law, a standard of good faith review has yet to be fully developed.[244] According to Burke-White and Von Staden, the standard could encompass two basic elements: and honest and fair action and a rational rational basis for the assertion of the NPM provision.[245] Accordingly, the tribunal must first establish if the State acted honestly and to the best of its ability in deciding to invoke the NPM provision.[246] For instance, if the State acted upon ulterior motives, then it would not be acting in good faith. Second, the tribunal must

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[239] Schill and Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 124.
[240] Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation*, 180. Similarly, in its Letter of Submittal of the US-Mozambique BIT, the US stated: "[m]easures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith" (Letter of Submittal of the US-Mozambique BIT, 1 May 2000).
[241] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, ICJ Reports 2008,* para 145 [hereinafter "*Djibouti*"].
[242] *LG&E*, paras 212-4.
[243] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 370.
[244] *Ibid.*, 378.
[245] *Ibid.*, 379.
[246] *Ibid.*

determine if a reasonable person in the State's position could have concluded that there was a threat to the international peace and security sufficient to justify the measures taken by the State.[247]

Thus, the respondent State would have to act honestly in order to condemn what could *reasonably* be considered an internationally wrongful act. However, this review does not seem difficult for the State to overcome. In fact, if self-judging, the tribunal would be showing a significant amount of deference to the State in determining the legality of the legal act of the absent third State.[248]

Although we contend that a self-judging clause defers the determination of the legality of the third State act to the State invoking the NPM provision, self-judging NPM provisions have received wide criticism for this very reason. According to Schill and Briese, self-judging NPM provisions threaten international cooperation by allowing unilateralism to prevail.[249] In this sense, a State may invoke this clause "*ex post* in a dispute […] to make use of its discretion in a manner that is beyond what the Contracting States had originally anticipated".[250] Moreover, self-judging NPM provisions do not define what constitutes a threat to the international peace and security, as they only define this permissible objective in a circular fashion by appealing to the self-judging nature of the provision.[251]

However, if the BIT is expressly drafted[252] in a manner that clearly showcases the Contracting Parties' intent for unilateral considerations to prevail:

> [A]s long as states agree to include self-judging clauses in international treaties […] such clauses cannot be viewed as invalid as the fundamental basis for the binding nature of international law is consent.[253]

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[247] *Ibid.*, 380.
[248] Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis", 348.
[249] Schill and Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 68.
[250] *Ibid.*, 64.
[251] Gibson, "Beyond Self-Judgment: Exceptions Clauses in US Bits", 31.
[252] The existence of a self-judging clause cannot be presumed. Rather, the provision must be expressly drafted in such a way that allows unilateral considerations to prevail. In this sense, see: *Sempra,* para 379; *CMS*, para 370.
[253] Schill and Briese, ""If the State Considers": Self-Judging Clauses in International Dispute Settlement", 138

Even more, self-judging clauses could even further international cooperation by providing States with exit-valves when important interests are at stake,[254] such as the maintenance or restoration of international peace and security.

As shown, a self-judging clause allows the subjective perception of the State invoking the NPM provision regarding the legality of the third State act to prevail. Even so, a self-judging clause will not oust the jurisdiction of the tribunal, only limit the standard of review that the dispute settlement body must apply, namely, the good faith review.

2. Non-Self-Judging Non-Precluded Measures Clauses

If the NPM provision is not self-judging, in order for the arbitral tribunal to hear the merits of the dispute it must decide *itself* upon the lawfulness of the third State's act. However, this may strongly contravene the Monetary Gold principle as it could involve deciding upon the rights of an absent third party. In this section, we will explore whether an arbitral tribunal may decide upon the acts legality even if the NPM provision is neither 'given' nor self-judging.

In a non-self-judging clause, the degree of deference according to the State is not defined by the Contracting Parties of the treaty.[255] For instance, in Court in *Nicaragua (Merits)* emphasized upon the terminology of the NPM provision. It held that Art. 2(b) of the 1956 Treaty of Friendship, Commerce and Navigation[256] between the US and Nicaragua was not self-judging as the treaty spoke "simply of 'necessary' measures, not of those considered by a party to be such".[257]

In a similar sense, various investment arbitration tribunals considered Art. XI of the 1991 US-Argentina BIT to be non-self-judging[258] as it read:

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[254] *Ibid.*
[255] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 370.
[256] Art. 2(b) reads: "the present Treaty shall not preclude the application of measures […] necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".
[257] *Nicaragua (Merits)*, para 222.
[258] *CMS*, para 373; *LG&E* paras 212-3; *Sempra*, para 388; *Enron*, para 339; *Continental Casualty*, paras 187-8.

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.

For instance, in *Continental Casualty*, the tribunal interpreted Art. XI as non-self-judging as it was not convinced that the Contracting Parties' aimed for the provision to be self-judging.[259] Similarly, the tribunal in *CMS* held that if the Contracting Parties' intended to draft a self-judging NPM provision, they would of done so expressly.[260]

When faced with a non-self-judging provision, arbitrators have a larger scope of review and thus do not always accord a wide margin of appreciation to the State to unilaterally determine the legitimacy of extraordinary measures.[261] For instance, in the *Gabčikovo-Nagymaros Project* case, the ICJ held that the State concerned was not the sole judge of whether the conditions for the State's necessity defense had been met.[262] Similarly, in the *Oil Platforms* case, the Court held that the actions taken in "self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'".[263]

Even if the NPM provision is non-self-judging, a State can execute measures to condemn the threat to international peace and security committed by another State. However, as held by tribunal in *CMS*, if the legitimacy of the measures are challenged before an international tribunal, it is not for the State in question to determine whether its measures exclude wrongfulness, but for the tribunal to do so.[264]

Hence, if the NPM provision is not self-judging, how could the arbitral tribunal rule on the legality of the third state act? First, this paper will analyze whether a third State would be truly affected by the tribunals decision if it decides to hear the merits of the dispute and declare unlawful the third State's act. Second, this paper shall evaluate

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[259] *Continental Casualty*, paras 187-8.
[260] *CMS*, para 370.
[261] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 371.
[262] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, para 51.
[263] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003*, para 73.
[264] *CMS*, para 373.

the possibility for a respondent State to rely on the predominance of unilateral State action to essentially 'transform' a non-self-judging NPM provision into a self-judging one. Finally, the existence of rights and obligations *erga omnes* will be taken into account in order to evaluate whether an arbitral tribunal could consider the third State's act to be blatantly wrongful.

a. The Bilateral Nature of Dispute Settlement Proceedings

When deciding on how to proceed, an adjudicator would have to ask itself whether the absence of a State in the proceedings would make it impossible to judicially determine the issues presented before it.[265] If this is not the case, then the tribunal could argue that the award would not affect the legal interests of the third State as it would bind only the parties to the proceeding.

As we know, both ICJ decisions and arbitral awards bind solely the parties to the proceedings. Accordingly, Art. 59 of the Statue states that: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". Similarly, Art. 53(1) of the ICSID Convention states: "[t]he award shall be binding on the parties […]".[266]

The protective force of Art. 59 of the Statue, for instance, was reaffirmed in *Nauru, Nicaragua* and *Frontier Dispute.* In *Nauru*, Australia was unable to argue that a decision against it would have the practical effect of depriving the United Kingdom and New Zealand of their rights under international law.[267] In *Nicaragua*, the Court emphasized that the fact that its decision could extend to another State did not make that State's interests the very subject matter of the dispute.[268] In *Frontier Dispute*, the Court was also categorical in this sense and held that Art. 59 of the Statute safeguarded third party's rights.[269]

In *Monetary Gold*, *East Timor* and *Larsen*, each third State would of have been substantially affected by the tribunal's decision. In *Monetary Gold*, the Court's decision would constitute a direct determination Albania's international responsibility, with

[265] Separate opinion of Judge Shahabuddeen, *Nauru*, 293.
[266] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 11.
[267] Separate opinion of Judge Shahabuddeen, *Nauru*, 294; *Nauru*, para 54.
[268] *Nicaragua*, para 88.
[269] *Frontier Dispute*, para 46.

concrete effects regarding the ownership of the gold. In *East Timor*, Indonesia would see its capacity as administering power of East Timor questioned. In *Larsen*, the US would see its rights over the territory of Hawaii affected. On the other hand, if an arbitral tribunal in the context of an investment arbitration decides that the third State's act was illegal, then at most, it could accept the respondent State's NPM defense and reject the investors claim. However, the absent third State would not see its rights or legal interests hindered by the tribunal's decision.

Even if arbitral award could impact interests that exceed the parties to the dispute, this would not be a determining factor for the tribunal to state that it does not have jurisdiction. In fact, the rights of a third party are not considered an independent factor by any domestic law or as part of international public policy.[270] For instance, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention, does not provide a basis for domestic courts to refuse the enforcement of an award just because they might adversely affect the legal interest of a third party.[271] In this sense, even if non-parties to the dispute may be affected, the decision would not affect them, and neither would the decision be subject to annulment.

Even more, there are important differences between the ICJ and international arbitral tribunals that forces the Court to be more cautious when interpreting the Monetary Gold principle. This caution, however, is not necessarily applicable to investment arbitration tribunals. On one hand, the Court is the judicial organ of the UN and thus its decisions have a strong rhetoric importance for the international community as a whole. In this sense,

> This special duty puts an extra layer of prudence which requires the ICJ not to exercise its jurisdiction in the limited situations that fall under the scope of the Monetary Gold principle.[272]

According to Judge Ajibola, a former ICJ judge, the Court is bound to protect not just the interests and rights of the States before it but even those who have not consented to the Court's jurisdiction. He also stated that, as the judicial organ of the UN, the Court

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[270] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 12.
[271] The grounds for non-enforcements are set out in Art. V of the New York Convention.
[272] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 13.

is not just "at the behest of the parties (as an arbitral tribunal is) and it is, therefore, not exclusively concerned with the legal interest of the parties to the particular case".[273]

For instance, in his dissenting opinion in the *Nauru* case Judge Ago stated that the rights and obligations of New Zealand and the UK would be affected even if the Court did not emit a statement on their legal situation.[274] Furthermore, Judge Schwebel, in a separate dissenting opinion in *Nauru*, stated that protecting the States by subsuming them under Art. 59 of the Statute was "notional rather than real".[275] Hence, there is a concern that legal disputes between States are rarely bilateral, as the resolution of such disputes will often directly affect the legal interests of other States.[276] Therefore, it is understandable if the Court is more reluctant to decide upon the interests and rights of an absent third party.

This is not the case, however, for investment arbitration tribunals as they do not enjoy the same status as the ICJ.[277] Arbitrators are not guardians of the public interest and as such are required to merely adjudicate the dispute between the parties. In fact, precedents in investment arbitration are theoretically non-binding,[278] and if applied by tribunals, they are mostly used to interpret vague terms in a treaty.[279]

According to Douglas, an expert in arbitration and public international law:

> An ICSID award does not create a truly 'international' liability at the inter-State level of responsibility such as would be the case, for example, with a judgment of the International Court of Justice.[280]

Otherwise, a respondent State could, for instance, resist the enforcement of an ICSID award by appealing to sovereign immunity from jurisdiction.[281] In this sense, the

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[273] Bola Ajibola, "The International Court of Justice and Absent Third States," *African Yearbook of International Law* 85 (1996): 89.
[274] Dissenting opinion of Judge Ago, *Nauru*, 328.
[275] Dissenting opinion of Judge Schwebel, *Nauru*, 342.
[276] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, Memorial of Nicaragua, para 248.
[277] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 14.
[278] *Suez and others v Argentina*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 182; *Corn Products*, para 77; Zamir, "The applicability of the Monetary Gold principle in international arbitration", 11; Gibson, "Beyond Self-Judgment: Exceptions Clauses in US Bits", 3.
[279] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 14.
[280] Douglas, "Other Specific Regimes of Responsibility: Investment Treaty Arbitration and ICSID", 820.
[281] *Ibid.*, 820-1.

liability created by the system of international responsibility in investment arbitration has a transnational commercial nature, as the interests of the parties are, in fact, commercial.[282]

In sum, the dispute settlement procedures offered both by the Court and arbitral tribunals are essentially bilateral. In this sense, an arbitral award does not bind non-parties to the proceedings, and thus any decision given by the tribunal in which a State is not a party is not in principle opposable to that State.

b. The Prevalence of Unilateral State Action

If the act's legality is not 'given' and the NPM provision contained in the BIT is not self-judging, then the State could attempt to justify the lawfulness of the measures it took by invoking the predominance of unilateral State action in condemning internationally wrongful acts. In essence, the respondent State would attempt to transform a non-self-judging clause into a self-judging one in order for its unilateral considerations to prevail and render non-justiciable any claim with respect to which the exception invoked.

Unilateral state action is a repeated practice in international relations in particular with respect to measures involving the use of force. Although a cardinal principle of the UN Charter is the non-use of force,[283] the rules against war are constantly disrespected by States.[284] In fact, some academics have even suggested that the rules of international law regarding the use of force are dead.[285]

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[282] *Ibid.*, 821.

[283] Not only does Art. 2(4) of the UN Charter prohibit the use of force, subsections 5 and 6 go on to urge States to refrain from giving assistance to these types of countries in order to maintain the international peace and security.

[284] O'Connell, "Peace and War", 291. There have been various occasions where the unilateral use of force was implemented in express violation of the UN Charter, including: the North Korean invasion of South Korea in 1950, the US actions in Guatemala in 1954, the Israeli, French and British invasion of Egypt in 1956, the Soviet invasion of Hungary in 1956, the US invasion of the Dominican Republic in 1965, the North Vietnamese actions against South Vietnam from 1960 to 1975, the Soviet invasion of Afghanistan in 1979, the Argentine invasion of the Falkland Islands in 1982, the US invasion of Panama in 1989 and the Iraqi attack on Kuwait in 1990 (Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly* 26, no. 2 (Spring 2003): 100).

[285] Wood, "International Law and the Use of Force: What Happens in Practice?", 352; Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," *American Journal of International Law* 100, no. 1 (January 2006): 88-9, doi:https://doi.org/10.2307/3518832; Michael J. Glennon, "Why the Security Council Failed," *Foreign Affairs*, May & June 2003.

Hence, States often unilaterally decide whether to take measures to condemn acts that they consider internationally wrongful. In fact, there has been a need to recognize countermeasures, in particular third-party countermeasures, faced with the perceived ineffectiveness of the Security Council.[286]

At times, the need for consensus erodes the UN's ability to take action in critical situations. According to Wedgwood, a Professor of Law at Yale University, when Security Council members become rivals, the UN's collective security system is neutralized.[287] During the Cold War, for instance, the Security Council was mostly unable to act, and so the use of countermeasures in response to international violations was necessary.[288]

Even more, States have acted unilaterally without a Security Council authorization, or even when the Security Council had already actively seized the issue.[289] For instance, after Russia's annexation of Crimea, the Security Council was unable to pass a resolution as its permanent members had opposing interests. However, the international community at large took measures to condemn the annexation.[290] For instance, the US, NATO and the European Union enacted sanctions against Russia. The US authorized sanctions against persons who had violated or assisted in the violation of Ukraine's sovereignty.[291] On its part, NATO heightened its air policing missions,[292] while the European Union banned exports of dual-use equipment for military use in Russia.[293]

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[286] Martin Dawidowicz, "Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council," *British Yearbook of International Law* 77, no. 1 (2007): 335, doi:https://doi.org/10.1093/bybil/77.1.333.
[287] Wedgwood, "Unilateral Action in the UN system", 351.
[288] Sicilianos, "Countermeasures in Response to Grave Violations of Obligations Owed to the International Community", 1141.
[289] Dawidowicz, "Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council", 416.
[290] In fact, the UN General Assembly condemned the annexation. If we adopt the view that the General Assembly may, much like the Security Council, decide upon the legality of acts that breach the international peace and security, then the arbitral tribunal could take the General Assembly resolution as 'given'. See General Assembly resolution 68/262 (2014).
[291] "Executive Order 13660—Blocking Property of Certain Persons Contributing to the Situation in Ukraine," 6 March 2014.
[292] "Operations and missions: past and present," North Atlantic Treaty Organization, December 21, 2016, http://www.nato.int/cps/en/natolive/topics_52060.htm.
[293] "EU restrictive measures in response to the crisis in Ukraine," European Council. Council of the European Union, June 28, 2017, http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/.

Moreover, in several cases, such as those of North Korea, China, Argentina, the Soviet Union, Panama, Iraq, Burundi, Yugoslavia and Sudan, third party countermeasures were adopted even when the Security Council had actively seized the issues.[294]

Although States often act unilaterally to condemn threats to the international peace and security, they do so in violation of the basic UN Charter paradigm and the rules of customary international law.[295] Professor Wood, an English Barrister and Member of the International Law Commission, has stated:

> One or a few States, however powerful, cannot change established rules of international law, Charter-based ones at that.[296]

Similarly, former UN Secretary-General Kofi Annan criticized the prevalent idea that States have the right to use force pre-emptively in order to deter an armed attack. Annan's concern at the time was that unilateral actions lacking a Security Council resolution would result in the unjustified use of force.[297]

In the context of an arbitration proceeding, the respondent State could attempt to justify its measures taken pursuant the NPM provision based on the prevalence of unilateral State action and in ineffectiveness of the Security Council. However, if an arbitral tribunal admits this defense, it would be converting an expressly non-self-judging NPM provision into a self-judging one. As we know, self-judging clauses must be expressly drafted in order to reflect the Contracting Parties' intent for unilateral considerations to prevail. Allowing the tribunal to disregard the non-self-judging nature of the clause based on the prevalence of State practice that is, at that, contrary to the principles set out in the UN Charter, would contravene the Contracting Parties' intent while drafting the BIT.

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[294] Dawidowicz, "Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council", 417.
[295] Arend, "International Law and the Preemptive Use of Military Force", 100.
[296] Wood, "International Law and the Use of Force: What Happens in Practice?", 365.
[297] Kofi Annan, "The Secretary-General Address to the General Assembly" (address, New York, September 23, 2003). Available at: http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm

Moreover, in these cases there is a clear battle between power and principle. Power, on one hand, involves the factual ability of a State to condemn the international peace and security by using force, by terminating diplomatic relations with the violating country or enacting economic sanctions. Principle, on the other hand, is embodied in the UN Charter, which categorically prohibits the use of force. Although State's may have the power to act unilaterally, and State practice has shown numerous violation to the UN Charter,[298] this reality cannot allow an arbitral tribunal to disregard the rules set out in the Charter and in customary international law.[299]

For this reason, although State practice appears to allow unilateral considerations to prevail, a tribunal in an investment arbitration could not accept this as a successful defense, as it would contravene both the Contracting Parties' intent to draft a non-self-judging NPM provision and the principles set out in the Charter and in customary international law.

c. Rights and Obligations erga omnes

The respondent State could argue that the existence of rights and obligations *erga omnes* showcase that the legality of the third State's act is 'given', as they entail breaches that affect the entire international community as a whole.

The concept of *erga omnes* obligations was first introduced as *obiter dicta* in the *Barcelona Traction* case as a means of law enforcement for the most serious types of breaches.[300] The case arose out of a bankruptcy case by a Spanish court of a Canadian company. Belgium filed an application seeking reparation for damages sustained by Belgium nationals, shareholders in the company, as a result of acts contrary to international law committed by Spain. The Court went on to analyze whether Belgium had the right to exercise diplomatic protection over its nationals. In passing, the Court distinguished between different kinds of obligations, and explained that some are so important that all States have an interest in their protection and compliance.[301] However,

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[298] Arend, "International Law and the Preemptive Use of Military Force", 100.
[299] Wood, "International Law and the Use of Force: What Happens in Practice?", 351.
[300] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970*, paras 33-4 [hereinafter "*Barcelona Traction*"].
[301] *Ibid.*, para 33.

it explained, obligations of the performance of which is the subject of diplomatic protection were not of the same category.[302]

Specifically, *erga omnes* obligations include the outlawing of acts of aggression, the outlawing of genocide and the protection from slavery and racial discrimination.[303] In these cases, the obligation breached is owed to the international community as a whole, as all States are affected by the breach of said obligation.[304] In this way, a situation may arise where a State invokes international responsibility even without being injured because of the interest it has in respect for the breached obligation.[305]

The respondent State could argue that the existence of an obligation *erga omnes* highlights the blatant violation to the international peace and security. For instance, if a State attacks its neighboring country with nuclear weapons, the respondent State invoking an NPM provision could argue that its measures to condemn the attack were reasonable, as the attack was a flagrant violation of the international peace and security. In this sense, it would be completely unnecessary for a Security Council resolution to declare unlawful said attack, as the outlawing acts of aggression are obligations *erga omnes*.[306] However, this type of defense has not been accepted by the jurisprudence of the Court.

In *East Timor*, Portugal argued that there were rights and obligations *erga omnes* involved in the dispute, namely, the right to self-determination of the East Timorese.[307] Although the Court recognized the existence of rights and obligations *erga omnes*, it considered that the character of a norm and the rule of consent to jurisdiction were two different things.[308] In this sense, the Court emphasized that it could not rule on the lawfulness of a third State conduct even if the right in question was a right *erga omnes*.[309] Similarly, in *Larsen,* the PCA held that substantive law must not be confused with questions of jurisdiction.[310] Even more, in *Armed Activities on the Territory of the Congo*,

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[302] *Ibid.*, para 35.
[303] *Ibid.*, para 33.
[304] Giorgio Gaja, "States having an Interest in Compliance with the Obligation Breached", in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 957.
[305] Eglantine Cujo, "Invocation of Responsibility by International Organizations", in *The Law of International Responsibility* (New York, New York: Oxford University Press, 2010), 976.
[306] *Barcelona Traction*, para 34.
[307] *East Timor*, para 29.
[308] *Ibid.*
[309] *Ibid.*
[310] *Larsen*, para 11.22.

the Court expressly noted that the existence of obligations *erga omnes* would not exclude the requirement of jurisdiction:

> [T]he Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.[311]

As shown, this defense has not been warmly received by an international tribunal. For this reason, this argument would not serve as a stronghold for the arbitral tribunal to decide that it has jurisdiction to hear the case.

V. CONCLUSIONS

According to the Monetary Gold principle, an international adjudicator cannot exercise its jurisdiction when determining the responsibility of a third State is a prerequisite for deciding upon the dispute in question. If so, the legal rights of that third State would form the very subject matter the Court's decision.[312] However, the Monetary Gold principle has been applied by the ICJ in only two cases and within limited circumstances: *Monetary Gold* and *East Timor*.

Cases involving the legal rights of non-parties to the dispute are complex as they involve two competing principles: the duty of the Court to decide cases submitted to its jurisdiction and the Monetary Gold principle.[313] If the duty to decide the case prevails at all times, the principle of consent of sovereign States to adjudication would be violated. Conversely, if the Monetary Gold principle is applied unrestrictedly, it would unduly narrow the competence and function of the Court.[314] A decision regarding the tribunal's competence to decide a case involving a third party interest is a product of the effort to balance these two opposing principles.

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[311] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006,* para 125 [hereinafter "*Congo*"].
[312] Zamir, "The applicability of the Monetary Gold principle in international arbitration", 5.
[313] Ajibola, "The International Court of Justice and Absent Third States", 91.
[314] According to former ICJ Judge, Bola Ajibola: "it is a principle to be given a narrow interpretation if the Court is not to fall into the pit of shirking its duty to decide the case presented to it" (*Ibid.*, 102).

This paper has explored the different paths an international adjudicator may adopt when deciding upon its competence when the rights and legal interests of a third party may be involved in the dispute. In particular, these options have been explored in the context of international investment arbitration and within a respondent's NPM defense.

An arbitral tribunal could adopt the traditional approach and apply the Monetary Gold principle in conformity with the *Monetary Gold*, *East Timor* and *Larsen* cases. In all three cases, the adjudicators stated that they could not exercise their jurisdiction due to the existence of an absent third State whose rights would be the very subject matter of the decision. Under this approach, the principles of consent and State sovereignty are highlighted. However, while this traditional approach prioritizes the sovereignty of States, it fails to ensure either justice or equity and often leaves important issues unanswered, such as the right of self-determination of the East Timorese in *East Timor*. In this way, traditional forms of adjudication do not easily solve multilateral disputes.[315]

Otherwise, the tribunal could make use of the exception to the Monetary Gold principle presented in *Larsen*. In this case, the PCA stated that a tribunal could take Security Council resolutions, for instance, as 'givens' of a legal finding against the absent third party.[316] The decision rendered in *East Timor* regarding Portugal's contention that the Security Council and General Assembly resolutions were not indicative of Portugal's role as administering power of East Timor does not affect this exception. In that case, the Court rejected Portugal's argument for considering that the resolutions did not go so far as to impose an obligation on States not to recognize Indonesia's authority in East Timor.[317] The Court did not, however, state that resolutions could not be taken as 'givens', only that they did not go so far as to state that State's had to deal only with Portugal regarding the administration of East Timor.

Moreover, the non-exhaustive terminology used by the PCA in *Larsen* while enunciating this exception showcases that, analogously, other entities could determine the existence of threats to the international peace and security. Namely, through its recommendations the General Assembly could decide upon the legality of State acts. The

[315] Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case," 328.
[316] *Larsen*, para 11.24.
[317] *East Timor*, paras 31-2.

same applies to the ICJ, who pursuant its Statute may decide upon the legality of State conduct in the context of a dispute settlement proceeding. In this way, its previous precedential decisions can be taken as 'givens' of illegal State conduct. Moreover, as endorsed by the Charter, the actions mandated by regional organizations could also be taken as 'givens' of the act's illegality.

If the acts legality is not 'given', the arbitral tribunal would have to analyze the NPM provision in the BIT to grasp whether the Contracting Parties' to the treaty intended for unilateral considerations of the parties to prevail in determining its obligations with respect to the maintenance of the international peace and security.

If the NPM provision is self-judging, then each Contracting Party to the BIT would be the sole judge of when a situation requires measures of the kind envisaged by the NPM provision, albeit subject to the good faith review. While undertaking the good faith review, the tribunal would merely have to review the honesty and reasonableness of the State's invocation of the clause.[318] If the clause is in fact self-judging, then the respondent State would be acting unilaterally, and enacting the measures *it* considers necessary to maintain the international peace and security. However, this approach does not allow the arbitral *itself* to decide upon the legality of the international act. Instead, it defers the determination of the acts legality to the respondent State.

On the other hand, if faced with a non-self-judging NPM provision, the legality of the third State's act may be more difficult for the tribunal to determine. In this case, unilateral State action could not be a legitimate defense for the respondent State to take the measures it considers necessary within the scope of the NPM provision. Although State practice seems to support unilateral State action taken to condemn breaches of the international peace and security, these measures often contravene the basic paradigm of the UN Charter. Hence, if the arbitral tribunal applies the principles of public and customary international law to the dispute, it would find that the unilateral State actions are unjustified.

Similarly, the invocation of the existence of rights and obligations *erga omnes* would not be a legitimate defense for the State invoking the NPM provision as

[318] Burke-White and Von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", 381.

international tribunals have repeatedly noted that the existence of *erga omnes* obligations do not exclude the requirement of jurisdiction, no matter how blatant the violation.[319]

However, the tribunal could decide upon the legality of the third State act if it is able to demonstrate that the arbitral award would exclusively bind the parties to the proceedings. In fact, if the tribunal decides upon the wrongfulness of the act's legality and holds that the measures taken in order to condemn the breach of the peace fall within the scope of the NPM provision, then, at most, the investor's claim would be rejected. In no way whatsoever would the rights and obligations of the third State be affected.

This highlights, moreover, the substantial differences between the ICJ and international arbitral tribunals. The Court, on one hand, is bound to protect the rights and interests not only of the State parties to a dispute, but also those of States not before the Court's jurisdiction. Arbitral awards, on the other hand, do not resonate on the international community on this scale. Although it is true that arbitral awards can impact a State's future conduct and national budget,[320] arbitrators are not guardians of the public interest.

As stated by Crawford, the Monetary Gold principle is not all-embracing, and it is not a barrier to judicial proceedings in every case.[321] Although there is little support to claim that an arbitral tribunal itself may decide upon the legality of a third State's act, it may vary its response to the Monetary Gold principle in accordance to the circumstances of each case.

[319] *East Timor*, para 29; *Larsen*, para 11.22; *Congo*, para 125.
[320] Nigel Blackaby, "Public Interest and Investment Treaty Arbitration." In *International Commercial Arbitration: Important Contemporary Questions*, 355-65. (The Hague, The Netherlands: Kluwer
[321] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and* Commentaries, 151.

LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
GATT	General Agreement on Trade and Tariffs
HFCS	High fructose corn syrup
ICJ or the Court	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NPM	Non-Precluded Measures
PCA	Permanent Court of Arbitration
the Statute	Statue of the International Court of Justice
UN	United Nations
UN Charter or Charter	Charter of the United Nations
US	United States
Vienna Convention	Vienna Convention on the Law of Treaties

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