

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

DOES CONSENT ENGENDER COMPLIANCE? INSIGHTS FROM EMPIRICAL RESEARCH ON INTERNATIONAL TRIBUNALS

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Zachary Mollengarden and Noam Zamir base their conclusion that the *Monetary Gold* principle should be abandoned on both legal considerations and policy implications. These two elements, however, do not receive equal attention in the article. This essay unpacks the authors’ dismissal of the idea that, by subjecting jurisdiction to consent, the principle makes compliance with awards from the ICJ more likely. Based on the notion that judicial decisions should be understood as embedded within wider political bargains, I contend that while consent might be indicative of states’ willingness to abide by a judicial decision, what ultimately matters for changing state policy towards compliance is the set of incentives that states face in the context of these wider political bargains. Thus, the essay argues, in line with Mollengarden and Zamir, that abandoning the *Monetary Gold* principle need not make the Court less effective. However, it will not necessarily make it more impactful either. Beyond *Monetary Gold* and in relation to its role in world politics more broadly, the Court’s impact rests, ultimately, on how political actors—including the ICJ itself—mobilize rulings strategically.

An extensive body of empirical work in International Relations offers a variety of explanations for when and why states comply with international tribunals’ decisions. Plenty of the mechanisms identified in this literature that can induce changes in state behavior neither rely on state consent nor are presupposed by it. These are useful for exploring a central question posed in the article: what could we expect in terms of compliance, and other political consequences, were the Court to adjudicate situations without the consent of all indispensable parties?

The Link Between Consent and Compliance

That consent engenders compliance is a ubiquitous proposition among legal practitioners and commentators. Technically, every dispute is ultimately rooted in the parties’ consent to the court’s jurisdiction. This is, after all, the ICJ’s most fundamental principle.¹ However, states can be more or less “pleased” with a particular dispute reaching the Court. Understood as a signal, consent can then be thought of as a matter of degree. One indicator of the degree of consent behind each dispute is the way in which proceedings are instituted. Special agreements signal the highest degree of consent since both parties agree to submit the dispute to the Court. Unilateral applications based

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¹ [Statute of the International Court of Justice](#) art. 36(1).

on the Statute's Optional Clause represent a lower degree of consent.² The takeaway here is that states may not want a specific dispute to reach the ICJ, even when they have accepted its compulsory jurisdiction.

While the way in which parties institute proceedings might make no difference in terms of the Court's authority to hear a case—consent, in legal terms, is absolute—it can be important politically because the degree of consent might signal a state's unwillingness to abide by an eventual decision. Expressions of consent provide information about the future, that potential results from adjudication are within a state's set of acceptable outcomes, and that each of these outcomes is better than non-judicial solutions or no solution at all. When both parties express consent to submitting their dispute to the Court, actors know that acceptable outcomes for the parties overlap, at least partially. Thus, compliance should follow.

Legal commentators and practitioners are well aware that consent at the beginning of a dispute can tell us much about what may happen once the proceedings are over. In his 2000 article, Judge Shigeru Oda expressed this view while lamenting the growth of cases initiated through unilateral applications instead of special agreements.³ His discontent was based on policy considerations alone. Oda appears to assume that respondents are more likely to ignore awards when they did not specifically consent to have that particular dispute adjudicated by the Court. And as non-compliance grows, the ICJ's legitimacy will suffer. A defense of *Monetary Gold* rests, at least partially, on this same idea. If Oda, and others, think decisions are less likely to be complied with when the respondent state did not originally consent to that particular exercise of jurisdiction, even less can be expected of compliance by third-party states. If the Court finds itself increasingly deciding on the legality of third-party states' actions without any discernible impact on their behavior, the Court's legitimacy will suffer even more.

International relations scholars are generally preoccupied by the link between consent and compliance. The notion that consent leads to compliance creates difficulties for testing theories that attribute independent effects to international legal institutions, a problem generally referred to as the self-selection bias.⁴ That said, many international tribunals exercise compulsory jurisdiction, the ICJ included, and this allows us to observe what happens when states do not self-select into a particular case.

International Judicial Decisions as part of Political Bargains

The empirical literature on international tribunals generally understands legal disputes as embedded in larger political bargains, rather than a substitute for them.⁵ A tribunal's decision does not mark the end of a dispute as much as it transforms it. It makes new outcomes possible by changing the incentives that states face in the context of that larger bargain. A ruling generally creates legal obligations for states to do certain things. As long as those obligations are pending, that is, as long as states do not comply, states may experience costs that did not exist pre-

² This is a simplified way of representing degrees of consent. There are more possibilities than just complete consent by both parties or only consent by the applicant party. For example, respondent states in unilateral applications can later come to accept the Court's jurisdiction.

³ Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: A Myth?*, 49 INT'L & COMP. L.Q. 251, 264 (2000).

⁴ If states only submit the disputes they consent to they are self-selecting into ICJ jurisdiction. Self-selection generates problems for establishing causal inference because we cannot be sure that subsequent compliance is a product of the Court's involvement or that an omitted variable explains both the decision to submit the dispute as well as posterior compliance. For a skeptical view of international law's autonomous explanatory power see George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996).

⁵ For an overview of how International Relations scholars understand the causes and consequences of international tribunals, see Karen J. Alter et al., *Theorizing The Judicialization of International Relations*, 63 INT'L STUD. Q. 449 (2019). Also see other articles in this special issue on the judicialization of international relations.

adjudication. Or, seen in another light, with a judgment, opportunities for capturing new benefits might open up. Benefits may include material and reputational gains as in a rationalist model but also ideational processes such as the affirmation of the actors' values and the satisfaction of "doing what is right," i.e., solving disputes peacefully.

The political bargaining process that a ruling is embedded in also includes actors beyond the parties to a dispute. A ruling can enable state and non-state actors to alter in their own interest the incentives that the parties face. Domestic actors with an interest in compliance, for example, could invoke how costly it is for the country's reputation to refuse to comply.⁶ The flip-side of this empowering effect is that if the actors with the capacity to impose costs and offer attractive benefits do not see it in their interest to do so, the impact of a tribunal's decision will be diminished. For example, material incentives, like economic sanctions, are generally dependent on powerful states' willingness to impose them.⁷

This is a brief and incomplete summary of the empirical literature on compliance, yet what should be taken from it is that none of these political dynamics that a ruling enables and that could lead states to change their practices are necessarily rooted in consent. Decisions in ICJ cases that the states consented to might be costlier to ignore but this does not make all other decisions costless. Thus, nothing precludes decisions by ICJ judges in cases that would otherwise have been rejected based on the *Monetary Gold* principle having comparably transformative effects in the political bargains of third states. Rather, what is most important from the point of view of concrete impacts on the ground are not the rulings themselves but what political actors are willing and able to do with them.

Moreover, understanding international judicial decisions as part of larger political bargains allows us to think about a variety of possible effects of international courts beyond the implementation of an award by the parties to a formal dispute. For example, what judges say can clarify rules beyond the particular context of the case. States in similar situations down the road can have greater certainty about what is expected of them. Similarly, a ruling can be a focal point that others employ in the future for exploring potential solutions to their own disagreements. In sum, judicial decisions can have positive impacts even if the directly involved parties do not abide by them. Thus, by preventing the Court from speaking on the legal aspects of important political problems of its time, *Monetary Gold* keeps the ICJ from potentially having a greater impact on world politics.

In fact, the Court already behaves in ways that illustrate the kind of political effects that its decisions could have, even without the consent of the essential parties. Advisory opinions are not legally binding yet they can be effectual as they are embedded in larger political disputes. Moreover, some opinions have even been rendered without the consent of the directly involved parties, such as the *Chagos* and the *Wall* advisory opinions.⁸ Since advisory opinions do not produce legal obligations for any state and contentious cases do not produce legal obligations for third parties, from a political point of view, it is hard to grasp the difference between a situation in which the Court speaks through an opinion on the actions of a particular state and one in which the Court speaks through a contentious case on the actions of a third party. Clearly, the Court has legal considerations in mind but, as Oda emphasizes, policy considerations are present as well.

⁶ The domestic politics of compliance with international judicial decisions cannot be fully covered in this essay. The main point here is that rulings enter political bargains that have domestic dimensions as well. It could be the case that rulings, by creating international obligations, are instrumental to governments in domestic political competition if their adversaries have an interest in non-compliance.

⁷ This goes for reputational benefits as well. As Paulson notes in the case of Libya's adverse ruling, "if the international community had celebrated its compliance with what must have been a tough Judgment to accept, Libya would have felt more pressure afterward to refrain from quietly circumventing it". Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AJIL 434, 443 (2004).

⁸ [Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965](#), Advisory Opinion, 2019 ICJ REP. 95 (Feb. 25); [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), Advisory Opinion, 2004 ICJ REP. 136 (July 9).

Compliance and Legitimacy: What Role for the Court?

What organizational theory suggests is that organizations—and the ICJ should be no exception—will seek to legitimize themselves in their social environment. This goal drives what the people inside these organizations do. In fact, what is evident from views like Oda's is that considerations about compliance are ultimately about the Court's legitimacy.⁹ When states ignore the Court, its legitimacy suffers. Hence the idea that if the Court adjudges the actions of a third-party as illegal and the party's behavior goes unchanged, the Court's legitimacy will suffer.

Why not, then, involve the Court in the compliance process? Recognizing that legal disputes are part of larger political bargains suggests a variety of ways in which the Court could amplify the impact of its rulings. As mentioned earlier, international judicial decisions are consequential because relevant actors are able to mobilize them in pursuance of desired political objectives. The ICJ is one of those actors. The Court could look to other dispute resolution bodies that have dealt with the problem of state defiance. One such institution is the Inter-American Court of Human Rights. The American Convention on Human Rights says nothing about compliance supervision. And yet the Court has developed its own system, including the creation, in 2014, of a Judgment Compliance Monitoring Unit devoted exclusively to this matter.¹⁰ Understanding that pending rulings can create costs for states only when those who can impose those penalties are aware of them, the Inter-American system has invested time and resources in developing compliance monitoring guidelines and better access to information about the implementation status of each individual judgment.

At the same time, and the Inter-American Human Rights System is also an example of this, creating more tasks for the Court without increasing its resources can only result in longer processing times and, eventually, lower levels of effectiveness. Moreover, a willingness to hear cases that would have otherwise been dismissed using the *Monetary Gold* rationale could also result in a larger docket. International tribunals, as other organizations, have finite resources. A choice is required about what to do with them. One option could be to retreat to disputes enjoying the maximum level of consent possible, where no indispensable party contests the jurisdiction. This would not only mean holding on to the *Monetary Gold* principle but also actively discouraging submission of disputes other than by special agreements. The Court's docket would probably become more manageable and it would perform a valuable function albeit in a reduced number of situations.

The other option is to abandon doctrines like the *Monetary Gold* principle that keep the ICJ from speaking about the legal dimension of important political issues. The affected third states would most likely protest the Court doing so. Those decisions, however, would then become symbolic resources for other states and domestic groups to mobilize, potentially altering the political bargain underlying the legal dispute. Ultimately, those with the capacity to make that decision need to consider what function the Court should serve in world politics.

⁹ “[T]he repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community”. [Armed Activities on the Territory of the Congo](#) (Dem. Rep. Congo v. Uganda), Provisional Measures, Order of July 1, 2000, 2000 ICJ REP 111 (Declaration of Oda J).

¹⁰ Pablo Saavedra Alessandri, [The Role of the Inter-American Court of Human Rights in Monitoring Compliance with Judgments](#), 12 J. HUM. RTS. PRAC. 178 (2020).