THE EXERCISE OF JURISDICTION AND ADMISSIBILITY

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The question of whether the Monetary Gold principle relates to jurisdiction or admissibility has puzzled jurists for decades. The answer might not be a simple yes or no, since the problem in fact stems from the very posing of the question. For such a question already presupposes a dichotomy between jurisdiction and admissibility, an assumption that this article challenges.

The idea of exercise of jurisdiction is crucial in resolving this question. The traditional dichotomy between jurisdiction and admissibility, however, leads to the conflation of this concept of exercise of jurisdiction with that of admissibility. Starting from a close examination of the judgment and individual opinions in the case of Arbitral Award of 3 October 1899 (Guyana v. Venezuela), this article analyzes the conceptual distinction between the idea of the exercise of jurisdiction and that of admissibility and points out the potential perils of conflating the two concepts, as well as that of the traditional dichotomy in general.

On the basis of this distinction, a new model for objections is developed that seeks to consolidate the Court's jurisprudence on objections and resolve the question regarding the characterization of the Monetary Gold principle. More specifically, the proper dichotomy of objections should be one between objections concerning the existence of jurisdiction and objections concerning the exercise of jurisdiction. Objections to admissibility fall within the latter category, but are, perhaps paradoxically, objections that argue for the exercise of jurisdiction to dismiss an application or a claim. They therefore stand in sharp contrast with objections that argue against the exercise of jurisdiction, which are, stricto sensu, objections to the exercise of jurisdiction, of which an objection on the basis of the Monetary Gold principle is a prime example.

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I. Introduction

While the distinction between jurisdiction and admissibility is longstanding in contentious cases before the ICJ, their exact demarcation is by no means clear-cut. A prime illustration of this difficulty is the decades old question of the characterization of the Monetary Gold principle. However, the very question of whether the Monetary Gold principle relates to jurisdiction or admissibility itself presupposes a dichotomy of jurisdiction and admissibility. This article challenges that dichotomy and seeks to develop a more nuanced model.

The Court's recent judgment in *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*[1] sheds new light on this matter and helps answer two questions that have long been debated: the

1. Arbitral Award of 3 Oct. 1899 (Guy. v. Venez.), Judgment on Preliminary Objection, 2023 I.C.J. Rep. 262 (Apr. 6) [hereinafter Arbitral Award of 3 Oct. 1899].

first is the proper characterization of an objection on the basis of the Monetary Gold principle, the second is the broader question concerning the categorization of objections in general. This article starts with an examination of this new case, focusing on the conceptual distinction between existence and exercise of jurisdiction. It then considers the traditional dichotomy of jurisdiction and admissibility and argues that while the distinction between jurisdiction and admissibility is well warranted, the dichotomy of them is not. In particular, the article scrutinizes how this simple dichotomy is unable to make sense of the Court's jurisprudence on objections in a coherent way.

This article argues that the concept of exercise of jurisdiction must be distinct from that of admissibility. The difficulties associated with treating them as equivalent is examined through analyzing closely the Declaration by Judge Iwasawa in the aforementioned case which exemplified this approach. This article shows that such a false equivalence goes hand-in-hand with, and indeed stems from, the simplistic dichotomy of jurisdiction and admissibility. The theoretical difficulties associated with such position are further discussed.

This article then proceeds to develop a new model, through the clarification of the relationships between the existence of jurisdiction, the exercise of jurisdiction, and admissibility, in a manner consistent with the jurisprudence of the Court. It starts with the rudimentary structure set out under Article 79 *bis* of the Rules of Court and then introduces the distinction between existence and exercise of jurisdiction into the model. The article then deals with the greater challenge which is the clarification of the relationship between admissibility and exercise of jurisdiction.

This article argues that instead of dividing objections into those concerning jurisdiction or admissibility, the more logical approach is to categorize them into objections concerning the existence of jurisdiction and those concerning the exercise of jurisdiction. Objections to admissibility, in turn, are properly placed within the latter category, but are in fact arguing *for* the exercise of jurisdiction in order to dismiss the application or the claims. On the other hand, an objection on the basis of the Monetary Gold principle, while also an objection concerning the exercise of jurisdiction, is in fact one that argues *against* the exercise of jurisdiction, and is in the strict sense, an objection to the exercise of jurisdiction. The article concludes by

examining the benefits of this new model. Particularly, this new understanding is not only consistent with the jurisprudence of the Court but also helps dispel many confusions concerning jurisdiction and admissibility in the past decades.

II. The Entangled History of Jurisdiction and Admissibility

A. *The Monetary Gold Principle and the Exercise of Jurisdiction*

There is perhaps no better illustration of the difficulty to distinguish jurisdiction and admissibility than the Monetary Gold principle. Ian Brownlie, in his authoritative textbook, had not categorized the principle as one concerning admissibility.[2] However, James Crawford, who edited the new edition of the textbook, categorized it as admissibility.[3] This seems to be a consistent view of his, as he stated the same in the commentary on the Draft Articles on State Responsibility.[4] Even the two Lauterpachts, father and son, diverged on this issue.[5] Other scholars are also divided as to whether it relates to jurisdiction, admissibility,[6] or even both.[7]

The Monetary Gold principle, or the indispensable third party rule, is a principle laid down in the 1954 judgment of *Monetary Gold Removed from Rome*, which states that the Court cannot exercise its jurisdiction in a case if the legal interests

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2. *See* Ian Brownlie, Principles of Public International Law 711 (Oxford Univ. Press 7th ed. 2008) (mentioning several grounds relating to admissibility without including the Monetary Gold principle).

3. *See generally* James Crawford, Brownlie's Principles of Public International Law 672 (Oxford Univ. Press 9th ed. 2019) (discussing the Monetary Gold principle as a ground of inadmissibility).

4. *See* International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. Doc. A/56/10 (Nov. 2001), 31, 67 (stating that "[t]he Monetary Gold principle is concerned with the admissibility of claims in international judicial proceedings").

5. *See* Martins Paparinskis, *Long Live Monetary Gold *Terms and Conditions Apply*, 115 AJIL Unbound 154, 156 (2020) (noting that the question dividing the Lauterpachts concerned whether Monetary Gold relates to jurisdiction or admissibility).

6. *See* Yuval Shany, Questions of Jurisdiction and Admissibility Before International Courts 155 (Cambridge Univ. Press 2016), 154 (discussing the Monetary Gold principle as a non-admissibility issue).

7. *See generally* Paparinskis, *supra* note 5 (arguing that the better answer to the question of jurisdiction versus admissibility is both).

of a non-participating third state would "form the very subject-matter of the decision."[8] The Court revisited this principle in a few subsequent cases, most notably in *East Timor (Portugal v. Australia)*[9] and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*.[10] For our present purpose, the most important conclusion to be gathered from these cases is that the Court has never considered the question of how the Monetary Gold principle relates to admissibility. Instead, the Court has consistently referred to the fact that it cannot exercise jurisdiction if there exists an indispensable third party to the case. To those who maintain the traditional dichotomy of jurisdiction and admissibility, it hence becomes a difficult question whether the Monetary Gold principle should be categorized as one relating to jurisdiction or admissibility.

1. *A Recent Development*

A recent case featured the Monetary Gold principle again prominently, and the Court in a curious circumstance was put squarely to address the question of the characterization of this principle. The result of this is an enlightening judgment that sheds new light on many questions concerning the Monetary Gold principle and objections in contentious cases in general. In the case of *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*,[11] Guyana first initiated proceedings against Venezuela in 2018.[12] With Venezuela's refusal to participate in the proceedings, the Court nonetheless rendered a judgment on jurisdiction in 2020.[13] In 2022, Venezuela filed preliminary objections to the Court, one of which concerns the Monetary Gold principle.[14]

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8. Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.,), Judgment on Preliminary Question, 1954 I.C.J. Rep. 19, 32 (June 15) [hereinafter Monetary Gold].

9. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90 (June 30).

10. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment on Preliminary Objections, 1992 I.C.J. Rep. 240 (June 26) [hereinafter Certain Phosphate Lands in Nauru].

11. Arbitral Award of 3 Oct. 1899, *supra* note 1.

12. *Id.* ¶ 1.

13. *Id.* ¶¶ 10–11.

14. *Id.* ¶¶ 15, 54.

Here, the characterization of the Monetary Gold principle was pushed to the forefront. Given the judgment on jurisdiction in 2020, the Court's decision on jurisdiction is *res judicata* and is not subject to further arguments. However, if an objection on the basis of the Monetary Gold principle is not concerning jurisdiction, then such an objection can be heard in the current preliminary objection phase. The Court rendered the judgment on preliminary objections in April 2023. It held that an objection on the basis of the Monetary Gold principle is not an objection to jurisdiction and can be heard by the Court in this phase. However, the Court ultimately rejected this objection after duly considering it.

2. *Introducing the Concept of the Exercise of Jurisdiction*

What is of interest here is how the Court dealt with the characterization of the Monetary Gold principle. After considering the Court's prior conclusions in the several cases related to the Monetary Gold principle, namely, *Monetary Gold*, *East Timor*, and *Nauru*, the Court noted:

> "The above cited jurisprudence is thus premised on a distinction between two different concepts: on the one hand, the existence of the Court's jurisdiction and, on the other, the exercise of its jurisdiction where that jurisdiction is established. Only an objection concerning the existence of the Court's jurisdiction can be characterized as an objection to jurisdiction. The Court concludes that Venezuela's objection on the basis of the Monetary Gold principle is an objection to the exercise of the Court's jurisdiction and thus does not constitute an objection to jurisdiction."[15]

The Court's pronouncement here is informative in at least three ways. First, it draws a sharp distinction between the *existence* of jurisdiction and the *exercise* of jurisdiction. Second, it makes clear that an objection to jurisdiction can only be an objection concerning the *existence* of jurisdiction. Thirdly, it states categorically that an objection based on the Monetary Gold principle is an objection to the *exercise* of jurisdiction.

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15. *Id.* ¶ 64.

However, such pronouncement also raises additional questions. The most obvious one is that the Court says nothing about admissibility. This silence is consistent with the Court's approach in previous cases. However, this silence is especially telling here, in light of the fact that Venezuela did present its objection based on the Monetary Gold principle as an objection to admissibility.[16] Hence, given the distinction between the *existence* of jurisdiction and the *exercise* of jurisdiction, the question that remains is how the concept of admissibility fits into this framework.

How should we construe the Court's refusal to label an objection on the basis of the Monetary Gold principle as one about admissibility, when it instead consistently characterizes the issue as one regarding the exercise of jurisdiction? In light of the deliberate silence of the Court, there are two possible views. One possible view is that an objection to the exercise of jurisdiction is in fact the same as an objection to admissibility. Another view is that admissibility and exercise of jurisdiction are indeed distinct concepts, and their exact demarcation is yet to be defined. This article argues for the second view and proceeds to explore the conceptual distinction between these two concepts. However, it is helpful to start by examining the first view, which is arguably the traditional and longstanding one, to see how it may not fit well with the Court's jurisprudence.

B. *The Traditional Dichotomy of Jurisdiction and Admissibility and its Difficulties*

The dichotomy of jurisdiction and admissibility is a long standing one. Indeed, the very question of whether the Monetary Gold principle concerns jurisdiction or admissibility itself presupposed this dichotomy. As a preliminary matter, it should be noted that the *distinction* of jurisdiction and admissibility is different from the *dichotomy* of jurisdiction and admissibility. The former merely entails treating the concept and objection of jurisdiction as distinct from those of admissibility. Such distinction is indeed well established,[17] and this article certainly affirms it.

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16. *Id.* ¶ 15.

17. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections,

This article, however, challenges the dichotomy of jurisdiction and admissibility. Such a dichotomy suggests that objections can be exhaustively and exclusively categorized as either objections to jurisdiction or objections to admissibility. This article suggests that a new model, one more refined than this dichotomy, is needed to give a consistent and coherent account of the Court's jurisprudence. But of course, it would still be completely appropriate to refer to the concepts of jurisdiction and admissibility generally, and in most cases in which the finer details concerning the exercise of jurisdiction are not implicated, the two models would arrive at the same conclusion.

The development of the new model is motivated by the various difficulties associated with the traditional dichotomy. The primary problem of such dichotomy is that it leads to, and intertwines with, the conflation of the concepts of exercise of jurisdiction and admissibility.

1. *The Problem with the Simple Dichotomy: Conflation of the Concepts of Exercise of Jurisdiction and Admissibility*

The ones who subscribe to the simple dichotomy of jurisdiction and admissibility would naturally equate the idea of the exercise of jurisdiction with that of admissibility. The case of *Arbitral Award of 3 October 1899* serves as a good illustration. The logic is relatively straightforward. As the Court held that an objection on the basis of the Monetary Gold principle is not an objection to jurisdiction but concerns the exercise of jurisdiction, one natural corollary under this dichotomy would be that the concept of exercise of jurisdiction is equivalent to, or is encapsulated by, the concept of admissibility.

The false equivalence of the two concepts, or the false subsumption of the concept of exercise of jurisdiction under that of admissibility, is what this article refers to as the conflation of the two concepts. This conflation can be rejected on two levels. The first is an evidentiary or systematic one: such a position finds no support in, and is inconsistent with, the body of case law of the Court. The second is a logical one. As discussed in section III.B below, conceptual analysis would likewise reject such a position.

2008 I.C.J. Rep. 412, ¶ 120 (Nov. 18) (noting that "[a] distinction between these two kinds of objections is well recognized in the practice of the Court").

One timely example that adopts the simple dichotomy and the concomitant equivalence of the concepts of exercise of jurisdiction and admissibility is Judge Iwasawa's declaration in the case of *Arbitral Award of 3 October 1899*.[18] As the Court in its judgment made clear the distinction between existence and exercise of jurisdiction and squarely assigned the Monetary Gold principle as relating to the latter, it remained silent to the idea of admissibility. Judge Iwasawa went on to address specifically the question of admissibility in his declaration. Given that Venezuela did characterize its objection as an objection to admissibility,[19] the Court's silence as to the issue of admissibility can be somewhat unsettling. Judge Iwasawa's effort in dealing with the issue of admissibility is therefore a helpful and commendable one. His conclusion was that "Venezuela's objection that the United Kingdom is an indispensable third party is not an objection to the Court's jurisdiction but an objection to admissibility."[20] But it is in fact the logic to his conclusion that merits the most attention, as it exemplifies the reasoning under the simple dichotomy.

Judge Iwasawa did refer first to the Court's pronouncement that its jurisprudence on the Monetary Gold principle is premised on a distinction between the existence and the exercise of its jurisdiction, something he did not seem to question. As regards objection to admissibility, he cited the dictum originally from the *Oil Platforms* case:

> "Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[21]

Immediately after citing this definition of what constitutes objection to admissibility, he put forth a line of arguments in the final paragraph of his declaration in reaching the conclusion that Venezuela's objection based on the Monetary Gold

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18. Arbitral Award of 3 Oct. 1899, *supra* note 1, at 298–99 (declaration of Iwasawa, J.).

19. *Id.* ¶¶ 15, 24, 26.

20. *Id.* at 299 (declaration of Iwasawa, J.).

21. Oil Platforms (Iran v. U.S.), Judgment on Merits, 2003 I.C.J. Rep. 161, ¶ 29 (Nov. 6) [hereinafter Oil Platforms].

principle is an objection to admissibility. It is helpful to quote this passage in full here:

> "An objection based on the Monetary Gold principle is one such objection calling for the Court not to exercise its jurisdiction and not to proceed to an examination of the merits. In the *Military and Paramilitary Activities* case, the Court expressly described the objection of the United States based on the Monetary Gold principle as one concerning the admissibility of the application (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 429, para. 84, and p. 431, para. 88). In discussing an objection based on the Monetary Gold principle before the Court, parties have likewise treated it as one concerned with admissibility. Venezuela's objection that the United Kingdom is an indispensable third party is not an objection to the Court's jurisdiction but an objection to admissibility."[22]

No doubt, the three propositions before the last sentence represent arguments that supposedly lead up to the conclusion in the last sentence. At first glance, they seem to support the ultimate conclusion. But a closer analysis may suggest otherwise.

i. The First Sentence

Bearing in mind that it is the Court's dictum in *Oil Platforms* regarding objections to admissibility that immediately precedes this paragraph, the first sentence suggests that an objection based on the Monetary is "*one such objection* calling for the Court not to exercise its jurisdiction and not to proceed to an examination of the merits" (emphasis added).[23] It is apparent here that Judge Iwasawa treated as equivalent the idea of objection to admissibility in the *Oil Platforms* dictum and the idea of "not to exercise its jurisdiction."[24]

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22. Arbitral Award of 3 Oct. 1899, *supra* note 1, at 299 (declaration of Iwasawa, J.).

23. *Id.*

24. *Id.*

Apart from not distinguishing exercise of jurisdiction and admissibility, the sentence is even more problematic if it is read to suggest his final conclusion that an objection based on the Monetary Gold principle is an objection to admissibility. It would then seem to be a form of *affirming the consequent*, namely, the logical fallacy of: if p, then q; *ergo*, q, therefore p. While objection to admissibility takes a certain form, it does not follow that if something has that certain form, it will necessarily be an objection to admissibility.

ii. The Second Sentence

The second sentence suggests that in *Military and Paramilitary Activities*, the Court "expressly described the objection of the United States based on the Monetary Gold principle as one concerning the admissibility of the application."[25] But a closer look at the cited paragraphs in *Military and Paramilitary Activities* would reveal that the Court did not in fact say so.

A core passage is paragraph 84 of the Judgment cited, which reads:

> "The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contended in its Counter-Memorial that Nicaragua's Application is inadmissible on five separate grounds . . . Some of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect."[26]

The Court indeed said that it now "turns to the question of the admissibility of the Application" in the beginning of the paragraph.[27] However, it goes on to state that the United States "contended" that Nicaragua's Application is inadmissible on five separate grounds.[28] The question here is a nuanced one in interpretation: should the initial reference to "the question

25. *Id.*

26. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. Rep. 392, 429 ¶ 84 (Nov. 26) [hereinafter Military and Paramilitary Activities].

27. *Id.*

28. *Id.*

of the admissibility of the Application" be seen as the Court "expressly described" the objections of the United States concerned as ones relating to admissibility? Or should this reference be construed as merely referring to the bracket of five grounds that the United States *contended as* concerning admissibility?

This article would argue for the second position. In other words, when the Court said it "now turns to the question of the admissibility of the Application of Nicaragua," it means merely that it will now turn to the various issues that the United States contended as questions of the admissibility of the Application. Such a cursory reference to "admissibility" is therefore procedural rather than substantive. It is not that the Court "expressly described" those grounds as relating to admissibility, still less that it was making a substantial determination of the nature of those grounds. This understanding found support in the same paragraph and the other paragraphs in the judgment, not to mention the fact that such understanding is consistent with the Court's decades of jurisprudence on the Monetary Gold principle.

First and foremost, the same passage went on to state explicitly that "[s]ome of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect."[29] This indicates that the Court recognized that the five grounds contended by the United States as objections to admissibility may not in fact be concerning admissibility, and that it had not made a substantive determination as to their classification.

Second, in the subsequent paragraph 88 when the Court referred to the Monetary Gold principle, it again phrased it in the form of exercise of jurisdiction:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it . . . ."[30]

Nowhere in this case did the Court make any statement suggesting that an objection on the basis of the Monetary Gold principle concerns admissibility. Indeed, this very paragraph is

29. *Id.*
30. *Id.* ¶ 88.

what the Court cited in the *Arbitral Award of 3 October 1899* case in support for the distinction between the existence of jurisdiction and the exercise of it.[31]

Thirdly, in the multiple instances in the subsequent paragraphs in which the Court referred to inadmissibility, it refers to:

- "[t]he first ground of inadmissibility *relied on by* the United States"[32]
- "this *alleged* ground of inadmissibility"[33]
- "fourth ground of inadmissibility *advanced by* the United States"[34]

In all these instances, the language makes clear that it is a ground of inadmissibility *as contended* by the United States. Such references do not represent the Court's substantive determination of the nature of the various grounds, which the Court has especially noted that they may be "matters of competence or jurisdiction rather than admissibility . . . ."[35] Therefore, the suggestion that the Court "expressly described the objection of the United States based on the Monetary Gold principle as one concerning the admissibility of the application"[36] does not seem to be substantiated.

iii. The Third Sentence

The third sentence stated that "[i]n discussing an objection based on the Monetary Gold principle before the Court, parties have likewise treated it as one concerned with admissibility."[37] It is certainly a true statement on its own. However, the parties' characterization of the type of objection is in no way determinative

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31. *See* Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 64 (noting that "[t]he above-cited jurisprudence is thus premised on a distinction between two different concepts: on the one hand, the existence of the Court's jurisdiction and, on the other, the exercise of its jurisdiction where that jurisdiction is established.").

32. Military and Paramilitary Activities, *supra* note 26, ¶ 86.

33. *Id.* ¶ 91.

34. *Id.* ¶ 97.

35. *Id.* ¶ 84.

36. Arbitral Award of 3 Oct. 1899, *supra* note 1, at 299 (declaration of Iwasawa, J.).

37. *Id.*

of its nature.[38] The Court will recharacterize an objection if they see fit. For example, in *Interhandel*, the Court clarified that one objection put forward by the United States as an objection to jurisdiction "must be regarded as directed against the admissibility of the Application."[39] In fact, one may well argue that given that the parties have characterized the objections as regarding admissibility, the fact that the Court still repeatedly refused to call them objection to admissibility shall make clear that exercise of jurisdiction and admissibility are two distinct concepts.

iv. Analysis

The above discussion illustrates the inherent difficulty with the traditional dichotomy in dealing with the characterization of the Monetary Gold principle. And it is pertinent to point out that, this analysis by no means suggests the lack of attentiveness or effort on the part of Judge Iwasawa, but rather, it demonstrates the sparsity of evidence that can support such a position. This sparsity stems from the very fact that the Court has consistently refused to apply the idea of admissibility in characterizing such an issue, but instead employ the idea of exercise of jurisdiction.

While the inability to resolve the Monetary Gold problem is a defect in itself, the above analysis in fact emphasizes a more fundamental problem associated with the simple dichotomy, namely its propensity to engender the conflation of the concepts of exercise of jurisdiction and admissibility. However, as will be shown below, these difficulties are not the only ones associated with this simple dichotomy.

2. *Other Difficulties with the Simple Dichotomy*

Another difficulty in insisting on a simple dichotomy of jurisdiction and admissibility lies in explaining the order in which objections concerning jurisdiction and admissibility should be

38. As Judge Xue noted in her extra-judicial writing: "The way in which the parties differentiate them does not bind the Court. It is always up to the Court to classify the issue." XUE HANQIN, JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE, COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW, VOLUME: 10, 38 (Brill | Nijhoff 2017).

39. Interhandel case, (Switz. v. U.S.), Judgment, 1959 I.C.J. Rep. 6, at 26 (Mar. 21) [hereinafter Interhandel].

considered, and relatedly, how the existence of jurisdiction is a prerequisite for the consideration of questions of admissibility.

i. The Established Jurisprudence of Jurisdiction before Admissibility

The oft-cited dictum from *Oil Platforms*, despite the qualifying word "normally," remains a good description of the Court's approach to admissibility:

> "[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits."[40]

This statement seems to suggest that consideration of admissibility is consequent to the finding that the Court has jurisdiction. If the phrase "even if" can potentially be construed as referring to a hypothetical scenario, the phrase "even when" in the following passage from *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* should leave no doubt that determination of admissibility normally only happens when the Court has found that it has jurisdiction:

> "Essentially such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein."[41]

Indeed, the Court itself has referred to this practice as its "established jurisprudence":

> "In accordance with its established jurisprudence, the Court will examine the issue of the admissibility of the DRC's Application only should it find that it has jurisdiction to entertain that Application."[42]

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40. Oil Platforms, *supra* note 21, ¶ 29.

41. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections, *supra* note 17, ¶ 120.

42. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment on Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. Rep. 6, ¶ 18 (Feb. 3).

In the earlier year of the Court, there was one notable case which deviated from this rule, namely the *Interhandel* case in 1959. In that case, the Court did not first establish its jurisdiction before finding that the application is inadmissible. Such an approach was rightly criticized by Judge Lauterpacht[43] and Judge Spender,[44] who both supported the view that before adjudicating upon objections to admissibility, the Court "is obliged first to satisfy itself that otherwise it has jurisdiction."[45] The majority approach in *Interhandel* is a lone anomaly which has not been followed by subsequent cases.

In fact, this rule is more than just "established jurisprudence." Rightly crediting Judge Fitzmaurice for the observation, Thirlway noted that the rule is indeed "one of the logical interrelationship of the concepts."[46]

ii. Exceptions to the Established Jurisprudence?

The simplistic dichotomy between jurisdiction and admissibility, however, is unable to account for this "established jurisprudence." It cannot explain why in some previous cases the Court did not rule on its jurisdiction before finding that it cannot proceed to the merits of the cases. Two of the most prominent examples are the 1963 *Northern Cameroons* case[47] and the 1974 *Nuclear Tests* cases.[48]

In *Northern Cameroons*, the Court "passed by the question of its jurisdiction"[49] and found that it "cannot adjudicate upon the merits of the claim."[50] The Court in its analysis noted that "even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases."[51]

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43. Interhandel, *supra* note 39, at 100 (dissenting opinion of Lauterpacht, J.)
44. *Id.* at 54 (separate opinion of Spender, J.).
45. *Id.*
46. Hugh Thirlway, The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume II 1708 (Oxford Univ. Press 2013).
47. Northern Cameroons (Cameroon v. U.K.), Judgment on Preliminary Objections, 1963 I.C.J. Rep. 15 (Dec. 2) [hereinafter Northern Cameroons].
48. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20) [hereinafter Nuclear Tests].
49. Northern Cameroons, *supra* note 47, at 39 (declaration of Koretsky, J.).
50. Northern Cameroons, *supra* note 47, at 38.
51. *Id.* at 37.

Similarly, in the *Nuclear Tests* cases, rather than examining the existence of jurisdiction, the Court started its analysis by noting that:

> "[T]he Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings."[52]

It would be apt to point out that the Court in this case was not considering whether a legal dispute existed at the time of the institution of proceedings. Rather, the Court here was in fact concerned about whether the dispute still exists between the parties. Most notably, the Court in its judgment considered the public statements made by France in 1974, even though the application was filed by Australia a year before that. The Court established that "the dispute has disappeared,"[53] and noted that it "can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties."[54] Again, the reference to the exercise of jurisdiction is apparent. Furthermore, citing *Northern Cameroons*, the Court held that this case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose."[55] Without commenting on the existence of jurisdiction, the Court in the operative part of the judgment "finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon."[56] As such, here the Court again did not first establish its jurisdiction before dismissing the case.

These cases present great difficulty to the simple dichotomy of jurisdiction and admissibility. Since these scenarios do not concern the existence of the jurisdiction, they can only be regarded as admissibility issues under that dichotomy. However, these cases would then be inconsistent with the Court's "established jurisprudence" that admissibility issues are only dealt with after the establishment of the Court's jurisdiction.

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52. Nuclear Tests, *supra* note 48, ¶ 24.
53. *Id.* ¶ 55.
54. *Id.* ¶ 57.
55. *Id.* ¶ 58.
56. *Id.* ¶ 62.

III. The New Model

With the potential difficulties of the simple dichotomy in mind, how should a new model be developed to fit all of these concepts—existence of jurisdiction, exercise of jurisdiction, and admissibility—into a coherent framework? Such a model should not only be able to accommodate the Court's jurisprudence but should also be consistent with the Rules of Court.

But a few words need to be said about what exactly is the model that is to be developed. First of all, this model is one for the classification of objections in general, not just preliminary objections. Second, the model could equally be seen as one concerning the classification of *grounds* for the dismissal of the application or the claims, as every objection corresponds to at least one substantive ground for dismissal. To develop this new model, it would be convenient to start with the Court's statutory provisions for a basic structure and proceed to refine the model by considering the Court's jurisprudence.

A. *The Rules of Court*

While the Court's Statute does not refer to objections, the Rule of Court does elaborate on the classification of *preliminary objections*. Article 79 *bis* of the Rules of Court provides:

> "When the Court has not taken any decision under Article 79, an objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party's first pleading."[57]

It is apparent that under this article, the Court in its procedure recognizes three types of preliminary objections:

(i) objection to the jurisdiction to the Court,

(ii) objection to the admissibility of the application, and

57. Rules of Court, 8 I.C.J. Acts & Docs. 89, art. 79 *bis*.

(iii) other objections the decision upon which is requested before any further proceedings on the merits.

The caveat here is that this provision refers to *preliminary objections* rather than *objections* in general. Furthermore, the concept of preliminary objection under this provision is procedural in nature, as the term "requested" in the provision indicates. It concerns what can be regarded as preliminary objections in the proceedings at the Court. Substantively speaking, "preliminary objection[s]" refer to those objections which possess "an exclusively preliminary character."[58] The category of objections is naturally broader than that of preliminary objections.

This provision on preliminary objections is nonetheless helpful for the model of objections in at least two ways. First, it makes clear that other than objections to jurisdiction and objections to admissibility, there exists other objections that do not fall into these two categories. Second, this provision also clarifies that jurisdiction is, more precisely, "jurisdiction of the Court." Similarly, admissibility is, in fact, "admissibility of the application."

In this connection it should also be noted that the Court in its long practice has also referred to the admissibility of a claim.[59] In most cases, to the extent that there is only one principal claim set out in the application, the admissibility of the claim is practically the same as the admissibility of the application. However, the landscape is not that simple when the proceedings become more complex. Such is the case of *Certain Phosphate in Nauru*. There, Nauru filed the Application in 1989, but its Memorial in 1990 contains an additional claim.[60] The Court held that the Application is admissible, while the claim made by Nauru in the latter Memorial is inadmissible,[61] as it "constitutes, both in form and in substance, a new claim."[62]

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58. *Id.* art. 79 *ter.* (4).

59. *See* e.g., Nottebohm case (second phase) (Liech. v. Guat.), Judgment, 1955 I.C.J. Rep. 4, 26 (Apr. 6) (holding that "the claim submitted by the Government of the Principality of Liechtenstein is inadmissible.").

60. *See* Certain Phosphate Lands in Nauru, *supra* note 10, ¶¶ 58, 62 (noting that Australia raised an objection to an additional claim by Nauru, as set out in Nauru's Memorial on the merits and concerns the overseas assets of the British Phosphate Commissioners).

61. *Id.* ¶ 72.

62. *Id.* ¶ 70.

This illustrates that, in such cases in which there are multiple claims set forth in a proceeding, it is possible for the Court to rule on the admissibility of specific claims. In such a scenario, the admissibility of the application should be distinct from the admissibility of the claims. One further point is that Art. 79 is more restrictive in the sense that it deals only with *preliminary* objections. Hence for objections more generally, questions of admissibility can arise in relation to claims set out not only in the application, but also subsequent to it. One last observation to be made is that, while Art. 79 *bis* does shed light on jurisdiction and admissibility, however, this provision, and for that matter, the Rules of Court, says nothing about the concept of exercise of jurisdiction.

B. *Developing the New Model*

With this basic structure under Article 79 *bis* of the Rules of Court in mind, the idea of the exercise of jurisdiction should be introduced into the model. The core distinction between existence of jurisdiction and exercise of jurisdiction, as set out in the clear words of the Court in the *Arbitral Award of 3 October 1899* case serves as a good starting point.

It is further proposed here that all objections can be categorized either as ones concerning the existence of jurisdiction or as ones concerning the exercise of jurisdiction. As noted above, the wording "on the one hand" and "on the other" in the passage cited[63] suggests that these two types of objections cover the whole gamut of objections. The Court has also in other occasions juxtaposed the idea of the existence of jurisdiction and the exercise of it.[64]

The next step is to place objection to jurisdiction and objection to admissibility within this framework. The former is straightforward, as the Court's dictum in *Arbitral Award of 3 October 1899* made clear that only an objection concerning the existence of jurisdiction is an objection to jurisdiction.[65] The

63. *See* Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 64 (stating that "[t]he above-cited jurisprudence is thus premised on a distinction between two different concepts: on the one hand, the existence of the Court's jurisdiction and, on the other, the exercise of its jurisdiction where that jurisdiction is established.")

64. *See, e.g.*, Northern Cameroons, *supra* note 47, at 37.

65. Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 64.

core question then is how the concept of admissibility relates to the exercise of jurisdiction.

As the above discussion on the Monetary Gold principle illustrates, the Court generally is silent on the idea of admissibility if it chooses to address an issue under the rubric of exercise of jurisdiction. It would then seem hard to distill from the Court's jurisprudence the relationship between the two concepts. However, given the proposition above that an objection can either be one concerning the existence of jurisdiction or one concerning the exercise of jurisdiction, and since the determination of an issue of admissibility is independent from and consequent to the existence of jurisdiction, an objection to admissibility should naturally be one concerning the exercise of jurisdiction. This position is echoed by Judge *ad hoc* Couvreur, who in his partially separate and partially dissenting opinion, noted that "while all questions of 'admissibility' are questions concerning the exercise of jurisdiction, the opposite is not true."[66]

Indeed, the proposition that objections to admissibility fall within objections concerning the exercise of jurisdiction is supported both by logic and the practice of the Court. From a logical standpoint, this conclusion follows naturally from one central idea that is often under-appreciated. It is the idea that the determination of the admissibility of the application or claims *essentially* constitutes the exercise of the Court's jurisdiction. This point was already appreciated by Judge Fitzmaurice in his Separate Opinion in *Northern Cameroon*:

> "The fact that jurisdiction is assumed, does not of course mean that the tribunal concerned necessarily proceeds to hear and determine the *merits*, for it may reject the claim *in limine* on some ground of inadmissibility (non-exhaustion of local remedies, undue delay, operation of a time-limit, etc.). Such a rejection however, on grounds of this kind, is itself an exercise of jurisdiction."[67]

The fact that an objection to admissibility essentially calls for the exercise of jurisdiction leads to a core proposition of this article: an objection to admissibility is a type of objection concerning the exercise of jurisdiction, but it is such an objection

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66. Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 11 (partially separate and partially dissenting opinion of Judge *ad hoc* Couvreur).

67. Northern Cameroons, *supra* note 47, at 101 (separate opinion of Fitzmaurice, J.).

which argues for the exercise of jurisdiction by the Court to dismiss the application or the claim.

An objection to admissibility therefore stands in sharp contrast to other types of objections concerning the exercise of jurisdiction, such as those on the basis of the Monetary Gold principle. It is because the latter are the kind of objection which argues against the exercise of jurisdiction by the Court. They are, *stricto sensu*, objections to the exercise of jurisdiction, in the sense of objections against the exercise of jurisdiction.

Apart from the greater logical clarity afforded to the categorization of objections, such a framework is consistent with the Court's "established jurisprudence" that an objection to admissibility should be dealt with after the establishment of the Court's jurisdiction. Such a rule is indeed premised on the same idea that ruling on an objection to admissibility is itself an exercise of jurisdiction, and therefore the Court must first ascertain that it has jurisdiction to begin with.

Such a new framework is also helpful for the clarification of the various concepts relating to objections. The false equivalence of admissibility with the exercise of jurisdiction has led to much confusion. For example, such an account falsely broadens the scope of objections to admissibility, and to the extent that the concept of admissibility is developed and inferred based on that enlarged set of objections, an imprecise definition of admissibility would ensue.

C. *Admissibility and Exercise of Jurisdiction Reconsidered*

In light of this new model, it would now be a good time to reconsider the meanings and characteristics of the concepts of admissibility and exercise of jurisdiction.

1. *Admissibility Reconsidered*

The idea of admissibility is traditionally somewhat amorphous. As Abi-Saab pointed out in 1967, there was a tendency for the Court to define admissibility in relation to jurisdiction.[68] However, a relative definition which presupposes a dichotomy

68. Georges Abi-Saab, Les exceptions préliminaires dans la procédure de la Cour Internationale 92 (Pédone 1967) ("On notera en premier lieu la

of jurisdiction and admissibility would naturally face difficulties when the distinct concept of exercise of jurisdiction is introduced into the framework.

The Court in subsequent years tried to give more general descriptions of the idea of admissibility, most notably in *Oil Platforms*[69] and *Genocide Convention (Croatia v. Serbia)*.[70] In the latter case, the Court remarked that an objection to admissibility "consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein."[71] This general description, however, says little about the substance of such legal reasons, or what legal grounds would, by their nature, implicate admissibility.

Judges and scholars over the years have endeavored to give a more substantive description of the concept of admissibility. One notable example is Judge Couvreur in his opinion in the case of *Arbitral Award of 3 October 1899*. He suggested that there are three types of questions of admissibility: those "formal in nature,"[72] those "more substantive in nature,"[73] and those "of a general nature."[74] He concluded by noting that "[w]hat all these 'admissibility' questions have in common is that, unlike questions of 'jurisdiction,' they are not linked to the establishment of some form of consent but instead concern the appropriate exercise of the judicial function in light of the specific circumstances of a particular case."[75] Here, we once again observe the tendency to define admissibility relative to jurisdiction. While Judge Couvreur's approach certainly has its own merits, this article differs in its approach. The difference stems principally from the fact that this article takes a more limited view of the range of questions of admissibility.

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tendance, manifeste surtout dans les énoncés de la Cour, à définir la recevabilité par rapport à la competence . . . .").

69. Oil Platforms, *supra* note 21, ¶ 29.

70. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections, *supra* note 17, ¶ 120.

71. *Id.*

72. Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 11 (partially separate and partially dissenting opinion of Judge *ad hoc* Couvreur).

73. *Id.*

74. *Id.*

75. *Id.*

The Court itself made the most extensive listing so far in *Genocide Convention (Croatia v. Serbia)* of what it considers as questions of admissibility or grounds of inadmissibility:

> "[F]or example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim."[76]

Of the four examples of questions of admissibility given, a few further words must be said of the final one. This article holds the view that scenarios that would fall under this "mootness of the claim" description are very limited in scope.

The Court has not systematically addressed the doctrine of mootness, nor has it clarified the specific meaning of the word "mootness," and the meaning of the term is uncertain as it stands.[77] But analytically speaking, the primary pitfall here is to speak of "mootness" generally, without specifying "mootness" of what. In particular, a sharp distinction must be drawn between "mootness of the claim," which concerns admissibility, and what one may call "general mootness," which concerns instead the exercise of jurisdiction, as discussed further below.

The primary example of "mootness of the claim" cases is *Genocide Convention (Croatia v. Serbia)*. The Court noted in a straightforward way that a submission by Croatia "has been presented rather as a matter of mootness of the claim, a question of admissibility."[78]

Another scenario must be added to this list of questions of admissibility. The Court has also found a claim inadmissible[79] when it is an additional claim "formulated in the course of

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76. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections, *supra* note 18, ¶ 120.

77. *See* MALCOLM N. SHAW, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 555 (5th ed. 2016) (noting the different meanings of the word *moot* in American and British English, among other arguments).

78. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections, *supra* note 18, ¶ 138.

79. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 165 (Nov. 30).

proceedings"[80] that is neither "implicit in the Application"[81] nor "arises directly out of the question which is the subject-matter of the Application."[82]

These examples of questions of admissibility that the Court listed are very limited and rather disparate. They do not seem to lend themselves to a useful further classification.

To further consider Judge Couvreur's view, one would note that his list is considerably larger and includes many scenarios that this article would rather consider as objections to jurisdiction or objections to the exercise of the jurisdiction.

Firstly, Judge Couvreur considered the non-existence of a dispute as a question of admissibility of more substantive nature.[83] This article, however, considers that such a question certainly is not one concerning admissibility. This is because, as a matter of fact, questions related to non-existence of dispute are often dealt with first by the Court, in the context of determining the existence of jurisdiction,[84] or even as a "essentially preliminary"[85] question before other jurisdictional questions. It is not a question of admissibility the determination of which is subsequent to the establishment of jurisdiction.

Secondly, Judge Couvreur considered the scenario in *Northern Cameroons* as reflecting a question of admissibility "of a general nature." However, this article's position is that the consideration in *Northern Cameroons* that "circumstances that have since arisen render any adjudication devoid of purpose"[86] would more appropriately be regarded as one concerning the exercise of jurisdiction, not admissibility. This is supported by

80. *Id.* ¶ 39.
81. *Id.* ¶ 41.
82. *Id.*
83. *See* Arbitral Award of 3 Oct. 1899, *supra* note 1, ¶ 11 (partially separate and partially dissenting opinion of Judge *ad hoc* Couvreur) (noting that questions of admissibility can be "more substantive in nature and may concern, for example, the nonexistence of a dispute").
84. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment on Preliminary Objections, 2016 I.C.J. Rep. 833, ¶ 58 (Oct. 5). The Court upheld the preliminary objection by the U.K. based on the absence of dispute and concluded that it has no jurisdiction under Article 36, paragraph 2 of the ICJ Statute.
85. Nuclear Tests, *supra* note 48, ¶ 24.
86. *Id.*

the fact that the Court dismissed the case on such ground without first establishing its jurisdiction.

The range of grounds that one regards as relating to admissibility would affect what one sees as the essence of the concept of admissibility. It is because one's definition of admissibility will have to cover this whole range of grounds, and indeed very often such essence is logically inferred from these grounds. For example, Judge Couvreur's view is that an objection to admissibility "concerns the appropriate exercise of the judicial function in light of the specific circumstances of a particular case". And we do see the reference to judicial function in *Northern Cameroons*,[87] which he considers as a case concerning the question of admissibility.

Given the broader range of grounds Judge Couvreur regards as relating to admissibility, his definition is an arduous attempt in finding the commonality behind all these grounds. However, as noted earlier, this article considers that the range of grounds relating to admissibility is much narrower than Judge Couvreur's list, and that a definition of admissibility derived from a broader list may not be most accurate as to the essence of admissibility.

In general, it seems that there are at least two caveats that one must bear in mind when trying to articulate a substantive description of admissibility. The first is that it is necessary to distinguish objections to admissibility from objections to the exercise of jurisdiction. The second is that it is necessary to be prudent and avoid placing too many grounds that are not clearly related to admissibility under the category of admissibility.

With these considerations in mind, this article would contend that there are arguably three defining features of an objection to admissibility. First, such an objection must be directed against the application or the claims, or in other words, targeting a defect pertaining to the application or claims. Second, it must be of such a nature that the disposition of which presupposes the existence of jurisdiction of the Court. Thirdly, it must provide "a legal reason, even when there is jurisdiction, why the Court should decline to hear the case," as the Court noted in *Genocide Convention (Croatia v.*

87. *See* Northern Cameroons, *supra* note 47, at 38 (referring to the "proper limits of its judicial function").

Serbia).[88] These three features together form the essence of an objection to admissibility.

2. *Exercise of Jurisdiction Reconsidered*

What then are the essential features of an objection to the exercise of jurisdiction? It would be helpful for this analysis to recall the scenarios that involve objections relating to the Court's exercise of jurisdiction, and also point out the Court's relevant dicta couched in terms of exercise of jurisdiction. There are at least two main types of scenarios that concern the exercise of jurisdiction. The first that comes to mind is, of course, the Monetary Gold principle, discussed extensively above. A second category concerns the doctrine of "general mootness," which covers a range of nuanced variations.

The beginning of this doctrine is the case of *Northern Cameroons*, in which the Court stated that "even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction."[89] The main consideration of the Court in this case is the lack of utility of any potential judgment rendered. The Court noted that it would be "impossible for the Court to render a judgment capable of effective application,"[90] and that "[t]he Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties . . . ."[91]

Cautioning that it must discharge "the duty to safeguard the judicial function,"[92] the Court concluded that:

> "Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose."[93]

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88. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment on Preliminary Objections, *supra* note 17, ¶ 120. This formula is but a slight variant of the *Oil Platforms* dictum.

89. Northern Cameroons, *supra* note 47, at 29.

90. *Id.* at 33.

91. *Id.* at 34.

92. *Id.* at 38.

93. *Id.*

In summary, this scenario can be described as one of fruitless adjudication or impossibility of effectual judgment, which is one variation of the general mootness doctrine.

The next case that relates to this doctrine is the 1974 *Nuclear Tests* cases, in which the Court held that it "can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties."[94] The Court also began with the observation that it is "entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters."[95] It then proceeded to analyze how the dispute had disappeared.[96] This shows that such a question is not related to jurisdiction or admissibility and is more properly characterized as one concerning the exercise of jurisdiction.

In this case, the Court referenced *Northern Cameroons*, in particular the point about fruitless adjudication.[97] However, the scenario in this case is more fittingly described as one concerning the disappearance of dispute, another variation of general mootness. Specifically, here the mootness is due to the fact that the claims of the claimant had been fulfilled through other means. In *Fisheries Jurisdiction (Spain v. Canada)*,[98] the Court did mention the word "moot"[99] and implicitly referred to the idea of mootness of dispute.[100]

Considerations related to general mootness have arisen in many other cases, including *Lockerbie*,[101] *Arrest Warrant*,[102] etc. A

94. Nuclear Tests, *supra* note 48, ¶ 57.

95. *Id.* ¶ 22.

96. Nuclear Tests, *supra* note 48, ¶ 55.

97. *See id.* ¶ 58 (quoting *Northern Cameroons* which noted that "circumstances that have . . . arisen render any adjudication devoid of purpose" and emphasizing that "[t]he Court sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless . . . the needless continuance of litigation is an obstacle to such [international] harmony.").

98. Fisheries Jurisdiction (Spain v. Can.), Judgment on Jurisdiction of the Court, 1998 I.C.J. Rep. 432 (Dec. 4).

99. *Id.* ¶ 88.

100. *Id.*

101. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Judgment on Preliminary Objections, 1998 I.C.J. Rep. 115 (Feb. 27).

102. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14).

more systematic exposition of the doctrine of general mootness is a task for another day. Suffice it to say that this doctrine covers a range of scenarios that are similar and related, but nonetheless should be distinguished for conceptual clarity. However, they are common in that they all concern the potential non-exercise of the Court's jurisdiction.

It is worth noting that in these cases concerning the exercise of jurisdiction, the Court was acting *proprio motu* in rejecting the application or claims, and such results did not seem discretionary. In *Monetary Gold*, the Court noted that the jurisdiction conferred upon it "does not . . . authorize it to adjudicate upon the first Submission."[103] In *Northern Cameroons*, the Court notes that "the proper limits of its judicial function do not permit it to entertain the claims." [104] And in the *Nuclear Tests* cases, the sentence noting that the Court "can exercise its jurisdiction … only when a dispute genuinely exists"[105] suggests that the Court *cannot* exercise jurisdiction when a dispute no longer exists. These terms, "not authorize," "not permit" and "cannot," all indicate that this non-exercise of jurisdiction is mandatory for the Court given the circumstances of the cases.

Furthermore, an aspect distinctive of objections to the exercise of jurisdiction is that the Court may not necessarily establish its jurisdiction before dismissing a case on the basis of non-exercise of jurisdiction. The cases of *Northern Cameroons*, *Nuclear Tests* and *East Timor* are examples of this.

What then is the essence of the exercise of jurisdiction? The exercise of jurisdiction fundamentally concerns the use of the Court's judicial power. Such power is derived from its constituent instrument and the consent of the litigating States. Considerations on the exercise of jurisdiction therefore take into account the congruency of the Court's understanding of its judicial function with the process and result of adjudication, as well as the propriety and legitimacy of such process and result. As a brief illustration, in cases concerning the Monetary Gold principle, if the Court decides to exercise jurisdiction absent the participation of the indispensable third party, the adjudicative process will be seen as improper and the result illegitimate.

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103. Monetary Gold, *supra* note 8, at 34.
104. Northern Cameroons, *supra* note 48, at 38.
105. Nuclear Tests, *supra* note 48, ¶ 57.

IV. Conclusion

To conclude, it is helpful to first consider the potential benefits of this new model. It accommodates the distinction of existence and exercise of jurisdiction, as well as that of jurisdiction and admissibility, and clarifies the logical relations between these concepts. The model also reconciles the Court's jurisprudence on various objections or grounds that are previously not easily fit under jurisdiction or admissibility, such as that of the Monetary Gold principle and those related to mootness. Further, the model safeguards the Court's established jurisprudence of addressing questions of admissibility only after jurisdiction is established, and thereby also maintains the distinctiveness of objections of admissibility.

It is of course still possible, and often convenient, to refer to jurisdiction and admissibility broadly. In cases in which questions regarding the non-exercise of jurisdiction do not arise, the new model may be reducible to the traditional dichotomy. On the other hand, the false equivalence between the exercise of jurisdiction and admissibility must be firmly rejected as a matter of logic. A case dismissed on the basis of non-exercise of jurisdiction is fundamentally different from one dismissed based on inadmissibility, since the latter involves a clear exercise of jurisdiction.

The new model shows that there are further nuances to the simple dichotomy between jurisdiction and admissibility, which may not be able to analytically cover all the varieties of objections or grounds on which cases are dismissed. In those problematic cases, a finer appreciation of the relationship between the existence and exercise of jurisdiction, as well as admissibility, is required to make sense of the Court's jurisprudence in a coherent way.