Arbitration — Constitution — Permanent Court of Arbitration—Optional Rules for Arbitrating Differences between Two Parties of which Only One is a State—UNCITRAL Rules—Whether available for disputes of a non-commercial, non-contractual character

Arbitration—Nature of arbitral proceedings—Jurisdiction—Requirement of a justiciable dispute—Purpose of tribunal to decide disputes, not to answer abstract questions—Whether arbitral tribunal entitled to decide issue where the very subject matter is the rights and obligations of a State not party to the proceedings

Arbitration—Procedure—Power of tribunal to determine procedure—Whether parties can override procedural decisions of tribunal by agreement

States—Existence—Recognition—Continuity—Extinction—Hawaiian Kingdom—Whether a State during the nineteenth century—Annexation by United States of America—Whether Hawaiian Kingdom extinguished thereby—Whether annexation valid—Whether arbitral tribunal entitled to determine that question in the absence of the United States of America

LARSEN *v.* THE HAWAIIAN KINGDOM[1]

Arbitration Tribunal.[2] 5 *February* 2001

(Crawford, *President*; Griffith and Greenwood, *Members*)

SUMMARY: *The facts*:—The claimant was a resident of Hawaii. By an agreement[3] expressed to be concluded between the claimant and "the Hawaiian Kingdom by its Council of Regency" ("the Hawaiian Kingdom"), the parties agreed to submit to arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Differences between Two Parties of which Only One is a State a claim that the Hawaiian Kingdom was in violation of the Treaty of Friendship, Commerce and Navigation, 1849, between the Hawaiian Kingdom and the United States of America, the principles of international law and international comity by "allowing the unlawful imposition of American municipal laws over claimant's person within the territorial

[1] The claimant was represented by Ninia Parks; the respondent was represented by David Keanu Sai, agent, Peter Umialiloa Sai, first deputy agent, and Gary Victor Dubin, second deputy agent and counsel.

[2] Conducted under the auspices of the Permanent Court of Arbitration.

[3] See Part 2 of the Award, p. 569 below.

jurisdiction of the Hawaiian Kingdom". Following a requisition made by the International Bureau of the Permanent Court of Arbitration, the Arbitration Agreement was amended by substituting the UNCITRAL Arbitration Rules for the Optional Rules. The Tribunal was constituted on that basis. Under a Special Agreement the parties provided that:

> The Arbitral Tribunal is asked to determine, on the basis of the Hague Conventions IV and V of 18 October 1907, and the rules and principles of international law, whether the rights of the Claimant under international law as a Hawaiian subject are being violated, and, if so, does he have any redress against the Respondent Government of the Hawaiian Kingdom.

In his written submissions, the claimant maintained that the Hawaiian Kingdom had been a State in international law during the nineteenth century and that the annexation of the Hawaiian Kingdom by the United States of America in 1898 had been unlawful and invalid. Accordingly, he submitted, the Hawaiian Kingdom still existed and its government had a duty to him to prevent the application to him of United States law and the denial of his status as a Hawaiian citizen. The respondent also maintained that the Hawaiian Kingdom still existed in international law and contended that the claimant's rights under international law were being violated but that he had no redress against the Government of the Hawaiian Kingdom for those violations.[4] The parties requested that the Tribunal give an award in two stages, the first of which was "to result in an award on the verification of the dominion of the Hawaiian Kingdom", in the course of which the Tribunal was to "decide territorial sovereignty in accordance with the principles, rules and practices of international law".

In the light of these submissions, the Tribunal issued a Procedural Order,[5] in which it asked the parties to address (a) whether there was a legal dispute between the parties within the meaning of the UNCITRAL Rules; (b) whether there was a real dispute between the parties to the arbitration; and (c) whether, in the light of the principle laid down by the International Court of Justice in the *Case concerning Monetary Gold*,[6] *the Case concerning Certain Phosphate Lands on Nauru*,[7] and *the Case concerning East Timor*,[8] any dispute which might exist was one over which the Tribunal could exercise jurisdiction in the absence of the United States of America. The parties submitted further written argument and oral hearings were held on these questions.

Held (unanimously):—There was no dispute between the parties capable of submission to arbitration and, in any event, the Tribunal was precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America was not a party to the proceedings and had not consented to them.

(1) The Tribunal having been constituted under the UNCITRAL Rules, it was unnecessary to determine whether the case could have come within the scope of the Optional Rules (paras. 8.1-8.8).

[4] The submissions of the parties are set out in Part 5 of the Award, p. 572 below. See also para. 7.4 and Annexures 1 and 2, pp. 581, 598 and 610 below.

[5] Procedural Order No 3 (17 July 2000), para. 6.2, p. 575 below.

[6] 21 *ILR* 399. [7] 97 *ILR* 1. [8] 105 *ILR* 226.

(2) The status of the Hawaiian Kingdom would arise, directly or indirectly, if the Tribunal were to seek to resolve on the merits the matters raised for decision by the parties. It was not possible for the Tribunal to avoid this question by proceeding, as the parties had invited it to do, on the basis of an agreement between the parties regarding the status of the Hawaiian Kingdom (paras. 9.1-9.3).

(3) The UNCITRAL Rules were essentially non-prescriptive and non-coercive and provided for their variation. Although primarily drawn up for commercial contract disputes, they could be applied to an agreement to arbitrate a non-contractual dispute if the parties so agreed, as they had done in the present case (paras. 10.1-10.10).

(4) The function of international arbitral tribunals in contentious proceedings was to determine disputes between the parties, not to make abstract rulings. It followed that, in order for the Tribunal to proceed, there had to be a legal dispute actually arising between the parties which was in existence at the time of the proceedings and had not become moot. It was not the function of an international arbitral tribunal to decide purely historical issues or controversies bearing no relation to the rights and obligations of the parties at the time of the decision. It was not sufficient that the parties agreed that there was a dispute between them (paras. 11.3-11.7).

(5) It was a well-established principle that an international tribunal could not decide a dispute if the very subject matter of the decision would be the rights or obligations of a State which was not party to the proceedings. Although formulated in the context of proceedings between States in the International Court of Justice, the principle was of wider application, reflecting the consensual basis of the jurisdiction of international tribunals, and it was applicable in the present case (paras. 11.8-11.24).

(6) There was no dispute between the parties on which the Tribunal could adjudicate. If the dispute was defined without reference to the actions of the United States of America and the legality of its presence in Hawaii, it had to be reduced to an abstract question on which no real, justiciable dispute existed. If, on the other hand, the dispute was defined in terms of whether the respondent had failed to protect the claimant, then it could not be determined without an evaluation of the lawfulness of the United States' actions which were said to have given rise to a duty of protection. In that case, the actions of the United States of America would be the very subject matter of the dispute (paras. 12.1-12.19).

The following is the text of the Award:

AWARD

1. *The Parties*

1.1 The claimant is Lance Paul Larsen, a resident of Hawaii. His address is stated in the Notice of Arbitration of 8 November 1999 to be PO Box 87, Mountain View, Hawai'i. The claimant was represented by Ms Ninia Parks as counsel and agent.

1.2 In the Notice of Arbitration of 8 November 1999 the respondent is expressed to be "the Hawaiian Kingdom by its Council of Regency". Without prejudice to any questions of substance, the respondent will be referred to in this award as "the Hawaiian Kingdom".

1.3 The respondent is represented by Mr David Keanu Sai as agent, by Mr Peter Umialiloa Sai as first deputy agent and by Mr Gary Victor Dubin as second deputy agent and counsel. The address of the respondent is stated as PO Box 2194, Honolulu, Hawai'i.

2. *Agreement to Arbitrate*

2.1 In Terms of Agreement expressed to be concluded between the claimant and the Hawaiian Kingdom by its Council of Regency and executed on 30 October 1999 by Ms Parks, as attorney for the claimant, and by Mr Dubin, as attorney for the Hawaiian Kingdom (the Arbitration Agreement), it was agreed as follows:

I. Fundamental Provisions

Article 1

1. The Parties agree to submit the following dispute alleged in the Complaint for Injunctive Relief filed on August 4, 1999, to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which Only One Is a State, as in effect on the date of this agreement:

a. Lance Paul Larsen, a Hawaiian subject, alleges that the Government of the Hawaiian Kingdom is in continual violation of its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, and in violation of the principles of international law laid [down] in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful imposition of American municipal laws over claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.
b. Lance Paul Larsen, a Hawaiian subject, alleges that the Government of the Hawaiian Kingdom is also in continual violation of the principles of international comity by allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.

2. The Parties commit themselves to abide by the decision of the Arbitral Tribunal.

II. Arbitration

Article 2

1. The Arbitral Tribunal shall sit at the Permanent Court of Arbitration at The Hague, the Netherlands.

2. The Arbitral Tribunal shall consist of one arbitrator to be chosen by Keoni Agard, Esq., a Hawaiian national, who shall select the Arbitral Tribunal in conformity with Article 6, section 3 of the Optional Rules for Arbitrating Disputes between Two Parties of which Only One Is a State.

3. The International Bureau of the Permanent Court of Arbitration at The Hague shall act as a channel of communications between the parties and the

Arbitral Tribunal, and provide secretariat including, inter alia, arranging for hearing rooms and stenographic or electronic records of hearings.

Article 3

1. The Arbitral Tribunal is requested to provide rulings in two stages, in accordance with International law and Hawaiian Kingdom law.

2. The first stage shall result in an award on the verification of the dominion of the Hawaiian Kingdom. The Arbitral Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.

3. The second stage shall result in an award of the dispute specified in section 1(a) and 1(b) of article 1 above. The Arbitral Tribunal shall decide taking into account the opinion that it will have formed on questions of territorial sovereignty, the Vienna Convention on the Law of Treaties, 1969, and any other pertinent factors.

4. The Arbitral Tribunal can consult experts of its choice.

2.2 By a Notice of Arbitration dated 8 November 1999 executed by Ms Parks, expressed as made pursuant to Article 8 of the Arbitration Agreement and addressed to various persons identified as members of the Council of Regency of the Hawaiian Kingdom, the claimant requested the initiation of arbitral proceedings at "the facilities of the Permanent Court of Arbitration in The Hague". The Notice of Arbitration was expressed to be "a demand pursuant to Article 3, Section 1 of the Permanent Court of Arbitration Optional Rules For Arbitrating Disputes Between Two Parties Of Which Only One Is a State" (the Optional Rules).

2.3 In the Notice of Arbitration the dispute was expressed in the following terms:

3. This dispute arises out of the 1849 Treaty of Friendship, Commerce and Navigation, (hereinafter referred to as "the 1849 Treaty") which was signed and ratified by both the United States of America and the Hawaiian Kingdom (A true and correct copy of the 1849 Treaty is attached hereto as "Exhibit 2"). The Claimant in this case, Mr Larsen, alleges and submits to arbitration, that the Hawaiian Kingdom is in continual violation of both the 1849 Treaty between the Hawaiian Kingdom and the United States of America, and of international law principles as set forth in the Vienna Convention On The Law Of Treaties (hereinafter referred to as "the Vienna Convention") which was concluded in Vienna on May 23, 1969 and ratified by the Hawaiian Kingdom on July 15, 1999 (true and correct copies of the Vienna Convention and the Hawaiian Kingdom's Ratification of the Vienna Convention are attached hereto as "Exhibit 3" and "Exhibit 4" respectively) by allowing the continued unlawful imposition and enforcement of American municipal laws within the territorial jurisdiction of the Hawaiian Kingdom.

4. Mr Larsen has already served an illegally imposed jail sentence resulting directly from the continued unlawful imposition and enforcement of American municipal laws within the Hawaiian Kingdom. Mr Larsen is also currently facing more jail time for the same reasons. In order to avoid further jail sentencing,

and in order to halt the continual imposition and enforcement of American municipal laws over himself, Mr Larsen hereby requests, as Claimant in this case, from the Arbitral Tribunal to be hereafter convened at the Permanent Court of Arbitration an award in two stages. In the first stage, Claimant requests an award verifying the territorial dominion of the Hawaiian Kingdom. In this first stage, the Arbitral Tribunal shall decide and determine the territorial dominion of the Hawaiian Kingdom under all applicable international principles, rules and practices.

5. In the second stage, Claimant requests an award verifying that the Hawaiian Kingdom is in continual violation of the 1849 Treaty, principles of international law set forth in the 1969 Vienna Convention and principles of international comity by allowing the unlawful imposition of American municipal laws over Claimant's person within the territorial jurisdiction of the Hawaiian Kingdom. As set forth in the said Arbitration Agreement, the Arbitral Tribunal shall sit at the Permanent Court of Arbitration in The Hague, The Netherlands.

2.4 Clause 6 of the Notice of Arbitration stated that the Arbitral Tribunal should consist of one arbitrator to be chosen by Keoni Agard, Esq., stated to be a Hawaiian national resident in Hawai'i (the Appointing Authority).

2.5 By an Amendment to the Special Agreement dated 28 February 2000 the parties agreed that the Arbitral Tribunal should comprise three arbitrators, one to be chosen by each party through the Appointing Authority with the two arbitrators so appointed choosing the presiding arbitrator.

3. *Application of the UNCITRAL Rules*

3.1 Following a requisition made by the International Bureau of the Permanent Court of Arbitration to the Appointing Authority on 3 December 1999, a First Amendment to Notice of Arbitration of even date, signed by Ms Parks on behalf of the claimant and by Mr Dubin on behalf of the Hawaiian Kingdom, amended the Notice of Arbitration and the Arbitration Agreement by substituting the "UNCITRAL Arbitration Rules As At Present In Force" (the UNCITRAL Rules) for the PCA Optional Rules as the governing rules for the arbitration.

3.2 By a further Special Agreement made on 25 January 2000, signed by Ms Parks on behalf of the claimant and Mr Sai as agent for the Hawaiian Kingdom, the parties agreed on several procedural matters for the arbitration, including, under Article IV, confirmation that the UNCITRAL Rules apply.

3.3 Under Article II of the Special Agreement the issue to be determined in the arbitration was defined as follows:

The Arbitral Tribunal is asked to determine, on the basis of the Hague Conventions IV and V of 18 October 1907, and the rules and principles of international law, whether the rights of the Claimant under international law as a Hawaiian

subject are being violated, and if so, does he have any redress against the Respondent Government of the Hawaiian Kingdom?

3.4 Article 6 of the Arbitration Agreement further provided:

Nothing in this Agreement can be interpreted as being detrimental to the legal positions or the rights of each Party with respect to the questions submitted to the Arbitral Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations or grounds on which that decision is based.

4. *Constitution of the Tribunal and Secretariat Services*

4.1 In April 2000 the Appointing Authority appointed each of Dr Gavan Griffith QC and Professor Christopher J. Greenwood QC as members of the Tribunal. After consultation, those two members of the Tribunal jointly appointed Professor James Crawford SC as the President of the Tribunal.

4.2 The appointment of the Tribunal and the terms of that appointment were advised by the Appointing Authority to the Secretary of the Tribunal by letter of 28 May 2000. The parties acknowledged the constitution of the Tribunal by their letter of 9 June 2000 to the Permanent Bureau of the Permanent Court of Arbitration.

4.3 Pursuant to the agreement of the parties in clause 6 of the Arbitration Agreement, and as finally expressed in the Amendment to the Special Agreement, the International Bureau of the Permanent Court of Arbitration was appointed to provide secretariat services and facilities for the arbitration. Ms Phyllis Pieper Hamilton, First Secretary of the Permanent Court of Arbitration, has served as secretary of the Tribunal.

5. *Pre-hearing Procedural Issues*

5.1 By their successive agreements the parties made rather detailed provisions concerning procedural matters of the sort more commonly directed by procedural orders made by an Arbitral Tribunal after consultation with the parties. In addition, the Tribunal pursuant to Article 15(1) of the UNCITRAL Rules gave a series of directions as to the procedure to be followed.

5.2 Pursuant to the terms of the agreement between the parties and the Procedural Orders made by the Tribunal pleadings were filed as follows:

Claimant's Memorial 22 May 2000;
Memorial Hawaiian Kingdom 25 May 2000;
Claimant's Counter-Memorial 22 June 2000; and
Hawaiian Kingdom's Counter-Memorial 22 June 2000.

The pleadings were supported by a substantial number of annexures, including many primary sources of the history of the Hawaiian islands.

5.3 The claimant's submissions in his Memorial requested the Tribunal to adjudge and declare:

Mr Larsen's rights as an Hawaiian subject are being violated under international law as a result of the prolonged occupation of the Hawaiian Islands by the United States of America.

Mr Larsen does have redress against the Respondent Government of the Hawaiian Kingdom, as his government has obligations and duties to protect the rights of Hawaiian subjects even in times of war and occupation:

The claimant also asked the Tribunal "to comment on what types of redress" might be available to him.

5.4. Each of the Hawaiian Kingdom's Memorial and Counter-Memorial maintained submissions that the Tribunal declare:

The Claimant's rights, as a Hawaiian subject, are being violated under international law;

The Claimant does not have a right to redress against the Hawaiian Kingdom Government for these violations; and

The Party responsible for the violation of the Claimant's rights as a Hawaiian subject is the United States Government.

5.5 In his Counter-Memorial dated 23 June 2000 the claimant enlarged on his response to the Hawaiian Kingdom's Memorial in the following terms:

Chapter 1
Issues agreed upon by the parties

Both parties have acknowledged that the rights of the Claimant are being violated under international law.

Both parties have also acknowledged that the primary cause of these injuries is the prolonged occupation of the Hawaiian Islands by the United States of America.

Both parties have also acknowledged that the Respondent Government of the Hawaiian Kingdom does have an obligation to protect the rights of the Claimant, Mr Larsen, as a Hawaiian subject. Specifically the Government of the Hawaiian Kingdom acknowledged that

> The Hawaiian Kingdom Government was established by its sovereign to acknowledge and protect the rights of its citizenry. This protection covers the acts of States at war within the territory of the Kingdom.

Chapter II
Issue in Dispute:
Respondent's Liability for Claimant's injuries

The primary issue in contention between the parties is that of the liability of the Respondent Government of the Hawaiian Kingdom towards the Claimant with respect to his injuries.

As summarized in Claimant's Memorial, it is Claimant's position that the Respondent Government of the Hawaiian Kingdom has a duty to protect Claimant's rights as a Hawaiian subject, even in times of war and occupation.

It is Claimant's position that although the United States of America is primarily liable to the Claimant for his injuries, the Government of the Hawaiian Kingdom can also be held liable for these injuries, to the extent that the Government of the Hawaiian Kingdom has not fulfilled its duty to protect Claimant's rights as a Hawaiian subject by preventing the United States of America from imposing its laws (as a part of occupation) within the territory of the Hawaiian Kingdom.

Claimant acknowledges the many steps taken by the Respondent Government of the Hawaiian Kingdom to end the unlawful occupation of the Hawaiian Islands by the United States of America. Unfortunately, none of these steps have successfully protected the rights of Claimant as a Hawaiian subject from the continual denial of his nationality and imposition of American laws over his person.

Because the occupation of the Hawaiian Islands still continues, Claimant's rights continue to be violated. Until Claimant's rights are fully protected, his Government has not fulfilled its obligations towards him as a Hawaiian subject. Claimant now seeks redress against his Government because this obligation has not been fulfilled. Claimant seeks to hold his Government liable only to the extent requested in the award requested by Claimant in his Memorial.

Chapter III
Clarification as to award requested by Claimant

Claimant is NOT requesting monetary compensation from the Government of the Hawaiian Kingdom for his injuries in the award requested from the Arbitral Tribunal. Claimant reserves his right at some future date to make a claim against the United States of America for monetary damages.

Instead, Claimant seeks to force the hand of his government to intervene or otherwise act to successfully end the unlawful occupation of the Hawaiian Islands, and thus to end the denial of his nationality and to end the imposition of American laws over his person.

Claimant has not requested an award for specific performance from this Arbitral Tribunal. Claimant has requested clarification as to whether he can hold his own Government liable for the continual occupation of his country.

If the Arbitral Tribunal issues an award that the Claimant is entitled to redress against the Hawaiian Kingdom, Claimant will at that point consider his options for seeking specific performance or some other remedy from Respondent. In his Memorial, Claimant did request clarification of what types of redress are available to him given such a ruling. It is Claimant's hopes that the Arbitral Tribunal can recommend action to be taken by the Government of the Hawaiian Kingdom that will effectively protect Claimant's rights.

5.6 Under Part 2 of his Counter-Memorial, the Claimant stated the submissions and task of the Court:

In view of the facts and arguments set forth in Claimant's Memorial, together with the clarification of those arguments set forth in this Counter-Memorial.

Mr Larsen requests the Arbitral Tribunal to adjudge and declare that

Mr Larsen's rights as a Hawaiian subject are being violated under international law as a result of the prolonged occupation of the Hawaiian Islands by the United States of America.

Mr Larsen does have redress against the Respondent Government of the Hawaiian Kingdom, as his government has obligations and duties to protect the rights of Hawaiian subjects even in times of war and occupation.

In the event of affirmation of these submissions, Mr Larsen further requests from the Arbitral Tribunal any clarification on what types of redress are available to him, specifically whether there is any way to force the Government of the Hawaiian Kingdom to take specific steps that will protect Claimant's rights.

5.7 The Hawaiian Kingdom's Counter-Memorial (at p. 15) requested the Tribunal to make orders for interim measures that by their terms clearly would affect the United States of America:

The United States Government, to include the State of Hawai'i as its organ, should take all measures at its disposal to ensure its compliance with the 1907 Hague Conventions IV and V as they are applicable to the territorial dominion of the Hawaiian Kingdom, and should inform the Secretary General of the United Nations, or some duly authorized body, of all the measures which it has taken in implementation of that Order.

Further, Article I of Special Agreement No 2 of 2 August 2000 provided:

Pursuant to Article 32(1) of the UNCITRAL Rules, the Parties request the Arbitral Tribunal to issue an Interlocutory Award, on the basis of the 1843 Anglo-Franco Proclamation of 28 November 1843 and the rules and principles of international law, verifying the continued existence of Hawaiian Statehood with the Hawaiian Kingdom as its government.

5.8 Special Agreement No 2 also provided by Article IV:

The Interlocutory Award of the Arbitral Tribunal as to the questions described in Article I shall be final and binding on the Parties and shall be made public.

Upon the issuance of the Interlocutory Award the Parties agree to amend the dispute as follows:

The Arbitral Tribunal is asked to determine, on the basis of the Hague Convention IV and V of 18 October 1907, and the rules and principles of international law, whether the Claimant has any redress against the Respondent Government of the Hawaiian Kingdom?

6. *Procedural Orders*

6.1 Following its constitution, the Tribunal made two Procedural Orders prior to the exchange of pleadings.

6.2 The Tribunal responded to the parties' exchange of the pleadings noted in para. 5.3 above by Procedural Order No 3 of 17 July 2000, which read as follows:

Course of the proceedings so far

1. By an Agreement of 30 October 1999, the plaintiff, Lance Paul Larsen, through his attorney, and the defendant, variously described as the "Hawaiian Kingdom" or as "the Government of the Hawaiian Kingdom", through an attorney, agreed to submit a dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which one only is a State. The dispute is described in Article 1 of the Arbitration Agreement in the following terms:

> a. Lance Paul Larsen, a Hawaiian subject, alleges that the Government of the Hawaiian Kingdom is in continual violation of its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, and in violation of the principles of international law laid [down] in the Vienna Convention on the Law of Treaties, 1969, by allowing the unlawful imposition of American municipal laws over claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.
>
> b. Lance Paul Larsen, a Hawaiian subject, alleges that the Government of the Hawaiian Kingdom is also in continual violation of the principles of international comity by allowing the unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.

The Agreement does not say what the defendant's position is in relation to these claims.

2. The Agreement specified that the Tribunal is to sit at the Permanent Court of Arbitration in The Hague (Article 2(1)), that the Tribunal is to consist of one person appointed by Keoni Agard, Esq. (Article 2(2)), and that the Permanent Court's Bureau is to act as the secretariat for the arbitration (Article 2(3)).

3. Subsequently by successive amendments, the parties amended the Arbitration Agreement to provide (a) that the arbitration should take place under the UNCITRAL Rules and (b) that the Tribunal should consist of three members. The Permanent Court agreed to act as the secretariat for the arbitration. The appointing authority appointed as members Professor Greenwood QC and Mr Griffith QC, who by agreement between them nominated Professor Crawford SC as president. The parties subsequently confirmed that the Tribunal was thereby duly constituted.

4. Article 3 sets out the task of the Tribunal. The Tribunal is to decide in two stages: the first to "result in an award on the verification of the dominion of the Hawaiian Kingdom", the second to "result in an award of [*sic*] the dispute specified in section 1(a) and 1(b) of article 1 above": In the first phase, the Tribunal "shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles".

5. It is necessary also to mention Article 6:

> Nothing in this Agreement can be interpreted as being detrimental to the legal positions or the rights of each Party with respect to the questions submitted to the Arbitral Tribunal, nor can affect or prejudice the decision of the Arbitral Tribunal or the considerations or grounds on which that decision is based.

Whatever else it may do, Article 6 clearly gives the Tribunal the normal range of powers to decide upon "the considerations or grounds" for its decision, which must be in accordance with international law and the UNCITRAL Rules.

6. The parties subsequently filed Memorials and Counter-Memorials dated respectively 22 May 2000 and 22/23 June. These were supported by a substantial number of annexes. The Tribunal has carefully considered these. However, before proceeding to the substance of the issues the parties have sought to place before it, the Tribunal wishes to raise a number of preliminary issues. In short, there are questions whether the "dispute" identified in Article 1 of the Arbitration Agreement is one which is capable of reference to arbitration under the UNCITRAL Rules, or which the Tribunal has jurisdiction to decide in accordance with international law. It does not matter that the parties have failed to raise these issues. The Tribunal has the power to do so, by virtue of Article 6 of the Agreement and Article 15(1) of the Rules. Indeed the jurisprudence of international tribunals suggests that it has the duty to do so.

Issues facing the parties in terms of the UNCITRAL Rules

7. Under the UNCITRAL Rules, legal disputes between the parties to a contract are submitted to arbitration as between those parties, leading to an award which should be enforceable under relevant national laws in accordance with the general system for recognition and enforcement of international arbitral awards. It is a cardinal condition for international arbitration (a) that the dispute is a legal one, and (b) that the Tribunal only has jurisdiction as between the parties to the contract of arbitration.

8. Article 1 of the Rules provides that they shall apply "[w]here the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules". On the face of the pleadings, however, it appears that the dispute referred to arbitration is not a dispute "in relation to a contract" between the parties, or a dispute that relates to any other contractual or quasi-contractual relationship between them, or that it falls within the field of "international commercial relations" referred to in the preamble to the United Nations General Assembly resolution which adopted the Rules (General Assembly resolution 31/98, 15 December 1976). There is therefore a preliminary question whether the dispute identified in Article 1 of the Agreement is an arbitrable dispute under the Rules.

9. As further defined in the pleadings of the parties, especially the Counter-Memorials, the plaintiff has requested the Tribunal to adjudge and declare (1) that his rights as a Hawaiian subject are being violated under international law as a result of the prolonged occupation of the Hawaiian Islands by the United States of America, and (2) that the plaintiff "does have redress against the Respondent Government" in relation to these violations (Plaintiff's Counter-Memorial, para. 3). The defendant "agrees that it was the actions of the United States that violated Claimant's rights, however denies that it failed to intervene" (Defendant's Counter-Memorial, para. 2). Accordingly the parties agree on the first of the two issues identified by the Claimant as in dispute, but disagree on the second. The second issue only arises once it is established, or validly agreed, that the first issue is to be decided in the affirmative.

10. On this basis the Tribunal is concerned whether the first issue does in fact raise a dispute between the parties, or, rather, a dispute between each of the parties and the United States over the treatment of the plaintiff by the United States. If it is the latter, that would appear to be a dispute which the Tribunal

cannot determine, inter alia because the United States is not a party to the agreement to arbitrate. The Tribunal notes in this regard that the respondent has sought interim measures of protection against the United States (Defendant's Counter-Memorial, para. 60). The Tribunal lacks jurisdiction to award interim measures against non-parties. Moreover the mere fact that such a request is made suggests that the real dispute which the parties have sought to bring before the Tribunal is a dispute involving that third party. There is thus a further preliminary question whether the Tribunal has jurisdiction over the first question submitted to it.

11. While the second question is one between the parties to the arbitration, that second question arises only if the Tribunal answers the first question in the affirmative. The Tribunal cannot proceed on the basis of an assumption or hypothesis regarding the first question. If the parties are inviting the Tribunal to do so, then it will be necessary to consider whether the Tribunal is, in fact, faced with a legal dispute within the meaning of the UNCITRAL Rules.

Issues facing the parties in terms of international law

12. Similar problems appear to arise under international law, in accordance with which the Tribunal is instructed to decide this case (cf. Article 33(1) of the Rules). Under international law, the jurisdiction of a non-national tribunal depends on consent and is limited to the parties.

13. Moreover under international law, there is a general principle that a non-national tribunal cannot deal with a dispute if its very subject matter will be the rights or duties of an entity not a party to the proceedings, or if as a necessary preliminary to dealing with a dispute it has to decide on the responsibility of a third party over which it has no jurisdiction: see *Case concerning Monetary Gold removed from Rome, ICJ Reports 1954* p. 12;[9] *Case concerning Certain Phosphate Lands on Nauru, ICJ Reports 1992* p. 240;[10] *Case concerning East Timor, ICJ Reports 1995* p. 90.[11] The International Court of Justice has also held that, under international law, a tribunal cannot decide a case which is hypothetical or moot: see *Case concerning Northern Cameroons, ICJ Reports 1963* p. 12.[12]

The approach of the Tribunal

14. In accordance with Article 15(1) of the Rules, the parties must have a full opportunity to deal with these questions before the Tribunal proceeds to consider them further, or to reach any conclusion on them. The pleadings currently before the Tribunal do not consider these questions.

15. The Tribunal believes that the parties should have an opportunity to decide whether they wish to undertake a separate round of pleadings on those questions, and if so, whether these can be confined to written pleadings or should include an oral phase. If the parties do not wish to engage in a separate round of pleadings, the Tribunal is presently of the view that it should then proceed to consider these issues as preliminary issues and to make an award thereon.

16. The Tribunal accordingly gives the parties until 7 August 2000 to present, jointly or separately, their views on the procedure that should now be followed. If the parties wish to engage in a preliminary round, the Tribunal has in mind the following schedule of pleadings:

The plaintiff to file a written statement by 30 September 2000;

The defendant to file a written statement by 14 November 2000.

[9] 21 *ILR* 399.]
[10] 97 *ILR* 1.]
[11] 105 *ILR* 226.]
[12] 35 *ILR* 353.]

The Tribunal in light of those statements would then, if the parties so request, be prepared to hold a short oral phase in The Hague, before issuing an order or award on the question of its jurisdiction and of the admissibility of the claims presented.

6.3 In summary, Procedural Order No 3 raised issues pursuant to Article 6 of the Arbitration Agreement and Article 15(1) of the UNCITRAL Rules, as to:

(1) the applicability of the UNCITRAL Rules to a non-contractual dispute;
(2) whether there is a justiciable dispute between the parties; and
(3) whether the United States is a necessary party to any such dispute.

6.4 Following the delivery of the Tribunal's Procedural Order No 3 the parties entered into Special Agreement No 2 of 2 August 2000 and sought to raise a preliminary issue to be determined by the Tribunal in the following terms:

Pursuant to Article 32(1) of the UNCITRAL Rules, the Parties request the Arbitral Tribunal to issue an Interlocutory Award, on the basis of the 1843 Anglo-Franco Proclamation of 28 November 1843 and the rules and principles of international law, verifying the continued existence of Hawaiian Statehood with the Hawaiian Kingdom as its government.

6.5 The Tribunal responded to the making of Special Agreement No 2 with its Procedural Order No 4 of 5 September 2000, which read as follows:

1. In its Procedural Order No 3, the Tribunal identified a number of issues which in its view are preliminary to any consideration of the merits of the dispute between the parties. The Tribunal gave the parties until 7 August 2000 "to present, jointly or separately, their views on the procedure that should now be followed".

2. On 2 August 2000 the parties entered into "Special Agreement No 2". The central provision of that Agreement is Article I, which provides as follows:

> Pursuant to Article 32(1) of the UNCITRAL Rules, the Parties request the Arbitral Tribunal to issue an Interlocutory Award, on the basis of the 1843 Anglo-Franco Proclamation of 28 November 1843 and the rules and principles of international law, verifying the continued existence of Hawaiian Statehood with the Hawaiian Kingdom as its government.

3. The Tribunal set out in its Order No 3 the questions which, in its view, are raised before it can proceed to the merits of the dispute. The issue identified in Article 1 of Special Agreement No 2 is not one of these. Rather it appears to be a reformulation of the first substantive issue identified as being in dispute.

4. It is not open to the parties by way of an amendment to the Special Agreement to seek to redefine the essential issues, so as to convert them into "interim" or "interlocutory" issues. In accordance with Article 32 of the UNCITRAL

Rules, and with the general principles of arbitral procedure, it is for the Tribunal to determine which issues need to be dealt with and in what order. For the reasons already given, the Tribunal cannot at this stage proceed to the merits of the dispute; these merits include the question sought to be raised as a preliminary issue by Article I. If the arbitration is to proceed it is first necessary that the preliminary issues identified in its Order No 3 should have been dealt with.

5. If the parties are not content with the submission of the dispute to arbitration under the UNCITRAL Rules and under the auspices of the Permanent Court of Arbitration, they may no doubt, by agreement notified to the Permanent Court, terminate the arbitration. What they cannot do, in the Tribunal's view, is by agreement to change the essential basis on which the Tribunal itself is constituted, or require the Tribunal to act other than in accordance with the applicable law.

6. For these reasons the Tribunal reaffirms its Order No 3. The issue of the continuing existence of "Hawaiian Statehood with the Hawaiian Kingdom as its government" is an issue for the merits if and to the extent that the Tribunal holds that it has jurisdiction to proceed to the merits. If the parties wish the present arbitration to go forward, they should proceed to an exchange of written pleadings on the issues referred to in Order No 3.

7. The Tribunal accordingly gives the parties until 25 September 2000 to agree a pleading schedule for a preliminary round, as envisaged in Order No 3. In default of such an agreement, the Tribunal will itself determine that schedule, or make such other order as may be appropriate in respect of the proceedings.

6.6 By letter dated 11 September 2000 addressed to the Secretary of the Tribunal, the parties elected to respond to the matters raised in Procedural Order No 4 with the claimant to file a Reply by 30 September 2000 and the Hawaiian Kingdom to file a Reply by 14 November 2000. The parties requested hearings for argument on the preliminary issues at the Peace Palace in The Hague.

6.7 The claimant's Reply of 30 September 2000 shortly addressed the procedural issues raised by Procedural Orders Nos 3 and 4. The Hawaiian Kingdom's Reply of 14 November 2000 was more discursive. Part 1 contained a useful summary of the Hawaiian Kingdom's contentions as to the underlying factual circumstances, dividing its consideration between the historical status of the Hawaiian Kingdom before 1898 and after 1898, when its transfer to administration by the United States of America was effected. Part 2 responded to the issues raised by Procedural Order No 3.

6.8 The parties to the arbitration also established an Internet site at *www.alohaquest.com/arbitration* that enables open access to many of the documents in the arbitration.

7. *The Hearings*

7.1 By their letter of 20 October 2000 the parties jointly notified the Secretary of the Tribunal to confirm the oral hearings were to be held on

7, 8, 11 and 12 December 2000 at the Peace Palace. At the hearings the parties were represented as noted in para. 1 above. A complete transcript was taken of the hearings that ran as follows:

7 December 2000	Submissions by claimant
8 December 2000	Response by Hawaiian Kingdom
11 December 2000	Reply by claimant followed by Reply by Hawaiian Kingdom.

7.2 For the reasons stated by the Tribunal in Procedural Orders Nos 3 and 4, the hearings were directed to resolve the issues identified by the Tribunal as necessary to be considered prior to the Tribunal making any relevant findings of fact or other determination on the merits of the matters raised by the parties.

7.3 This consideration of preliminary issues requires the Tribunal to have some regard to the parties' contentions as to the relevant historical and other facts enlarged upon in the Memorials, Counter-Memorials, Replies and the comprehensive annexes and materials to those pleadings. Chapter 2 of the Hawaiian Kingdom's Reply contains a useful summary of the factual circumstances that are expanded upon in the earlier exchange of pleadings and annexes. Although the Tribunal cannot make any relevant findings of fact as part of its consideration of preliminary issues identified for determination at this stage in the proceedings, the Tribunal has had regard to the entirety of this material in its consideration of these preliminary issues.

7.4 A perusal of the material discloses that in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties. On 6 July 1898, Joint Resolution No 55 was passed by the United States House of Representatives and Senate to provide for the annexation of the Hawaiian Islands to the United States. This followed an uncompleted process of annexation attempted during the administration of President Grover Cleveland in 1893. These matters can be seen from the following documents, which are annexed to this Award:

- the text of President Cleveland's message to the Senate and House of Representatives dated 18 December 1893 (Annexure 1);
- the text of Public Law No 103-140 of the 103rd Congress, approved by President Clinton on 23 November 1993 and expressed as a joint resolution "to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii" (Annexure 2).

8. *The Applicable Rules: The Optional Rules or the UNCITRAL Rules?*

8.1 In the Terms of Agreement of 30 October 1999 (above, para. 2.1), the parties agreed to refer the dispute to arbitration under the Permanent Court's Optional Rules for Arbitrating Disputes between Two Parties of which Only One is a State. As described above (para. 3), the arbitration proceeded by agreement under the UNCITRAL Rules.

8.2 The question whether the Optional Rules were available to the present parties in respect of the dispute identified in the Notice of Arbitration was nonetheless discussed before the Tribunal.

8.3 Paras. 19 and 20 of the claimant's Reply maintained a preference for the PCA Optional Rules to apply. At the hearing, however, the claimant's counsel indicated (Transcript, p. 4) that the claimant would submit to the decision of the Tribunal as to the applicable rules.

8.4 Paras. 120 and 127 of the respondent's Reply also expressed a preference for the PCA Optional Rules to apply, and invited the Tribunal, with the consent of the parties, to proceed under those Rules. At the hearing (Transcript, pp. 80-1) the claimant's counsel invited the Tribunal to apply the PCA Optional Rules on the basis that the Tribunal then would first be required to address the issue whether the Hawaiian Kingdom was presently a State within the meaning of the 1899 and 1907 Conventions and the PCA Optional Rules. Whilst accepting that the matter could proceed under either the Optional Rules or the UNCITRAL Rules, Mr Dubin submitted that the issue of the status of the Hawaiian Kingdom could be considered either as a preliminary matter or as an issue postponed to the merits.

8.5 An initial difficulty (which arises also under Article 1(1) of the UNCITRAL Rules) is that the dispute in question arose independently of any contract between the parties and concerned obligations said to exist by reference to the status of the parties and not their contractual relations. Given the facilitative character of the Optional Rules, however, the Tribunal accepts that it is possible for disputes arising independently of a contract to be referred to arbitration under those Rules. In this respect the concluding phrase of Article 1(1) of the Optional Rules ("subject to such modifications as the parties may agree in writing") is pertinent.

8.6 More difficult questions arise in cases where it is doubtful whether either of the parties to a dispute submitted to arbitration under the Optional Rules is a State or State entity, and *a fortiori* when the status of a party as a State is at the core of such a dispute.

8.7 In the exercise of its mandate to facilitate arbitration, the Permanent Court has made itself available as an administering body in a much wider range of cases than those covered by the Conventions of 1899 and 1907.[13] Indeed, the Optional Rules are themselves

[13] See 1899 Convention for the Pacific Settlement of International Disputes, Art. 21; 1907 Convention for the Pacific Settlement of International Disputes, Art. 42. These provisions appear to contemplate a broader role for the Permanent Court than the resolution of interstate disputes; at least, the Permanent Administrative Council must have so considered, *inter alia* in adopting the Optional Rules.

an adaptation of the UNCITRAL Rules, adopted by the Administrative Council in 1993 to provide for an extended reach of the Permanent Court's facilities beyond the arbitration of disputes between two States.

8.8 In the present case, however, the International Bureau, having regard to the evident likelihood that the continuing status of the Hawaiian Kingdom after 1898 would or might be an issue, declined to allow the arbitration to be conducted under its auspices except on the basis that it was conducted under the UNCITRAL Rules. This requirement was expressed in the First Secretary's communication to the Appointing Authority on 3 December 1999 (see para. 3.1 above). On this footing the claimant executed the First Amendment to the Notice of Arbitration, and the parties subsequently concluded the Special Agreement of 25 January 2000. The arbitration having been conducted on this basis, the Tribunal considers that the question of the potential scope of the Optional Rules does not arise. In its view there is neither occasion nor need to accede to the parties' request to apply the Optional Rules.

9. *The Status of the Hawaiian Kingdom as Represented by its Council of Regency: Relation to the Preliminary Issues*

9.1 This does not however mean that the status of the respondent, or its identification as the Hawaiian Kingdom, ceases to be an issue for the Tribunal. On the contrary, the issue of the status of the Hawaiian Kingdom would arise, directly or indirectly, if the Tribunal were to seek to resolve on the merits the matters raised by the parties for decision under the Arbitration Agreement. This is so, quite apart from the matters raised in Procedural Order No 3, because the Tribunal would have to consider, *inter alia*, the question whether the respondent constitutes "the Hawaiian Kingdom as represented by its Council of Regency". This issue is the subject matter of arguments made in the respondent's Memorial. Moreover it is not suggested that the dispute identified in the Notice of Arbitration or in the Special Agreement of 25 January 2000 would arise if the respondent were not the entity referred to as the "Hawaiian Kingdom", or if the persons identified as the "Council of Regency" were not entitled to represent the Hawaiian Kingdom.

9.2 The parties sought to avoid this difficulty by stipulating as between them on the status of the respondent. According to the pleadings, the issue of the continuing existence of the Hawaiian Kingdom was agreed to by the parties as a matter not in dispute. In outline, the position of the parties was that, once recognized as such, a State would continue indefinitely

during a period of annexation by another State. This agreed position would call for careful examination by the Tribunal in the context of the merits, having regard *inter alia* to the lapse of time since the annexation, subsequent political, constitutional and international developments, and relevant changes in international law since the 1890s. Whatever may have been agreed between the parties, this issue would appear to underlie, or to be presupposed by, any determination of the merits of the dispute which the Tribunal might be called on to make.

9.3 At the hearings, counsel for each party accepted that these issues of status, both for the purposes of the procedure of the arbitration as well as for the purposes of the determination of the substantive dispute, should be postponed, and that the Tribunal should first consider the three preliminary issues identified in Procedural Order No 3 (see Transcript, pp. 137-8, 145, 150-1, 160-1).

9.4 Accordingly, the Tribunal turns to consider the three preliminary issues identified in Procedural Order No 3. For the reasons set out above, the Tribunal has not found it necessary for the purposes of the present Award to consider or determine whether the Hawaiian Kingdom may be accepted as a party represented by its Council of Regency in these proceedings. Still less has the Tribunal found it necessary to consider whether for the purposes of international law the Hawaiian Kingdom may be regarded as continuing to exist.

9.5 The three preliminary issues raised by Procedural Order No 3 are as follows:

(a) the applicability of the UNCITRAL Rules;
(b) whether there is a justiciable dispute between the parties; and
(c) whether the United States is a necessary party to such dispute, with the consequence that the Tribunal lacks jurisdiction over the dispute in its absence.

9.6 In its consideration of these issues the Tribunal has had regard to the entirety of the pleadings and their annexes, referred to in para. 5.2 above, and particularly to the parties' Replies and annexes referred to in para. 6.6 above. The Tribunal appreciates the constructive and thoughtful submissions made by the parties, which have helpfully informed the Tribunal's consideration of these matters.

10. *Application of the UNCITRAL Arbitration Rules*

10.1 As already noted, the Arbitration Agreement was amended to substitute the UNCITRAL Arbitration Rules (the UNCITRAL Rules) for the PCA Optional Rules. Thereafter the Tribunal was constituted and the proceedings continued under the UNCITRAL Rules.

10.2 In their Special Agreement No 2 of 2 August 2000 the parties sought to raise a preliminary issue in the following terms:

Article I
Request for Interlocutory Award

Pursuant to Article 32(1) of the UNCITRAL Rules, the Parties request the Arbitral Tribunal to issue an Interlocutory Award, on the basis of the 1843 Anglo-French Proclamation of 28 November 1843 and the rules and principles of international law, verifying the continued existence of the Hawaiian Statehood with the Hawaiian Kingdom as its government.

10.3 As noted in para. 6.5 above, the Tribunal responded with its Procedural Order No 4 of 5 September 2000. This reaffirmed Procedural Order No 3 and stated that the parties should address the preliminary issues there raised, including the applicability of the UNCITRAL Rules to a non-contractual arbitration. The matter was accordingly addressed in the written pleadings and in oral argument.

10.4 Article 1 of the UNCITRAL Rules provides that:

> 1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.
> 2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.[14]

10.5 The Tribunal observes that neither the UNCITRAL Rules nor, for that matter, the UNCITRAL Model Law of International Commercial Arbitration (the Model Law) has any effect as such in international law. The Model Law applies only when it is enacted as the domestic law of a State to apply as the law of that State to international commercial disputes. When so enacted, parts of the Model Law have prescriptive local application, but many provisions may be subject to variation or exclusion by the parties. The UNCITRAL Rules are even less prescriptive. They stand as a convenient set of rules that parties may agree to apply to the arbitration of a dispute. The UNCITRAL Rules have been adapted to become the rules of various arbitral institutions, including by the Permanent Court of Arbitration. Parties to a dispute or an arbitration agreement also are able further to adapt the terms of the Rules, expressly or by implication, for the purposes of their proceedings.

10.6 Hence the issue of the applicable rules is not dispositive of the consideration and determination of this dispute. Arbitration is dependent upon the consent of the parties, given either before or after a dispute arises between them. This consent includes agreement as to what institutional or other procedural rules are to apply. The parties may agree to arbitrate under the auspices of the Permanent Court of Arbitration by reference

[14] This may be compared with Article 7(1) of the UNCITRAL Model Law, which refers to disputes arising between the parties to an arbitration agreement "in respect of a defined legal relationship, whether contractual or not".

to other agreed rules, including the UNCITRAL Rules as a standard form of arbitral rules.

10.7 The Tribunal raised the issue of the application of the UNCITRAL Rules in the context of its concerns as to the preliminary issues identified in Procedural Order No 3. When regard is had to the non-prescriptive and non-coercive nature of the UNCITRAL Rules as a standard regime available for parties to apply to resolve disputes between them, however, there appears no reason why the UNCITRAL Rules cannot be adapted to apply to a non-contractual dispute. For example, the parties could agree that a dispute as to tort, or occupier's or environmental liability might be determined in an arbitration applying the UNCITRAL Rules. Moreover they could so agree in relation to a dispute which had already arisen independently of any contractual relationship between them. In this manner the parties to an arbitration may specifically or by implication adopt or apply the UNCITRAL Rules to any dispute.

10.8 Further, although the UNCITRAL Rules were primarily drawn for the purposes of the arbitration of contractual disputes between parties or corporations, a State entity, or a State itself, may become a principal party to an agreement to arbitrate subject to UNCITRAL Rules. A State may agree to arbitrate under the UNCITRAL Rules before or after a dispute arises. Indeed, State parties commonly agree to apply the UNCITRAL Rules, modified as may be appropriate, to disputes that they have agreed to arbitrate with a non-State party. In the context of international arbitration this often enough occurs in disputes over procurement or "build, operate and transfer" contracts and other transactions involving a State and a non-State foreign party.

10.9 In their final submissions the parties accepted that the UNCITRAL Rules enabled the parties to put their case and contentions on the preliminary issues as much as if they had invoked the PCA Optional Rules, and that there was no prejudice arising to the position of either party from the continued application of the UNCITRAL Rules (see Transcript, pp. 135, 145-6).

10.10 For these reasons the Tribunal approaches the issue of the applicable rules on the basis that the UNCITRAL Rules may be applied to an agreement to arbitrate a non-contractual dispute, including a dispute where one of the parties is or is said to be a State. The Tribunal finds that the parties to this arbitration effectively have agreed to apply the UNCITRAL Rules with such necessary adaptations as arise from the terms of the Arbitration Agreement and the nature of the issues referred to arbitration.

11. *Justiciable Dispute and Necessary Parties Issues*

11.1 The Tribunal turns to the second and third issues raised in Procedural Order No 3, namely whether the pleadings and oral submissions

disclose a justiciable dispute between the parties to the proceedings and whether the United States was a necessary party to any such dispute.

11.2 A primary argument of the parties was that these principles are inapplicable in the present proceedings and are binding, if at all, only on the International Court or other tribunals exercising jurisdiction in State to State matters. Before considering how these principles apply to the circumstances of the present case, it is accordingly necessary to ask whether they are applicable at all.

(a) *Requirement of a dispute between the parties*

11.3 The first such principle is derived from the fact that the function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings. It follows that if there is no dispute between the parties the tribunal cannot proceed to a ruling. There are several aspects to this principle. The dispute must be a legal dispute, i.e. one as to the respective rights and obligations of the parties. It must also be one actually arising between the parties at the time of the proceedings and not one which has become moot so that any decision given would be devoid of purpose. It is not the function of an international arbitral tribunal, whose decision is enforceable by legal process as between the parties, to decide purely historical issues or controversies which bear no relation to the legal rights and obligations of the parties at the time of the decision. And this is true whatever symbolic significance or effect may be attributed to those historical issues.

11.4 This principle was recognized by the International Court of Justice, for example, in its judgments in the *Northern Cameroons* case *(Republic of Cameroon* v. *United Kingdom)*, *ICJ Reports 1963*, p. 15[15] at pp. 27, 38, and the *East Timor* case *(Portugal* v. *Australia)*, *ICJ Reports 1995*, p. 90[16] at pp. 99-100, para. 22. Although the Court in those cases found that there was a dispute between the parties, it is clear that, had it not come to that conclusion, it would have held that there was no basis for the exercise of its jurisdiction.

11.5 Moreover, in the *Northern Cameroons* case, the Court held that the dispute had become moot so that a decision would no longer serve any useful purpose: *ICJ Reports 1963* at p. 38. The dispute in question there concerned whether the United Kingdom had been legally justified in administering the Northern Cameroons (part of the trust territory of British Cameroon) in administrative union with the British colony and protectorate of Nigeria. The difficulty was that, after a United Nations-supervised plebiscite, the people of the Northern Cameroons had opted for union with Nigeria rather than Cameroon, and their decision had been accepted by the General Assembly which had decided to

[15 35 *ILR* 353.] [16 105 *ILR* 226.]

terminate the trusteeship. In the circumstances, any legal dispute as to the circumstances of the administration of the territory prior to the termination of the trusteeship could no longer have any effect on the relationship between the United Kingdom and the Republic of Cameroon.

11.6 There is no reason, in the Tribunal's view, why these rules should not also apply to the present proceedings. The requirement of a dispute between the parties is explicit in the UNCITRAL Rules, Article 1(1), the terms of which are set out in para. 10.4 above. It may be noted that the position is the same under the PCA Optional Rules, Article 1(1).

11.7 For these reasons the Tribunal holds that it must be satisfied that such a dispute exists. For that purpose it is not sufficient that the parties to the arbitration both claim that there is a dispute between them. The nature of the arbitral function requires the Tribunal carefully to scrutinize the submissions of the parties in order to ensure that they do in fact disclose the existence of a dispute and to decline to exercise jurisdiction if it is not satisfied on that score.

(b) *Necessary parties—the* Monetary Gold *principle*

11.8 The second principle is that an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a State which is not a party to the proceedings.

11.9 This principle is likewise well established in the jurisprudence of the International Court of Justice. In the *Monetary Gold* case, *ICJ Reports 1954*, p. 19,[17] the Court was faced with proceedings instituted by Italy against France, the United Kingdom and the United States of America concerning a consignment of monetary gold looted by German forces from Rome in 1943. The gold was held by the Tripartite Commission constituted by the three Respondent States. An arbitrator had already advised the three respondents that the gold had been the property of the National Bank of Albania. The three States had agreed that they would deliver the gold to the United Kingdom (in partial satisfaction of the judgment of the International Court in the *Corfu Channel* case, *ICJ Reports 1949*, p. 4,[18] awarding the United Kingdom damages against Albania which Albania had not paid) unless Italy or Albania made an application to the International Court. Italy made such an application, Albania did not. In its application, Italy maintained that Albania had incurred international responsibility towards Italy as a result of an allegedly unlawful act and that Italy was entitled to the gold as reparation for that act. Italy further argued that her claim to the gold should take priority over any claim by the United Kingdom.

11.10 The Court held that the entire case raised by the application centred around a claim by Italy against Albania:

[17 21 *ILR* 399.] [18 16 *Ann Dig* 155.]

> In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her ... The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. *ICJ Reports 1954*, p. 19 at p. 32.

The Court went on to say that the mere fact that a State not party to the proceedings might be affected by the decision of the Court was not enough to preclude the exercise of jurisdiction. The decisive factor was that "Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision" (p. 32).

11.11 This test has been repeated by the Court in subsequent decisions such as *Military Activities in and against Nicaragua, ICJ Reports 1984*, p. 431,[19] para 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990*, p. 116,[20] para. 56, *Phosphate Lands in Nauru, ICJ Reports 1992*, p. 240[21] at pp. 258-62, paras. 48-55 and *East Timor, ICJ Reports 1995*, p. 90[22] at pp. 102-5, paras. 28-35. While the Court reached different decisions in these cases, each of these judgments repeats the test laid down in the *Monetary Gold* case.[23]

11.12 The *Nauru* and the *East Timor* cases are particularly pertinent. In the present proceedings the Tribunal put a number of questions regarding these cases to the parties and invited their submissions. Extensive discussion of the relevant issues ensued.

11.13 In the *Nauru* case, the Court rejected an Australian preliminary objection based on the *Monetary Gold* principle. Australia had argued that the Court could not exercise jurisdiction over Nauru's claims regarding the administration of Nauru by Australia during the period when Nauru had been a United Nations trust territory, because any decision would necessarily affect the rights of New Zealand and the United Kingdom who were not parties to the proceedings. Australia based its argument on the fact that it had administered Nauru on behalf of itself, New Zealand and the United Kingdom. The Court held, however, that this was not a case in which the rights of the two States would be the "very subject matter" of the Court's decision. The Court stated that:

> In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned but no finding in

[19 76 *ILR* 1.] [20 97 *ILR* 112.] [21 97 *ILR* 1.]
[22 105 *ILR* 226.] [23 21 *ILR* 399.]

respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction. *ICJ Reports 1992*, p. 240 at pp. 261-2, para. 55.

11.14 In the *East Timor* case, Portugal brought proceedings against Australia regarding a treaty concerning the exploitation of the continental shelf which Australia had concluded with Indonesia in respect of the territory of East Timor. East Timor, a Portuguese colony, had been occupied by Indonesian forces in 1975 and Indonesia had purported to annex the territory. Portugal claimed that Australia's act in concluding the treaty with Indonesia, providing for exploration and exploitation of natural resources between the coasts of East Timor and Australia, violated the right to self-determination of the East Timorese people. Australia objected that the Court could not decide the case without determining the legality or illegality of the Indonesian occupation and could not do that in the absence of Indonesia. This time, the Court upheld Australia's objection, holding, by fourteen votes to two, that the case came within the *Monetary Gold* principle.

11.15 The Court stated that . . .

> Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered into and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia. *ICJ Reports 1995*, p. 90 at p. 102, para. 28.

11.16 At the invitation of the Tribunal, the parties addressed the issue whether the *Monetary Gold* principle applies to arbitral proceedings and, if so, what were the limits of that principle. Each party suggested that the *Monetary Gold* principle should be regarded as confined to proceedings in the International Court of Justice and not as extending to arbitral proceedings of a mixed character, although neither party developed this argument in any detail.

11.17 In assessing this argument, it needs to be stressed that, in accordance with the agreement between the parties, the Tribunal is called on to apply international law to a dispute of a non-contractual character in which the sovereign rights of a State not a party to the proceedings are clearly called in question. The position in contractual disputes governed by some system of private law and involving the rights of a third party might conceivably be different. But in proceedings such as the present, the Tribunal is not persuaded that the *Monetary Gold* principle is inapplicable. On the contrary, it can see no reason either of principle or policy for applying any different rule. As the International Court of

Justice explained in the *Monetary Gold* case (*ICJ Reports 1954*, at p. 32),[24] an international tribunal may not exercise jurisdiction over a State unless that State has given its consent to the exercise of jurisdiction. That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings.

11.18 Mr Dubin, who argued this part of the case for the respondent, endeavoured to persuade the Tribunal that the International Court's formulation of the *Monetary Gold* principle was unsatisfactory. Reasoning by analogy with the approach adopted by national courts, in particular those of the United States, he contended that, instead of asking whether the interests of a non-party constituted "the very subject matter" of the decision which the Tribunal was asked to give, the Tribunal should ask whether there was a substantial risk of prejudice to the absent State. He contended that there was no risk of prejudice in the present case, since any award given by the Tribunal would be binding only on the parties.

11.19 The Tribunal has given careful thought to this argument. It is not, however, persuaded that it should apply a test different from that laid down in the *Monetary Gold* case and subsequent decisions of the International Court. There are several reasons for this.

11.20 First, the Tribunal considers that the test which has been applied by the International Court of Justice is the correct one. Analogies with the position in national laws are not persuasive in this context. The principle of consent, which is fundamental to the jurisdiction of international tribunals, is largely irrelevant in determining the scope of jurisdiction of a national court. In addition, national courts generally enjoy the power to join third parties as parties to the proceedings, a power which this Tribunal lacks. The principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party.

11.21 Secondly, it is clear from the decisions of the International Court of Justice, particularly the passages in the *Monetary Gold* and *Nauru* cases which are set out above, that the Court has rejected a "prejudice" test in favour of the "very subject matter test". Although there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice.

[24] 21 *ILR* 399.]

11.22 For the claimant, Ms Parks submitted that the Tribunal should not be deterred from exercising jurisdiction as between the parties on account of a concern for the rights of the United States of America, because, as she put it, the United States of America had no rights in Hawaii. But this is to confuse the substantive law with the law relating to jurisdiction. As the International Court of Justice explained in its judgment in the *East Timor* case, even where the substantive law at issue consists of rights *erga omnes* (i.e. rights which can be asserted against the entire world rather than rights which can be opposed to only one other party) such as the right of self-determination, that did not affect the jurisdiction of the Court:

> ....the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*. *ICJ Reports 1995*, p. 102, para. 29.

Moreover, it may be noticed that throughout its jurisprudence on the *Monetary Gold* principle, the Court refers to the "legal interests", not the "rights" of the absent State.

11.23 It follows that, even if (for the sake of argument) one were to accept Ms Parks' premise that the United States of America has no rights in Hawaii, the Tribunal can neither decide that question, nor proceed on the assumption that it is correct. The Tribunal cannot rule on the lawfulness of the conduct of the respondent in the present case if the decision would entail or require, as a necessary foundation for the decision between the parties, an evaluation of the lawfulness of the conduct of the United States of America, or, indeed, the conduct of any other State which is not a party to the proceedings before the Tribunal.

11.24 The Tribunal notes, for the sake of completeness, that there 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.[25] It is also possible that the principle does not apply where the finding involving an absent third party is merely a finding of fact, not entailing or requiring any legal assessment or qualification of that party's conduct or legal position. In the present case, however, the parties did not seek to rely on any possible exception to the principle, and in particular they accepted that the Tribunal was called on to do more than investigate purely factual issues: see below, para. 13.3.

[25] In *East Timor*, the Court rejected Portugal's argument that, at the time the Treaty of 1989 was concluded, the unlawfulness of Indonesia's administration of the territory was a "given" in this sense. *ICJ Reports 1995*, p. 90 at p. 104, para. 32 [105 *ILR* 226].

12. *Application of the Requirements for a Dispute and Necessary Parties in the Present Proceedings*

12.1 For these reasons, it is necessary for the Tribunal to determine—

(a) whether there is a legal dispute between the parties to the present proceedings; and, if so
(b) whether the Tribunal can make a decision regarding that dispute without the interests of a State not party to the proceedings forming the very subject matter of that decision.

The two questions are closely related and fall to be considered together.

12.2 The Tribunal considers that, as originally pleaded by both parties, the case did not disclose a dispute in respect of which the Tribunal could exercise jurisdiction. This conclusion is obvious if one considers the formal submissions of the parties. In the claimant's Memorial, Part 3, the claimant asks the Tribunal to adjudge and declare that:

> Mr Larsen's rights as a Hawaiian subject are being violated under international law as a result of the prolonged occupation of the Hawaiian Islands by the United States of America.
>
> Mr Larsen does have redress against the Respondent Government of the Hawaiian Kingdom, as his government has obligations and duties to protect the rights of Hawaiian subjects even in times of war and occupation.

The respondent's Memorial, p. 117, asks the Tribunal to adjudge and declare that:

> The Claimant's rights, as a Hawaiian subject, are being violated under international law;
>
> The Claimant does not have a right to redress against the Hawaiian Kingdom Government for these violations; and
>
> The party responsible for these violations of the claimant's rights, as a Hawaiian subject, is the United States Government.

12.3 In his Counter-Memorial, Chapter III, the claimant sought to clarify the purpose of the proceedings as follows:

> Claimant is NOT requesting monetary compensation from the Government of the Hawaiian Kingdom for his injuries in the award requested from the Arbitral Tribunal. Claimant reserves his right at some future date to make a claim against the United States of America for monetary damages.
>
> Instead, Claimant seeks to force the hand of his government to intervene or otherwise act to successfully end the unlawful occupation of the Hawaiian Islands, and thus to end the denial of his nationality and to end the imposition of American laws over his person.

12.4 As noted in para. 5.9 above, in its Counter-Memorial at p. 15, the respondent requested the Tribunal to indicate interim measures of protection in the following terms:

The United States Government, to include the State of Hawai'i as its organ, should take all measures at its disposal to ensure its compliance with the 1907 Hague Conventions IV and V as they are applicable to the territorial dominion of the Hawaiian Kingdom, and should inform the Secretary General of the United Nations, or some duly authorized body, of all the measures which it has taken in implementation of that Order.

12.5 As pleaded, the entire case clearly raises questions about whether there was a real dispute between the parties, as opposed to a dispute between the parties and the United States of America. It also clearly raised the question whether the Tribunal could give a decision without ruling on the legality or illegality of the conduct of the United States of America. It was these concerns which led the Tribunal to issue Procedural Order No 3.

12.6 As noted in para. 6.4 above, and in order to avoid the need for the Tribunal to hear argument on the issues raised in Procedural Order No 3, the initial reaction of the parties to Procedural Order No 3 was to amend the Special Agreement submitting the dispute to arbitration in the terms of Special Agreement No 2. This course of action did not, however, remove the Tribunal's concerns regarding the requirement of a dispute and the application of the *Monetary Gold* principle. Although the parties may, by agreement, determine the extent of the Tribunal's jurisdiction as between themselves, they cannot thereby entitle, let alone compel, the Tribunal to ignore the fundamental requirements of international law that there must be a real dispute between the parties and that the Tribunal must not make a decision which evaluates the legality of the conduct of a State not party to the proceedings. The Tribunal made that clear in its Procedural Order No 4 (para. 6.5 above). The parties complied with that Order and submitted fresh pleadings on the points raised in Procedural Order No 3.

12.7 Having heard the arguments of the parties, the Tribunal considers that, had the case remained as pleaded before the Tribunal adopted Procedural Order No 3, there is no doubt that the *Monetary Gold* principle would have precluded the exercise of jurisdiction. The pleadings of both parties expressly invited the Tribunal to decide that the United States of America had acted unlawfully and, indeed, the respondent sought interim measures against the United States of America. It was also difficult to see that, as originally pleaded, there was a real dispute between the parties. At any rate, any such dispute concerned only the consequences for the parties of a legal situation, involving intimately the rights of a third State, on which the parties were not in dispute with each other but were in dispute with that third State. In other words, the gist of the dispute submitted to the Tribunal was a dispute not between the parties to the arbitration agreement but a dispute between each of them and a third party.

12.8 In the light of Procedural Order No 3, each party amended the way in which it put its case. In his Reply, para. 39, the claimant asked the Tribunal to adjudge and declare that:

The *Acting* Council of Regency of the Hawaiian Kingdom has an obligation and a responsibility under international law, to take steps to protect Claimant's nationality as a Hawaiian subject, and that

Because the *Acting* Council of Regency of the Hawaiian Kingdom has failed to adequately protect Claimant's nationality as a Hawaiian subject, it is liable to the Claimant for redress of grievances.

This request was maintained by Ms Parks in her closing submissions at the hearing (Transcript, p. 130).

12.9 The respondent's Reply, para. 134, concluded that:

> The purpose of this case as it pertains to the parties, is to achieve a better understanding as to the relationship between the Claimant and the Respondent. But on a broader level, this case can serve to clarify an understanding to assist in providing harmony between nationals and their governments. Any award which might come from this case is not going to be enforced by national courts. However, this does not mean the findings and conclusions will not have persuasive effect in other international proceedings, in which the history and status of the Hawaiian Kingdom may become an issue. Indeed, by doing its work here, the Tribunal may be able to add immeasurable insight, within the context of law, in related decision-making processes as it relates to the Hawaiian Kingdom.

12.10 The parties developed these submissions during the hearings. The Tribunal is grateful to counsel for the careful way in which they developed their arguments and formulated the dispute as each party saw it. Nevertheless, the Tribunal is compelled to find that in the present case there is no dispute between the parties on which this Tribunal can adjudicate without falling foul of the *Monetary Gold* principle.

12.11 If the dispute is defined without reference to the actions of the United States of America and the legality of its presence in Hawaii, it has to be reduced to an abstract question about whether the respondent has a duty to protect the claimant. There is, however, no dispute between the parties on that question.

12.12 It is clear from the pleadings that the parties are agreed on the following propositions:

1. Hawaii was not lawfully incorporated into the United States of America at any time;
2. Therefore the Hawaiian Kingdom still exists as a matter of international law;
3. The claimant is a national of that Kingdom;
4. The respondent is entitled and required to act on behalf of that Kingdom; and
5. The respondent therefore has a duty of protection in respect of the claimant.

There is no dispute between the parties in respect of any of these propositions.

12.13 At the hearing the agent for the Hawaiian Kingdom submitted (Transcript, p. 59), in terms with which the claimant concurred, that:

> ... the present issue before the Tribunal is not a contentious case between the parties.

12.14 An identified dispute between the parties only emerges in respect of whether the respondent has discharged its duty of protection towards the claimant. In other words, the dispute, if there is one, relates to the consequences for the parties of the five propositions identified in para. 12.12 above, in terms of the "duty of protection" thereby stipulated. This cannot, however, be addressed unless the Tribunal first determines that there is something against which the respondent should have acted to protect the claimant. Yet when one looks at what the claimant demands that the respondent protect him against, one is inevitably and inexorably forced back to allegations regarding the acts of the United States of America. If there is a dispute between the claimant and the respondent, it concerns whether the respondent has fulfilled what both parties maintain is its duty to protect the claimant, not in the abstract but against the acts of the United States of America as the occupant of the Hawaiian islands. Moreover, the United States' actions of which the claimant claims to be the victim would not give rise to a duty of protection in international law unless they were themselves unlawful in international law.

12.15 It follows that the Tribunal cannot determine whether the respondent has failed to discharge its obligations towards the claimant without ruling on the legality of the acts of the United States of America. Yet that is precisely what the *Monetary Gold* principle precludes the Tribunal from doing. As the International Court explained in the *East Timor* case, "the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case". (*ICJ Reports 1995*, p. 90, para. 29).

12.16 At the hearings, counsel for the claimant sought to avoid this conclusion by submitting that the claimant's arguments that the respondent had failed in its duty towards him was not confined to a claim that the respondent should have protected him against the United States of America. She maintained that other States have also refused to acknowledge his status as "a national of the Hawaiian Kingdom" and have treated him in a manner which calls for action on the part of the respondent. She pointed, in particular, to the refusal of the Netherlands to recognize the claimant's travel documents, its insistence on treating him as a United States citizen and its consequent refusal to allow him to enter the Netherlands on any other basis.

12.17 The Tribunal considers, however, that the reference to the conduct of other States which are not parties to the proceedings merely

reinforces the fact that if there is a dispute between the parties, it is one which cannot be decided by the Tribunal without falling foul of the rule in *Monetary Gold*[26] and *East Timor*.[27]

12.18 There is also a more fundamental problem. The claimant's claim that the respondent has failed adequately to protect him is based upon the assumption that, contrary to the position under United States law and what appear to be the views of other States, the Hawaiian Kingdom has never been lawfully incorporated into the United States of America and remains an independent State in international law. The Tribunal was impressed by the obvious sincerity with which this position was advanced by counsel for both parties. However, as it has already stated, in the absence of the United States of America, the Tribunal can neither decide that Hawaii is not part of the USA, nor proceed on the assumption that it is not. To take either course would be to disregard a principle which goes to heart of the arbitral function in international law.

12.19 The Tribunal therefore concludes that there is in the present case no dispute between the parties on which the Tribunal can rule.

13. *Fact-finding Enquiry*

13.1 At one stage of the proceedings the question was raised whether some of the issues which the parties wished to present might not be dealt with by way of a fact-finding process. In addition to its role as a facilitator of international arbitration and conciliation, the Permanent Court of Arbitration has various procedures for fact-finding, both as between States and otherwise.[28]

13.2 A request that the Tribunal should reconstitute itself as a fact-finding commission would have raised a number of issues. A new compromis or agreement would presumably have been required. More fundamentally the question would have been raised whether at least some of the objections to the admissibility of arbitral proceedings, discussed above, would not also apply to a fact-finding commission.

The Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.[29]

13.3 However that may be, it emerged in the course of argument that there was no essential question of fact as to the situation of the parties

[26] 21 *ILR* 399.] [27] 105 *ILR* 226.]

[28] Part III of each of the Hague Conventions of 1899 and 1907 provides for International Commissions of Inquiry. The PCA has also adopted Optional Rules for Fact-finding Commissions of Inquiry. See N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry* (OUP, London, 1974).

[29] See e.g. the report on the *Red Crusader* incident: (1962) 35 *ILR* 485.

or of the Hawaiian islands which is in dispute. The parties accordingly did not press the issue of a possible fact-finding commission, and the questions identified in the preceding paragraph do not therefore arise.

14. *Costs*

14.1 The parties agreed on the terms for the costs of the arbitration in the Arbitration Agreement, and no orders for costs were sought by either party.

Award

For the reasons stated above, the Tribunal determines as a matter of international law, which it is directed to apply by Article 3(1) of the Arbitration Agreement:

(a) that there is no dispute between the parties capable of submission to arbitration, and
(b) that, in any event, the Tribunal is precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America is not a party to the proceedings and has not consented to them.

Accordingly, the Tribunal finds that these arbitral proceedings are not maintainable.

[Report: Not yet published]

ANNEXURE 1

President Cleveland's message to the Senate and House of Representatives dated 18 December 1893

Message

To the Senate and House of Representatives:
In my recent annual message to the Congress I briefly referred to our relations with Hawaii and expressed the intention of transmitting further information on the subject when additional advices permitted.

Though I am not able now to report a definite change in the actual situation, I am convinced that the difficulties lately created both here and in Hawaii and now standing in the way of a solution through Executive action of the problem presented, render it proper, and expedient, that the matter should be referred to the broader authority and discretion of Congress, with a full explanation of the endeavor thus far made to deal

with the emergency and a statement of the considerations which have governed my action.

I suppose that right and justice should determine the path to be followed in treating this subject. If national honesty is to be disregarded and a desire for territorial extension, or dissatisfaction with a form of government not our own, ought to regulate our conduct, I have entirely misapprehended the mission and character of our Government and the behavior which the conscience of our people demands of their public servants.

When the present Administration entered upon its duties the Senate had under consideration a treaty providing for the annexation of the Hawaiian Islands to the territory of the United States. Surely under our Constitution and laws the enlargement of our limits is a manifestation of the highest attribute of sovereignty, and if entered upon as an Executive act, all things relating to the transaction should be clear and free from suspicion. Additional importance attached to this particular treaty of annexation, because it contemplated a departure from unbroken American tradition in providing for the addition to our territory of islands of the sea more than two thousand miles removed from our nearest coast.

These considerations might not of themselves call for interference with the completion of a treaty entered upon by a previous Administration. But it appeared from the documents accompanying the treaty when submitted to the Senate, that the ownership of Hawaii was tendered to us by a provisional government set up to succeed the constitutional ruler of the islands, who had been dethroned, and it did not appear that such provisional government had the sanction of either popular revolution or suffrage. Two other remarkable features of the transaction naturally attracted attention. One was the extraordinary haste—not to say precipitancy—characterizing all the transactions connected with the treaty. It appeared that a so-called Committee of Safety, ostensibly the source of the revolt against the constitutional Government of Hawaii, was organized on Saturday, the 14th day of January; that on Monday, the 16th, the United States forces were landed at Honolulu from a naval vessel lying in its harbor; that on the 17th the scheme of a provisional government was perfected, and a proclamation naming its officers was on the same day prepared and read at the Government building; that immediately thereupon the United States Minister recognized the provisional government thus created; that two days afterwards, on the 19th day of January, commissioners representing such government sailed for this country in a steamer especially chartered for the occasion, arriving in San Francisco on the 28th day of January, and in Washington on the 3rd day of February; that on the next day they had their first interview with the Secretary of State, and another on the 11th, when the treaty of annexation was practically agreed upon, and that on the 14th it was formally concluded and on the 15th transmitted to the Senate. Thus between the initiation of the scheme for a provisional government in

Hawaii on the 14th day of January and the submission to the Senate of the treaty of annexation concluded with such government, the entire interval was thirty-two days, fifteen of which were spent by the Hawaiian Commissioners in their journey to Washington.

In the next place, upon the face of the papers submitted with the treaty, it clearly appeared that there was open and undetermined an issue of fact of the most vital importance. The message of the President accompanying the treaty declared that "the overthrow of the monarchy was not in any way promoted by this Government", and in a letter to the President from the Secretary of State, also submitted to the Senate with the treaty, the following passage occurs: "At the time the provisional government took possession of the Government buildings no troops or officers of the United States were present or took any part whatever in the proceedings. No public recognition was accorded to the provisional government by the United States Minister until after the Queen's abdication and when they were in effective possession of the Government buildings, the archives, the treasury, the barracks, the police station, and all the potential machinery of the Government." But a protest also accompanied said treaty, signed by the Queen and her ministers at the time she made way for the provisional government, which explicitly stated that she yielded to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support such provisional government.

The truth or falsity of this protest was surely of the first importance. If true, nothing but the concealment of its truth could induce our Government to negotiate with the semblance of a government thus created, nor could a treaty resulting from the acts stated in the protest have been knowingly deemed worthy of consideration by the Senate. Yet the truth or falsity of the protest had not been investigated.

I conceived it to be my duty therefore to withdraw the treaty from the Senate for examination, and meanwhile to cause an accurate, full, and impartial investigation to be made of the facts attending the subversion of the constitutional Government of Hawaii, and the installment in its place of the provisional government. I selected for the work of investigation the Hon. James H. Blount, of Georgia, whose service of eighteen years as a member of the House of Representatives, and whose experience as chairman of the Committee of Foreign Affairs in that body, and his consequent familiarity with international topics, joined with his high character and honorable reputation, seemed to render him peculiarly fitted for the duties entrusted to him. His report detailing his action under the instructions given to him and the conclusions derived from his investigation accompany this message.

These conclusions do not rest for their acceptance entirely upon Mr Blount's honesty and ability as a man, nor upon his acumen and impartiality as an investigator. They are accompanied by the evidence

upon which they are based, which evidence is also herewith transmitted, and from which it seems to me no other deductions could possibly be reached than those arrived at by the Commissioner.

The report with its accompanying proofs, and such other evidence as is now before the Congress or is herewith submitted, justifies in my opinion the statement that when the President was led to submit the treaty to the Senate with the declaration that "the overthrow of the monarchy was not in any way promoted by this Government", and when the Senate was induced to receive and discuss it on that basis, both President and Senate were misled.

The attempt will not be made in this communication to touch upon all the facts which throw light upon the progress and consummation of this scheme of annexation. A very brief and imperfect reference to the facts and evidence at hand will exhibit its character and the incidents in which it had its birth.

It is unnecessary to set forth the reasons which in January, 1893, led a considerable proportion of American and other foreign merchants and traders residing at Honolulu to favor the annexation of Hawaii to the United States. It is sufficient to note the fact and to observe that the project was one which was zealously promoted by the Minister representing the United States in that country. He evidently had an ardent desire that it should become a fact accomplished by his agency and during his ministry, and was not inconveniently scrupulous as to the means employed to that end. On the 19th day of November, 1892, nearly two months before the first overt act tending towards the subversion of the Hawaiian Government and the attempted transfer of Hawaiian territory to the United States, he addressed a long letter to the Secretary of State in which the case for annexation was elaborately argued, on moral, political, and economical grounds. He refers to the loss to the Hawaiian sugar interests from the operation of the McKinley bill, and the tendency to still further depreciation of sugar property unless some positive measure of relief is granted. He strongly inveighs against the existing Hawaiian Government and emphatically declares for annexation. He says: "In truth the monarchy here is an absurd anachronism. It has nothing on which it logically or legitimately stands. The feudal basis on which it once stood no longer existing, the monarchy now is only an impediment to good government—an obstruction to the prosperity and progress of the islands."

He further says: "As a crown colony of Great Britain or a Territory of the United States the government modifications could be made readily and good administration of the law secured. Destiny and the vast future interests of the United States in the Pacific clearly indicate who at no distant day must be responsible for the government of these islands. Under a territorial government they could be as easily governed as any of the existing Territories of the United States." . . . "Hawaii has reached the

parting of the ways. She must now take the road which leads to Asia, or the other which outlets her in America, gives her an American civilization, and binds her to the care of American destiny." He also declares: "One of two courses seems to me absolutely necessary to be followed, either bold and vigorous measures for annexation or a 'customs union,' all ocean cable from the Californian coast to Honolulu, Pearl Harbor perpetually ceded to the United States, with an implied but not expressly stipulated American protectorate over the islands. I believe the former to be the better, that which will prove much the more advantageous to the islands, and the cheapest and least embarrassing in the end to the United States. If it was wise for the United States through Secretary Marcy thirty-eight years ago to offer to expend $100,000 to secure a treaty of annexation, it certainly can not be chimerical or unwise to expend $100,000 to secure annexation in the near future. To-day the United States has five times the wealth she possessed in 1854, and the reasons now existing for annexation are much stronger than they were then. I can not refrain from expressing the opinion with emphasis that the golden hour is near at hand."

These declarations certainly show a disposition and condition of mind, which may be usefully recalled when interpreting the significance of the Minister's conceded acts or when considering the probabilities of such conduct on his part as may not be admitted.

In this view it seems proper to also quote from a letter written by the Minister to the Secretary of State on the 8th day of March, 1892, nearly a year prior to the first step taken toward annexation. After stating the possibility that the existing Government of Hawaii might be overturned by an orderly and peaceful revolution, Minister Stevens writes as follows: "Ordinarily in like circumstances, the rule seems to be to limit the landing and movement of United States forces in foreign waters and dominion exclusively to the protection of the United States legation and of the lives and property of American citizens. But as the relations of the United States to Hawaii are exceptional, and in former years the United States officials here took somewhat exceptional action in circumstances of disorder, I desire to know how far the present Minister and naval commander may deviate from established international rules and precedents in the contingencies indicated in the first part of this dispatch."

To a minister of this temper full of zeal for annexation there seemed to arise in January, 1893, the precise opportunity for which he was watchfully waiting—an opportunity which by timely "deviation from established international rules and precedents" might be improved to successfully accomplish the great object in view; and we are quite prepared for the exultant enthusiasm with which in a letter to the State Department dated February 1, 1893, he declares: "The Hawaiian pear is now fully ripe and this is the golden hour for the United States to pluck it."

As a further illustration of the activity of this diplomatic representative, attention is called to the fact that on the day the above letter was written, apparently unable longer to restrain his ardor, he issued a proclamation

whereby "in the name of the United States" he assumed the protection of the Hawaiian Islands and declared that said action was "taken pending and subject to negotiations at Washington". Of course this assumption of a protectorate was promptly disavowed by our Government, but the American flag remained over the Government building at Honolulu and the forces remained on guard until April, and after Mr Blount's arrival on the scene, when both were removed.

A brief statement of the occurrences that led to the subversion of the constitutional Government of Hawaii in the interests of annexation to the United States will exhibit the true complexion of that transaction.

On Saturday, January 14, 1893, the Queen of Hawaii, who had been contemplating the proclamation of a new constitution, had, in deference to the wishes and remonstrances of her cabinet, renounced the project for the present at least. Taking this relinquished purpose as a basis of action, citizens of Honolulu numbering from fifty to one hundred, mostly resident aliens, met in a private office and selected a so-called Committee of Safety, composed of thirteen persons, seven of whom were foreign subjects, and consisted of five Americans, one Englishman, and one German. This committee, though its designs were not revealed, had in view nothing less than annexation to the United States, and between Saturday, the 14th, and the following Monday, the 16th of January—though exactly what action was taken may not be clearly disclosed—they were certainly in communication with the United States Minister. On Monday morning the Queen and her cabinet made public proclamation, with a notice which was specially served upon the representatives of all foreign governments, that any changes in the constitution would be sought only in the methods provided by that instrument. Nevertheless, at the call and under the auspices of the Committee of Safety, a mass meeting of citizens was held on that day to protest against the Queen's alleged illegal and unlawful proceedings and purposes. Even at this meeting the Committee of Safety continued to disguise their real purpose and contented themselves with procuring the passage of a resolution denouncing the Queen and empowering the committee to devise ways and means "to secure the permanent maintenance of law and order and the protection of life, liberty, and property in Hawaii". This meeting adjourned between three and four o'clock in the afternoon. On the same day, and immediately after such adjournment, the committee, unwilling to take further steps without the cooperation of the United States Minister, addressed him a note representing that the public safety was menaced and that lives and property were in danger, and concluded as follows:

> We are unable to protect ourselves without aid, and therefore pray for the protection of the United States forces.

Whatever may be thought of the other contents of this note, the absolute truth of this latter statement is incontestable. When the note was written and delivered, the committee, so far as it appears, had neither

a man nor a gun at their command, and after its delivery they became so panic-stricken at their position that they sent some of their number to interview the Minister and request him not to land the United States forces till the next morning. But he replied that the troops had been ordered, and whether the committee were ready or not the landing should take place. And so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the *bona fide* purpose of protecting the imperilled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government. In point of fact the existing government instead of requesting the presence of an armed force protested against it. There is as little basis for the pretense that such forces were landed for the security of American life and property. If so, they would have been stationed in the vicinity of such property and so as to protect it, instead of at a distance and so as to command the Hawaiian Government building and palace. Admiral Skerrett, the officer in command of our naval force on the Pacific station, has frankly stated that in his opinion the location of the troops was inadvisable if they were landed for the protection of American citizens whose residences and places of business, as well as the legation and consulate, were in a distant part of the city, but the location selected was a wise one if the forces were landed for the purpose of supporting the provisional government. If any peril to life and property calling for any such martial array had existed, Great Britain and other foreign powers interested would not have been behind the United States in activity to protect their citizens. But they made no sign in that direction. When these armed men were landed, the city of Honolulu was in its customary orderly and peaceful condition. There was no symptom of riot or disturbance in any quarter. Men, women, and children were about the streets as usual, and nothing varied the ordinary routine or disturbed the ordinary tranquillity, except the landing of the *Boston's* marines and their march through the town to the quarters assigned them. Indeed, the fact that after having called for the landing of the United States forces on the plea of danger to life and property the Committee of Safety themselves requested the Minister to postpone action, exposed the untruthfulness of their representations of present peril to life and property. The peril they saw was an anticipation growing out of guilty intentions on their part and something which, though not then

existing, they knew would certainly follow their attempt to overthrow the Government of the Queen without the aid of the United States forces.

Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister.

Therefore the military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property. It must be accounted for in some other way and on some other ground, and its real motive and purpose are neither obscure nor far to seek.

The United States forces being now on the scene and favorably stationed, the committee proceeded to carry out their original scheme. They met the next morning, Tuesday, the 17th, perfected the plan of temporary government, and fixed upon its principal officers, ten of whom were drawn from the thirteen members of the Committee of Safety. Between one and two o'clock, by squads and by different routes to avoid notice, and having first taken the precaution of ascertaining whether there was anyone there to oppose them, they proceeded to the Government building to proclaim the new government. No sign of opposition was manifest, and thereupon an American citizen began to read the proclamation from the steps of the Government building almost entirely without auditors. It is said that before the reading was finished quite a concourse of persons, variously estimated at from 50 to 100, some armed and some unarmed, gathered about the committee to give them aid and confidence. This statement is not important, since the one controlling factor in the whole affair was unquestionably the United States marines, who, drawn up under arms and with artillery in readiness only seventy-six yards distant, dominated the situation.

The provisional government thus proclaimed was by the terms of the proclamation "to exist until terms of union with the United States had been negotiated and agreed upon". The United States Minister, pursuant to prior agreement, recognized this government within an hour after the reading of the proclamation, and before five o'clock, in answer to an inquiry on behalf of the Queen and her cabinet, announced that he had done so.

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister's recognition of the provisional

government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen's troops were quartered), though the same had been demanded of the Queen's officers in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal, while the Committee of Safety, by actual search, had discovered that there were but very few arms in Honolulu that were not in the service of the Government. In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Accordingly, some hours after the recognition of the provisional government by the United States Minister, the palace, the barracks, and the police station, with all the military resources of the country, were delivered up by the Queen upon the representation made to her that her cause would thereafter be reviewed at Washington, and while protesting that she surrendered to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support the provisional government, and that she yielded her authority to prevent collision of armed forces and loss of life and only until such time as the United States, upon the facts being presented to it, should undo the action of its representative and reinstate her in the authority she claimed as the constitutional sovereign of the Hawaiian Islands.

This protest was delivered to the chief of the provisional government, who endorsed thereon his acknowledgment of its receipt. The terms of the protest were read without dissent by those assuming to constitute the provisional government, who were certainly charged with the knowledge that the Queen instead of finally abandoning her power had appealed to the justice of the United States for reinstatement in her authority; and yet the provisional Government with this unanswered protest in its hand hastened to negotiate with the United States for the permanent banishment of the Queen from power and for a sale of her kingdom.

Our country was in danger of occupying the position of having actually set up a temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. We are not without a precedent showing how

scrupulously we avoided such accusations in former days. After the people of Texas had declared their independence of Mexico they resolved that on the acknowledgement of their independence by the United States they would seek admission into the Union. Several months after the battle of San Jacinto, by which Texan independence was practically assisted and established, President Jackson declined to recognize it, alleging as one of his reasons that in the circumstances it became us "to beware of a too early movement, as it might subject us, however unjustly, to the imputation of seeking to establish the claim of our neighbours to a territory with a view to its subsequent acquisition by ourselves". This is in marked contrast with the hasty recognition of a government openly and concededly set up for the purpose of tendering to us territorial annexation.

I believe that a candid and through examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States. Fair-minded people with the evidence before them will hardly claim that the Hawaiian Government was overthrown by the people of the islands or that the provisional government had ever existed with their consent. I do not understand that any member of this government claims that the people would uphold it by their suffrages if they were allowed to vote on the question.

While naturally sympathizing with every effort to establish a republican form of government, it has been the settled policy of the United States to concede to people of foreign countries the same freedom and independence in the management of their domestic affairs that we have always claimed for ourselves; and it has been our practice to recognize revolutionary governments as soon as it became apparent that they were supported by the people. For illustration of this rule I need only to refer to the revolution in Brazil in 1889, when our Minister was instructed to recognize the Republic "so soon as a majority of the people of Brazil should have signified their assent to its establishment and maintenance"; to the revolution in Chile in 1891, when our Minister was directed to recognize the new government "if it was accepted by the people"; and to the revolution in Venezuela in 1892, when our recognition was accorded on condition that the new government was "fully established, in possession of the power of the nation, and accepted by the people".

As I apprehend the situation, we are brought face to face with the following conditions:

The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.

But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building.

And finally, but for the lawless occupation of Honolulu under false pretexts by United States forces, and but for Minister Stevens's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States.

Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.

But in the present instance our duty does not, in my opinion, end with refusing to consummate this questionable transaction. It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory.

By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair. The provisional government has not assumed a republican or other constitutional form, but has remained a mere executive council or oligarchy, set up without the assent of the people. It has not sought to find a permanent basis of popular support and has given no evidence of any intention to do so. Indeed, the representatives of that government assert that the people of Hawaii are unfit for popular government and frankly avow that they can be best ruled by arbitrary or despotic power.

The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized State are equally applicable as between enlightened nations. The considerations that international law is without a court for its

enforcement, and that obedience to its commands practically depends upon good faith, instead of upon the mandate of a superior tribunal, only give additional sanction to the law itself and brand any deliberate infraction of it not merely as a wrong but as a disgrace. A man of true honor protects the unwritten word which binds his conscience more scrupulously, if possible, than he does the bond a breach of which subjects him to legal liabilities; and the United States in aiming to maintain itself as one of the most enlightened of nations would do its citizens gross injustice if it applied to its international relations any other than a high standard of honor and morality. On that ground the United States can not properly be put in the position of countenancing a wrong after its commission any more than in that of consenting to it in advance. On that ground it can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers endowed with its authority and wearing its uniform; and on the same ground, if a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.

These principles apply to the present case with irresistible force when the special conditions of the Queen's surrender of her sovereignty are recalled. She surrendered not to the provisional government, but to the United States. She surrendered not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States. Furthermore, the provisional government acquiesced in her surrender in that manner and on those terms, not only by tacit consent, but through the positive acts of some members of that government who urged her peaceable submission, not merely to avoid bloodshed, but because she could place implicit reliance upon the justice of the United States, and that the whole subject would be finally considered at Washington.

I have not, however, overlooked an incident of this unfortunate affair which remains to be mentioned. The members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government of the Queen by the indefensible encouragement and assistance of our diplomatic representative. This fact may entitle them to claim that in our effort to rectify the wrong committed some regard should be had for their safety. This sentiment is strongly seconded by my anxiety to do nothing which would invite either harsh retaliation on the part of the Queen, or violence and bloodshed in any quarter. In the belief that the Queen, as well as her enemies, would be willing to adopt such a course as would meet these conditions, and in view of the fact that both the Queen and the provisional government had at one time apparently acquiesced in a reference of the entire case to the United States Government, and considering the further fact that in any event the provisional government

by its own declared limitation was only "to exist until terms of union with the United States of America have been negotiated and agreed upon", I hoped that after the assurance to the members of that government that such union could not be consummated I might compass a peaceful adjustment of the difficulty.

Actuated by these desires and purposes, and not unmindful of the inherent perplexities of the situation nor of the limitations upon my power, I instructed Minister Willis to advise the Queen and her supporters of my desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned. The conditions suggested, as the instructions show, contemplate a general amnesty to those concerned in setting up the provisional government and a recognition of all its *bona fide* acts and obligations. In short, they require that the past should be buried, and that the restored Government should reassume its authority as if its continuity had not been interrupted. These conditions have not proved acceptable to the Queen, and though she has been informed that they will be insisted upon, and that, unless acceded to, the efforts of the President to aid in the restoration of her Government will cease, I have not thus far learned that she is willing to yield them her acquiescence. The check which my plans have thus encountered has prevented their presentation to the members of the provisional government, while unfortunate public misrepresentations of the situation and exaggerated statements of the sentiments of our people have obviously injured the prospects of successful Executive mediation.

I therefore submit this communication with its accompanying exhibits, embracing Mr Blount's report, the evidence and statements taken by him at Honolulu, the instructions given to both Mr Blount and Minister Willis, and correspondence connected with the affair in hand.

In commending this subject to the extended powers and wide discretion of the Congress, I desire to add the assurance that I shall be much gratified to cooperate in any legislative plan which may be devised for the solution of the problem before us which is consistent with American honor, integrity, and morality.

Grover Cleveland
Executive Mansion
Washington, December 18, 1893

ANNEXURE 2

Public Law 103-150
103d Congress
23 November 1993

Joint Resolution

To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to the native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

Whereas the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;

Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government:

I Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons, claiming to have established a Provisional Government of and for this Kingdom.

That I yield to the superior force of the United States whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.

Now to avoid any collision of armed forces and perhaps the loss of life, I do this under protest and imperilled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.

Done at Honolulu this 17th day of January AD 1893;

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and sufficient arms;

Whereas, on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarch;

Whereas the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas the Committee and its Chairman, Senator John Morgan, conducted hearings in Washington, DC, from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898 as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the native people of Hawaii or their sovereign government;

Whereas the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the land in Hawaii in the United States;

Whereas the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people;

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions;

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies;

Whereas the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the Native Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the Native Hawaiians; and

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Section I. Acknowledgement and Apology

The Congress—

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

Section 2. Definitions

As used in this Joint Resolution, the term "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Section 3. Disclaimer

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Approved November 23, 1993

Arbitration—North American Free Trade Agreement, Chapter 11—Procedure—ICSID arbitration—Additional Facility Rules—Amendment of claim—Requirement that amendment must be within the scope of the arbitration agreement and sufficiently timely—Due process—Discovery—North American Free Trade Agreement

Damages—Expropriation of property—*Restitutio in integrum*—Fair market value—Calculation—Loss of profits—Discounted cash flow analysis—Whether appropriate in case where project never operational—Alternative methods of calculation