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 P.O. 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 P.O. 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*, I.C.J. Reports 1954 p. 12;* Case concerning Certain Phosphate Lands on Nauru*, I.C.J. Reports 1992 p. 240;* Case concerning East Timor*, I.C.J. Reports 1995 p. 90. 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*, I.C.J. Reports 1963 p. 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.

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 No. 3 and 4. The Hawaiian Kingdom's Reply of 14 November 2000 was more discursive. Part I 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 No. 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 recognised 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. 80-81) 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 Convention and the PCA Optional Rules. Whilst accepting that the matter could proceed under either the Optional Rules or the UNCTIRAL 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.[1] Indeed, the Optional Rules are themselves 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

[1] 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.

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.137-138, 145, 150-151, 160-161).

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. 6.4 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.*[2]

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 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

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[2] 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

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, 145-146).

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relationship, whether contractual or not".

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 affect may be attributed to those historical issues.

11.4. This principle was recognised 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 at pp. 27, 38, and the *East Timor* case *(Portugal v. Australia)*, ICJ Reports 1995, p. 90 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 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 scrutinise 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, 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, 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:

> *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, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1990, p. 116, para. 56, *Phosphate Lands in Nauru*, ICJ Reports 1992, p. 240 at pp. 258-62, paras. 48-55 and *East Timor*, ICJ Reports 1995, p. 90 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.

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 Australia 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 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. 261-262, 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), 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.

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.[3] 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.

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[3] 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.

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 Three, 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 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 recognise 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* and *East Timor*.

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.[4]

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.

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[4] Part III of each of the Hague Conventions of 1899 and 1907 provide 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).

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.[5]

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 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.

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

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.

SIGNED as at the Permanent Court of Arbitration, the Peace Palace, Den Haag.

JAMES CRAWFORD SC

GAVAN GRIFFITH QC

CHRISTOPHER GREENWOOD QC

5 February 2001