

**LANCE PAUL LARSEN V. THE HAWAIIAN KINGDOM.**  
Permanent Court of Arbitration Tribunal, February 5, 2001.<sup>†</sup>

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In *Larsen v. The Hawaiian Kingdom*,<sup>1</sup> Lance Paul Larsen, a resident of the state of Hawai`i, sought redress from the Hawaiian Kingdom for its failure to protect him from the United States and the State of Hawai`i. The parties, who agreed to submit their dispute to arbitration by the Permanent Court of Arbitration (PCA), shared similar goals and wished the Arbitral Tribunal (Tribunal) to address the question of the international legal status of Hawai`i.<sup>2</sup> On February 5, 2001, however, the Tribunal issued an award that sidestepped this sensitive question. After determining that the UNCITRAL [UN Commission on International Trade Law] Arbitration Rules<sup>3</sup> (UNCITRAL Rules) may be applied to a noncontractual dispute, the Tribunal scrutinized international doctrines of standing and indispensable third parties within the unique context of an international arbitration at the PCA. It decided that there was no dispute between the parties upon which the Tribunal could issue a ruling. It also decided that, even assuming *arguendo* that the legal question was arbitrable under the UNCITRAL Rules, the Tribunal would be precluded from addressing the merits because the United States, which was absent, was an indispensable third party. Despite the curious—and collusive—nature of the underlying action, the award will likely prove to be influential in its treatment of issues of standing and indispensable parties.

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<sup>1</sup> *Larsen v. Hawaiian Kingdom*, at <http://www.pca-cpa.org> (Permanent Ct. Arb. Trib. Feb. 5, 2001) [hereinafter Award]; also published in the *International Law Reports* 119 (February 5, 2001): 566-598. Reprinted at *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 238-277. The Tribunal comprised James Crawford, Gavan Griffith, and Christopher Greenwood. Under the parties' agreement to arbitrate, the appointing authority for the Tribunal was Keoni Agard.

<sup>2</sup> The merits of the arbitration were designed by both parties to the arbitration to address the legal consequences of the Hawaiian coup of 1893, when the United States invaded Hawaii and dethroned the Hawaiian Queen, Liliuokalani. See Award, *supra* note 1. The coup was virtually forgotten until November 1993, when former President acknowledged by joint resolution the hundredth anniversary of the January 17, 1893, overthrow of the Kingdom of Hawaii, and offered an apology to the native Hawaiians on behalf of the United States. See Pub. L. No. 103-150; Award, *supra* note 1, Annexure 2.

<sup>3</sup> 15 ILM 701 (1976), available at <http://www.uncitral.org>.

At the center of the PCA proceeding was the argument that Hawaiians never directly relinquished to the United States their claim of inherent sovereignty either as a people or over their national lands, and accordingly that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States' "unlawful imposition [over him] of [its] municipal laws" through its political subdivision, the State of Hawai'i.<sup>4</sup> As result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States had committed against him.

By mutual agreement, the parties—Larsen and the Hawaiian Council of Regency—initiated arbitral proceedings on November 9, 1999. An appointing authority was named, and the PCA was the designated registry of the arbitration proceeding. Although the arbitration was originally brought under the PCA Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State (PCA Optional Rules),<sup>5</sup> the parties subsequently agreed that the proceedings would be governed by the UNCITRAL Rules.<sup>6</sup> This switch to the UNCITRAL Rules presented certain threshold questions for the Tribunal: first, whether that body of rules, which by its terms applies to contractual disputes, "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,"<sup>7</sup> and second, whether the dispute was one that was justiciable under international law principles, in general, and Article 1(1) of the UNCITRAL Rules, in particular.<sup>8</sup>

In deciding that the UNCITRAL Rules could be applied to a noncontractual dispute such as that involved in the instant case, the Tribunal noted that nothing barred parties to a noncontractual dispute from "adapt[ing]" the UNCITRAL rules to such a dispute.<sup>9</sup> The Tribunal also noted that states often agree to apply the UNCITRAL Rules, "*modified as may be appropriate,*" to the arbitration of disputes with

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<sup>4</sup> Award, *supra* note 1, para. 3.1.

<sup>5</sup> 32 ILM 572 (1993), available at <http://www.pca-cpa.org>>1; see Award, *supra* note 1, para. 2.2.

<sup>6</sup> Award, *supra* note 1, para. 3.1.

<sup>7</sup> *Id.*, para. 10.10.

<sup>8</sup> *Id.*, Procedural Order No. 3, para. 8 (July 17, 2000), reproduced in Award, *supra* note 1, para. 6.2.

<sup>9</sup> Award, *supra* note 1, para. 10.7 (emphasis added).

nonstate parties.<sup>10</sup> The Tribunal's conclusion was that Larsen and the Hawaiian Kingdom "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."<sup>11</sup>

As for the question of whether the "dispute" was justiciable under international law principles, including Article 1(1) of the UNCITRAL Rules, the Tribunal began by noting that "the function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings."<sup>12</sup> A fortiori, if no legal dispute exists, the Tribunal cannot issue a ruling. As such, the Tribunal stated that it is beyond the powers of the Tribunal to determine "purely historical issues or controversies" unrelated to those rights and obligations of the parties at the time of the decision.<sup>13</sup> In other words, purely historical issues or controversies do not constitute a "legal dispute."<sup>14</sup> Analogous to the bar on giving advisory opinions and also to the political question doctrine present in U.S. federal court practice, the Tribunal asserted that the requirement for a legal dispute must be satisfied independent of either the potential historical import of the issue or any similar "symbolic significance."<sup>15</sup> Citing the *Northern Cameroons*<sup>16</sup> and the *East Timor*<sup>17</sup> cases, the Tribunal held that, although legal disputes were found in those cases, the Court would have refrained from exercising jurisdiction if such disputes had been absent.<sup>18</sup> After noting that Article 1(1) of both the UNCITRAL Rules and the PCA Optional Rules explicitly require a dispute,<sup>19</sup> the Tribunal concluded, that the "nature of the arbitral functions 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."<sup>20</sup>

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<sup>10</sup> *Id.*, para. 10.8 (emphasis added).

<sup>11</sup> *Id.*, para. 10.10.

<sup>12</sup> *Id.*, para. 11.3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Northern Cameroons (Cameroon v. UK)*, Preliminary Objections, 1963 ICJ Rep. 15, 27-38 (Dec. 2).

<sup>17</sup> *East Timor (Port. V. Austl.)*, 1995 ICJ REP. 90, 99-100 (June 30).

<sup>18</sup> Award, *supra* note 1, para. 11.4.

<sup>19</sup> *Id.*, para. 11.6.

<sup>20</sup> *Id.*, para. 11.7.

The Tribunal's analysis of the parties' pleadings established that they "clearly raised questions about whether there was a real [legal] dispute between the parties, as opposed to a dispute between the parties and the United States of America."<sup>21</sup> The Tribunal realized that it could not issue an award without ruling on the legality or illegality of the conduct of the United States. Moreover, the parties had requested interim measures against the United States that clearly affected U.S. legal interests.<sup>22</sup> And the parties had attempted, pursuant to Article 32(1) of the UNCITRAL Rules, to recharacterize the dispute as an interlocutory award verifying the continued existence of Hawai'i as an independent state.<sup>23</sup> With such obvious interests of the United States at stake, the Tribunal concluded that it would not "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."<sup>24</sup>

As is readily observed from the styling of the case, the United States was not a named party to the PCA arbitration. In the view of the Tribunal, the absence of the United States brought into play the complex international law doctrine of indispensable third parties. Larsen argued that although the United States was primarily liable to him for his alleged injuries, the government of the Hawaiian Kingdom could and should also be held liable for these injuries because, and to the extent that, the Hawaiian Kingdom had not fulfilled its duty to protect Larsen's rights as a Hawaiian subject by preventing the United States from imposing its laws within the territory of the kingdom. As such, Larsen evidently believed that his naming of, and asserting a claim against only, the Hawaiian Kingdom would be sufficient to exempt the United States from becoming an indispensable third party in the dispute.

The doctrine of absent or indispensable third parties precludes a court from determining the merits of a case that would compromise the rights and obligations of a third party not present at the proceedings. Both parties in the instant case argued, however, that the doctrine should be strictly confined to the parameters of proceedings before the International Court of Justice, and not be applied to arbitral proceedings

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<sup>21</sup> *Id.*, para. 12.5.

<sup>22</sup> The parties sought an order requiring the United States government, including the State of Hawaii as its political subdivision, to 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 to inform the UN Secretary-General or some duly authorized body of all the measures that it has taken in implementation of that order. *See id.*, para. 5.7.

<sup>23</sup> *Id.*, Special Agreement No. 2, Art. 1 (Aug. 2, 2000); *see Award supra* note 1, para. 5.7.

<sup>24</sup> Award, *supra* note 1, para. 12.6 & Procedural Order No. 4 (Sept. 5, 2000), *reproduced in Award*, para. 6.5.

of a “mixed character.”<sup>25</sup> The Tribunal noted, in response, that the parties offered little in the way of support for their argument.<sup>26</sup> Emphasizing the unique situation presented by the noncontractual dispute,<sup>27</sup> the Tribunal concluded that it “cannot exercise jurisdiction over a State which is not a party to its proceedings.”<sup>28</sup> A key determining factor for the Tribunal was the international law that governs “consent”: an international tribunal may not exercise jurisdiction over a state unless that state has given its consent to the exercise of jurisdiction.<sup>29</sup> Reinforcing this position was the Tribunal’s view that the PCA operates within the “general confines of public international law” and therefore within parameters similar to those of the ICJ, which also cannot exercise jurisdiction over a state that is not a party to the proceedings.<sup>30</sup> The Tribunal concluded that the principle of consent in international law would itself be violated if the Tribunal were to determine the legality of the conduct of a nonparty—in this case, the United States.<sup>31</sup> It therefore held the doctrine should be and was applicable to the arbitration.

In the instant case, the crucial question that the Tribunal endeavored to answer was whether the dispute merely “affected” or involved as its “very subject matter” the legal interests of the United States, a nonparty to the arbitration. Although no doctrine of *stare decisis* or other binding precedent exists in international law, the Tribunal nevertheless used several ICJ decisions to support its analysis in implicit recognition of the Court’s *jurisprudence constante* on this subject. The Tribunal began its analysis with the *Monetary Gold* case,<sup>32</sup> the first international decision invoking the doctrine of indispensable third parties. The ICJ held that the dispute was not between Italy and the respondents (France, the United Kingdom, and the United States), but between Italy and Albania. Since Albania—an absent, indispensable party—had not consented to the

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<sup>25</sup> Award, *supra* note 1, para. 11.16.

<sup>26</sup> The argument was made that a different test should be applied—namely, “substantial risk of prejudice to the absent State.” *Id.*, para. 11.18. The Tribunal discarded this argument easily, however, by asserting that domestic legal principles have no persuasive force in this particular international legal context. *Id.*, paras 11.19-21.

<sup>27</sup> The Tribunal stated that in contractual disputes, application of the doctrine may be different. *Id.*, para. 11.17.

<sup>28</sup> *Id.*

<sup>29</sup> See *Monetary Gold Removed from Rome in 1943 (Italy v. Fr./UK/U.S.)*, 1954 ICJ REP. 19, 31 (June 15), *quoted in* Award, *supra* note 1, para. 11.10. This doctrine is in keeping with international principles of comity and dispute settlement.

<sup>30</sup> Award, *supra* note 1, para. 11.17.

<sup>31</sup> *Id.*, para. 11.20.

<sup>32</sup> 1954 ICJ REP. 19.

Court's jurisdiction, however, the ICJ could not resolve the dispute.<sup>33</sup> By its decision, the Court manifestly intended to adopt an extremely rigorous interpretation of the doctrine. The Tribunal next cited the case of *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States).<sup>34</sup> In that case, the United States claimed that El Salvador was an indispensable third party because the conduct of the United States in Nicaragua was not unilateral, but rather one of collective self-defense. Employing a broad interpretation of the *Monetary Gold* principle, the United States argued that the claim of collective self-defense mandated an analysis of the legality not only of the actions of United States, but also of El Salvador—specifically, with regard to its having a legitimate claim to self-defense. In rejecting this interpretation, the ICJ held that although its decision would certainly affect El Salvador, the Court was still entitled to make its determination despite that state's absence.

Based upon its analysis of the line of *Monetary Gold* cases, the PCA Tribunal in *Larsen* interpreted those cases as setting forth a general international principle 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 and obligations of a State which is not a party to the proceedings.”<sup>35</sup> For this distinction the Tribunal quoted *Monetary Gold*'s use of the same language: “Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision.”<sup>36</sup> The Tribunal went on to assert that “the mere fact that a State not a party to the proceedings might be affected” was not enough to decline jurisdiction.<sup>37</sup> The doctrine of indispensable third parties would apply, that is, only if the nonparty state's legal interests were “the very subject matter of the decision.”

The Tribunal proceeded to discuss two “particularly pertinent”<sup>38</sup> ICJ cases—*Certain Phosphate Lands in Nauru*<sup>39</sup> and *East Timor*<sup>40</sup>—in which the ICJ applied the *Monetary Gold* test just mentioned. In the former

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<sup>33</sup> See *id.* at 32.

<sup>34</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Oct. 4).

<sup>35</sup> Award, *supra* note 1, para. 11.8 (emphasis added).

<sup>36</sup> 1954 ICJ REP. at 32, quoted in Award, *supra* note 1, para. 11.10.

<sup>37</sup> Award, *supra* note 1.

<sup>38</sup> *Id.*, para. 11.12.

<sup>39</sup> *Certain Phosphate Land in Nauru* (Nauru v. Austl.), Preliminary Objections, 1992 ICJ REP. 240 (June 26).

<sup>40</sup> *East Timor* (Port. V. Austl.), 1995 ICJ REP. 90 (June 30).

case, Nauru sought compensation from Australia in relation to Nauru lands that had been jointly administered by Australia, New Zealand, and the United Kingdom as trustees prior to Nauru's becoming an independent state. As a preliminary matter, Australia opposed the Court's jurisdiction because any decision in the case would "necessarily affect the rights of New Zealand and the United Kingdom who were not parties to the proceedings."<sup>41</sup> The Court agreed with Australia that its decision "might well have implications for the legal situation of the two other States concerned."<sup>42</sup> Nevertheless, "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,"<sup>43</sup> from which the Court inferred that the legal interests of New Zealand and the United Kingdom were not the "very subject matter" of the case.

The issue presented in East Timor was the legality of a treaty concluded by Indonesia and Australia permitting exploration and exploitation of natural resources between the coasts of East Timor and Australia. The application to the ICJ alleged a violation of East Timor's right of self-determination, and as the PCA Tribunal recognized, the ICJ was unable to decide the case without also deciding upon the legality of the Indonesian occupation, where Indonesia was a nonparty to the dispute. The ICJ held that their ruling was in keeping with *Monetary Gold* and affirmed the test set forth therein:

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 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.<sup>44</sup>

In sum, the Tribunal could "see no reason either of principle or policy for applying any different rule" than the *Monetary Gold*.<sup>45</sup> The Tribunal held that it could not rule on the lawfulness of the conduct of the Hawaiian Kingdom as that decision would "entail or require, as a necessary

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<sup>41</sup> Award, *supra* note 1, para. 11.13.

<sup>42</sup> 1992 ICJ REP. at 261, para. 55, *quoted in* Award, *supra* note 1, para. 11.13.

<sup>43</sup> 1992 ICJ REP. at 261-62, para. 55, *quoted in* Award, *supra* note 1, para. 11.13.

<sup>44</sup> 1995 ICJ REP. at 102, para. 28, *quoted in* Award, *supra* note 1, para. 11.15.

<sup>45</sup> Award, *supra* note 1, para. 11.17.

foundation for the decision between the parties, an evaluation of the lawfulness of the conduct of the United States.”<sup>46</sup>

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This award raises important questions concerning the use of the doctrines of standing and indispensable third parties in the context of international arbitrations, and also concerning the Tribunal’s application of the ICJ’s *Monetary Gold* principle. From the outset of the proceedings, it was clear that the parties were in conflict not with one another, but with the United States. The Tribunal properly recognized that the “function of international arbitral tribunals in contentious proceedings is to determine disputes between parties, not to make abstract rulings.”<sup>47</sup> As such, the Tribunal could have based its ruling initially on the lack of a legal dispute. Absent a legal dispute, the UNCITRAL Rules do not apply, irrespective of party agreement.

Instead of making such a ruling, the Tribunal launched into lengthy discussion of the doctrine of indispensable third parties—one that is likely to be influential in subsequent decisions. As the Tribunal recognized, the parties made a crucial error that was patently evident in their pleadings. Although the case was styled bilaterally<sup>48</sup> and explicitly, albeit deceptively, focused on the conduct of the Hawaiian Kingdom in relation to Larsen, both parties accused the United States of illegal occupation and unlawful imposition of municipal laws over Larsen. Any reasonable interpretation of the submissions would have raised a red flag concerning the nonparty legal interests of the United States.

Was the Larsen Tribunal correct, however, in applying the ICJ decisions to this case? When the parties have failed to designate the applicable law, it is well within the purview of the Tribunal to use the substantive international law that it deems applicable. In the instant case, however,

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<sup>46</sup> *Id.*, para. 11.23. The Tribunal did point out exceptions to the *Monetary Gold* test: (1) the principle may not apply if the legal finding against an absent third party could be assumed, without decision, citing the East Timor case; and (2) the principle may also not apply where the finding involving the third party was merely a finding of fact that did not require any legal determination. The Tribunal emphasized that it was asked to do more than merely determine facts in the underlying case. *Id.*, para. 11.24.

<sup>47</sup> *Id.*, para. 11.3.

<sup>48</sup> In *East Timor*, Portugal also framed its application from a bilateral perspective, focusing only on Australia’s conduct, with no reference to that of Indonesia, but it complained only of the objective conduct of Australia in disregarding Portugal’s exclusive treaty-making power in relation to East Timor. Despite this styling, the ICJ pierced the party pleadings and concluded that “Australia’s behaviour cannot be assessed without first entering into the question why is it Indonesia could not lawfully have concluded the [Timor Gap] Treaty.” 1995 ICJ REP. at 102. For further discussion of this point, see Manoocher Mofidi, *Prudential Timorousness in the Case Concerning East Timor* (Portugal v. Australia), 7 J. INT’L L. & PRAC. 35 (1998).



the Tribunal invoked ICJ jurisprudence over party objections disfavoring such application. Notwithstanding the objections, the Tribunal felt open, due to its need to make “adaptations” of the UNCITRAL Rules<sup>49</sup> to pierce the party pleadings and expound upon a distinction between merely “affected” legal interests and legal interests that are the “very subject matter” of the dispute at issue. A number of questions arise from the Tribunal’s analysis. First, how is the phrase “very subject matter” to be defined? Second, what bright line distinguishes it from the apparently lower threshold of “affected” legal interests? Third, under a modified application of the UNCITRAL Rules (for example, in a tort suit or even a human rights matter), who is to decide upon a nonparty’s legal interest?

As to the first question, the Tribunal apparently has set forth a rule that an international arbitral tribunal cannot exercise jurisdiction over a case where the lawfulness of a state’s conduct implicates on the merits an evaluation of the lawfulness of the conduct of another state that is a nonparty to the arbitration. As such, the phrase “very subject matter” may be defined as the existence of an inextricable link between the merits of the case and the legal rights of a nonparty. Therein lies the apparently bright-line distinction from merely “affected” legal interests. The term “affected” may be defined by cases in which the merits do not call into question sovereign rights of a nonparty state—which therefore have no substantive link to the merits of the case. The Tribunal suggests that this reasoning is a logical extension of the well-settled principle of international consent.

Because international tribunals lack the power of joinder that national courts enjoy, it is possible—as a result of procedural maneuvering alone—for legitimate international legal disputes to escape just adjudication. For example, in *Larsen*, the United States commanded an enviable litigation posture: even though the United States admitted its illegal overthrow of the Hawaiian Kingdom, it repeatedly refused to consent to international arbitration. Larsen was thus forced to engage in the artful pleading of a claim against his own, ostensible government. In a weird inversion of the normal principles of diplomatic protection, Larsen was compelled to argue that his *own* government failed to protect him.

Although the Tribunal was clearly correct in rejecting this claim as presented, the manner in which it did so may cause some mischief in the future. Instead of taking a principled stand on the inapplicability of Article 1 of the UNCITRAL Rules to noncommercial disputes, the Tribunal’s detour into justiciability in relation to indispensable third parties may establish a dangerous trend. Parties who have submitted matters to arbitration may deliberately modify the UNCITRAL Rules to apply to noncontractual disputes. They might, in particular, seek creative ways to avoid rulings of inadmissibility by invoking Larsen’s

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<sup>49</sup> See *supra* notes 9-11 and accompanying text.

interpretation on indispensable parties in international arbitrations and arguing that an unjoined party's interests are merely "affected" by the proceeding and do not go to "the very subject matter of the legal interest" to be litigated. Modification of the UNCITRAL Rules to cover noncommercial disputes may give rise to forms of declaratory judgments, with doubtful legal effect and problematic enforcement. This award may also spawn unnecessary wrangling about the scope of unjoined parties' interests in arbitrations that should not have been commenced in the first place.

If Article 1(1) of the UNCITRAL Rules were strictly limited to the scope of contractual disputes, the ability to make tactical use of argument concerning the interests of third parties affected by the proceeding would be greatly reduced. Party disputes relating to contracts are usually clearly delineated, and the parties are unambiguous. In this context, and in view of the Tribunal's having opened the door to new, tactical uses of the doctrine of indispensable third parties, the Tribunal's statement that "it can see no reason either of principle or policy for applying any different rule"<sup>50</sup> of indispensable parties may come to be regarded as unfortunate and short-sighted. The wiser course would have been to douse the fires of this litigation at the outset, instead of allowing it almost to burn out of control.

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<sup>50</sup> See *supra* note 45 and accompanying text.