NOTE

A New Approach to Status Determination in International Arbitration? A Comparison of *Larsen v. Hawaiian Kingdom* and the Disputes Concerning Venezuela's Representation before ICSID Tribunals

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Before deciding cases submitted to them, international tribunals first need to determine the identity of the parties and their representatives. In international arbitration, this kind of status determination not only implicates core concepts of statehood and governance under public international law, but potentially controversial political questions as well. At the same time, resolving issues of this kind challenges tribunals to find the right methodological approaches within their loosely regulated procedural frameworks. Recently, within the context of Venezuela's ongoing constitutional crisis, several arbitral bodies constituted under the International Centre for Settlement of Investment Disputes (ICSID) developed a framework to resolve disputes about state representation before arbitral tribunals. Most importantly, this approach rejects recognition by other states and instead uses effective control over territory as the primary standard to determine which government can represent the state. While recent scholarship has focused on the effect of these ICSID decisions on arbitral procedure, their implications on international dispute resolution remain largely unexplored.

This Note argues that the ICSID approach is the appropriate tool to decide questions of status determination in international dispute resolution in general, including questions about statehood itself. To do so, it analyzes the 2001 Award in the case of Larsen v. Hawaiian Kingdom*, in which the Tribunal declared the central question of a purported independent Hawaiian state inadmissible. Analyzing the historical and legal backgrounds of the* Larsen *and Venezuelan ICSID cases, this Note argues that* Larsen *would have been more legally sound had it applied a slightly modified ICSID approach Moreover, in fostering increased legal certainty, effectiveness, and institutional dignity, the ICSID approach would also have been preferable from a policy perspective. Most importantly, this analysis shows that even in politically charged areas, international tribunals can shape and apply manageable legal standards that pay sufficient regard to practical realities.*

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INTRODUCTION

States represent the basic building blocks of public international law. Not only are they the primary subjects of international law, they also shape its rules through concluding treaties and engaging in state practice. Consequently, identifying what states are and who may represent them as their governments are vitally important tasks. However, decisions of international courts on these issues are few and far between.[1] Questions of statehood and legitimate governance bear undeniable political connotations. In decentralized legal systems, such undertones can render legal and political considerations indistinguishable. The somewhat blurred role of recognition in the definition of states and governments is a prime example of this phenomenon. Therefore, it is perhaps not surprising that international courts and tribunals are not exactly lining up to answer these questions, even in the rare cases in which they do have jurisdiction to do so.

The first case analyzed in this Note exemplifies an international tribunal hesitating to rule on issues of statehood and legitimate governance. As I will set out in Section I, in the 2001 case of *Larsen v. Hawaiian Kingdom*, the arbitral tribunal failed to decide the status of the eponymous entity which purports to be a sovereign state located in the Hawaiian Islands. In fact, the Tribunal's decision employed convoluted legal rationales and controversial doctrines in order to evade this single question.

In comparison, a number of arbitral bodies operating under the framework of the International Centre for Settlement of Investment Disputes (ICSID) were far less hesitant to engage with the definition of governments under international law, albeit on a narrow procedural basis. As I will show in Section II, these tribunals, when faced with rivalling governments purporting to represent Venezuela in pending cases, developed a legal framework to identify the correct state representative. The most notable feature of this framework is that it rejects recognition as a yardstick for identifying governments and adopts effective control over territory as part of the test instead.[2]

Overall, the ICSID approach is better suited to deal with status questions under international law. As I will argue in Section III, notwithstanding the significant differences between the underlying facts and law, the ICSID approach would have provided a feasible and even preferrable basis on

1. For a similarly rare domestic court case that directly addresses and applies the definition of a state under international law, see VerwG Köln [administrative court Cologne], May 3, 1978, 9 K 2565/77, 80 I.L.R. 683 (1989) (Ger.) (denying the claim of the "Duchy of Sealand" to be a sovereign state located in the North Sea).

2. As I will argue *infra* Section I.c., the classification of the issue as procedural carries with it other strands of the test such as a presumption in favor of the procedural status quo and an inquiry into the procedural fairness of the representation.

which to decide *Larsen*. I will show that the *Larsen* Tribunal deliberately adopted a procedural framework that was agnostic to the status of the respondent under international law. This ostensibly allowed the Tribunal to postpone the statehood question to the merits phase. At the same time, it heeded the parties' request to apply public international law, whose sole discernible effect was to allow the Tribunal to apply the admissibility criteria of the International Court of Justice (ICJ).[3] One of these doctrines, the so-called *Monetary Gold* Principle, which purports to protect the legal interests of third parties, remains highly controversial in its application to arbitral proceedings. I will argue that the Tribunal could and should have preempted an application of this disputed admissibility principle by first inquiring whether it had jurisdiction.[4]

Within the context of such a jurisdictional inquiry, the ICSID approach would constitute an appropriate framework for legal analysis. I will demonstrate that the claim of belligerent occupation in *Larsen* reveals a limitation of the territorially based ICSID model because the laws of war provide for explicit exceptions to the requirement of territorial effectiveness under general international law. However, I will argue that recognition by other states should still not be dispositive in such cases. Rather, a tribunal should have recourse to determinations by a competent international body, which was not available in the Venezuelan ICSID cases but present in *Larsen* in the form of a UN General Assembly resolution.[5]

Thus, this Note will place the recent Venezuelan ICSID decisions within broader debates about public international law without disregarding their distinctly procedural provenance and nature. At the same time, it will show that there are feasible legal models that international adjudicative bodies can use to engage with the definitions of states and governments when they are confronted with these questions.

I. LARSEN V. HAWAIIAN KINGDOM

A. Historical, Legal, and Procedural Background

The Kingdom of Hawaii under the House of Kamehameha ruled over the Hawaiian Islands since the early 1800s.[6] In the 1820s, the United States recognized Hawaii's independence and entered into consular relations with

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3. *See infra* Section III.a.
4. *See infra* Section III.c.
5. *See infra* Section III.b.
6. *See generally* GAVAN DAWS, SHOAL OF TIME: THE HISTORY OF THE HAWAIIAN ISLANDS 29-60 (1968) (providing a foundational account of Hawaii's history in the early 19th century).

the country.[7] The Island played a central part in American Pacific policy in the mid-19th century, and the United States accordingly expanded its cultural and trade relations with Hawaii.[8] As part of this policy, the United States and Hawaii concluded the Treaty of Friendship, Commerce, and Navigation of 1849 ("1849 Treaty").[9] In 1893, a so-called "Committee of Safety," consisting mostly of Americans, overthrew the reigning Queen Lili'uokalini and soon after proclaimed the Republic of Hawaii.[10] Even though American government agents and private individuals had been involved in this coup, the new administration of President Grover Cleveland at first refused to accept the new government.[11] However, after a five-year phase in which the two states normalized their relations, the United States officially annexed Hawaii in 1898.[12] In August 1959, after more than 60 years as a Federal territory, Hawaii joined the United States as the 50th state following a referendum in which the Hawaiian people overwhelmingly voted in favor of doing so.[13] The United Nations recognized this as an act of self-determination of the Hawaiian people and consequently removed the islands from the list of 'Non-Self Governing Territories' administered by the United States.[14]

However, Hawaii's admittance into the Union did not settle all questions about its status. Beginning in the 1990s, Hawaiian activists intensified their political and legal efforts to contest the legality of Hawaii's annexation.[15] Meanwhile, in 1993, on the occasion of the 100th anniversary of the coup, the United States, through a Joint Resolution of Congress, officially recognized that the overthrow of Queen Lili'uokalini had been illegal and apologized to the Hawaiian people.[16] Going off from this success, a group of Hawaiian activists, styling themselves the "Council of Regency" and thus

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7. Office of the Historian, *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Hawaii*, U.S. DEP'T OF STATE, https://history.state.gov/countries/hawaii (last visited Feb. 18, 2023).

8. GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U. S. FOREIGN RELATIONS SINCE 1776, at 177 & 208 (2008).

9. Treaty of Friendship, Commerce, and Navigation and Extradition of 1849, U.S.-Haw., Dec. 20, 1849, 9 Stat. 977.

10. *See* Jennifer Chock, *One Hundred Year of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 465 (1995).

11. *See* HERRING, *supra* note 8, at 297; Chock, *supra* note 10, at 465-66.

12. DAWS, *supra* note 6, at 285-90; HERRING, *supra* note 8, at 318.

13. DAWS, *supra* note 6, at 381-91.

14. G.A. Res. 1469 (XIV), Cessation of the Transmission of Information under Article 73e of the Charter in Respect of Alaska and Hawaii (Dec. 12, 1959); *see also* U.N. Charter art. 73(e); Patrick Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continuity as an Independent State under International Law*, 1 CHINESE J. INT'L L. 655, 657-58 (2002).

15. Dumberry, *supra* note 14, at 659-60.

16. *Id.* at 658.

as the legitimate government of the Kingdom of Hawaii, started litigation in federal courts to contest the annexation.[17]

However, these efforts failed, and the activist tried to seek legal remedies through international arbitration instead. In October 1999, the Hawaiian Kingdom entered into an arbitration agreement to resolve a dispute with Mr. Lance Paul Larsen, a resident of Hawaii.[18] The agreement covered a claim by Mr. Larsen alleging that the Hawaiian Kingdom had breached its international legal obligations, including the 1849 Treaty, by allowing "the unlawful imposition of American municipal laws" over him.[19] As a preliminary question, the agreement requested the Arbitral Tribunal to resolve whether the Hawaiian Kingdom enjoyed territorial sovereignty over the Islands.[20] The parties selected a tribunal sitting at the Permanent Court of Arbitration (PCA) in the Hague and initially opted for that Court's "Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State" to govern the procedure.[21] However, given the contested nature of the respondent's status, the PCA considered the application of these rules inappropriate.[22] Accordingly, the parties amended their agreement to provide for arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[23] and the Tribunal was duly constituted.[24]

In his Memorials, Mr. Larsen, acting as claimant in the case, essentially repeated his claims that the United States' occupation of Hawaii violated his rights under international law and that the Hawaiian Kingdom had not fulfilled its obligations to protect him from these violations.[25] Responding, the Hawaiian Kingdom explicitly conceded that the United States violated Mr.

17. *Id.* at 660. *See* Petition for Writ of Mandamus, Sai v. Clinton (not admitted) (No. 97-969).

18. Arbitration Agreement art. 1, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001); *see also* Notice of Arbitration, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001).

19. Arbitration Agreement art. 1(1), *supra* note 18.

20. *Id.* at art. 3(2).

21. *Id.* at art. 1(1); Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State*, *in* 532 I.L.M. 572 (1993).

22. Letter of Correspondence from Appointing Authority to the Parties advising discussion with Deputy Secretary General of the P.C.A. concerning the adoption of UNCITRAL Rules of Arbitration, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001); *see also* Dumberry, *supra* note 14, at 677-78.

23. G.A. Res. 31/98, Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 15, 1976) [hereinafter UNCITRAL Rules].

24. First Amendment to Notice of Arbitration, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001).

25. Memorial of Lance Paul Larsen ¶ 2, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001).

Larsen's rights.[26] Moreover, both parties agreed that the Hawaiian Kingdom continued to exist after the United States' purported annexation.[27]

Based on the parties' submissions, the Tribunal, in a procedural order, identified three preliminary issues that could affect the proceedings and its jurisdiction: (i) which procedural rules applied, (ii) whether there was a legal dispute between the parties, and (iii) whether, if there was such a dispute, the United States was an indispensable third party to it over which the Tribunal could not exercise jurisdiction.[28] The respondent's status as a state was conspicuously absent from these issues. Intent on obtaining a resolution of this question, the parties entered into a special agreement in which they requested the Tribunal to issue an interlocutory award based on Article 32(1) of the UNCITRAL Rules and "[verify] the continued existence of Hawaiian Statehood with the Hawaiian Kingdom as its government."[29] The Tribunal responded by issuing Procedural Order No. 4, in which it classified the respondent's statehood as a merits question to which it could not proceed without answering the preliminary questions first.[30] Accordingly, the focus of the arbitration shifted to these issues, on which the parties subsequently presented legal arguments in late 2000.[31]

B. An Award without a Decision

When the Tribunal issued its Award in February 2001, it confined its decision to the three preliminary issues it had raised before and found that it could not decide the dispute between the parties.[32] Thus, it did not answer any of the substantive questions the parties had presented, including, crucially, the Hawaiian Kingdom's status under international law.

1. Procedural Issues

Even though the parties had amended their arbitration agreement to apply the UNCITRAL Rules, both parties continued to express a preference for the Optional Rules during the proceedings.[33] To resolve this question,

26. Memorial of the Government of the Hawaiian Kingdom ¶ 4, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001).

27. *See* David J. Bederman & Kurt R. Hilbert, *Lance Paul Larsen v. The Hawaiian Kingdom*, 95 AM. J. INT'L L. 927, 932 (2001) (arguing that this conspicuous lack of a dispute constituted a major mistake by the two parties).

28. Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01, Procedural Order No. 3 ¶¶ 7-13 (2000), https://www.alohaquest.com/arbitration/procedural_order_3.htm.

29. Special Agreement No 2 art. I, Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01 (2001).

30. Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01, Procedural Order No. 4 ¶¶ 3-4 (2000), https://www.alohaquest.com/arbitration/procedural_order_4.htm.

31. *See* Dumberry, *supra* note 14, at 664.

32. Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01, Award, at 44 (2001).

33. *Id.* ¶¶ 8.2-8.4.

the Tribunal first considered whether it could apply the UNCITRAL Rules to a non-contractual dispute. The Rules explicitly mention "parties to a contract,"[34] but in keeping with the traditionally high degree of party control in arbitration proceedings, the Tribunal concluded that the Rules explicitly allowed for their own modification and that the parties could extend their applicability to non-contractual disputes.[35]

The Tribunal next examined the relationship between the UNCITRAL Rules and the purported statehood of the Hawaiian Kingdom. It found that the UNCITRAL Rules had no independent normative value in international law and operated solely based on the consent of the parties.[36] Accordingly, both private and state parties could adopt them.[37] Therefore, the Tribunal could apply the UNCITRAL Rules based on the parties' consent without making a determination of the respondent's status.[38] Here, the parties had effectively consented to the UNCITRAL Rules and thus they applied.[39]

Even though the Respondent's status was not determinative for the procedural rules, this question did not "[cease] to be an issue for the Tribunal."[40] In contrast, "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."[41] This excerpt shows that the Tribunal classified this issue as a merits question, as it had already done in Procedural Order No. 4. Consequently, it would have to decide the other preliminary issues, namely the existence of a dispute and jurisdiction over an indispensable third party, before addressing the merits.[42]

2. Lack of a Legal Dispute

The Tribunal proceeded to examine whether and how the requirement of a legal dispute applied to international arbitration.[43] Since the nature and function of arbitration was "to determine disputes between the parties, not to make abstract rulings," it found that the parties must bring before the Tribunal an actual legal dispute that has not yet become moot.[44] It based this primarily on procedural principles developed the International Court of

34. UNCITRAL Rules art. 1(1).
35. *Larsen*, PCA Case Repository ¶¶ 8.5, 10.7.
36. *Id.* ¶ 10.5.
37. *Id.* ¶¶ 10.7, 10.8.
38. *Id.* ¶¶ 10.5, 10.7.
39. *Id.* ¶¶ 8.8, 10.10.
40. *Id.* ¶ 9.1.
41. *Id.* ¶ 9.1.
42. *Id.* ¶ 9.4.
43. *Id.* ¶¶ 11.3.-11.7.
44. *Id.* ¶ 11.3.

Justice (ICJ).[45] For example, in the *Northern Cameroons* case, Cameroon claimed that the United Kingdom had unlawfully administered the Northern Cameroons trust territory as a part of its Nigeria colony.[46] The ICJ declined to decide the case because the Northern Cameroons had exercised its right to self-determination and freely joined newly independent Nigeria, which made the case moot.[47]

The *Larsen* Tribunal rejected the parties' argument that these justiciability principles developed by the ICJ did not apply to arbitration, especially since Article 1(1) of the UNCITRAL Rules also explicitly required the parties to have a dispute to commence arbitration proceedings.[48] Furthermore, it found that even though arbitration gave the parties leeway to make jurisdictional arrangements by agreement, they could not abrogate such a fundamental requirement nor prevent the Tribunal from independently establishing whether it was fulfilled in a given case.[49]

After analyzing the submissions of the parties, the Tribunal largely denied that they had presented a justiciable legal dispute. It first identified several propositions on which both parties agreed, including the continued existence of the Hawaiian Kingdom as a state under international law, its duty to protect Mr. Larsen, and the fact that the United States had violated his rights.[50] Therefore, the only contested issue was "whether the Respondent has discharged its duty of protection towards the Claimant…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."[51] This meant assessing whether the United States had in fact violated Mr. Larsen's rights.[52] Therefore, the one point on which there was an actual dispute involved the conduct of a third party that had not consented to the Tribunal's jurisdiction.

3. The Monetary Gold Doctrine

In its analysis of the legal issues affecting the United States, the Tribunal again heavily relied on the ICJ's jurisprudence on indispensable third parties. The ICJ's statute allows the Court to exercise jurisdiction only where the parties to a dispute have consented, which they may do in different ways

45. *Id.* ¶¶ 11.4.-11.5.

46. *See* Case Concerning the Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. 15, 26 (Dec. 2) (containing a summary of Cameroon's claims and arguments).

47. *Id.* ¶ 11.5; Case Concerning the Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. 15, 27, 38 (Dec. 2).

48. *Larsen*, PCA Case Repository ¶ 11.5.

49. *Id.* ¶¶ 11.7, 12.6.

50. *Id.* ¶¶ 12.2, 12.12.

51. *Id.* ¶ 12.14.

52. *Id.* ¶¶ 12.14-12.15.

either before or after a dispute arises.[53] The statute also allows states to intervene in proceedings in which their legal interests may be affected.[54] However, it does not explicitly regulate cases in which a dispute clearly affects a third party that has not chosen to intervene in the case.[55]

This issue first came up early in the court's history, in the 1954 *Monetary Gold* decision.[56] The complex and unique facts of this case concerned the distribution of gold which German authorities had removed from Rome during World War II.[57] After the war, the United States, the United Kingdom, and France formed a tripartite commission to deal with claims for German-seized gold. As both Italy and Albania laid claim to the gold, the Commission instituted an arbitral tribunal which awarded the gold to Albania, but at the same time recognized the United Kingdom's claim over it for reparations awarded by the ICJ in the *Corfu Channel* case in 1949.[58] The Commission's agreement explicitly allowed both Albania and Italy to challenge the Arbitration Award at the ICJ, which Italy did. However, the agreement constituted consent for the United States, the United Kingdom, and France only.[59] In contrast, Albania had not consented to the ICJ's jurisdiction.[60]

In light of this, the court declined to exercise its jurisdiction because the legal interests of Albania, over which it had no jurisdiction, "would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[61] This so-called *Monetary Gold* Principle was repeatedly applied by the court over the next decades and by the late 20th century had become, as the *Larsen* Tribunal noted, a mainstay of the ICJ's jurisdictional doctrine.[62]

53. Statute of the International Court of Justice arts. 36(1), 36(2), 37, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

54. *Id.* arts. 62, 63.

55. *Cf.* Alina Miron & Christine Chinkin, *Article 62*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1699 (Andreas Zimmermann et al. eds., 3rd ed. 2012) (stating that the indispensable third-party rule is not in the statute and pointing out that the criteria for its operation under the Court's jurisprudence differ from those for intervention).

56. Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Judgment, 1954 I.C.J. 17 (June 15) [hereinafter *Monetary Gold*].

57. This paragraph's overview of the historical developments underlying the Court's decision is based on the account given in Zachary Mollengarden & Noam Zamir, *The Monetary Gold Principle: Back to Basics*, 115 AM. J. INT'L L. 42, 45-47 (2021).

58. Corfu Channel (U.K. v. Alb.), Judgment (Merits), 1949 I.C.J. 4 (Apr. 9); Corfu Channel (UK v. Alb.), Judgment (Amount of Compensation), 1949 I.C.J. 244 (Dec. 15).

59. *Monetary Gold*, 1954 I.C.J. at 21-22.

60. *Id.* at 32.

61. *Id.* at 32; *see also Larsen*, PCA Case Repository ¶¶ 11.9-11.10 (summarizing the relevant jurisdictional facts and rulings).

62. *Larsen*, PCA Case Repository ¶¶ 11.11-11.15; *see, e.g.*, East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶¶ 34-35 (June 30) (declining to exercise jurisdiction over Portugal's claim against Australia for entering into a treaty with Indonesia concerning the Continental Shelf between Australia and East Timor because determining the legality of Indonesia's presence in East Timor would be a prerequisite to deciding the claims); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v.

Moreover, the *Larsen* Tribunal regarded the *Monetary Gold* Principle as applicable to international tribunals generally.[63] Reiterating that the matter before it was non-contractual and that the parties' agreement explicitly required it to apply to international law, it started from the presumption that the ICJ's decisions on third parties would be applicable to it.[64] It proceeded to read *Monetary Gold* as embodying the international law principle of consent which was equally applicable to international tribunals other than the ICJ.[65]

Thus, the Tribunal found a framework which it could apply to the only issue which it determined to be disputed, namely whether the Hawaiian Kingdom had discharged its duty of protection toward Mr. Larsen.[66] The Tribunal held:

> [t]his 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. . . . 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.[67]

Therefore, in order to decide the dispute between Mr. Larsen and the Hawaiian Kingdom the Tribunal would first have to answer the preliminary question of whether the acts of the United States were legal under international law.[68] In addition to this specific question presented to the Tribunal, Mr. Larsen's claim as a whole depended on the status of the Hawaiian Kingdom as an independent state. However, a finding of this would also implicate the United States in a manner inconsistent with *Monetary Gold*.[69] Thus, the Tribunal found that it had no dispute before it over which it could

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U.S.), Judgment (Jurisdiction and Admissibility), 1984 I.C.J. 392, ¶¶ 68, 88 (Nov. 26) (affirming the validity of the *Monetary Gold* Principle but declining to apply it where a decision would have merely affected third state parties to the multilateral convention that was in dispute); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. 240, ¶¶ 49, 55 (June 26) (affirming the *Monetary Gold* Principle but refusing to apply it where third states' legal position would be implicated but did not form a preliminary question to decide the case).

63. *Larsen*, PCA Case Repository ¶ 11.8.

64. *Id.* ¶¶ 11.17, 11.21; *see also* Dumberry, *supra* note 14, at 669.

65. *Larsen*, PCA Case Repository ¶ 11.17.

66. *See also supra* § I.b.ii.

67. *Larsen*, PCA Case Repository ¶ 12.14.

68. *Id.* ¶ 12.15.

69. *Id.* ¶ 12.18.

exercise jurisdiction[70] and in the end left the parties with an Award that sidestepped all issues that they had sought to resolve.[71]

II. VENEZUELA'S REPRESENTATION BEFORE ICSID TRIBUNALS

A. Factual and Legal Background

Venezuela faces a political and constitutional crisis that goes back at least as far as 2015. In the National Assembly elections of that year, the opposition won two thirds of the seats and dealt a crushing electoral defeat to the increasingly repressive governing United Socialist Party, led by President Nicolás Maduro.[72] Entrenching himself, President Maduro preempted the selection of Supreme Court judges in a politically disputed process.[73] In December 2015, shortly after the election, the Supreme Court disqualified three opposition parliamentarians from taking office on the charge of vote-buying, thereby denying the opposition a two-thirds supermajority. When the National Assembly swore them in anyway, the Supreme Court held the whole body in contempt and has ever since refused to regard the legislature's acts as valid.[74]

After violently suppressing a wave of protests in 2017, Maduro was reelected in highly disputed presidential elections in May 2018, a result that the National Assembly refused to accept.[75] In January 2019, shortly after Maduro took the oath of office, the newly elected president of the National Assembly, Juan Guaidó, invoked Article 233 of the Venezuelan Constitution and declared himself acting president until new elections could be held.[76] In his plan to guide this transition period, Guaidó foresaw, among others, that the National Assembly, "as the only legitimate body elected by the Venezuelans," would represent Venezuela before the international community and international organizations.[77] Around 60 states accepted Guaidó's claim and recognized him as head of state.[78] Likewise, several intergovernmental

70. *Id.* ¶ 12.19.

71. Bederman & Hilbert, *supra* note 27, at 927-28.

72. José Briceño-Ruiz, *The Crisis in Venezuela: A New Chapter, or the Final Chapter?*, 10 LATIN AM. POL'Y 180, 185 (2019); CLARE RIBANDO SEELKE ET AL., CONG. RSCH. SERV., R44841, VENEZUELA: BACKGROUND AND U.S. RELATIONS 3 (2021).

73. Briceño-Ruiz, *supra* note 72, at 185.

74. *Id.* at 185-86; RIBANDO SEELKE ET AL., CONG. RSCH. SERV., R44841, VENEZUELA: BACKGROUND AND U.S. RELATIONS 3 (2021).

75. *See* Laura Rees-Evans & Rhys Carvosso, *Legal Consequences of and Approaches to the Question of Recognition of a Government of a State: Disputes Involving Venezuela*, 36 ICSID REV. 1, 11 (2021).

76. Briceño-Ruiz, *supra* note 72, at 180-81; *Id.*

77. Briceño-Ruiz, *supra* note 72, at 180-81.

78. *See* Héctor Fernández, *Representation of Venezuela in Investment Arbitration*, KLUWER ARB. BLOG (Jan. 16, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/16/representation-of-venezuela-in-investment-arbitration/; RIBANDO SEELKE ET AL., *supra* note 74, at 4-5 (noting that since then, "Guaidó's domestic and international support has eroded substantially").

organizations, including the Organization of American States and the Inter-American Development Bank, recognized the Guaidó government or the National Assembly as Venezuela's legitimate representatives.[79] Meanwhile, the Venezuelan Supreme Court, still regarding the National Assembly's acts as void, invalidated Guaidó's proclamation.[80] Additionally, Nicolás Maduro continued to receive wide support from the Venezuelan security forces and held on to de facto power in the country, thus freezing the situation indefinitely.[81] In Spring 2019, the dual government issue spilled over into the realm of investor-state arbitration, when the Guaidó government's Special Attorney General and a law firm retained by him started to lay claim to Venezuela's representation in cases pending before ICSID bodies.[82]

B. ICSID Cases Concerning the Representation of Venezuela

Faced with opposing representation claims, ICSID adjudicators were faced with difficult legal-political questions. ICSID proceedings, like international arbitration in general, are inherently flexible in nature. Its adjudicative bodies do not rely on a system of precedents and thus, it can be challenging to synthesize consistent legal rules and principles from these decisions. In addition, the situation in Venezuela is still ongoing and some decisions remain unpublished. However, a cursory study of four major cases reveals that despite some inconsistencies, one can detect an emerging framework to deal with the representation issue raised by Venezuela's constitutional crisis.[83]

1. Valores Mundiales v. Venezuela (2019)

One of the first ICSID proceedings in which the representation issue arose was *Valores Mundiales*, in which a tribunal rendered an Award in 2017.[84] When the constitutional crisis arose in 2019, an annulment proceeding was pending before an ad hoc committee.[85] In March 2019, the Special Attorney

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79. *See* Elizabeth Melimopoulos, *OAS Recognises Guaido's Envoy Until New Venezuela Elections Held*, AL JAZEERA (Apr. 10, 2019), https://www.aljazeera.com/news/2019/4/10/oas-recognises-guaidos-envoy-until-new-venezuela-elections-held; Lesley Wroughton, *Latam Lender Replaces Venezuela's Maduro Representative With Guaido Economist*, REUTERS (Mar. 15, 2019), https://www.reuters.com/article/us-venezuela-politics/latam-lender-replaces-venezuelas-maduro-representative-with-guaido-economist-idUSKCN1QW29J.

80. Briceño-Ruiz, *supra* note 72, at 180-81.

81. RIBANDO SEELKE ET AL., *supra* note 74, at 4-5.

82. Rees-Evans & Carvosso, *supra* note 75, at 11.

83. *Cf. Id.* at 15, 27-29.

84. Valores Mundiales, S.L. v. Bolivarian Republic of Venez., ICSID Case No. ARB/13/11, Award (July 25, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw10247.pdf.

85. For the grounds for and procedure governing annulments, see Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

General appointed by Juan Guaidó contacted the ICSID Secretary General and claimed to be the only lawful representative of Venezuela in ICSID proceedings.[86] After the Secretary General declined to decide this question on an institutional basis and forwarded this communication to all adjudicatory bodies with pending cases involving Venezuela, the *Valores Mundiales* ad hoc committee decided to address the representation issue as a preliminary question and invited the parties involved to present arguments on the subjects.[87]

The Tribunal first ascertained that it had the power to decide the question.[88] Specifically, it narrowed the scope of the question from one about Venezuela's legitimate government to one about who may speak on the state's behalf in the proceedings.[89] Because this question clearly affected the procedure and was not provided for in any applicable legal instruments, the Tribunal had the power to decide the question based on Article 44 of the ICSID Convention.[90] Additionally, the Tribunal reasoned that since the Attorney General appointed by the Guaidó government challenged the prior status quo of the proceedings, he had to bear the burden of proof regarding representation.[91]

The Committee then analyzed the legal situation under international law and Venezuela's domestic law and found that the Guaidó-appointed Special Attorney General had not rebutted the presumption of the status quo under these sources of law.[92] It commenced with an analysis of international law, under which only a government that has effective control over a state's territory may represent that state.[93] It found that the recognition of foreign states alone could not establish effective control and that absent any other material facts, the Guaidó government did not exercise such control over the territory of Venezuela.[94] Thus, the domestic law of the established government, the one headed by Nicolás Maduro, governed the situation.[95] Under this legal regime, the actions of the Guaidó government were invalid, and the appointment of its Special Attorney General specifically had been voided by the Supreme Court, which was the body which the Venezuelan

86. Valores Mundiales, S.L. v. Bolivarian Republic of Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2 (Annulment Proceeding), ¶¶ 1-2 (Aug. 29, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw11464.pdf [hereinafter *Valores Mundiales Procedural Resolution No. 2*].

87. *Valores Mundiales Procedural Resolution No. 2*, ¶ 3; *see also* Rees-Evans & Carvosso, *supra* note 75, at 13.

88. *Valores Mundiales Procedural Resolution No. 2*, ¶¶ 30-38.

89. *Id.* ¶¶ 31-32.

90. *Id.* ¶¶ 34, 37-38. ICSID Convention art. 44 provides in relevant part: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

91. *Valores Mundiales Procedural Resolution No. 2*, ¶ 40.

92. *Id.* ¶¶ 42-50.

93. *Id.* ¶ 42.

94. *Id.* ¶ 48-49.

95. *Id.* ¶ 43.

Constitution mandated with such determinations.[96] The Committee rejected the request of the Guaidó-appointed Attorney General and confirmed the continued representation of Venezuela by the Maduro-appointee.[97]

2. Kimberly-Clark v. Venezuela (2019)

Unlike in *Valores Mundiales*, where the representation issue was decided during the course of annulment, in *Kimberly-Clark* the question came up during the main stage of the arbitration proceedings.[98] Here again, after the ICSID Secretary General's letter of the Guaidó government's Attorney General claiming representation reached the Tribunal in March 2019, it invited all interested parties to comment on the issue.[99]

In its order on the representation issue, the Tribunal, like the ad hoc Committee in *Valores Mundiales*, framed its decision as a procedural one.[100] It narrowed the decision even further by placing the analysis on the level of the lawyers who may represent Venezuela, not the Attorneys General or the putative governments themselves.[101] Operating on this basis, the Tribunal adopted a presumption in favor of the status quo and, apparently without much analysis, denied the existence of any reasons that would overcome this presumption.[102]

3. ConocoPhillips v. Venezuela (2019-2020)

In this case, ICSID bodies considered and decided the representation question multiple times in different stages of the proceedings.[103] First, the Tribunal brought up the issue on its own motion during the rectification procedure, which the representatives of the Guaidó government had initiated in April 2019.[104] The Tribunal found that both putative representatives

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96. *Id.* ¶¶ 44-47; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 30, 1999, arts. 334-35.

97. *Valores Mundiales Procedural Resolution No. 2*, ¶¶ 51, 57.

98. The Tribunal eventually found that it lacked jurisdiction. Kimberly-Clark BVBA v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/18/3, Award (Nov. 5, 2021), https://jusmundi.com/en/document/pdf/decision/en-kimberly-clark-dutch-holdings-b-v-kimberly-clark-s-l-u-and-kimberly-clark-bvba-v-bolivarian-republic-of-venezuela-award-friday-5th-november-2021.

99. *Kimberly-Clark*, ¶¶ 17-19.

100. The order is not published but quoted in relevant parts in Recommendation of Lord Phillips, ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Annulment Proceedings (July 10, 2020), https://jusmundi.com/en/document/pdf/decision/en-conocophillips-petrozuata-b-v-conocophillips-hamaca-b-v-and-conocophillips-gulf-of-paria-b-v-v-bolivarian-republic-of-venezuela-lord-phillips-recommendation-friday-10th-july-2020 [hereinafter *Recommendation of Lord Phillips*].

101. *Recommendation of Lord Phillips*, ¶ 38.

102. *Recommendation of Lord Phillips*, ¶¶ 39 & 97.

103. *See* Rees-Evans & Carvosso, *supra* note 75, at 577.

104. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Decision on Rectification, ¶ 9 (Aug. 24, 2019), https://www.italaw.com/sites/default

of Venezuela substantially agreed on the rectification request and therefore did not consider it necessary to decide which representative to choose at this point.[105]

After rectification, in November 2019, both Venezuelan representatives applied for annulment of the original Award and the representation issue was raised again.[106] The ad hoc Committee first recognized that Article 44 of the ICSID Convention empowered it to answer this procedural question.[107] Like the other decisions mentioned above, it applied the status quo principle. However, since both representatives of Venezuela had filed for annulment, the status quo in this case was dual representation and thus the burden was on the Maduro government's Attorney General to disqualify the Guaidó appointee.[108] The Committee recognized that procedural fairness and equality of the parties could operate to change the status quo but found that these principles did not apply in this case. Even though both representatives would probably present different arguments, they agreed to argue in favor of annulment.[109] The only burden would be on ConocoPhilips to respond to two adversaries, but its representatives had agreed to do so and thus, the Committee decided to proceed with both representatives.[110] The Maduro government's representative asked the Committee to reconsider, which it declined to do in November 2020, in a final decision on the question.[111]

4. Mobil Cerro Negro v. Venezuela (2021)

Here, the issue of representation again came up in the resubmission context.[112] In October 2018, two claimants of the original proceedings filed

/files/case-documents/italaw10770.pdf; *see also* ICSID Convention art. 49(2) (governing rectification requests).

105. *ConocoPhillips* (Rectification), ¶ 25.

106. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Representation (Annulment Proceedings), ¶¶ 1, 3 (Apr. 3, 2020), https://jusmundi.com/en/document/decision/en-conocophillips-petrozuata-b-v-conocophillips-hamaca-b-v-and-conocophillips-gulf-of-paria-b-v-v-bolivarian-republic-of-venezuela-order-on-the-applicants-representation-friday-3rd-april-2020#decision_11805.

107. *ConocoPhillips* (Annulment Proceedings), ¶ 30.

108. *Id.* ¶¶ 31, 35.

109. *Id.* ¶ 36.

110. *Id.* ¶¶ 36-37.

111. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Order on the Applicant's Request for Reconsideration dated 3 August 2020 on the issue of Venezuela's Legal Representation, ¶ 41 (Nov. 2, 2020), https://jusmundi.com/en/document/decision/en-conocophillips-petrozuata-b-v-conocophillips-hamaca-b-v-and-conocophillips-gulf-of-paria-b-v-v-bolivarian-republic-of-venezuela-order-on-the-applicants-request-for-reconsideration-dated-3-august-2020-on-the-issue-of-venezuelas-legal-representation-monday-2nd-november-2020#decision_13234.

112. Originally decided in 2014 and annulled in 2017. Mobil Cerro Negro Holding, Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award (Oct. 9, 2014), https://jusmundi.com/en/document/decision/pdf/en-mobil-cerro-negro-holding-ltd-mobil-cerro-negro-ltd-mobil-

for resubmission.[113] In March 2019, the Attorney General of the Guaidó government intervened, claiming to be the lawful representative of Venezuela in the case.[114] This complicated the Tribunal's constitution because the parties and their opposing representatives did not agree on a method of selecting the president, who had to be appointed by the Chairman of ICSID's Administrative Council.[115] In September 2020, the Tribunal identified the conflicting claims on Venezuela's representation as a preliminary issue and subsequently heard arguments and submissions on the question.[116]

In its decision, the Tribunal first stated that representation in the proceedings was not a political question, but a legal and specifically a procedural one.[117] It emphasized that it did not determine the legitimate government of Venezuela but merely decided who could represent that state within the scope of the proceedings.[118] It found that the Attorney General's authority was the appropriate level of analysis, because the government itself was too broad an inquiry for this procedural question.[119] Relying on prior ICSID decisions, the Tribunal adopted the status quo principle and accordingly laid the burden of proof on the Guaidó-appointed Special Attorney General.[120]

Starting from this presumption, the Tribunal ruled that the representative of the Guaidó government had rebutted it. First, his appointment was invalid under Venezuela's domestic law because the Constitutional Court had invalidated the acts of the Guaidó government, including the appointment of a Special Attorney General.[121] Additionally, the Guaidó representative could not rebut this presumption from an international law perspective because he conducted his affairs from Bolivia and thus did not have effective control of Venezuela's territory.[122] The Tribunal next denied that the Maduro government had breached any peremptory norms of international law (or jus cogens) and thus found that it had no duty of non-recognition

corporation-and-others-v-bolivarian-republic-of-venezuela-award-of-the-tribunal-thursday-9th-october-2014; Mobil Cerro Negro Holding, Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Annulment, ¶ 95 (Mar. 9, 2017), https://jusmundi.com/en/document/decision/pdf/en-mobil-cerro-negro-holding-ltd-mobil-cerro-negro-ltd-mobil-corporation-and-others-v-bolivarian-republic-of-venezuela-decision-on-annulment-thursday-9th-march-2017.

113. *See* Mobil Cerro Negro Holding, Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation (Resubmission Proceeding), ¶ 2 (Mar. 1, 2021), https://jusmundi.com/en/document/decision/pdf/en-mobil-cerro-negro-holding-ltd-mobil-cerro-negro-ltd-mobil-corporation-and-others-v-bolivarian-republic-of-venezuela-resubmission-proceeding-wednesday-24th-october-2018; *see also* ICSID Convention art. 52(6) (governing resubmission after annulment).

114. *Mobil Cerro Negro* (Resubmission Representation), ¶ 8.

115. *Id.* at ¶¶ 11-19; *see also* ICSID Convention art. 36.

116. *Mobil Cerro Negro* (Resubmission Representation), ¶¶ 21-32.

117. *Id.* ¶ 43.

118. *Id.* ¶ 45.

119. *Id.* ¶ 49.

120. *Id.* ¶¶ 50-54.

121. *Id.* ¶ 55.

122. *Id.* ¶ 56.

of this government's acts under general international law.[123] Further, it found that recognition of governments was too non-uniform and guided by political purposes to form the basis of a legal decision.[124] Likewise, guidance by institutional practice of other ICSID bodies such as its Administrative Council was impossible because Venezuela had denounced the Convention.[125] Lastly, the Tribunal turned to "principles of procedural law and fairness, in particular the efficiency of the proceedings and the rights of defence," but found that absent a joint defense it had to decide the representation issue and that the Maduro government's representative did not hurt Venezuela's defense.[126]

5. An Emerging Test: The Status Quo, Procedural Fairness, and Effective Control

The cases described above undoubtedly show an inclination of international arbitral tribunals to decide representation questions, yet to frame them very narrowly.[127] Thus, all of the analyzed decisions explicitly did not purport to declare the legitimate government of Venezuela, but only the legitimate representative for procedural purposes, which at once alleviated concerns about political questions and squarely moved the matter within the Tribunals' (or Committees') jurisdiction under Article 44 of the ICSID Convention.[128] Within this procedural framework, all decisions opted for a presumption in favor of the status quo (even though in *ConocoPhilips* this led to the unusual result of concurrent representation).[129] To rebut this presumption, two arbitral bodies explicitly adopted effective control as the applicable test under international law.[130] Too little is known about the unpublished *Kimberly-Clark* order to assess its reasoning, but its outcome to let the Maduro-appointed Attorney General continue to represent Venezuela is certainly consistent with this approach.[131]

ConocoPhillips is an outlier in this regard, as both the Tribunal and the ad hoc Committee declined to change the concurrent representation because it

123. *Id.* ¶ 59; *see also* G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001).

124. *Mobil Cerro Negro* (Resubmission Representation), ¶ 60.

125. *Id.* ¶ 62.

126. *Id.* ¶ 65.

127. *See* Rees-Evans & Carvosso, *supra* note 75, at 589-90.

128. *See* Christian Leathley et al., *New Developments in Relation to the Legal Representation of Venezuela in International Proceedings*, HERBERT SMITH FREEHILLS (Apr. 2, 2021), https://hsfnotes.com/latamlaw/2021/04/02/new-developments-in-relation-to-the-legal-representation-of-venezuela-in-international-proceedings/. *But see* Rees-Evans & Carvosso, *supra* note 75, at 590 (describing the distinction between a procedural decision and one identifying the legitimate government as "artificial").

129. *See supra* Section II.b.iii.

130. Valores Mundiales, S.L. v. Bolivarian Republic of Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2 (Annulment Proceeding), ¶¶ 48-49 (Aug. 29, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw11464.pdf; *Mobil Cerro Negro* (Resubmission Representation), at ¶ 56.

131. *See supra* Section II.b.ii.

did not constitute an impairment of procedural rights.[132] This indicates more reluctance to decide the question. However, in cases in which the submissions at least pursue the same general aim and do not constitute an impairment of the opposite side's procedural rights, an "assessment of governmental status might have little value in deciding who may represent a state."[133] Thus, *ConocoPhillips* does not necessarily repudiate the effective control test, but can be seen as an attempt to resolve the issue before any test would be applied.[134] This approach is consistent with, albeit a little broader, than the fairness analysis of the Tribunal in *Mobil Cerro Negro*, which found that it had to decide the representation issue absent a joint defense.[135]

In conclusion, one can synthesize the above cases to state that (i) resolution of the claim of rival governments purporting to represent their state in arbitral proceedings is a procedural question; (ii) the procedural status quo of prior representation in the case creates a presumption in favor of that representative; (iii) concurrent representation is a feasible alternative to resolving the question where procedural fairness permits it (particularly, where the parties agree on a joint defense or at least on substantially the same claim); and (iv) where the question must be decided, effective control of the state's territory is the relevant factor under international law to overcome the presumption in favor of the status quo.

II. COMPARING APPROACHES TO STATUS DETERMINATION IN *LARSEN* AND THE VENEZUELAN REPRESENTATION CASES

The purpose of international arbitration is to provide a flexible and efficient forum to resolve the disputes which the parties submit to the arbitrators.[136] The cases described above are extraordinary in that the disputes at issue implicate much broader legal questions about the status of governments and states under international law. In *Larsen v. Hawaiian Kingdom*, there was a giant elephant in the room that cast its shadow over the proceedings from the beginning. This led an early commentator to find that "[i]t was clear that the parties were in conflict not with one another, but with the

132. *See infra* Section III.A.b.3.

133. Niko Pavlopoulos, *Contested Governments and State Representation before International Courts and Tribunals*, EJIL:TALK! (Sept. 29, 2021), https://www.ejiltalk.org/contested-governments-and-state-representation-before-international-courts-and-tribunals/.

134. *But see* Héctor Fernández, *Representation of Venezuela in Investment Arbitration*, KLUWER ARB. BLOG (Jan. 16, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/16/representation-of-venezuela-in-investment-arbitration/ (arguing that including both representatives in the proceedings might be preferrable because the effective control test would hinder enforcement in states such as the United States whose governments recognize the Guaidó government).

135. *See supra* Section II.b.iv.

136. *See, e.g.*, NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 1.04, at 2 (6th ed. 2015).

United States."[137] The Tribunal was clearly intent on evading the delicate issues connected to the United States' (non-)involvement, including whether the Hawaiian Kingdom was a state. In contrast, the arbitral bodies dealing with ICSID cases involving Venezuela were more inclined to decide which government could represent that state, while at least claiming to narrow the decision to a purely procedural one.

What prevented the Tribunal in *Larsen* from adopting a similar approach? Specifically, why did it fail to analyze whether the Kingdom of Hawaii and its Council of Regency in fact had effective control over the Hawaiian Islands and then dismiss the claim early in the proceedings because it failed this test? Certainly, there are major differences between *Larsen* and the examined ICSID cases. However, as I will address in turn below, none of the special factors present in *Larsen* necessarily precluded the Tribunal from deciding the status question raised in its proceedings and taking the approach of the ICSID Tribunals in the Venezuelan cases. In fact, valid legal and policy considerations undergirding arbitral decision-making weigh in favor of taking this approach in *Larsen* and similar future cases.

A. Differences in the Applicable Procedural Rules

A major difference between the cases at issue are the procedural rules governing the respective proceedings. For the ICSID cases, the situation is relatively straightforward. As far as the ICSID Convention, ICSID's Arbitral Rules, and party agreements do not cover the situation, the Tribunal is empowered to decide the question itself.[138] Thus, in the ICSID cases analyzed above, the arbitral bodies had a clear jurisdictional basis to decide the representation issue.[139]

Procedurally, the *Larsen* Tribunal faced a more complicated situation because its choice and application of the procedural rules were inherently connected to the merits of the case. It was in the unusual position that it had to decide which procedural rules applied. As their name suggests, the PCA's "Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State" would have necessarily raised Hawaiian statehood as a preliminary question.[140] In contrast, the UNCITRAL Rules were agnostic as to the parties' statehood. Thus, by finding that the UNCITRAL Rules were not limited to contractual disputes and could apply to disputes

137. Bederman & Hilbert, *supra* note 27, at 932.

138. ICSID Convention art. 44. This provision also applies in rectification, annulment, and resubmission proceedings. *See* ICSID Convention art. 52(4); CHRISTOPH H. SCHREUER ET AL., *Article 44 – Rules on Procedure*, *in* THE ICSID CONVENTION: A COMMENTARY 71, ¶ 6 (2d ed. 2009).

139. *See supra* Sections II.b.i.–II.b.iv; s*ee also* Rees-Evans & Carvosso, *supra* note 75, at 577.

140. *See supra S*ection I.a.

in which the parties explicitly requested the application of public international law, the Tribunal evaded the statehood question at this stage.[141]

Scholars have criticized this application of the UNCITRAL Rules in *Larsen* and even suggested that the Tribunal could have dismissed the claim at this early point because the Rules' central requirement of a contractual dispute was not fulfilled.[142] However, others have rightly pointed out that the UNCITRAL Rules embody a flexibility that has allowed it to be applied (and modified) in several high-profile international law disputes, such as in the Iran-U.S. Claims Tribunal and the United Nations Compensation Commission for claims against Iraq.[143] Therefore, applying the UNCITRAL Rules was certainly not inconsistent with their scope as interpreted by other tribunals.

However, the truly extraordinary aspect of *Larsen's* procedural decision manifests itself only when one looks at all of its effects as a whole. International law operates primarily on states. Rejecting the Optional Rules allowed the Tribunal to remain ambiguous about whether a state was involved in the dispute while finding that it could apply international law to solve it. This might be seen as reflective of the heightened degree of party autonomy in arbitral proceedings. However, by finding the UNCITRAL Rules applicable the Tribunal rejected the repeatedly stated preference of both parties to apply the Optional Rules.[144] Moreover, as will be shown below, by applying public international law, the Tribunal would go on to severely restrict party autonomy by applying the ICJ's admissibility principles to the case. Therefore, the applicable procedural rules did not determine the Tribunal's refusal to decide Hawaii's status. On the contrary, the Tribunal seems to have built a peculiar procedural framework for the very purpose of evading that question.

B. Admissibility of the Claims

The major, and arguably the only effect of *Larsen's* application of public international law was to bring in the ICJ's admissibility principles regarding the existence of a dispute and indispensable third parties. However, the ICJ's jurisdictional framework as the UN's "principal judicial organ" is unique and it is not self-evident that these principles automatically operate in arbitral tribunals just because they apply to international law. [145]

141. *See infra* Section I.b.i.

142. Bederman & Hilbert*, supra* note 27, at 932-33.

143. Dumberry, *supra* note 14, at 678-80. The 2010 changes to the UNCITRAL Rules reflect this flexibility, as its Article 1(1) now explicitly covers disputes "in respect of a defined legal relationship, whether contractual or not." G.A. Res. 65/22, UNCITRAL Arbitration Rules as Revised in 2010 (Dec. 6, 2010).

144. *See infra* Section I.B.1.

145. U.N. Charter art. 92.

In that regard, the requirement of a dispute is somewhat less problematic. First, the requirement of a dispute is already implicit in the nature of the arbitral function itself.[146] In fact, the major rules frameworks that generally govern international arbitration, including the UNCITRAL Rules, explicitly assume the presence of a dispute.[147] Second, where arbitral tribunals apply public international law, some form of dispute requirement usually applies. For example, it is widely accepted that investment arbitration under the ICSID Convention requires the presence of a dispute.[148] Likewise, the Iran-U.S. Claims Tribunal, which operates under modified UNCITRAL Rules and applies public international law, recognizes admissibility principles such as ripeness, which are closely related to the dispute requirement.[149] Although these tribunals operate under broader jurisdictional frameworks (the ICSID Convention[150] and the Algiers Claims Settlement Declaration[151] respectively) their decisions can be seen an expressing basic principles that apply regardless of party stipulation even under ad hoc arbitrations like *Larsen*.[152] Thus, these examples show that, at least where public international law applies, recourse to the ICJ's dispute requirement is not incompatible with and might even be necessary for the functions of an arbitral tribunal.

As shown above, the *Larsen* Tribunal recognized the presence of a dispute in one area, namely whether the Hawaiian Kingdom had discharged its duty of protection towards Mr. Larsen against the imposition of U.S. laws

146. *See*, *e.g.*, JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1-1 (2003).

147. *See* UNCITRAL Rules art. 1(1); ICSID Convention art. 25; Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two Parties of Which only one is a State* art. 1(1) (July 6, 1993), https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf (which closely follows the 1976 UNCITRAL Rules); International Chamber of Commerce, *Arbitration Rules* arts. 1(2), 4(3)(c), 12, 21 (Jan. 1, 2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/; The London Court of International Arbitration, *LCIA Arbitration Rules* arts. 1(1)(iii), 14(1)(ii) (Oct. 1, 2020), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx; s*ee also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. I(1) II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (referring to arbitral awards arising out of "differences" between the parties). *But see* Reinmar Wolff, *Art. II*, *in* NEW YORK CONVENTION: ARTICLE-BY-ARTICLE COMMENTARY ¶¶ 60-64 (Reinmar Wolff ed., 2d ed. 2019) (criticizing the interpretation of certain common law courts that the presence of "differences" in art. II(1) of the New York Convention is beyond party control).

148. *See* CHRISTOPH H. SCHREUER ET AL., *Article 25 – Jurisdiction*, *in* THE ICSID CONVENTION: A COMMENTARY 71, ¶¶ 41-47 (2d ed. 2009) (citing to the *Northern Cameroons* and related ICJ cases).

149. CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 80-86 (1998).

150. ICSID Convention art. 25.

151. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the United States of America and the Government of the Islamic Republic of Iran art. 2, Jan. 19, 1981, 20 I.L.M. 230; *see* STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE 8 (1992) (observing that Article 2 of the Claims Settlement Declaration has largely superseded Article 1 of the UNCITRAL Rules).

152. *See also* Bederman & Hilbert, *supra* note 27, at 932 (claiming without discussion that the UNCITRAL Rules do not apply absent a legal dispute).

against him.[153] It based its rejection of this part of the claim on the ICJ's indispensable third party principle, also known as the *Monetary Gold* doctrine.[154] The Tribunal found that this doctrine was based on the international law principle of consent and that therefore, all tribunals that applied international law should apply it.[155]

The application of the *Monetary Gold* Principle in international arbitration is highly controversial. Notably, *Larsen* was not only the first arbitral tribunal to invoke it, but to date remains the only one to deny admissibility based on this doctrine.[156] Scholars have raised several arguments against such an application. The first concerns the different institutional status of the ICJ and arbitral tribunals. While there is no system of precedent in international tribunals, the ICJ has a stronger tendency to follow its own prior decisions than arbitral tribunals, whose composition changes with every case even where they operate under an umbrella institutional framework such as ICSID or the PCA.[157] This reflects a more profound difference which is based on the ICJ's role as a permanent treaty organ of the UN. This institutional footing arguably leads to the Court basing its decisions much more on multilateral legal and policy considerations than arbitral tribunals.[158] Moreover, even in context of the ICJ itself, some scholars have recently raised doubts about the continued application of *Monetary Gold*.[159]

On the other hand, an arbitral award that intrudes on the claims of third states could be seen as an ultra vires action that causes the award's invalidity.

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153. *See supra* Section I.b.ii.

154. *Cf.* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 661-63 (2013) (arguing that these are two distinct concepts but acknowledging that in scholarship and practice the two have become somewhat conflated).

155. *See supra* Section I.b.iii.

156. Noam Zamir, *The Applicability of the Monetary Gold Principle in International Arbitration*, 33 ARB. INT'L 523, 527-28, 532 (2017); Ori Pomson, *Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?*, 10 J. INT'L DISP. SETTLEMENT 88, 104-07 (2019). *See, e.g.*, Chevron Corp. v. Republic of Ecuador, PCA Case Repository No. 2009-23, Second Interim Award on Interim Measures, ¶ 4.60 (Feb. 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf (denying that the *Monetary Gold* doctrine would operate on the facts of the case without deciding whether it applies to mixed international investment arbitrations); Niko Resources (Bangladesh) Ltd. v. People's Republic of Bang., ICSID Case No. ARB/10/11, Decision on Jurisdiction, ¶¶ 516-24 (Aug. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw6322_0.pdf (denying that the *Monetary Gold* doctrine would apply to the facts of the claim without explicitly deciding whether it is a binding principle on the Tribunal).

157. *See* Zamir, *supra* note 156, at 535-36; *see also* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment (Preliminary Objections), 1998 I.C.J. 275, ¶ 28 (June 11) (indicating that the Court's default is to "follow the reasoning and conclusions of earlier cases" unless there are reasons not to).

158. *See* Zamir, *supra* note 156, at 535-36; *see also* Bola Ajibola, *The International Court of Justice and Absent Third States*, 4 AFR. Y.B. INT'L L. 85, 89 (1996); Martina Monti, Threats to the International Peace and Security: Who Decides? Its Possible Valuation by Arbitral Tribunals in International Investment Arbitration 58 (Jul. 31, 2017) (Bachelor Thesis, Universidad de San Andrés), https://repositorio.udesa.edu.ar/jspui/bitstream/10908/15618/1/%5BP%5D%5BW%5D%20T.%20G.%20Abo.%20Monti%2C%20Martina.pdf.

159. *See, e.g.*, Mollengarden & Zamir, *supra* note 57.

This argument has been raised particularly in the context of boundary disputes.[160] However, this concern is answered by a theory that strikes directly at *Larsen's* reasoning in that it denies consent as the basis for the *Monetary Gold* Doctrine. This view does not deviate from the conventional wisdom that consent forms the jurisdictional basis of every international tribunal.[161] However, it holds that tribunals may discuss the legal interests of third states precisely because the lack of consent makes clear that they do not pass binding judgment on their conduct.[162]

On a policy basis, some critics of *Monetary Gold* note the relatively great potential for abuse by respondents to evade claims that are otherwise admissible and meritorious.[163] This concern is heightened by the rather "unpredictable"[164] nature and application of the *Monetary Gold* principle, which an application in arbitration proceedings would only increase. However, some scholars deem the principle to be reconcilable with the arbitral function if it is interpreted narrowly and confined to disputes where the third state's legal interests form the very subject matter of the decision as was the case in *Larsen*.[165]

On balance, the *Monetary Gold* doctrine is certainly not the entrenched general legal principle that the *Larsen* Tribunal made it out to be. Refusing to apply it would have been equally if not more consistent with the available legal sources and scholarship. Moreover, on a prudential level, this approach was problematic because *Larsen* itself shows that, where the question of statehood implicates the legal interests of a third party, some form of status determination might be inevitable. This is because the Tribunal explicitly confined the *Monetary Gold* doctrine to the protection of third states, not

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160. CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 252-53 (1993).

161. *See, e.g.*, Status of the Eastern Carelia, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 5, at 27 (Jul. 23) ("It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.").

162. *See* Pomson, *supra* note 156, at 109-10. Note, however, that Pomson argues that the *Monetary Gold* Principle is a rule of customary international law. *Id.* at 117-24; *see also* Mollengarden & Zamir, *supra,* note 57, at 57-59 (arguing in the context of the ICJ that the consent-based approach to third states is not supported by the ordinary meaning of the Court's statute nor its *travaux préparatoires*); CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 251, 253-54 (1993); Channel Islands Arbitration (U.K. v. Fr.), 18 I.L.M. 397, 412 (Ct. Arb. 1979).

163. Saar A. Pauker, *Admissibility of Claims in Investment Treaty Arbitration*, 34 ARB. INT'L 1, 59 (2018); *see also* CRAWFORD, *supra* note 154, at 661-62 (arguing in favor of a distinction between the *Monetary Gold* Principle and the concept of indispensable third parties and criticizing the latter for being prone to procedural evasion).

164. Christian J. Tams & Andreas Zimmermann, *[T]he Federation Shall Accede to Agreements Providing for General, Comprehensive and Compulsory International Arbitration*, 51 GERMAN Y.B. INT'L L. 391, 414 (2008).

165. *See, e.g.*, Christian Titje & Andrej Lang, *The (Non-)Applicability of the Monetary Gold Principle in ICSID Arbitration Concerning Matter of EU Law*, 173 BEITRÄGE ZUM INTERNATIONALEN WIRTSCHAFTSRECHT 1, 12-18 (2021).

private entities.[166] Thus, in order to avoid determining the Hawaiian Kingdom's status under international law, the Tribunal implicitly acknowledged the United States' status as a state when it applied the principle to protect its legal interests. It might seem obvious that the Tribunal took this fact for granted. However, *a priori* the two claims to statehood may not be distinguishable and, in a system based on sovereign equality, arguably should not be.

Moreover, this line of reasoning in *Larsen* shows that determining the international status of states is not per se foreign to international tribunals. As I will argue below, the United States' effective control of the Hawaiian Islands is not less obvious than its overall existence and could have easily supported a decision denying jurisdiction.

C. Differences in the Law Governing the International Status of States and Governments

The last major difference between *Larsen* and the Venezuelan ICSID cases concerns the nature of the disputed objects at issue in the respective decisions. The Hawaiian Kingdom, represented by its Council of Regency, purported to be a sovereign state located in the Hawaiian Islands, prompting the question whether this entity constituted a state under international law.[167] In comparison, the ICSID cases saw two rivalling governments claiming to represent a state party whose identity was undisputed.[168]

Different legal rules govern the definitions of states and governments. Under the prevailing theory, a state must comprise at least the following three components: a fixed territory, a permanent population, and an effective government.[169] The definition of government under international law is less clearly delineated. The traditional approach requires a government to

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166. Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01, Award, ¶ 11.17 (2001).

167. It will be assumed that at the time of the proceedings, the United States had undisputed de facto territorial control over these territories at the time of the proceedings.

168. *See*, *e.g.*, ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Decision on Rectification, ¶ 25 (Aug. 24, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10770.pdf.

169. *See* GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 394-434 (3rd ed. 1914). Sometimes other criteria are adduced, but these may generally be subsumed under one of the three existing categories. *See, e.g.*, 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE: INTRODUCTION AND PART I, at 120-23 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (requiring sovereignty as a fourth criterion); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 118-20 (9th ed. 2019) (requiring "independence", but noting that this "may be used in close association with a requirement of effective government"); MALCOM SHAW, INTERNATIONAL LAW 181-87 (9th ed. 2021) (treating the capacity to enter into relations with other states as a prerequisite for independence); Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (requiring the "capacity to enter into relations with the other states" as a fourth factor).

have effective control over the state's territory.[170] However, the importance of recognition by other governments is still disputed.[171] As the Venezuelan cases show, recognition can be highly political and lead to inconsistent approaches by different countries. Thus, it is not suitable for a neutral arbitral tribunal that seeks to make a procedural determination[172] and a majority of the analyzed ICSID cases rejected recognition as the main factor to rebut the procedural status quo.[173]

It is submitted that despite these differences, the *Larsen* Tribunal could have adopted the ICSID approach for two reasons. First, it did not necessarily have to analyze and decide the question at the state level. Rather, it could have based its analysis on the governmental level, inquiring whether the Council of Regency was authorized under international law to act for *any* purported state located in the Hawaiian Islands. While such an approach seems logically inverted, this would have resolved the issue in the narrowest way possible and thus served the Tribunal's apparent need to avoid as much legal determination of the statehood question as possible. Moreover, even if the Tribunal had analyzed the issue at the state level, effective governmental control over territory would have implicated two out of the three constitutive factors of statehood.

Both of these approaches would have implicated the Council of Regency's ability to enter into arbitration agreements in a governmental capacity. As shown above, the Tribunal tried to circumvent this question by holding that the UNCITRAL Rules were indifferent as to whether parties to an arbitration are states or not.[174] However, the Council of Regency explicitly claimed to act on behalf of a sovereign state. Any doubts about the apparent authority of such representation (including the question whether the principal existed at all) clearly implicated the validity of the arbitration agreement and hence the Tribunal's jurisdiction. Under the principle of *compétence de la compétence*, international tribunals enjoy the power to make procedural decisions necessary to ascertain their jurisdiction.[175] In *Larsen*, the *compétence de la*

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170. Tinoco Arbitration (U.K. v. Costa Rica), 1 R.I.A.A. 369, 381 (1923); *see also* CRAWFORD, *supra* note 169, at 142; Rees-Evans & Carvosso, *supra* note 75, at 569.

171. *See* Rees-Evans & Carvosso, *supra* note 75, at 566-73.

172. *See* Mobil Cerro Negro Holding, Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on the Respondent's Representation (Resubmission Proceeding), ¶¶ 61-62 (Mar. 1, 2021), https://jusmundi.com/en/document/decision/pdf/en-mobil-cerro-negro-holding-ltd-mobil-cerro-negro-ltd-mobil-corporation-and-others-v-bolivarian-republic-of-venezuela-resubmission-proceeding-wednesday-24th-october-2018. *But see supra* note 134.

173. *See supra* Section II.c.

174. *See supra* Section I.b.i.

175. Nottebohm Case (Liechtenstein v. Guatemale), Judgment (Preliminary Objections), 1953 I.C.J. 111, at 120-21 (Nov. 18); *see also* Abdul G. Koroma, *Assertion of Jurisdiction by the International Court of Justice*, *in* ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES 189, 192-94 (Capps et al. eds., 2003).

compétence power would have enabled the Tribunal to inquire into the matter on its own motion, as some ICSID bodies did in the Venezuelan cases.[176]

If the Tribunal had done so regarding the validity of the arbitration agreement it would have questioned its own jurisdiction. Consequently, applying the ICSID framework, there would not have been any procedural status quo and no presumption to rebut in either direction. Therefore, under article 24(1) UNCITRAL Rules, the Hawaiian Kingdom would have borne the burden of proof.[177] Against this procedural backdrop, the Tribunal could have ruled on the Council of Regency's authority as a state representative or alternatively on the Hawaiian Kingdom's control of its purported territory. Given the United States' undisputed control over the Hawaiian Islands, the Tribunal could have denied both of these claims with ease and therefore denied its jurisdiction.

Arguably, this analysis would have required the Tribunal to engage with the claim that the Hawaiian Islands were under the occupation of the United States. The laws of war represent an explicit exception to territorial effectiveness because under belligerent occupation, sovereign statehood survives the loss of territorial control.[178] Likewise, international law recognizes the existence of legitimate governments in exile who do not have any control over territory.[179] Belligerent occupation thus certainly reveals a limitation of the ICSID approach to status determination, which relies heavily on effective control over territory.

However, on the facts of *Larsen*, a slight modification of this test would have sufficed. It is certainly true that, as the Tribunal itself noted, an extensive analysis of the occupation issue would have raised several questions on the merits, including the intertemporal applicability of the laws of war.[180] However, the Tribunal would not have had to examine this question on the merits, but merely within the context of a jurisdictional analysis of the arbitration agreement. In this context, two additional points can be extrapolated from ICSID's procedural framework. First, after failing to show that it did not have territorial control, the Council of Regency would bear the burden

176. *See, e.g.*, ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Decision on Rectification, ¶ 9 (Aug. 24, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10770.pdf.

177. UNCITRAL Rules art. 27(1) (providing that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence").

178. *See* LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE. VOL. II: DISPUTES, WAR AND NEUTRALITY (Hersch Lauterpacht ed., 8th ed. 1952); SHAW, *supra* note 169, at 1039-42.

179. Stefan Talmon, *Who Is a Legitimate Government in Exile? Towards Normative criteria for Governmental Legitimacy in International Law*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 499, at 503-06 (Guy Goodwin-Gill & Stefan Talmon eds., 1999).

180. Larsen v. Hawaiian Kingdom, PCA Case Repository 1999-01, Award, ¶ 9.2 (2001); *see also* Dumberry, *supra* note 14, at 682 (arguing that "any defect in the original American legal title over Hawaii may be remedied by means of a 'continuous and peaceful' exercise of territorial sovereignty by the United States on the Islands").

of showing that it was a genuine government in exile. Second, to determine this question the Tribunal could look to determinations by third parties. For the reasons stated above, recognition by states is not the proper standard for neutral adjudicative bodies. However, the ICSID cases indicate that determinations by a competent multilateral political body could be sufficient. In the case of Venezuela this was not possible because the country had denounced the ICISD Convention and was therefore not represented on its Administrative Council (which therefore did not have to determine which government would represent the state there).[181] But in *Larsen*, there was an authoritative determination of Hawaii's status under international law because in 1959, the UN General Assembly had recognized Hawaii's referendum in favor of joining the United States as an effective exercise of the Hawaiian people's self-determination.[182] This determination, coupled with the Hawaiian Kingdom's burden of proof, should have sufficed to deny jurisdiction.

Moreover, because an inquiry into the Hawaiian Kingdom's status implicated the Tribunal's jurisdiction, this question would have preempted the problematic admissibility analysis laid out above.[183] As the Venezuelan ICSID cases show, the Tribunals there clearly thought that the issue of the status of the representatives before them were preliminary to other questions.[184] Similarly, the International Criminal Court, in deciding that it could exercise its territorial jurisdiction in Palestine, treated this as preliminary to potential admissibility questions, including the application of the *Monetary Gold* doctrine.[185] Applying this approach, the Tribunal could have avoided a controversial application of the *Monetary Gold* Principle by denying jurisdiction before the question even came to the admissibility stage.

CONCLUSION

In the preceding pages, I have argued that the *Larsen* Tribunal went through significant legal contortions to avoid facing the Hawaiian Kingdom's statehood claim. It opted for a procedural regime that ostensibly permitted it to postpone the question to the merits phase. Additionally, it imported controversial

181. *See supra* Section III.b.iv.

182. G.A. Res. 1469 (XIV), Cessation of the Transmission of Information under Article 73e of the Charter in Respect of Alaska and Hawaii, ¶ 3 (Dec. 12, 1959).

183. *See supra* Section III.b.

184. *See, e.g.*, Valores Mundiales, S.L. v. Bolivarian Republic of Venez., ICSID Case No. ARB/13/11, Procedural Resolution No. 2 (Annulment Proceeding), ¶ 3 (Aug. 29, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw11464.pdf.

185. Situation in the State of Palestine, ICC-01/18-143, Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', ¶¶ 58-60 (Feb. 5, 2021); *see also* Álvaro Rueda Rodríguez-Vila, *The ICC, the Monetary Gold Principle and the Determination of the Territory of Palestine*, OPINIOJURIS (Nov. 2, 2020), http://opiniojuris.org/2020/11/02/the-icc-the-monetary-gold-principle-and-the-determination-of-the-territory-of-palestine/.

admissibility criteria from the ICJ's jurisprudence and applied one of them, the *Monetary Gold* doctrine, in a way that gave preference to the United States' claim to statehood over that of the Hawaiian Kingdom.

I have shown that the framework employed by the ICSID bodies dealing with the Venezuelan representation question constitutes a solution to this kind of problem that is not only procedurally and legally sounder, but also preferable on a policy basis. First, because jurisdiction logically precedes admissibility, the *Larsen* Tribunal could and should have examined the validity of its underlying arbitration agreement before declaring the case inadmissible. Second, the effective control approach adopted by the ICSID bodies would also have served as an appropriate analytical framework for the statehood question in *Larsen* because effective control is not only a fundamental part of the definition of governments, but of states as well. Third, the ICSID approach increases legal certainty and stability because effective control coupled with its procedural status quo rule provides Tribunals with clear and manageable standards. Finally, it fosters the effectiveness and dignity of international arbitral bodies because it prevents long-winded proceedings in which the status of the parties is in continual limbo in between international subjects and private individuals.

At the same time, *Larsen* also reveals a possible limitation of the ICSID approach, which does not consider exceptions to the effective control requirement provided for in the laws of war. To fix this, I have suggested an adjustment to the ICSID model, which relies on the determination by competent international institutions. Like recognition by individual states, these determinations are undoubtedly political in nature. However, bodies like the UN General Assembly, which provided a determination of Hawaii's status in *Larsen*, represent the collective competence and will of the international community in particular areas of the law. Therefore, these determinations are inherently more legitimate than state recognition and are more appropriate for arbitral tribunals to use.

A comparative look at *Larsen* and the *Venezuelan* ICSID cases shows that the flexible procedural nature of international arbitration gives arbitrators considerable room in dealing with delicate political questions. However, that does not mean that tribunals should always use this room to avoid answering these questions. As the analyzed ICSID cases show, a restrained and narrow framing may transform a political question into a legal one. A similar path was open to the Tribunal in *Larsen*. This path would have relied on more firmly established legal principles, involved fewer procedural contortions and, by addressing the issue head-on, would have strengthened the legitimacy of international dispute resolution overall.

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