DEXTER K. KA'IAMA (Bar No. 4249)
DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM
P.O. Box 2194
Honolulu, HI 96805-2194
Telephone: (808) 284-5675
Email: attorneygeneral@hawaiiankingdom.org

Attorney for Plaintiff, Hawaiian Kingdom

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

HAWAIIAN KINGDOM,

Plaintiff,

v.

JOSEPH ROBINETTE BIDEN JR., in his official capacity as President of the United States; KAMALA HARRIS, in her official capacity as Vice-President and President of the United States Senate; ADMIRAL JOHN AQUILINO, in his official capacity as Commander, U.S. Indo-Pacific Command; CHARLES P. RETTIG, in his official capacity as Commissioner of the Internal Revenue Service; et al.,

Defendants.

Civil No. 1:21:cv-00243-LEK-RT

PLAINTIFF HAWAIIAN KINGDOM'S SUPPLEMENTAL RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA FILED NOVEMBER 5, 2021 [ECF 164]; CERTIFICATE OF SERVICE

PLAINTIFF HAWAIIAN KINGDOM'S SUPPLEMENTAL RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA FILED NOVEMBER 5, 2021 [ECF 164]

INTRODUCTION

Plaintiff HAWAIIAN KINGDOM hereby supplements its response [ECF 166] to the Statement of Interest of the United States of America filed November 5, 2021 [ECF 164].

The Plaintiff would like to expand on what it stated in its conclusion that the "jurisdiction of the Court as an Article II Court is consequential to the existence of the Hawaiian Kingdom as a State [ECF 166, p. 7]," by drawing the Court's attention to the consequences of the United States and those States whose Consulates are Defendants in this case that did not object to the Permanent Court of Arbitration ("PCA"), by its International Bureau,[1] of its *juridical act* of acknowledging the Hawaiian Kingdom's existence as a non-Contracting State, is a reflection of customary international law and the practice of States—*opinio juris*, thereby precluding the United States and Defendant foreign Consulates from denying otherwise.

[1] "The PCA has a three-part organizational structure consisting of an *Administrative Council* that oversees its policies and budgets, a panel of independent potential arbitrators known as the *Members of the Court*, and its Secretariat, known as the *International Bureau*, headed by the Secretary-General" (online at https://pca-cpa.org/en/about/).

The Plaintiff hereafter explains the significance of the PCA's *juridical act* by tying it directly to the continuity of the Hawaiian Kingdom as a *juridical fact* through the application of the civil law, as opposed to the common law, in international proceedings.

DISCUSSION

The first allegation of the war crime of usurpation of sovereignty,[2] was made the subject of an arbitral dispute in *Larsen v. Hawaiian Kingdom* at the PCA, whereby the claimant alleged that the Plaintiff was legally liable "for allowing the unlawful imposition of American municipal laws" over him within Hawaiian territory.[3] The war crime of usurpation of sovereignty consists of the "imposition of legislation or administrative measures by the occupying power that go beyond those required by what is necessary for military purposes of the occupation."[4]

To ensure that the dispute is an international dispute, the PCA needed to possess jurisdiction, as an institution, first,[5] before it could form the *ad hoc* arbitral

---

[2] Memorial of Lance Paul Larsen (May 22, 2000), *Larsen v. Hawaiian Kingdom*, Permanent Court of Arbitration, at para. 62-64 (online at https://www.alohaquest.com/arbitration/pdf/Memorial_Larsen.pdf).
[3] Permanent Court of Arbitration Case Repository, *Larsen v. Hawaiian Kingdom*, PCA Case no. 1999-01 (online at https://pca-cpa.org/en/cases/35/).
[4] William Schabas, "War Crimes Related to the United States Belligerent Occupation of the Hawaiian Kingdom," in David Keanu Sai (ed.) *Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* 157 (2020).
[5] United Nations, *United Nations Conference on Trade and Development: Dispute Settlement* 15 (2003).

tribunal to resolve the dispute. The jurisdiction of the PCA is distinguished from subject-matter jurisdiction of the *ad hoc* tribunal presiding over the dispute between the parties. International disputes, capable of being accepted under the PCA's institutional jurisdiction, include disputes between any two or more States; a State and an international organization; two or more international organizations; a State and a private party; and an international organization and a private party.[6]

The PCA accepted the case as a dispute between a "State" and a "private party" and acknowledged the Hawaiian Kingdom to be a non-Contracting State under Article 47 of the Hague Convention for the Pacific Settlement of International Disputes, I, which states, "[t]he jurisdiction of the Permanent Court may, within the conditions laid down in the regulations, be extended to…non-Contracting [States]."[7] The PCA annual reports of 2000 through 2011 specifically states that the *Larsen v. Hawaiian Kingdom* proceedings were done "[p]ursuant to article 47 of the 1907 Convention" [ECF 55, ¶97]. And in its case repository online, it identifies the Hawaiian Kingdom as a "State" and Larsen as a "private party."[8]

As a matter of evidence, Hawaiian laws are silent in explaining the actions taken by the PCA. When Hawaiian "laws are silent on the subject of evidence," the

---

[6] *Id*.
[7] 36 Stat. 2199, 2224 (1907).
[8] PCA Case Repository, *Larsen v. Hawaiian Kingdom* (online at https://pca-cpa.org/en/cases/35/).

Hawaiian Kingdom Supreme Court stated that it would "be guided by the general principles which are recognized in civilized countries, and providing that we may adopt, in any case, the reasonings and analogies of the common law, or of the civil law, so far as they are deemed to founded in justice, and not in conflict with the laws and usages of this Kingdom."[9]

The common law is English in origin and is derived from judicial decisions as opposed to statutes. The civil law, on the other hand, originates from continental Europe and has developed over time on the basis of general principles that find their expression in civilian methodology and terminology.[10] "While the Common Law is characterized by its having been centered in one set of the courts and its organized bar," states Professor Rheinstein, "the Civil Law has been centered around a book [Corpus Iuris Civilis], and a set of universities."[11] According to Professor Planiol, the civil law "is the freest of all because it is purely theoretical. It is also the most prolific because it is developed leisurely. In its examination it does not confine itself to an isolated case. It gives to its concepts and its deductions the broadness of view, the logic and the force of synthesis."[12]

---

[9] *Bullions v. Loring Brothers & Co.*, 1 Haw. 372, 377 (1856).
[10] A.N. Yiannopoulos, *Civil Law System* 94 (2nd ed. 1999).
[11] Max Rheinstein, "Common Law and Civil Law: An Elementary Comparison," 22 *Rev. Jur. U.P.R.* 90, 92 (1952).
[12] 1 Planiol, *Civil Law Treatise* (translation by the Louisiana State Law Institute) §21 (1959).

According to Professor Picker, "[t]here is a wide degree of support for the proposition that civil law has served as the most significant influence on international law."[13] He goes on to state that "some would even argue that international law is essentially a civil law system."[14] And Professor Nagle explains, "[i]t is the civil-law traditions that have most widely influenced international law [and] international organizations."[15] Furthermore, as stated by Professors Merryman and Clark, "[t]he civil law was the legal tradition familiar to the Western European scholar-politicians who were the fathers of international law. The basic charters and the continuing legal development and operation of the European Communities are the work of people trained in the civil law tradition."[16]

Of the 44 Contracting States to the 1907 Convention that established the PCA at the Hague Conference in 1907, the United States and Great Britain, as common law States, were the only States that were not from a civil law tradition. The other 42 States were represented by men who were "trained in the civil law tradition." This includes the Netherlands where the PCA is situated in its city The Hague. The current

---

[13] Colin B. Picker, "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction," 41 *Vanderbilt J. Transant'l L.*, 1083, 1106 (2008).
[14] *Id*.
[15] Estella Nagle, "Maximizing Legal Education: The International Component," 29 *Stetson L. Rev.* 1091 (2000).
[16] John Henry Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* 77 (1978).

number of Contracting States to the 1907 Convention is 122, the majority of which are based on the civil law tradition.

Therefore, it stands to reason that the action taken by the PCA in acknowledging the continuity of the Hawaiian Kingdom as a State for purposes of its institutional jurisdiction should be viewed through the reasonings of the civil law tradition as opposed to the common law. In the civil law tradition, a fact is juridical or legal when it produces a legal effect, by virtue of a legal rule. In *Schexnider v. McDermott Int'l Inc.,* the federal court in Louisiana stated *juridical facts* are defined as "events having prescribed legal effects."[17] According to the German tradition of the civil law, a *juridical act*, which is triggered by a *juridical fact*, "sets the law in motion and produces legal consequences."[18] Under American jurisprudence, the equivalent of a *juridical act* in the civil law tradition is judicial notice of a fact or facts.

The Hawaiian Kingdom, as an independent and sovereign State in continuity, is a *juridical fact* according to the civilian law. Both rights and powers held by a subject of international law may arise from a *juridical fact*, which is precisely what occurred when arbitral proceedings were initiated in *Larsen v. Hawaiian Kingdom* at the PCA, being a subject of international law. An arbitration agreement was

[17] *Schexnider v. McDermott Int'l Inc.*, 688 F. Supp. 234, 238 (W.D. La. 1988).
[18] Nikolaos A. Davrados, "A Louisiana Theory of Juridical Acts," *La. Law Rev.* 1129 (2020).

entered into between Larsen and the Hawaiian Kingdom on October 30, 1999 [ECF 55, ¶94], and a notice of arbitration was filed by the claimant on November 8, 1999, with the PCA's International Bureau. Access to the institutional jurisdiction of the PCA would only be triggered by the *juridical fact* of the Hawaiian Kingdom being a non-Contracting "State," and not by Larsen as a "private party." This *juridical fact* set in motion and produced legal consequences, which was the convening of the *ad hoc* arbitral tribunal on June 9, 2000.

Prior to the formation of the tribunal under the auspices of the PCA, as an intergovernmental organization and subject of international law, it required that the international dispute conform to the provisions of the 1907 Hague Convention on the Pacific Settlement of International Disputes (1907 Convention)[19] as a matter of international law. Access to the auspices of the PCA are for Contracting and non-Contracting States, and the Hawaiian Kingdom is a non-Contracting State to the 1907 Convention. Private parties do not have access to the PCA unless sponsored by their State.[20] In this case, the Plaintiff did not sponsor Larsen in its suit, but rather

[19] 36 Stat. 2199 (1907).

[20] See *Ilya Levitis (United States) v. The Kyrgyz Republic*, PCA Case no. 2021-21 (online at https://pca-cpa.org/en/cases/97/); *U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic*, PCA Case no. 2013-06 (online at https://pca-cpa.org/en/cases/2/); *Windstream Energy LLC (United States) v. The Government of Canada*, PCA Case no. 2013-22; and *Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic*, PCA Case no. 2014-01 (online at https://pca-cpa.org/en/cases/24/).

waived its sovereign immunity by consenting to submit their dispute to the PCA for resolution of the dispute by virtue of Article 47, which is a legal rule that provides for non-Contracting States to have access to the jurisdiction of the PCA.

The *juridical fact* of the Hawaiian State and its continuity produced a legal effect for the International Bureau of the PCA to do a *juridical act* of accepting the dispute under the auspices of the PCA by virtue of Article 47, being a legal rule. The international dispute between Larsen and the Hawaiian Kingdom was not created by the *juridical fact*, but rather the *juridical fact* determined the legal conditions for the PCA's acceptance of the dispute, which is the *juridical act* by which the dispute is established in order to have access to the jurisdiction of the PCA.

The significance of the juridical act taken by the International Bureau acknowledging the Hawaiian Kingdom's continued existence, is that the United States, as a member of the PCA Administrative Council, was fully aware of the *Larsen* case and did not object to the *juridical act* by the International Bureau [ECF 55, ¶104]. In fact, the United States entered into an agreement with the Council of Regency to access all records and pleadings of the case [ECF 55-1].

State continuity of the Hawaiian Kingdom is determined by the rules of customary international law. And while State members of the Administrative Council furnishes to all Contracting States "with an annual Report" in accordance

with Article 49,[21] it does represent "State practice [that] covers an act or statement by…State[s] from which views can be inferred about international law," and it "can also include omissions and silence on the part of States."[22] The fact that the United States, to include all member States of the Administrative Council and those States whose consulates are Defendants in this case, did not object to the International Bureau's *juridical act* of acknowledging the Hawaiian Kingdom's existence as a non-Contracting State, is a reflection of the practice of States—*opinio juris*. Furthermore, the Administrative Council is a treaty-based component of an intergovernmental organization comprised of representatives of States, and "their practice is best regarded as the practice of States."[23]

III. CONCLUSION

It is important to draw attention to the closing statement of the *Amici* who stated in their *amicus* brief, "[u]nder the concept of *void ab initio*, there are structures that have no legal effect from inception. The United States occupation of Hawai'i began with unclean hands, and this can only be remedied by a clean slate and a new beginning."[24] Like the *Amici*, the Hawaiian Kingdom, "request that the Court

---

[21] *Id*., 2225.
[22] Michael Akehurst, "Custom as a Source of International Law," 47(1) *Br. Yearb. Int. Law* 1, 10 (1975).
[23] *Id*., 11.
[24] Brief of Amici Curiae International Association of Democratic Lawyers, National Lawyers Guild, and Water Protector Legal Collective in Support of Plaintiff's Amended Complaint 29 [ECF 96].

consider U.S. Obligations under international law, which forms part of U.S. law, in evaluating the long-standing occupation of the Hawaiian Kingdom."[25] Article 43 of the 1907 Hague Regulations[26] is a legal rule that provides for the Hawaiian Kingdom to have access to the jurisdiction of an Article II Court established within its territory by the occupying power.

This Court is in the same situation as the PCA regarding jurisdiction as an institution. Where the PCA's *juridical act* stems from the *juridical fact* of the Hawaiian State's continued existence whereby the PCA established the arbitral tribunal pursuant to Article 47 of the 1907 Convention regarding jurisdiction, this Court, as a matter of jurisdiction, is capable of an Order taking judicial notice of the fact of the Hawaiian State's continued existence that would grant this Court subject matter and personal jurisdiction pursuant to Article 43 of the 1907 Hague Regulations, where "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[27]

Therefore, the Plaintiff HAWAIIAN KINGDOM respectfully asks this Court to be guided by the filed *amicus curiae* and by the PCA's *juridical act* to transform

[25] *Id*.
[26] 36 Stat. 2277 (1907).
[27] *Id*., 2306.

itself into a *de facto* Article II Court so that it can provide due process and proper relief for all parties to this suit, which includes the U.S. in its Statement of Interest.

DATED: Honolulu, Hawai‘i, November 29, 2021.

Respectfully submitted,

/s/ Dexter K. Ka‘iama

DEXTER K. KA‘IAMA (Bar No. 4249)
Attorney General of the Hawaiian Kingdom
DEPARTMENT OF THE ATTORNEY GENERAL, HAWAIIAN KINGDOM

Attorney for Plaintiff, Hawaiian Kingdom