

An Appraisal of the Role of the Permanent Court of Arbitration in Dispute Resolution

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ABSTRACT

The Permanent Court of Arbitration (PCA) is a unique international organisation, particularly in the dispute resolution spectrum. Its uniqueness stems from the mere fact that it is not a court in the true sense of the word. Interestingly, this unique international organisation has played a vital role in dispute resolution, particularly in international arbitration, and has not relented for over a hundred (100) years. Despite its role, it is regrettably unfortunate that the PCA remains an unsung hero. Adopting an expository method of research, this article gives us an insight into the role of the Permanent Court of Arbitration in the resolution of disputes.

Keywords: Permanent Court of Arbitration (PCA); Dispute Resolution; International Arbitration, international organisation.

INTRODUCTION

The Permanent Court of Arbitration was established by the First International Peace Conference held at The Hague, Netherlands, in 1899—the 1889 Hague Peace Conference (Lesaffer, 2017). Established by the 1889 Convention for the Pacific Settlement of International Disputes (1889 Convention), as revised by the 1907 Convention for the Pacific Settlement of International Disputes (1907 Convention, together with the 1899 Convention), with an objective to "facilitate the arbitration of international disputes" (Barber, 2017). The PCA, as conceived by the drafters of the 1899 Convention, was a pioneer of all present-day forms of international dispute resolution, including the International Court of Justice. The Permanent Court of Arbitration plays a unique role in international dispute resolution (Zhang, 2023). The Permanent Court of Arbitration is not a court of law, as many will think because of its name, but an international organisation that provides a range of dispute resolution services to the international community

(Rosenne, 2023). Neither is the court permanent in nature; rather, it is a court selected from a permanent panel of arbitrators. Nor is it a true court with judges permanently in residence. Instead, there is a permanent and operative secretariat, known as the international bureau, which is the administrative organ of the court in channelling communication regarding meetings of the court, serving as a registry, and headed by the secretary-general.

The seat of the International Bureau of the PCA is the Peace Palace. Apart from the Peace Palace in The Hague, which serves as its headquarters, the PCA has offices in various cities (Mauritania, Singapore, Buenos Aires, etc.) to make its services more accessible in different regions of the world. The Permanent Court of Arbitration (PCA) was the first permanent intergovernmental organisation to provide a forum for the resolution of international disputes through arbitration and other peaceful means such as conciliation and fact-finding (Levine & Kimani, 2020). In many quarters, the PCA gets muddled up with the ICJ, which has its seat in the same building, but the two organisations are unrelated. However, the PCA is not a United Nations agency but has been an observer in the UN General Assembly since 1993 (Cremers, et al., 2020). It was because of this misrepresentation that the United Nations made this clarification in 2016. In the Chinese Microblog, it is stated that "the tribunal that ruled against China's historic claims over the disputed South China Sea was not a UN agency" (Cremers, et al., 2020, p 75)

THE ROLE OF THE PERMANENT COURT OF ARBITRATION IN INTERNATIONAL ARBITRATION

The role of the Permanent Court of Arbitration is as follows:

Provision of administrative support between states and non-state parties

The PCA was initially conceived as an instrument for the settlement of disputes between states (Zeng, 2009). The PCA elaborates a set of rules of arbitration and conciliation for the settlement of international disputes between two parties, of which only one is a state, which inspired the subsequent adoption of the 1965 agreement establishing the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank (Broad, 2014). Over time, in keeping with the changing needs of dispute resolution at the international level, the institution's mandate has been extended to include disputes involving various combinations of states, state entities, international organisations, and private parties. Examples of Interstate parties include *Belgium v. The Netherlands* (the Iron Rhine Case) and *Croatia v. Slovenia* (Wood, 2017).

Provision of a wide range of dispute resolution services

The PCA makes its services available upon request to tribunals established under the rules of certain international arbitration institutions or pursuant to rules agreed to ad hoc. The PCA provides alternative dispute resolution (ADR), including arbitration, mediation, conciliation, and other forms of ADR (Chong & Mohamad Zin, 2012). The PCA has adopted its own rules relating to alternative dispute resolution. For example, the PCA Arbitration Rules 2012 are a set of procedural rules for the arbitration of disputes involving various combinations of states, state

entities, international organisations, and private parties; "Optional Conciliation Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment 2002," both of which are based on the UNCITRAL Conciliation Rules 2002 (Chong & Mohamad Zin, 2012). Thus, the PCA administers conciliation under both its conciliation rules and the UNCITRAL conciliation rules. Furthermore, the PCA provides administrative support, in fact, by finding and setting up commissions of inquiry.

A classic example is the "red Crusader incident case" between Great Britain and Denmark (McLaughlin, 2018). The PCA also functions as a registry. The permanent court served as the registry in the disputed South China Sea arbitration case between the Philippines and China. Also in the celebrated case of *Mauritus v. United Kingdom*, which bordered on the status of the Chagos Archipelago and the attempts of the Government of the United Kingdom to create a marine protected area in British Indian Ocean territory, the Permanent Court of Arbitration functioned as a registry in the proceedings (Naldi, 2021).

As a reference point to other international tribunals

Suffice it to note that most of the PCA cases are still relevant today and are cited by other international tribunals, including the ICJ (Giorgetti, 2012). This is because its early tribunals decided disputes involving issues of public international law, including territorial sovereignty, state responsibility, etc., since the PCA was initially established for the purpose of resolving disputes between states.

The PCA is suitable and experienced in administering all types of proceedings, regardless of the facts and laws involved.

With respect to disputes between a state and a non-state party, the PCA "optional rules for arbitrating disputes between two parties of which only one is a state" provides an effective means for conducting arbitral proceedings to resolve a wide variety of cases (Kaufmann-Kohler, 2003). They are based on the UNCITRAL arbitration rules that were designed for all types of disputes, regardless of the subject matter. Similarly, the PCA "Optional Conciliation Rules" based on the UNCITRAL Conciliation Rules are also suitable for use in resolving all types of disputes, including those involving international trade, investment, or intellectual property. For example, the case of *Cairn Energy Plc & Cairn UK Holdings Limited v. The Republic of India* is a tax and investment dispute (Singh, 2022). The Permanent Court of Arbitration, as a special arbitral tribunal, administers interstate arbitration cases based on the United Nations Convention on the Law of the Sea (UNCLOS). In *Phillipines v. China (also known as the South China Sea Arbitration)*, the Philippines initiated the arbitration in January 2013 under the dispute resolution procedures of Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (Bautista, 2018).

As a forum for scholarly discourse

The PCA is a forum for scholarly discourse. The Permanent Court of Arbitration has a programme of research, publications, and seminars and strives to keep pace with current developments in international dispute resolution and to provide

avenues for practitioners and academics to exchange views on topical issues of international law and dispute resolution. In addition, the PCA hosts practice moot rounds. On March 9, 2023, the office of the permanent court of arbitration (PCA) in Mauritius hosted practice moot rounds in preparation for the 30th Willem C. Vis International Commercial Arbitration Moot, which took place on March 19, 2023, and the 20th Vis East Moot, which took place on April 4, 2023. During these moot rounds, the teams are giving feedback on their pleadings to assist their preparation and practice.

Conformity with arbitration rules:

Its procedural rules are on all fours with the UNCITRAL rules. The PCA has improved and modernised the functioning of its system of dispute settlement primarily by adopting several sets of procedural rules based on UNCITRAL rules. In addition to applying its UNCITRAL rules, the PCA often administers arbitrations conducted under the UNCITRAL arbitration rules or under ad hoc rules developed by the parties for the purposes of the arbitration concerned.

As an appointing authority in arbitration.

The Secretary General of the PCA is usually called upon to act as the appointing authority or to designate another appointing authority for the appointment of arbitrators under the PCA's rules of procedure, the UNCITRAL Arbitration Rules, or other rules of procedure. In 1981, the Secretary General was called upon for the first time to designate an appointing authority, not for commercial arbitration but for the Iran-United States Claims Tribunal, and ever since then, requests for designation as an appointing authority have been submitted to the Secretary-General (Peterson, 2023). Under the UNCITRAL Arbitration Rules 2010 and 13 rules, a party may request the Secretary-General of the PCA to designate an "appointing authority" in reviewing arbitrators's fees and expenses (Castello, 2010), in the challenge of arbitrators, and in the appointment of arbitrators.

Provision of a Financial Assistance Fund:

The PCA has in place a financial assistance fund to help developing nations meet part of the costs incurred in bringing cases before it. To qualify for the financial assistance fund, a qualifying state (who are contracting parties to the convention of 1899 or 1907) must fulfil the conditions of: concluding an agreement for the purpose of submitting one or more disputes, whether existing or future, for settlement by any of the means administered by the PCA; and being listed on the "DAC list of aid recipients" as prepared by the organisation for Economic Co-Operation and Development.

CONCLUSION

The permanent court of arbitration has existed for over a century, providing a wide range of dispute resolution mechanisms for PCA disputes. Its role in dispute resolution in international arbitration is manifold and cannot be overemphasized.

Resort to PCA should be provided for by parties when drafting dispute resolution clauses for existing as well as future dispute resolution interests and needs.

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