

# The permanent court of arbitration and the uncitral arbitration rules: current interaction and future perspectives<sup>1</sup>

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## 1. Introduction

This paper will discuss the beginnings of the PCA, and some of the most determinative events that have shaped its history and continue to guide its work today. It will focus particularly on the role of the Secretary-General under the UNCITRAL Rules over the past thirty years, and consider how that role may develop in light of the current revision of the Rules.

## 2. The creation of the PCA

### 2.1. The first Hague peace conference 1899

In the late 1890's, during the time of the last Russian Czar, Nicholas II, many states were devoting significant resources to their military forces and the amassing of armaments.<sup>2</sup> The result of this trend was that if two or more states became involved in a dispute that proved impossible to resolve through diplomatic means, the chance of war breaking out was high. This outcome was made even more likely by the fact that at the time, the use of armed force was considered to be an accepted method of attaining national aims and resolving international disputes.<sup>3</sup>

At the end of the 19<sup>th</sup> century, Russia's military was among probably the most powerful in the world.<sup>4</sup> Notwithstanding this, the Czar feared that the massive cost of a long, drawn-out war, in terms of human suffering and material destruction, would bankrupt his country, and among other things, reduce the population to famine.<sup>5</sup> The Czar was convinced that it was necessary to limit the arms-race, and to find an

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<sup>2</sup> Count Mouravieff, 'Russian Circular Note Proposing the First Peace Conference, St. Petersburg, 12 August 1898', in Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, p. xiv.

<sup>3</sup> Shabtai Rosenne, 'Introduction' in *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press (2001), p. xv.

<sup>4</sup> Robin Sharwood, 'Princes and Peacemakers: The Story of the Hague Peace Conference of 1899' in *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press (2001), p. 448.

<sup>5</sup> Peter van den Dungen, "The Making of Peace: Jean de Bloch and the First Hague Peace Conference", Center for the Study of Armament and Disarmament (1983), p. 3; Jean de Boch's study, contained in a six-volume examination of the technical, economical and political features of war, was published between 1898 and 1900 in four languages. Only the last volume called *The Future of War* appeared in the English language.

alternative way to settle conflicts between states, and that this objective could only be successfully pursued, if at all, as part of an international agreement.

Accordingly, in 1898, the Czar invited many of the world's leaders to attend what was to become known as the First Hague Peace Conference (the "Conference"). In convening the Conference, the Czar had two main objectives in mind: (1) to obtain a reduction of military budgets through some agreed system of disarmament, and to reduce the suffering of war (especially by members of the armed forces by limiting some of the more harmful military technology that was emerging)<sup>6</sup>; and (2) to strengthen the systems available for the pacific settlement of international disputes, and in particular, to set international arbitration as a real alternative to war for the resolution of international disputes.<sup>7</sup>

Reactions to the Czar's bold initiative at the time varied, however almost all invitations were accepted.<sup>8</sup> The Netherlands was selected as the host-state because, in addition to familial links between the Czar and the young Dutch Queen Wilhelmina (they were distant cousins), it was seen as a neutral country, had hosted international conferences before, and was associated with "the first great modern international lawyer" Hugo Grotius.<sup>9</sup>

Representatives from twenty-six nations convened at Queen Wilhelmina's summer residence in The Hague from 18 May through 29 July 1899.<sup>10</sup> The Conference resulted in, among other things, the adoption of three conventions, namely, the Convention on the Pacific Settlement of International Disputes, the Convention Regarding Land Warfare, and the Convention Applying to Maritime Warfare the Principles of the Geneva Convention. Arguably the most concrete achievement of the Conference and its conventions, was the establishment of the Permanent Court of Arbitration ("PCA").

## 2.2. The second Hague peace conference 1907

Eight years after the First Hague Peace Conference, a Second Hague Peace Conference was held, this time with forty-three attendees.<sup>11</sup> At this Conference, a second Convention on the Pacific Settlement of International Disputes was signed, which made some additions and improvements to the 1899 Convention, particularly with respect to the procedures for arbitration and international commissions of inquiry.

Despite the original objectives of the Czar, in the years between the Conferences, and following 1907, there was no deceleration in the arms race: "The years surrounding the 1907 conference witnessed many attempts to navigate the turbulent waters of defense policy. [...] Not only did international law fail to mitigate armament competition, but states exhibited strong tendencies toward unilateral solutions of security concerns, including a predilection for preemptive strikes."<sup>12</sup> In retrospect, it is easy to see where all of this was

<sup>6</sup> To this end, three signed declarations resulted from the Conference which prohibited the launching of projectiles from balloons, the use of asphyxiating gases, and expanding bullets. (see 'Introduction' by James B. Scott to *The Reports to the Hague Conferences of 1899 and 1907* (1917)).

<sup>7</sup> *Supra* note 3.

<sup>8</sup> Robin Sharwood, 'The Hague Peace Conference of 1899: A Historical Introduction', in *International Alternative Dispute Resolution: Past, Present and Future* (*The Permanent Court of Arbitration Centennial Papers*), 2000 Kluwer Law International, at p. 165: "formal reactions of nations like Britain and the United States of America were warm and welcoming", whereas the Prince of Wales (later King Edward VII) was reported to have commented that the Czar's proposal was "the greatest nonsense and rubbish" he had ever heard of.

<sup>9</sup> *Supra* note 3, p. xiii; note 8, p. 164.

<sup>10</sup> The attending delegations were Austria-Hungary, Belgium, China, Denmark, France, Germany, Great Britain and Ireland, Bulgaria, Greece, Italy, Japan, Luxembourg, Montenegro (represented by members of the Russian Delegation), the Netherlands, Persia, Portugal, Roumania, Russia, Serbia, Siam, Sweden and Norway (two separate delegations), Spain, Switzerland, Turkey, the U.S.A., and the United States of Mexico.

<sup>11</sup> In addition to those who attended the First Hague Peace Conference, the following states – many from Latin America – attended the Second Conference: The Argentine Republic, Bolivia, Brazil, Chile, Colombia, the Republic of Cuba, the Dominican Republic, the Republic of Ecuador, Guatemala, the Republic of Haiti, Nicaragua, Panama, Paraguay, Peru, Salvador, and Uruguay.

<sup>12</sup> Scott Andrew Keefer, "Building the Peace Palace: The Hague Conference of 1907 and Arms Control before the World War", *Journal of the History of*

leading. Only seven years after the Second Hague Peace Conference, and just one year after the building of the Peace Palace as an international symbol to peace, the First World War broke out. Whereas during the first fifteen years of the PCA's life, it administered fifteen arbitrations,<sup>13</sup> no arbitrations were commenced during the First World War. In the years between the First and Second World Wars, seven cases were submitted to arbitration.<sup>14</sup> It was of no surprise that during the Second World War, as during the First, no arbitrations were commenced; the world's powers being engaged in non-pacific means of dispute-settlement.<sup>15</sup>

## 2.3. Structure of the PCA

The PCA is “not a court in the conventional understanding of that term, but rather an administrative organization with permanent and readily available means to serve as the registry for purposes of international arbitration and other related procedures, including commissions of [inquiry] and conciliation, if the [parties] concerned have agreed to such recourse.”<sup>16</sup> In short, it is a permanent framework set up to assist temporary arbitral tribunals or commissions, and parties.

The PCA has a three-part structure consisting of an Administrative Council, Members of the Court, and an International Bureau or Secretariat:

1. The Administrative Council is composed of diplomatic representatives to The Netherlands of the states that have signed one or both of the Conventions. These states are known as member states, of which there are currently 109.<sup>17</sup> The Administrative Council decides matters of policy and approves the PCA budget and any new initiatives;
2. Each member state may nominate up to four potential arbitrators who are known as Members of the Court. Their names constitute a list of arbitrators that parties may appoint – but are not obliged to – in PCA proceedings. The founding Conventions stipulate that such persons shall be “of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.”<sup>18</sup> Members are appointed for renewable terms of six years, and their names are published in the PCA Annual Report and on the PCA's website.<sup>19</sup> In the early 1900s, the list of the Members of the Court was used extensively; in the first seventeen PCA arbitrations, 93% of all arbitrators appointed were Members of the Court.<sup>20</sup> In addition to forming a panel of potential arbitrators, the ICJ statute uses Members of the Court to constitute “national groups” which are

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*International Law* 9 (2007), p. 38.

<sup>13</sup> Barring recent years, the first fifteen years were the PCA's busiest period with the following cases coming under its auspices [name of case, parties to the dispute (year of award)]: 1. Pious Fund of the Californias, U.S.A. v. Mexico (1902); 2. Preferential Treatment of Claims of Blockading Powers Against Venezuela, U.K., Germany and Italy v. Venezuela (other joined states: Belgium, Spain, U.S.A., France, Mexico, The Netherlands, Sweden, and Norway) (1904); 3. Japanese House Tax, Germany, France, and U.K. v. Japan (1905); 4. Muscat Dhows, France v. U.K. (1905); 5. Deserters of Casablanca, France v. Germany (1909); 6. The *Grisbådarna* Case, Norway v. Sweden (1909); 7. North Atlantic Coast Fisheries, U.K. v. U.S.A. (1910); 8. Orinoco Steamship Company, U.S.A. v. Venezuela (1910); 9. Arrest and Restoration of *Savarkar*, France v. U.K. (1911); 10. *Carnevaro* Claim, Italy v. Peru (1912); 11. Russian Claim for Indemnities, Russia v. Turkey (1912); 12. French Postal Vessel “*Manouba*”, France v. Italy (1913); 13. The “*Carthage*”, France v. Italy (1913); 14. The “*Tavignano*”, “*Camouna*” and “*Gaulois*” Incident, France v. Italy (1912); 15. Dutch-Portuguese Boundaries on the Island of Timor, The Netherlands v. Portugal (1914).

<sup>14</sup> 1. Expropriated Religious Properties, Spain, France and U.K. v. Portugal (1920); 2. French Claims Against Peru, France v. Peru (1921); 3. Norwegian Claims Case, U.S.A. v. Norway (1922); 4. The Islands of Palmas Case (or *Miangas*), U.S.A. v. The Netherlands (1928); 5. *Chevreau* Claim, U.K. v. France (1931); 6. Claims of the *Nordstjernan* Company, Sweden v. U.S.A. (1932); 7. *Radio Corporation of America* v. China (1935).

<sup>15</sup> No arbitrations were commenced, but one ongoing case was resolved: the *Radio Orient* case, which concerned a dispute between the States of Levant under the French Mandate and Egypt. The award was rendered on April 2, 1940.

<sup>16</sup> *Supra* note 3, p. xxi.

<sup>17</sup> For a list of member states, visit [http://www.pca-cpa.org/showpage.asp?pag\\_id=1038](http://www.pca-cpa.org/showpage.asp?pag_id=1038).

<sup>18</sup> Article 23 of the 1899 Convention, Article 44 of the 1907 Convention.

<sup>19</sup> For a list of Members of the Court, visit <http://www.pca-cpa.org/upload/files/MC%2020080627.pdf>.

<sup>20</sup> The Rt. Hon. Sir Kenneth Keith KBE, “Member of the Permanent Court of Arbitration”, in Timothy L.H. McCormack and Cheryl Saunders (eds.), *Sir Ninian Stephen: A Tribute*, The Miegunyah Press, (2007), p. 160.