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Permanent Court Of Arbitration As A Centennial Institution – An Analysis Of The Indian Experience Over The Century

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Abstract
The dynamism of law as a discipline necessitates constant change and development to keep up with the requisites that a developing and ever-changing society brings forth. As such, any institution within the legal domain that completes its centennial anniversary deserves to be studied and analyzed since institutional longevity is not common within the discipline. The "Permanent Court of Arbitration" (PCA) is one of those rare legal institutions that has withstood the ravages of time, having recently completed a hundred and twenty years of its existence. Initially conceptualized as an institution of pacific dispute settlement, comprising arbitration, conciliation, mediation, and inquiry as methods of dispute settlement amongst nations, in a 19th-century global regime, the fact that the two world wars since its establishment, as well as the multitude of changes in the global socio-political regime, hasn't made it completely redundant is a testament to the farsightedness of its founding fathers.
In light of these facts, this paper has tried to look into the historical background that contributed to the establishment of the PCA in the first place, and then attempt to examine its procedural intricacies, which have perhaps been the most vital in preventing its continued operation even after a century of its initial conceptualization. Subsequently, the paper has looked at how India has fared in its endeavors into the PCA's regime and ultimately tries to determine the significance of the PCA as an institution of pacific dispute settlement today, and also, in the coming decades.

Keywords: Dispute Settlement, Permanent Court of Arbitration, Hague Convention, UN Charter

1. INTRODUCTION

Armed conflict has always been socially detested because of the dire consequences that it entails. However, it has been an inevitable bane of human society. The pursuit of power & territory and the settlement of disputes between States have often concluded in violent armed conflict. The resultant conclusion to the differences among States has come at the cost of human life. In the past century, however, there has been a shift in the status quo, and efforts have been made to resolve conflicts in the international arena through peaceful settlement of disputes to incubate harmony at the international level. The "Hague Conference of 1899" was a pioneering effort to foster international peace through cooperation among the members of this community. It aimed to establish certain alternate modes of dispute resolution and was instrumental in ushering in an era of change in international law. Among the numerous developments of this landmark event, one of the foremost was the establishment of the "Permanent Court of Arbitration" (hereafter PCA) through Article 20 of the "Convention for the Pacific Settlement of International Disputes, 1899" (hereafter "Hague Convention, 1899"). A second "Hague Conference" in 1907 further bolstered the ideals conceptualized in the first one, and the details of the developments were recorded within the "Hague Convention, 1907."
The PCA, unlike what its name would suggest, is neither a Court nor an institution that is responsible for solely dealing with arbitration. Rather, it is more akin to an "intergovernmental organization" that has institutionalized peaceful resolution of disputes at the international level through a plethora of settlement methods, including mediation, conciliation, fact-finding inquiry, and of course, arbitration. The formation of the "Permanent Court of Justice Optional Arbitration Rules, 2012", which in themselves are a consolidation of a number of previous enactments, more than a century after its inception is a testament to the longevity and significance of the PCA even in the 21st century.
During its centennial existence, India has also been a party to the PCA several times. Although the cases involving India are minuscule when weighed against the period of time that they have occurred, the developments from the PCA's decrees nevertheless hold a lot of significance not just for India's legal history but also for the promotion and furtherance of peaceful dispute settlement.
Against this backdrop, the present paper shall trace the historical development of the PCA as a centennial institution, with special emphasis on the role that it has played in being an institution of peaceful dispute settlement in the international arena for India.

2. THE ESTABLISHMENT OF THE PERMANENT COURT: A BRIEF HISTORICAL OVERVIEW

Human history is replete with examples where there have been institutionalized attempts to reconcile disputes among States through peaceful settlement. The earliest attempts at the same can be attributed to the “Amphictyonic Council” of the Greek states which attempted to formulate a rudimentary form of arbitration.[1] The next major development occurred centuries later when the jurist Hugo Grotiousin his treatise “Law of War” opined that "The Christian States and Kings should avoid war by holding congresses, wherein parties who are not interested in controversies between two parties may decide on those issues, and eventually, take measures to compel the parties to the controversy to accept peace on equitable terms."[2]These juristic developments invariably contributed to the formation of the first modern treaty on arbitration – the “Jay Treaty of 1794” between the USA and Great Britain.[3] Subsequently, the “Alabama Claims Settlement”, also known as the “Geneva Arbitration” ended the controversies between Great Britain and the USA, stemming from the American Civil War, by way of arbitration, which concluded in the “Treaty of Washington, 1871”, and this was a landmark development for it paved way for the notion that peaceful means of dispute settlement were indeed a viable option for States to solve disputes in the international arena.[4] Provisions with regard to arbitration in the event of disputes between parties were also included in a few other multipartite international instruments; the “Universal Postal Convention of 1874” (under Article 16), the “General Act of Brussels of 1890” (under Article 55) and the “Convention on Railway Freight Transportation of 1890” (under Article 57) are some great examples.[5]

The stage was therefore set for greater development in this domain, and ultimately, the process was begun by Count Mouravieff, the foreign Minister of Russia at that time, on 24th August 1898, when he sent a letter to all the powers accredited to St. Petersburg with a proposal. This proposal requested all the powers to assemble at a conference for “the maintenance of the general peace and a possible reduction of the excessive armaments which were burdening all nations.”[6]This meeting concluded in the “Hague Conference on Pacific Settlement of Disputes, 1899”, which began on 18th May, 1899, with twenty-six nations present as attendees, with this gathering noted for being the “finest and most remarkable body of men who had come together for diplomacy.”[7] A range of diverse topics were discussed at this gathering, and they resulted in the creation of three separate declarations that collectively entered into force from 4th September 1900. The most significant among these, undoubtedly, was the “Convention for the Peaceful Adjustment of International Differences.” This Convention was the result of the “Third Committee”, which was also the conference’s most prominent commission. The significance of this treatise, often referred to as the “Magna Carta of the coming World State” is due to the contents within its declaratory Preamble that recognized “solidarity between the uniting members of civilized nations, while at the same time expressing a desire of the powers who were signatory to the Convention to extend the empire of law and ultimately, strengthen the appreciation of international justice.”[8] This Convention contained sixty-one articles, with seven related to good offices & mediation, six devoted to the formation of international inquiry commissions and fifty-two concerned with international arbitration. It was signed by all twenty-six attending nations.[9]

The most landmark development of this Convention was the establishment of the PCA, with the three prominent powers of the era – the USA, Great Britain, and Russia each presenting plans for the establishment of such a court. Ultimately, the proposal that was forwarded by Lord Pauncefote, the first delegate from Great Britain, became the inspiration for establishing the PCA.[10] The aforementioned principles within the Preamble were embodied by the PCA as an institution accessible to all independent parties of the Convention, as highlighted by Article 1, which stated "contracting powers agree to use their best efforts to ensure the pacific settlement of international differences.”[11]Article 25 of the Convention mandates that its seat will be at The Hague, and in 1913, the headquarters of the PCA was shifted to the “Peace Palace” at the Hague.[12]Each nation was allowed to have an equal number of arbitrators, and this number was fixed at four. The collective of all arbitrators would form a panel and from this, the State parties to a dispute may select an adequate tribunal. Therefore, the Court was, in actuality, a panel from which either a commission or a tribunal could be appointed[13] and two classes of dispute could be adjudicated by the PCA – questions or judicial character and questions arising from the

[1]W.L Westermann, “Interstate Arbitration in Antiquity*”* 2(5) *The Classical Journal* 198 (1907).
[2]William Whewell, *GrotiousOn The Rights of War and Peace* 275 (The Lawbook Exchange, 2009).
[3]James Brown Scott, “The Development of Modern Diplomacy II: Peaceful Settlement of Controversies Between Nations by Means of Arbitration, Congresses or Judicial Decisions” 83(3) *Advocate of Peace* 98 (1921).
[4]Gordon Martel, *The Encyclopaedia of Diplomacy* 03 (John Wiley & Sons, 2018).
[5]Manley O. Hudson, “The Permanent Court of Arbitration”27 *American Journal of International Law*440 (1933).
[6]Robert Raymond, “Hague Conferences and World Peace” 73 *The Advocate of Peace (1894-1920)* 83 (1911).
[7]E.E. Hale, “The Permanent Court of Arbitration”63 *The Advocate of Peace* 81 (1901).
[8]J.L. Tyron, “The Hague Conferences, 20 *Yale Law Journal* 474 (1911).
[9] Amos Hershey, “Convention for the Peaceful Adjustment of International Differences” 2 *American Journal of International Law* 30 (1908).
[10]*Supra Note* 8, at 485.
[11]Hague Convention 1899, Art. 1.
[12]Kenneth Keith, “100 Years of International Arbitration and Adjudication”*15 Melbourne Journal of International Law* 01 (2014).
[13]*Supra Note* 3, at 98

interpretation or application of a treaty that was "international" in scope or nature. The empanelled members were unsalaried, with wages paid only when they were called into actual service as part of a tribunal or commission, and an International Bureau was constituted at The Hague to function as the "record office" of the PCA.[14] Regarding the finality of awards, it was decided by the parties, following the opinion of Dr. Fredric De Martens, the Russian jurist, that an arbitral award should be final once it was provided, and any deviation from this norm would result in a "failure of the award to command respect" and a revision would only be allowed if it had explicitly been provided for within the "compromise."

Although there was a general consensus of appreciation for the notable and novel developments contained within the "Hague Convention of 1899", as well as the work done by the "Comité d'Examen" of the Third Committee, there was also a sentiment that some procedural corrections and revisions were necessary as far as the functioning of the PCA was concerned. The most prominent of these echoes was that the PCA should be composed of "salaried, impartial and independent judges" who should be instituted in a manner akin to a traditional 'court'. Furthermore, the PCA did not mandatorily obligate the parties to adhere to the strict nuances enshrined within its procedural code, and it was felt that rather than such a liberal and flexible approach, an obligatory responsibility to adhere to the PCA's norms should be placed on the parties rather than granting them the ability to decide the same according to their mutual desires.

Five years after the 1899 Conference, in 1904, at the "Inter-Parliamentary Union" at St. Louis, the idea for a second Peace Conference was flouted, and President Roosevelt of the USA requested the Tsar of Russia, who had been the initiator of the first conference in 1899, to issue the formal call for the meeting, leading to the Second "Hague Conference" in 1907. This was attended by 44 States.[15] The issues discussed herein can be classified into three categories – "measures to be undertaken for the prevention of war"; "measures to be undertaken for the regulation of war"; and, "measures to be undertaken regarding neutrality within the international arena."[16] The 1899 Convention's contents were expanded to 97 articles at this Conference, and this new version (hereafter 1907 Convention) effectively replaced its predecessor.

The most interesting change in the 1907 Convention was Article 48, which sought to replace Article 27 of the erstwhile Convention. While Article 27 had stipulated that the signatory members were duty-bound to remind other signatory parties of the Convention with whom there was a dispute that the PCA was open for settlement of the same, this was reduced to a dead letter since it was only applied by President Roosevelt regarding certain affairs with Latin America, Article 48 of the 1907 changed the procedural intricacies. It stated, according to a proposal introduced by the Peruvian delegation, that the parties to the Convention are empowered to, in case of a dispute between them, submit a note to the "International Bureau of the Hague" that it is willing to send the dispute to arbitration, following which the Bureau will notify the other party about the note and make itself available for settling the dispute through peaceful means.[17] This was a significant development since it allowed one party to a dispute to initiate the proceedings and notify the others through official channels about its desires to engage in peaceful means of settlement rather than directly contact it and inform about the same during a contentious period, something which was difficult given the conflicting disposition of the States engaged in a dispute.

3. THE PERMANENT COURT'S ORGANIZATION AND COMPOSITION: AN OVERVIEW

Article 20 of the 1899 Convention stated - "With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention"[18]established the PCA. The PCA's basis for existence remains the same under the 1907 Convention as well, since the 1907 Convention replaced the 1899 Convention as discussed previously, with the only change being that under Article 41 of the 1907 treatise, the term "contracting powers" has replaced the phrase "signatory powers",[19] with the contracting powers undertaking to maintain the PCA as established through the first Convention.[20] Furthermore, as already highlighted, the PCA's scope is not merely limited to arbitration, as its name would suggest, but also extends to other forms of peaceful settlement - "good offices, mediation, and inquiry."

The PCA can be broadly divided into three bodies – the "Panel of Members", the "International Bureau" and the "Administrative Council." The members are nominated representatives of each contracting State, and it is mandated that the members must possess the qualities of "known competence in questions of international law, of the highest moral reputation, and disposed to accept the duties of an arbitrator."[21]The duties of the members extend to making themselves available when invited to act as an arbitrator, albeit this obligation of availability is not absolute and the members are

[14]*Supra Note* 11, Art. 22.
[15]*Ibid,* at 479.
[16]*Ibid,* at 481.
[17]*Supra Note 9,* at 42.
[18]*Supra Note* 11, Art. 20.
[19] Hague Convention 1907, Art. 41.
[20]*Supra Note* 5, at 443.
[21]*Supra Note* 20, Art. 44.

allowed to decline an invitation.[22] Furthermore, the members are only granted diplomatic immunities and privileges when they are part of an active tribunal.[23] Finally, they are prohibited from acting as agents, counsels or advocates or parties other than the State on whose behalf they have been nominated to the PCA,[24] albeit this does not preclude them from giving legal advice to States and parties other than their nominators.[25]The second body i.e. the "International Bureau" is composed of the Secretary-General (hereafter Secy-Gen) of the PCA, who also acts as the Secy-Gen of the tribunals formed within the Court's aegis, and also a number of other secretaries. This body acts as the registry of the PCA.[26] Furthermore, it is also responsible for overseeing the administrative requisites of the court[27] and also functions as a channel of communication for ascertaining the court's meetings. Finally, the "Administrative Council" is composed of the Foreign Minister of the Netherlands, who acts as its President and the diplomatic representatives of all the contracting States accredited to The Hague.[28] This Council meets annually, with the first meeting held on 19th September 1900, wherein a re'glement d'ordre (regulations order) was adopted by it with regards to the International Bureau, and presently is responsible for exerting control over the "International Bureau."[29]

Initially, only States were allowed to become parties to a dispute within the aegis of the PCA, since the term "powers" within the 1907 Convention was construed to refer to only contracting and non-contracting States, with private entities excluded from the Court's jurisdiction. Nevertheless, this position changed when the "Radio Corporation of America" was allowed by the Bureau to become a party in the case of "Radio Corporation of America v. China"[30] The reasoning for allowing this entity to become a party was published in the PCA's Annual Report in 1934, and it was held that although international arbitration is usually assumed to be between two State Parties, the scope of Article 47 does not imply that special arbitration boards, wherein a broader interpretation is necessary, are to be considered with this condition in mind, and therefore, the Bureau was appropriate in accepting the request of a non-State party as well.[31]

In the year 1962, the first set of regulations titled "Rules of Arbitration and Conciliation for Settlement of International Disputes between Two States of which only one is a State" was adopted by the "Administrative Council" and this allowed the Bureau to allow disputes where one party was a State that was a signatory to either the 1899 or the 1907 Convention and the other was a non-State entity. However, despite broadening the scope of the PCA, these rules were criticized on three grounds – firstly, it did not appoint the Secy-Gen of the "International Bureau" as the appointing authority, secondly, it adopted a presumption of unanimity wherein the dissenting opinion of the minority was not to be mentioned in the award, and finally, the tribunal lacked the power to award costs of representation to the party which had won the case. Presently, perhaps on account of the developments that were made in the "Radio Corporation of America" case and these Rules from 1962, that the parties to a dispute at the PCA may be "any combination of States, international organizations and private entities."[32]

Subsequently, the "United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 1976" were enacted and the Secy-General was recognized here as the default appointing authority within the same. Subsequently, the "Optional Rules for Arbitrating Disputes between two Parties of which only one is a State, 1993" also accorded similar powers to the Secy-Gen. These also opened up the services of the PCA to all States notwithstanding whether they were parties to the "Hague Conventions" or not, thus furthering the scope of the Rules from 1962. Optional Rules have also been formulated for arbitrating disputes "Between Two States (1992)"; "Between International Organizations and States (1996)"; and, "Between International Organizations and Private Parties (1996)"; these three along with the aforementioned Optional Rules consolidated into the "PCA Arbitration Rules, 2012."[33]

Despite the landmark developments over the years in the PCA's scope, organization, and character, a few criticisms have continued to be levied against it. Firstly, the PCA was envisaged as the foremost institution of dispute settlement by the 1899 and 1907 Conventions, yet, during its centennial existence, countless wars have been fought between States in the international arena, including two World Wars, of which the first was fought within 15 short years of its inception.[34] Second, although peaceful dispute settlement was a desirable choice among States, it was not mandatory and there was no legal obligation upon States to resort to the same. This made the scope as well as the mandate of the PCA limited and

[22]*Supra Note* 5, at 445.
[23]*Supra Note* 20, Art. 46.
[24]*Ibid,* Art. 62.
[25]James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* 294, (Johns Hopkins Press, 1909).
[26]*Supra Note* 20, Art. 43.
[27]*Ibid.*
[28]*Ibid,* § 49.
[29]*Supra Note* 5, at 445.
[30](PCA Case No. 1934-01).
[31]Permanent Court of Arbitration Annual Report, 1934. Retrieved from - https://pca-cpa.org/en/about/annual-reports/.
[32]T. T. Van Den Hout, "Resolution of International Disputes: The Role of the Permanent Court of Arbitration - Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes" 21 *Leiden Journal of International Law* 647 (2008).
[33]PCA Arbitration Rules. Retrieved from - https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/.
[34] J. B. Moore, *"The Organization of the Permanent Court of International Justice"* 22 *Columbia Law Review* 499 (1922).

it can also be opined that the first criticism is a result of this shortcoming. Third, some critics have argued that since the PCA is not a court in the traditional sense and thus, the enforceability of the awards of the PCA is not as robust as that of a traditional Court. Fourth, it has been opined that since the representative members of a nation that are nominated to become empanelled at the PCA are still within the control of their host nations, it is unlikely that the tenet of impartiality will be completely adhered to by these members during their adjudicatory responsibilities.[35]

4. THE INDIAN EXPERIENCE AT THE PCA – AN ANALYSIS

India has been an active member of the PCA and over the years has had several disputes adjudicated by the PCA. However, the focus of this chapter shall be limited to only analyzing the issues that were submitted to the PCA's jurisdiction after it attained independence and became a sovereign nation State. This will naturally exclude the "Arrest and Return of Savarkar between France and Great Britain"[36]Case that was contested between France and Britain (during the period when India was under the colonial rule of the British empire) involving the "defective extradition" of Mr. Savarkar to Britain. Furthermore, the chapter shall be confined to analyzing only those disputes which were adjudicated in their entirety by the PCA. This implies that the "Mr. Gokul Das Binani, 2. Mrs. Madhu Binani (India) v. Republic of North Macedonia,"[37]will also not be dealt with since merely administrative support was provided in this case by the PCA according to a bilateral agreement by the two States regarding the "Promotion and Reciprocal Protection of Investments (2008)" and the "UNCITRAL Arbitration Rules 1976." Similarly, the "Indian Potash Limited (India) v. Agriculture Inputs Company Limited (Nepal)"[38]case where the PCA had merely provided administrative support under UNCITRAL Arbitration Rules and the "CC/Devas (Mauritius) Ltd. v. Republic of India",[39]case where the PCA had acted as the registry, following the "Agreement between Mauritius and India for the Promotion and Protection of Investments (2000)" will also not be highlighted in this chapter.

4.1 Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)[40]

Bangladesh instituted proceedings against India through reliance upon Article 287 and Annex VII to the "United Nations Convention for the Law of the Sea (UNCLOS), 1982" for invoking competent jurisdiction. The dispute was regarding the proposed location of the land boundary terminus and base points were advanced by the two States. A two-week hearing was conducted by an arbitral tribunal[41] Composed of five arbitrators, with both States represented by a host of agents and counsels.

The tribunal relied primarily on the decision of Sir Cyril Radcliffe, who had been the Chairman of the "Bengal Boundary Commission" to ascertain the precise terminus of the land boundaries between India & Bangladesh. Relying on the same, the PCA unanimously delineated the land boundary. A 12-nautical mile line was demarcated to connect the land boundary terminus and the "Exclusive Economic Zone" (hereafter EEZ) and the "Continental Shelf" was also determined to be concave and delineated accordingly both within and beyond the 200-nautical mile boundary. The tribunal held that due to the concave nature of the Bay-of-Bengal, reliance upon the equidistance rule would inevitably cause a "cut-off effect" vis-à-vis the seaward projections on the coast of Bangladesh, and therefore, to achieve an equitable result, the tribunal readjusted the equidistance line, with a majority of four-to-one. To ascertain the same legalities vis-à-vis delimitation, the tribunal also relied upon the jurisprudence used in the "Arbitration between Barbados and Trinidad and Tobago Relating to the Delimitation of the Exclusive Economic Zone and Continental Shelf"[42] along with Article 77 of UNCLOS. It was held that there was a "grey area" and Bangladesh was given the sole right to explore and exploit the "Continental Shelf" while India and Myanmar were bestowed sovereign rights over the EEZ, with the tribunal leaving the detailed intricacies and arrangements of this demarcation on the States, to be determined according to practicality and in a manner that was conducive for the realization of the rights of all concerned parties within the "grey area."[43]

4.2 The Indus Waters Kishenganga Arbitration (Pakistan v India)[44]

The Indus River is one of the largest perennial rivers flowing through the Indian subcontinent. The river begins its descent from China and passes through India before reaching Pakistan and draining into the Arabian Sea. This river is thus an

[35]Jackson H. Ralston, "Some Suggestions as to The Permanent Court of Arbitration" 1 *American Journal of International Law*325 (1907).
[36](PCA Case No. 1910-03).
[37] (PCA Case No. 2018-38).
[38](PCA Case No. 2015-17).
[39](PCA Case No. 2013-09).
[40](PCA Case No. 2010-16).
[41]Raghavendra Mishra, "The Grey Area in the Northern Bay of Bengal: A Note on a Functional Cooperative Solution" 47 *Ocean Development and International Law*35 (2016).
[42](PCA Case Number 2004-02).
[43]Tafsir Malick Ndiaye, "*The Judge, Maritime Delimitation and the Grey Areas" Indian Journal of International Law* 520 (2015).
[44](PCA Case No. 2011-01).

integral source of water for both India and Pakistan and pursuant to the same, the "Indus Water Treaty" (hereafter IWT) was brokered between the two nations by the World Bank. The law regarding the usage of rivers flowing in two or more States under customary international law relies on the principle of "limited territorial sovereignty" over rivers, with this term stating that the country can use rivers that are within its territory, but which also flow to another sovereign nation, only to such an extent that this usage does not prejudice the interests of the other co-riparian nations,[45] with this principle being famously iterated in the "Lake Lannoux Arbitration case" between France and Spain.

The present dispute arose in the year 2010 when Pakistan initiated arbitral proceedings against India under Article IX of the IWT. Two main questions were raised – firstly, whether the IWT permitted the construction of the "Kishenganga Hydro-Electric Project" (hereafter KHEP) that was being proposed on the Kishenganga tributary of the Jhelum River that flows downstream into Pakistan; and secondly, whether the IWT allowed India to deplete the reservoir level of a "run-of-river plant" level below "dead storage level" (hereafter DSL).[46] The IWT envisages a permanent commission and Article IX states that concerning any dispute about the interpretation of the treaty, it shall be referred initially to the commission, and upon the failure of the commission to reach a viable consensus or solution, a "neutral expert" shall be called to adjudge the dispute on the technical matters. However, if the dispute is not on technical matters, then attempts may be made by both parties to solve it amicably through negotiation, and if the same also fails, then the matter shall be solved by an arbitral tribunal consisting of seven members.

When this issue was brought before the PCA, it first became actively involved in fact-finding. The 1907 Convention places an obligation on the States that they are obligation to furnish all necessary information and details to the tribunal that is required for the adjudication of a dispute.[47] The tribunal also requested information regarding the intricacies of the IWT's framework and also examined relevant eye-witnesses and experts about the disputed issues in the presence of the two parties so as to get a fair understanding of the details This process also led to some commentators stating that the work of the PCA was more proactive than other international judicial institutions, such as the "International Court of Justice" (hereinafter ICJ) for example.[48] The tribunal allowed India to go ahead with the construction of the KHEP on 18th February 2013; however, it noted that the same was to be subject to certain limitations vis-à-vis the minimum flow of water that would be subsequently determined in the final award.[49]During the proceedings, reliance was placed by the PCA's tribunal on the obligations arising under international environmental law as well, as the ICJ's decision in the "Pulp Mills on the River Uruguay, Argentina v Uruguay"[50] case where it was concluded that States are obligated "to prevent or at least mitigate", when pursuing large-scale developmental projects, significant harm to the environment, and even in pursuance to this obligation, India is supposed to maintain a minimum downstream flow of water.[51] Obligations arising from the ICJ's decision in the "Gabčikovo-Nagymaros Project, Hungary v Slovakia"[52] the cases were also relied upon to underline that new principles must be incorporated into existing legal instruments, wherever necessary, to ensure that the same adhere to the present obligations arising under international law.

Ultimately, in the final award, the Court held that about the first issue, India was obligated under customary international law, environmental law, and the IWT to maintain a minimum flow of 9 cumecs of water from the KHEP to the downstream regions of Pakistan.[53] Regarding the second question, the tribunal held that notwithstanding unforeseen emergencies, the IWT does not permit the reduction of the reservoir below the DSL and that the accumulation of sediment in a "run-of-river plant cannot be construed to constitute what amounts to an unforeseen emergency", thus mandating that India "may not employ drawdown flushing" that would ultimately lead to depletion below the DSL level.[54]

4.3 Indian Potash Company (India) v. Agriculture Inputs Company Limited (Nepal)[55]

The Indian Potash Company, an Indian corporate entity, initiated the proceedings against a public corporation from Nepal – the Agriculture Inputs Company Ltd. The arbitration proceedings were started by virtue of Clause 15 of the contract signed by both parties that stated any dispute between them, if remained unresolved for 30 days, has to be settled through arbitration under the aegis of UNCITRAL with the seat of the arbitration being Kathmandu, Nepal. The present dispute was regarding the alleged non-payment of dues by the respondent, with the claimant claiming an amount of USD

[45]Pretty Bhogal &KatarznyaKaszubkska, "The Case against Weaponizing Water" 172 *Orf Issue Brief* 05 (2017).
[46]Jawad Ahmad, "The Indus Waters Kishenganga Arbitration and State-to-State Disputes" 29 *Arbitration International*509 (2013).
[47]*Supra Note* 20, Art. 75.
[48]Shashank Kumar, "The Indus Waters Kishenganga Arbitration (Pakistan v. India" 17 *American Journal of International Law*(2013).
[49], (Partial Award) ¶ 405-408, 415.
[50][2006] ICJ Rep 113.
[51]*Supra Note* 45, ¶ 463.
[52]ICJ GL No 92.
[53]*Supra Note* 45, (Final Award), ¶ 113.
[54]*Ibid,* ¶ 479.
[55] (PCA Case No. 2015-17).

2,790,003 at 14% interest p.a as relief,[56] while the respondent also filed counter-claims during the arbitration amounting to a sum of USD 3,060,000.[57]
Three arbitrators, one appointed by each part, and the third presiding arbitrator appointed by the Secy-Gen composed the tribunal. During the proceedings, a dispute arose regarding the eligibility of the arbitrator selected by Nepal, since he was a retired Justice of the Nepalese Supreme Court, and according to Article 125 of the Constitution of Nepal, he was ineligible to function as an arbitrator. In pursuance of this controversy, he resigned and another competent jurist replaced him. Subsequently, the tribunal examined competent witnesses and also the evidence submitted by the parties, and in its award, concluded that the claimant was entitled to damages on account of non-payment of dues. The amount was decided to be USD 857,304.18, with 10% interest p.a.,[58] and the respondent's counter-claims were dismissed because there was no merit in their claims according to the tribunal.[59]

4.4 Enrica Lexie Case (Italy v. India)[60]

Two Indian fishermen who were fishing in the Indian Ocean were shot and killed by two Italian navy officials who were on official duty aboard the Italian vessel "Enrica Lexie" on 15th February 2012. The incident occurred within the Indian EEZ, at a distance of around 20 nautical miles from the Indian coast. The Indian authorities convinced the captain of the Italian vessel to come to Kochi Port, and upon reaching the same, a case of murder was registered against the Italian officials, with the local judiciary taking immediate cognizance of the issue.[61] Although the vessel "Enrica Lexie" was allowed to leave and continue on its mission, due to a verdict by the Supreme Court (hereafter SC) in "M.T. Enrica Lexie and Another v. Doramma and Others",[62] the two soldiers who were responsible for the killing were detained.
The SC then delved into the matter concerning the two Italian marines, and a special five-member tribunal was constituted to look into the peculiarities of the case. During the subsequent domestic proceedings, two things became clear – first, the incident had occurred at 20.5 nautical miles from the Indian coast and well within the Indian EEZ, and second, the marines had shot the fishermen resulting in their deaths. One point of contention remained – while the Italians claimed that the Indian vessel "St. Anthony", aboard which the Indian fishermen were killed was carrying arms and the attack was the result of self-defense committed in the fear of an impending pirate attack by the vessel, the Indians aboard the "St. Anthony" remained steadfast in their claim that their vessel neither had armaments nor were they indulging in any sort of piracy, rather, they were fishermen engaged in fishing within the Indian waters.
In addition to this factual dispute, there was another issue surrounding the question of jurisdiction. This was because while international law, under Article 97 of UNCLOS, grants jurisdiction to the flag state only, under Indian municipal law, Sections 3&4 of the "Indian Penal Code, 1860" (hereafter IPC, 1860) and Section 188 of the "Code of Criminal Procedure, 1973" grant competency to the Indian State to exercise jurisdiction over foreign nationals for criminal actions committed against its citizens. Thus, the question of jurisdiction concerned a conflicting position between international law and municipal law. Another dispute regarding the law arose vis-à-vis the navigation of "Enrica Lexie", with Italy raising a claim that by forcing the vessel into India's national waters, Italian freedom of navigation, as guaranteed under Article 87(1) of UNCLOS was breached, while India contended that by engaging in violence, Italy had violated India's right to its high seas to be used for only peaceful purposes, as guaranteed under Article 88 of UNCLOS.[63]
At this juncture, Italy took India to the "International Tribunal for Law of the Sea" (hereafter ITLOS) by exercising its rights under UNCLOS, and through a decision given in August 2015, all domestic trials related to the incident were suspended. Subsequently, a five-member arbitral tribunal was constituted under the auspices of the PCA,[64] although India raised objections regarding the PCA's jurisdiction on this issue.
During the arbitration, a plea was raised by Italy under Article 92(xiii) of the UNCLOS, requesting the exclusive jurisdiction of the flag State, an action that would lead to immunity from Indian prosecution.[65] Italy also argued that India had violated Articles 2(3), 56(2), 58(2), and 100 of the UNCLOS for continuing its domestic prosecution under municipal law against the Italian marines and ignoring the obligations that it had under international law, including the functional immunity that the accused marine officers enjoyed. India asserted that it was competent to try the issue because even if the argument of functional immunity raised by Italy is accepted, the same would not stand the exception of "territorial tort" since the crime was committed against Indian nationals and on Indian waters.
Ultimately, in its award, the tribunal concluded that it enjoyed jurisdiction on the issue under international law and was competent to adjudicate upon it. Regarding the incident, it held that legally, the flag state of the perpetrators and the flag

[56]Ibid, ¶ 191.
[57]Ibid, ¶195.
[58]*Ibid,* ¶ 273.
[59]*Ibid,* ¶ 275.
[60](PCA Case No. 2015-28).
[61] U.K. Raha & K.D. Raju, "The Enrica Lexie Case at the Permanent Court of Arbitration: An Analysis" 56*Indian Journal of International Law* 223 (2016).
[62] (2012) 6 SCC 760.
[63] *Ibid*, ¶ 72.
[64]*Supra Note* 62, at 225.
[65]*Supra Note* 61, ¶ 75.

state of the victims both had competent jurisdiction to try the matter in normal circumstances, as established in the "S.S. Lotus (France v. Turkey)"[66] case, however, in the present dispute, the Italian officers enjoyed functional immunity, and in light of the same, India was precluded from exercising its jurisdiction.[67]Finally, regarding the contention over navigational positions, it was held that the Italian vessel had indeed violated India's "freedom of navigation" under Article 87 of the UNCLOS.

5. THE PCA'S SIGNIFICANCE IN THE PRESENT AND FUTURE

The PCA is over a century old now, and in its legacy as a centennial institution, the international political regime has undergone drastic changes. Since its inception in the final year of the 19th century, to the present scenario, where a quarter of a century has passed in the 21st century, the status quo of international relations has changed significantly. This has also, inevitably, brought forth a plethora of changes in international law, including its principles, concepts, applicability, and importance.

During this centennial existence, a plethoras of allegations vis-à-vis the efficacy of the PCA as a tribunal for facilitating peaceful dispute settlement have been levied. Nonetheless, the longevity of this institution is a testament to its importance and significance, and even today, the PCA holds a position of prominence and importance as far as judicial institutions within the aegis of international law are concerned. Although other institutions that were its successors, such as the "Permanent Court of International Justice" have been replaced by successors, the PCA remains steadfast in its position, and even though the 20th century saw a lot of turbulence as far as its existence was concerned, primarily due to the numerous conflicts that ravaged the globe during that period, there has been a resurgence in the prominence of the institution at the present. For example, exactly a century after the 1907 Convention revised its mandate, an article written in 2008 highlighted that it had 28 pending cases that year, an all-time high number,[68] thus indicating that the PCA's importance is far from over, and that to write it off would be an incorrect analysis.

Today, inter-state arbitration has become one of the most prominent forms of dispute resolution between parties since more and more States are willing to take a peaceful route instead of a violent one involving conflict. The PCA's scope that allows it to deal with non-State entities also grants it an added layer of significance primarily due to the emerging importance of commercial arbitration across the globe. Thus, the addition of Optional Protocols to the PCA has enlarged its scope and this has also played a key role in increasing the significance of the PCA in the current century. Furthermore, important treatises in the international legal system, such as UNCITRAL and UNCLOS have made arbitration a practical way of addressing disputes, and this has made the PCA all the more valuable in the present context. For example, arbitration at the PCA, mandated by Article 287 of UNCLOS, has played an unfathomably important role in peaceful dispute settlement in the aforementioned "Bay of Bengal" case and also the highly publicized "Arbitral Tribunal Constituted Pursuant to Article 287, and by Annex VII, of the United Nations Convention on the Law of the Sea in the Matter Between Guyana & Suriname."[69]Thus, for such multilateral instruments that mandate arbitration as a form of settlement, the PCA has developed "a body of expertise and relevant procedural precedent prove invaluable in future disputes submitted to arbitration."[70]

Finally, the UN Charter prescribes that parties to a dispute must attempt to seek a resolution of their conflict through peaceful settlement,[71] and among the various options provided therein, four of them – arbitration, conciliation, inquiry, and mediation are present in the PCA. This implies that any party that seeks to adhere to the obligations imposed by the UN Charter vis-à-vis peaceful settlement can use the PCA as a reliable institution.[72]

6. CONCLUSION

The longevity of the PCA is a testament to its significance. Envisaged at the twilight of the 19th century to fulfill what can only be deemed utopian aspirations, it has functioned as a robust institution of dispute settlement for well over a century. Although the initial decades of its existence were marred with obscurity and somewhat insignificance, mainly due to the various conflicts ongoing across the globe during that period, including two World Wars, there has been a resurgence in the PCA's importance and significance during the last decades of the 20th century, and this has only increased during the first quarter of the 21st century. The addition of Optional Protocols and the recognition afforded to the PCA as a viable institution within multilateral treaties is an indication of the growing importance of the PCA today.

From an Indian perspective, the PCA did not have much significance during the first century of its existence since India did not approach its doors to resolve any disputes. Nevertheless, in a manner mimicking its global resurgence in the 21st century, its importance and presence for India has drastically changed during the 21st century, as highlighted by the

[66]1927, P.C.I.J. Series A, No. 10
[67]*Supra Note* 61, ¶ 368.
[68]*Supra Note* 33, at 647.
[69] (PCA Case No. 2004-04).
[70]*Supra Note* 33, at 651.
[71] UN Charter, Art. 33; see also Art. 2(3).
[72]J.J. Van Haersolte-van Hof, "The Revitalization of the Permanent Court of Arbitration"54 *Netherlands International Law Review* 399 (2007).

disputes that were adjudicated by it involving India as a party. Although not specifically highlighted, it has also played a supplementary role in some important issues of international character involving India. This makes the PCA an extremely important international institution for the future because the adjudicatory experiences discussed above in this paper have proven to India that the PCA provides a neutral, international forum to resolve disputes, and India's continued commitment to the PCA's mechanisms will underscore its dedication to peaceful dispute resolution.

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