A judge by any other name? Arbitrator challenges in state-to-state disputes

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What makes an international arbitrator different from a national judge? All of us in the arbitration world have a pretty solid answer to this question. *At what point do the distinctions between an international arbitrator and an international judge melt away?* That's a bit of a trickier question, depending on the case.

With the increase in investment law jurisprudence in recent years, we've become accustomed to seeing international judges sit on the same investment arbitration panels as commercial arbitrators with their own private practices. In any given arbitration, international judges serving as arbitrators are subject to the same challenge standards as their commercial arbitration peers. And they are not necessarily more immune to accusations of appointing-party bias than their commercial-world co-arbitrators.

But are there times when an international judge, sitting as an *ad hoc* arbitrator, should be nonetheless judged by the ethics applicable to international judges? On the wide spectrum of international dispute settlement — from private-to-private commercial arbitrations, to private-state disputes in investment arbitration, to state-to-state arbitrations, and finally, to state-to-state permanent tribunals — is there a point at which an arbitrator's independence and impartiality standards have more in common with those of an international judge than to those of a commercial arbitrator? And if that tipping point isn't to be found in hybrid public-private disputes like investor-state arbitrations, where *is* it to be found?

An arbitrator challenge decision released this month by the Permanent Court of Arbitration in the United Nations Convention on the Law of the Sea ("UNCLOS") case between Mauritius and the United Kingdom gives one answer: the tipping point occurs with state-to-state arbitrations.

The decision concerns Mauritius' challenge of the UK-appointed arbitrator, Sir Christopher Greenwood. Sir Greenwood currently sits as a Member of the International Court of Justice. Prior to his election to the Court, he served as a professor and a barrister, in the course of which he represented and advised both the UK and foreign governments. In the challenge decision, the remaining four members of the Tribunal, including Mauritius' party-appointed arbitrator and three arbitrators appointed by the President of the International Tribunal for the Law of the Sea, addressed whether Judge Greenwood's relationship to the UK Government should result in his disqualification from the dispute.

Mauritius did not argue that Judge Greenwood had advised the UK on the specific dispute before the tribunal (concerning a UK regulation regarding the Chagos Archipelago). Rather, it asserted that he

has a “long-standing” and “close” working relationship with the UK Government. Mauritius was particularly concerned by the Judge’s participation in 2011 as a member of a Board to appoint the post of Legal Advisor to the British Foreign and Commonwealth Office (“FCO”). (The Legal Advisor has overall responsibility for the work of the FCO legal advisors, including their work on the *Mauritius v. United Kingdom* dispute.)

While Mauritius didn’t allege that Judge Greenwood was actually biased, it asserted that in light of his close relationship with the UK and his recent role in the FCO appointment, his participation on the tribunal permitted the appearance of bias or lack of independence. Mauritius argued, drawing on case law under the UNCITRAL Rules, the LCIA, ICSID, and the IBA Guidelines on Conflicts of Interest in International Arbitration, that an “appearance of bias” standard should apply to Judge Greenwood. According to Mauritius, the “appearance of bias” standard is “applicable to all arbitrations” and “there is no justification in law or policy for a different or lower standard of arbitral ethics in inter-State arbitrations, especially where the tribunal must resolve disputes that involve issues of national importance and great public interest.”

The United Kingdom, in contrast, argued the following:

> Under the law and practice of these forums, “close past relationship” has never been a ground for challenging an arbitrator. In fact, according to the United Kingdom, “the law and practice applicable in inter-State arbitrations fully supports the election of judges with a close professional relationship to their own State, as shown by the record of most serving and previous ICJ and ITLOS judges, and the limited basis on which they are disqualified from sitting in particular cases.”

According to the UK, the law and practice of arbitrator challenges in international commercial and investment protection arbitrations are irrelevant. Those disputes involve “repeat arbitral appointments, whether by the same party or by the same law firm; potential for influence where arbitrators may be perceived as worrying about where their next appointment will come; [and] cross-overs, where individuals repeatedly switch between the roles of counsel and arbitrator”—in other words, a situation that the UK sees as different from Judge Greenwood’s appointment and role in the present state-to-state arbitration.

The Tribunal sided with the United Kingdom. In determining the applicable challenge standard for Judge Greenwood, the Tribunal first determined that all members composing an arbitral tribunal under Annex VII of the UNCLOS are required to maintain the highest reputation for “fairness, competence and integrity.” The Tribunal then drew on the law and practice of the International Court of Justice and the International Tribunal for the Law of the Sea. The Tribunal noted in particular the following provisions of the Statute of the International Court of Justice:

> Article 16 requires that “no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.” (The Tribunal noted, however, that Article 16 applies to judges only after their election to the Court, and does not disqualify those who exercised such functions before their election.)
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> Article 17 provides that (1) “No member of the Court may act as agent, counsel, or advocate in any case,” and that (2) “No Member of the Court may participate in the decision in any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.”

The Tribunal rejected Mauritius' reliance on the "appearance of bias" standard and the IBA Guidelines. It explained:

> The Tribunal recalls that the system of inter-State dispute settlement is based upon the consent of the Parties, and more specifically upon the rules of public international law, the sources of which are set out in Article 38(1) of the Statute of the ICJ. In the Tribunal's view, Mauritius has not demonstrated that the rules adopted by non-governmental institutions such as the IBA have been expressly adopted by States, nor do they form part of a general practice accepted as law, nor fall within any other of the sources of international law enumerated in Article 38(1) of the Statute of the ICJ.

The Tribunal stressed that Article 287(1) of the UNCLOS permits States the option alternatively to submit their case to ITLOS, the ICJ, or arbitration under Annex VII, and that these three options comprise the States' consent to dispute settlement under the UNCLOS. The Tribunal considered that that the States parties could not have intended to apply different conditions of independence and impartiality to an Annex VII arbitration than to a dispute adjudicated by the ICJ or ITLOS.

The Tribunal's decision is unlikely to prove controversial. Nonetheless, it's worth asking whether the distinctions we tend to draw between arbitrators and judges — including the incentives that may affect their behavior and the ethics that should apply to them — are obsolete in the context of state-to-state disputes.

Certainly, some technical distinctions remain between international judges and appointed ad hoc arbitrators adjudicating state-to-state disputes. Unlike an *ad hoc* arbitrator, the Members of the ICJ are elected by the UN General Assembly to serve 9-year terms at the Court. They generally sit on all cases, unless they have been recused or unless a smaller Chamber of the Court has been constituted for a specific case. As such, ICJ Members receive their caseload (and their pay) from the Court, rather than from the State parties appearing before them.

The Tribunal in *Mauritius v. United Kingdom* did not address these distinctions. It's tempting, nonetheless, to speculate as to why this distinction may not matter. Is it, as the UK suggests, that state-to-state arbitration occurs relatively infrequently, and that arbitrators are therefore less likely to focus their careers and income streams around securing future state-to-state arbitration appointments than other kinds of arbitration? Or is it that the arbitrators appointed to state-to-state disputes are more likely to come from a tiny pool of candidates, most of whom are public international lawyers and judges, who might *all* be disqualified if more stringent challenge standards were applied? Or is it something even more intangible? Is it that there is inherently a diplomatic culture or sensitivity that pervades inter-State disputes and sets them apart from other forms of arbitration? (*See, e.g.,* the "Notes to the Text" of the PCA Optional Rules for Arbitrating Disputes Between Two States state that they are based on the UNCITRAL Arbitration Rules, with certain modifications, including, inter alia, modifications "to reflect the public international law character of disputes between States, and diplomatic practice appropriate to such disputes.")

I'm inclined to think it's a combination of all of the above. I'd welcome readers' thoughts on the subject.