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# Revisiting the Chagos Decision: Search for a Rationale

Ritwik Bhattacharya (Shardul Amarchand Mangaldas & Co) · Monday, November 20th, 2017

In 2012, the Permanent Court of Arbitration ["PCA"] in the *Chagos Decision* entertained a challenge to an arbitrator's impartiality in an inter-state arbitration between Mauritius and the United Kingdom ("UK") (analyzed here) . The PCA had to decide the appropriate standard for impartiality of arbitrators, and in the process, deal with the novel question of whether inter-State arbitration should be considered more like private commercial arbitrations or State-to-State permanent tribunals (like the International Court of Justice ("ICJ") or the International Tribunal for the Law of the Sea ("ITLOS")). While it decided in favour of the standard applicable to the latter, this post will examine whether the Tribunal's decision is supported by a clear rationale.

## The Two Viewpoints and the Tribunal's Decision

Mauritius argued that inter-State arbitration should be treated like any other arbitration. Thus, the higher standard of *appearance of bias* was "applicable to all arbitrations," and there was "no justification in law or policy for a different or lower standard of arbitral ethics in inter-State arbitrations." It further argued that inter-State arbitration could not be considered akin to State-to-State permanent tribunals like the ICJ or the ITLOS for three reasons: *first,* the views of a particular judge carry far lesser weight in the ICJ or the ITLOS as the number of judges is higher; *second,* judges of the ICJ or the ITLOS are elected as opposed to being appointed in inter-State arbitrations and *third,* the likelihood of a dispute involving the home state of the elected judge in the ICJ or the ITLOS is very small.

The UK considered any reliance on the law and practice applied in international commercial and investment protection arbitrations to be "misleading" and "wrong" since inter-State arbitration does not 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 […]". It argued that the standard derived from the rules and practice of the ICJ and the ITLOS, which envisages a lower threshold, should be applied.

The Tribunal supported the UK's viewpoint. In doing so, the Tribunal did not consider that the principles "developed in the context of international commercial arbitration and arbitration regarding investment disputes" had any relevance to the present dispute. To buttress its conclusion, it relied on the UK's argument regarding inter-State arbitration being an alternative to the ICJ and the ITLOS, stating that "it cannot have been the intention behind that framework that different

conditions would apply to the independence and impartiality of adjudicators in the third forum (arbitration under Annex VII) in comparison with the ICJ or ITLOS."

## The Search for a Rationale

The Tribunal did not directly address the submissions made by Mauritius and the UK about why inter-State arbitration should be treated like international commercial arbitration/investor-State arbitration, and State-to-State permanent tribunals respectively.

The Tribunal's only reason was that inter-State arbitration in the instant case was an alternative to the ICJ and the ITLOS, because of which different rules cannot apply to impartiality and independence of arbitrators. *First,* it is not always necessary that inter-State arbitration is presented as an alternative to the ICJ or the ITLOS. It is possible for inter-State arbitration to exist as a standalone option, say in a Friendship, Commerce and Navigation ("FCN") Treaty, where this reasoning is not tenable. *Second,* in any event, it is not necessary that alternative options for dispute resolution must be subject to the same procedural constraints. This was explicitly pointed out by Mauritius when it said that the mere availability of three alternative judicial bodies "doesn't meld them or merge them in their procedures. There is no common set of procedural rules for bodies exercising jurisdiction under Part XV. […] To take an example, there is no provision for intervention before Annex VII Tribunals. There are different provisions for intervention before the court and before ITLOS."

It is also not clear why the standard in international commercial arbitration/investor-State arbitration is irrelevant in the present case. In paragraph 151, the Tribunal recognized that the standard for impartiality in the *PCA's Optional Rules,* while not adopted by the parties to the dispute, "has been adopted in a number of PCA administered arbitrations" and "can be considered to form part of the practice of inter-State arbitral tribunals." The explanatory notes to the text of the *PCA's Optional Rules* clearly state that they "are based on the UNCITRAL Arbitration Rules," with certain modifications. The articles to which such modifications have been made are enumerated in the notes to the text at page 64. None of the modifications concern the standard of impartiality under Rule 10, *PCA's Optional Rules.* Therefore, it can be inferred that decisions applying UNCITRAL rules and supporting the *appearance of bias* standard, would arguably be relevant to the standard of impartiality, even in inter-state arbitrations.

Lacking a clear rationale by the Tribunal for its decision, some authors have speculated what the rationale behind this decision could be. Annalise Nelson has stated that a potential rationale could be the "diplomatic culture or sensitivity that pervades inter-State disputes and sets them apart from other forms of arbitration." This, combined with the low frequency of inter-State arbitrations, means 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." That, by itself, is not a very strong reason since it does not explain why the perception of the integrity of the dispute resolution process is any less important in an inter-state arbitration. Furthermore, it could be argued that an arbitrator could potentially be seen as favouring a State in inter-State arbitrations, so as to procure future appointments in other kinds of arbitrations.

## A Question of Practicality

Some authors have focussed on more practical considerations that may have played on the mind of the Tribunal. Chiara Giorgetti posits that the decision to employ a low threshold for impartiality was taken deliberately to disincentivise challenges to arbitrators, which have become common and unnecessarily increase the cost and length of arbitration proceedings. Annalise Nelson argues that if a stringent threshold is applied, it will make it difficult to find arbitrators, as most arbitrators who are appointed in inter-state arbitrations tend to come from "a tiny pool of candidates." These practical considerations need to be weighed against the strong principle of preserving the integrity of the judicial decision-making process where justice should not only be done but should manifestly and undoubtedly be seen to be done. Further, the practical implications of this decision must also be considered.

Broadly, there are three impacts that flow out of the *Chagos Decision. First,* while the Tribunal disregarded the *appearance of bias* standard, it did not provide an alternative standard beyond stating that there must be no prior involvement in the subject matter of the case and there must not be justifiable doubts about the impartiality of the arbitrator. Lack of prior involvement in a subject matter cannot be the only criterion for bias. The "justifiable doubts" standard is an unhelpful truism since it does not provide any guidance as to what conditions can lead to these "justifiable doubts." Therefore, as one author has noted, "the contours of the applicable standard adopted remain unclear." *Second,* challenges to arbitrators will undoubtedly reduce. While this will help in saving time and costs in arbitration, it also means that parties will deter from challenging arbitrators in legitimate cases. In the *Chagos Decision,* Mauritius was careful to repeatedly emphasise its "respect for the probity and standing of Judge Greenwood." However, parties must now show that the concerned arbitrator is actually biased, which can prove detrimental from a strategic viewpoint if the challenge fails and arbitrator proceeds to adjudicate the case. *Third,* a practical consequence peculiar to inter-state arbitration would be the likelihood of state parties considering the arbitration as illegitimate and refusing to accept its consequences, as can be seen in the case of China in the South China Sea. This danger is more aggravated in the context of inter-state arbitral awards since no direct enforcement mechanism exists and this can potentially undermine the faith in inter-state arbitration as a viable means of dispute resolution. For the sake of clarity of the law and viability of inter-state arbitration as a dispute resolution mechanism, it is imperative that *appearance of bias* threshold be applied even to inter-state arbitrations or in the alternative, compelling reasons be provided for applying a lower threshold.

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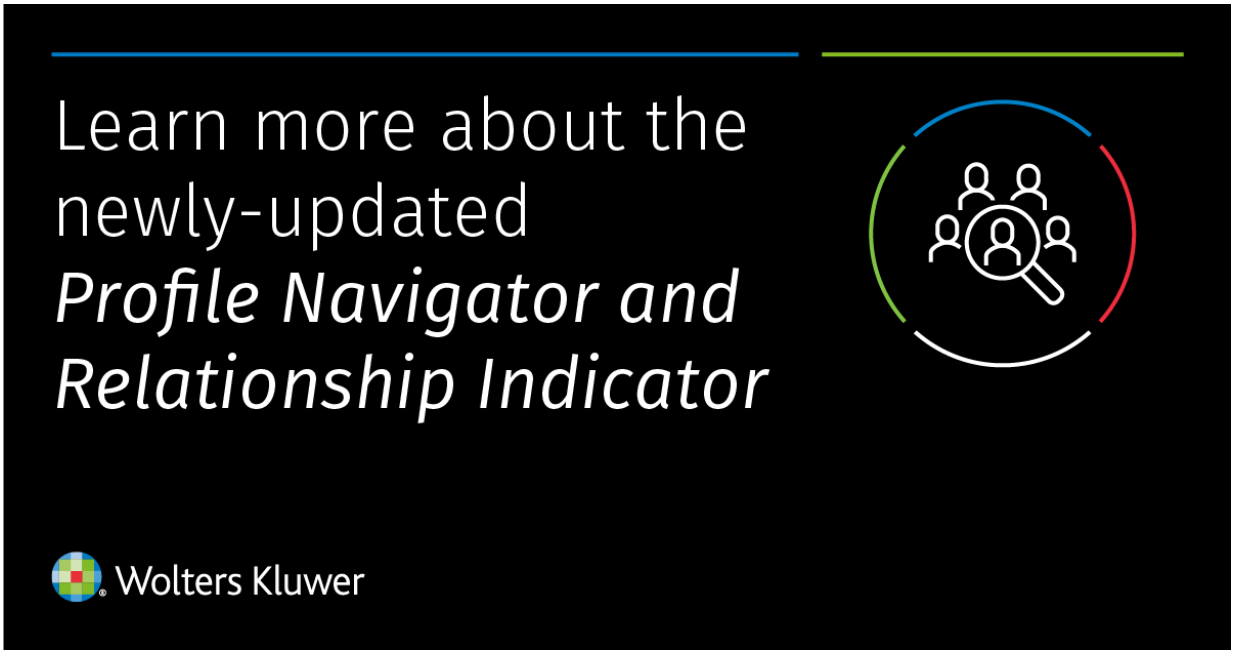


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