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Challenges of Arbitrators in Inter-State Cases: A Different Cattle of Fish?

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Abstract

Compared to those in international commercial and investment arbitration, arbitrator-challenge practices in inter-state cases are abnormally rare. The reasons behind the asymmetric practices include the ideology towards the role of arbitrators (authority vs. expertise), the effectiveness of enforcement (whether the award can be executed in domestic courts or whether there exist preconditions), and the unique structure and function of the specific tribunals. By virtue of illustrating the rules and practices of the *ad hoc* tribunal established under Annex VII of the United States Convention on the Law of the Sea, the Iran-United States Claims Tribunal, and the International Court of Justice, the current standard, "justifiable doubts to the impartiality and independence of arbitrators", is not interpreted uniformly and somehow unreasonable. To overcome the phenomenon of fragmentation and other problems, the arbitrator-challenge rules in inter-state disputes should not be treated differently and should be harmonized with rules and case laws developed in international commercial and investment arbitration.

Keywords

Challenge of Arbitrators; Inter-State Arbitration; Impartiality and Independence; Justifiable Doubts Standard.

1 Introduction

The Since the end of the 19th century,[1] international law has developed in a dominant form of juridicalisation and judicialization, of which

1 ORFORD, A. A Global Rule of Law. In: LOUGHLIN, M. and J. MEIERHENRICH (eds.). *The Cambridge Companion to the Rule of Law*. Cambridge: Cambridge University Press, 2021, pp. 538–566.

the conception is that rule of law is based on principle rather than power.[2] Following the Permanent Court of Arbitration ("PCA") establishment, increasing third-party adjudicatory institutions,[3] whether for general or specific purposes, have been involved in inter-state disputes. International adjudication, the most objective and impartial way to settle disputes and its effectiveness, is guaranteed by the balanced composition of the tribunal/bench as a whole[4] together with the required impartiality (subjective factor) and independence (objective factor) of every single arbitrator/judge.[5] Among other things, the "challenge of arbitrators", serving as a procedural tool for parties, is used to remove biased and dependent arbitrators, thereby safeguard the fairness and the validity of the outcome of the proceedings.

However, the frequency asymmetry of questioning arbitrators is common in international arbitration, explicitly speaking, although arbitrators have been routinely challenged in international commercial and investment arbitration,[6]

2 HELFER, R. L. and A. SLAUGHTER. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, 1997, Vol. 107, no. 2, p. 273; See also KALSEN, H. *Peace through law*. Chapel Hill: The University of North Carolina Press, 1944, 155 p.

3 For comprehensive statistics of international and regional courts, see The International Judiciary in Context: A Synoptic Chart, The Project on International Courts and Tribunals. *ELAW* [online]. [cit. 1. 5. 2021]. Available at: https://elaw.org/system/files/intl tribunals synoptic_chart2.pdf; see also MACKENZIE, R. et al. *The Manual on International Courts and Tribunals*. New York: Oxford University Press, 2010, 547 p.

4 For instance, Art. 9 of the Statute of the International Court of Justice requires that the judges as a whole should represent the main forms of civilization and the principal legal systems of the world. The Statute of the International Court of Justice is annexed to the United Nations, of which it forms an integral part.

5 Impartiality and independence highlight different aspects of requirements for arbitrators. As correctly described by Art. 3.1 IBA Guidelines on Conflicts of Interest in International Arbitration: *"Partiality arises when an arbitrator favors one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or someone closely connected with one of the parties."*

6 As for treatises, see BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration; TUPMAN, W. M. Challenge and Disqualification of Arbitrators in International Commercial Arbitration. *International and Comparative Law Quarterly*, 1989, Vol. 38, no. 1, pp. 26–52; BOTTINI, G. Should Arbitrator Live on Mars – Challenge of Arbitrators in Investment Arbitration. *Suffolk Transnational Law Review*, 2009, Vol. 32, no. 2, pp. 341–366; PANJABI, R. K. L. Economic Globalization: The Challenge for Arbitrators. *Vanderbilt Journal of Transnational Law*, 1995, Vol. 28, no. 1, pp. 173–184; BERG, A. J. van den. Justifiable Doubts as to the Arbitrator's Impartiality or Independence. *Leiden Journal of International Law*, 1997, Vol. 10, no. 3, pp. 509–520; YU, H. L. and L. SHORE. Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives. *International and Comparative Law Quarterly*, 2003, Vol. 52, no. 4, pp. 935–968; BASTIDA, B. M. The Independence and Impartiality of Arbitrators in International Commercial Arbitration. *Revista E-Mercatoria*, 2007, Vol. 6, no. 1, pp. 1–15; OGLINDA, B. Key Criteria in Appointment of Arbitrators in International Arbitration. *Juridical Tribune,* 2015, Vol. 5, no. 2, pp. 124–131.

they are seldom questioned in inter-state proceedings. For instance, the PCA Secretary-General has submitted 28 challenges since 1976, none of which filed in inter-state arbitrations.[7] Indeed, up to now only one inter-state arbitration proposed by the state formally challenged the arbitrator, i.e., *the Chagos Marine Protected Area Arbitration (Mauritius vs. the United Kingdom)*, where the tribunal found no case law to invoke and then created its own standards regarding the grounds for challenging in inter-state cases.[8] Besides, not only in *ad hoc* arbitration, but states also appeared careless about the impartiality and independence of judges in the judicial process: only 3 out of 43 cases of recusals of the International Court of Justice ("ICJ") judges[9] were requested by parties,[10] while others are cases of self-recusals *"as a matter of routine"*.[11] The only exception is the Iran-United States Claims Tribunal ("IUSCT"), a "court-like" tribunal dealing with both inter-state claims and private claims.[12] Surprisingly, although the number of private claims is much higher than public claims,[13] 20 out of 22 challenges raised from 1981–2015 were brought by states and 9 out of them were filed

7 GRIMMER, S. The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, pp. 83–85.

8 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03..

9 This number does not include non-participation of judges after 2017, where Peter Tomka was absent in 1 case, Mohamed Bennouna was absent in 2 and James Richard Crawford did not participate in all the 6 cases delivered in 2018. No official document (including the yearbooks) has yet explained the reasons for their absence.

10 Two of the three cases refer to the instance of alleged bias in advisory opinions, which are not binding, and thus only one was brought during contentious proceedings. For details, see Part 2.3.

11 ROSANNE, S. *The Law and Practice of the International Court, 1920-2005*. Leiden: Brill – Nijhoff, 2006, p. 1062.

12 Official introduction to the IUSCT. *Iran-United States Claims Tribunal* [online] [cit. 9. 5. 2021]. Available at: https://iusct.com/introduction/

13 The tribunal now has resolved almost all of the approximately 4,700 private U.S. claims. See Office of the Assistant Legal Adviser for International Claims and Investment Disputes, Iran-U.S. Claims Tribunal. *U.S. Department of State* [online]. [cit. 4. 5. 2021]. Available at: https://www.state.gov/iran-u-s-claims-tribunal/; On the contrary, the IUSCT has only resolved 110 public claims. See IUSCT Cases. *Iran-United States Claims Tribunal* [online]. [cit. 20. 5. 2021]. Available at: https://iusct.com/pending-cases/

in public claims.[14] However, considering the unique purpose, history and characters of this tribunal, and that almost all the challenges occurred under *"rather unusual circumstances"*[15], the frequent atypical challenges in IUSCT cannot represent the general practices in inter-state arbitration.[16] By and large, practices of challenge in inter-state cases were "abnormally rare" compared to those in commercial and investment arbitration. It is hard to believe that arbitrators behave themselves more in inter-states cases than in commercial or investment disputes. There might be some reasons.

Moreover, the grounds for disqualification established in inter-state cases are also worth discussing. On the one hand, the rules concerning arbitrator-challenge in commercial and investment arbitration, such as the substantial grounds and procedural requirements, were exceedingly detailed and explicit. As will be discussed below, 28 possible factual circumstances were summarized by *Gary Born* in commercial practices for finding lack of impartiality.[17] In addition, International Bar Association had published Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), in which both general standards and factual circumstances categorized in red, orange, and green lists were provided.[18] Though the IBA Guidelines are not approved as a treaty via due process, it considerably impacts daily commercial and investment arbitration.[19]

14 As will be illustrated in Part 2.2, the challenges of arbitrators are sometimes not filed during a specific case because of the "standing" character of the tribunal. See TEITELBAUM, R. Challenges of Arbitrators at the Iran-United States Claims Tribunal: Defining the Role of the Appointing Authority. *Journal of International Arbitration*, 2006, Vol. 23, no. 6, p. 549: *"unlike an ad hoc commercial arbitration tribunal, allows for general challenges of arbitrators to be initiated by either the United States or Iran at any time."*

15 CAPLAN, L. M. Arbitrator Challenges at the Iran-United States Claims Tribunal. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 116. See detailed discussion in Part 3.

16 Somehow, the abundant practices of the IUSCT have been totally ignored by both parties and the tribunal in *Chagos Arbitration*.

17 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2001–2008. For details, see *infra* note 166.

18 IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 2014. *International Bar Association* [online]. [cit. 2. 5. 2021]. Available at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918

19 MOSS, M. The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges. *Kluwer Arbitration Blog* [online]. 23. 11. 2017 [cit. 10. 5. 2021]. Available at: http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/

On the other, the rules regarding arbitrator-challenge in inter-state cases had never been demonstrated until the *Chagos Arbitration* in 2011, where the tribunal found that it *"does not consider that principles and rules relating to arbitrators, developed in the context of international commercial arbitration and arbitration regarding investment disputes to inter-State disputes"*.[20] According to the tribunal, only the Optional Rules for Arbitrating Disputes between Two States ("PCA Optional Rules"), The Statute of the International Tribunal of the Law of the Sea ("ITLOS") and ICJ Statute can function as "source of law" during inter-state proceedings.[21] Considering the precedential effect of international cases,[22] *Chagos Arbitration* may set the tone for the future. As a result, the reasoning and conclusions given by the tribunal should be discussed rationally and prudently.

This paper is divided into five parts. Following the brief introduction, in Part 2, the current practices and standards regarding the challenge of arbitrators in inter-state cases are examined. Three categories of proceedings, including those before *ad hoc* tribunals, mixed claims tribunals and standing courts were focused. Part 3 tries to illustrate the reasons behind the asymmetric challenge practices. After that, in Part 4, the characters of the current standards are discussed, and the question, why rules in commercial and investment arbitration should not be precluded in inter-state cases, is to be answered. And Part 5 concludes.

2 Current Practices in Inter-State Cases

Three categories of tribunals dealing with inter-state cases will be discussed in this part. The first is the *ad hoc* tribunals established under Annex VII of the 1982 United Nations Convention of the Law of the Sea ("UNCLOS"), composing 3 or 5 arbitrators, each dealing with specific litigation concerning the application and interpretation of the UNCLOS. Arbitrators are appointed

20 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 156.

21 Ibid., para. 152–154.

22 As for comprehensive analysis about the precedent in international law, see SHAHABUDDEEN, M. *Precedent in the World Court*. Cambridge: Cambridge University Press, 2007, 245 p.; see also ZEKOS, I. G. Precedent and Stare Decisis by Arbitrations and Courts in Globalization. *The Journal of World Investment & Trade*, 2009, Vol. 10, no. 3, pp. 475–510.

(by parties or the appointing party) from an arbitrator pool (list) nominated by state parties prior.[23] *Chagos Arbitration* is the only case where the challenge to arbitrator has formally been filed among the 15 Annex VII cases, or even among the whole inter-state cases dealt in *ad hoc* tribunals.

The second is the mass mixed claims tribunal, and the IUSCT will be illustrated as a representative. As mentioned above, the IUSCT is entitled to deal with both private and public claims. IUSCT consists of 9 "standing" members,[24] three nominated by Iran and three by the US, with the left three with third-country nationalities appointed by agreement of the six party-appointed arbitrators or the Appointing Authority.[25] Nine arbitrators have been divided into three chambers: one Iranian, one American, and one third-country arbitrator serving as presiding arbitrators. Claims are resolved either by chambers or the full tribunals.[26] The President of the IUSCT is entitled to decide *"the composition of Chambers, the assignment of cases to various Chambers, the transfer of cases among Chambers and the relinquishment by Chambers of certain cases to the Full Tribunal"*.[27]

The third category is the rules and practices of the ICJ, a permanent court consisting of 15 judges covering the "main forms of civilization and the principal legal systems of the world". Strictly speaking, the recusal of judges of a standing court does not fall in the scope of arbitrator-challenge. However, compared to international commercial and investment arbitration, which does not have a judicial settlement mechanism, the practices of standing courts are the most unique and exclusive experiences in inter-state disputes, as stones from other hills[28]. As a result, by reference to the case laws regarding the removal of judges, we may better understand the specific requirements of "impartiality and independence of arbitrators" in inter-state cases.

23 Art. 2 Annex VII UNCLOS.

24 In the founding documents and practices of the IUSCT, adjudicators have three titles: "members", "arbitrators" and "judges".

25 Art. III para. 1 1981 Declaration of the government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the government of the United States of America and the government of the Islamic Republic of Iran ("Claims Settlement Declaration").

26 Art. III para. 1 Claims Settlement Declaration.

27 Art. 5 1983 Tribunal Rules of Procedure.

28 "Stones from other hills" is one line of verse from the *Book of the Songs*, an anthology of ancient Chinese poetry, meaning "other people's good quality or suggestion whereby one can remedy one's own defects".

2.1 Chagos Arbitration: A Leading Debate

In 2010, Mauritius initiated arbitration against the UK under Annex VII of the UNCLOS, and PCA served as the Registry.[29] Twenty-one days after the PCA transmitting to the Parties the *Declarations of Acceptance and the Statements of Impartiality and Independence* of the five arbitrators, Mauritius stated its intention to challenge the appointment of Judge Greenwood, a party-appointed arbitrator who had acted for the UK several years and was selected by the UK as the new legal adviser during the proceeding. In June 2011, Mauritius submitted its *Memorial on the Challenge* containing the detailed grounds and reasons.[30] After examining the opinions and evidence given by both parties and Judge Greenwood himself, the left four arbitrators, on behalf of the whole tribunal, delivered a reasoned decision in November 2011 in which Mauritius's challenge was denied.[31] Whether Judge Greenwood was actually partial and dependent on UK's government is beyond the discussion of this paper; what is more noteworthy lies in that the parties and the tribunal had a significant debate, unprecedentedly, on the standards of arbitrator-challenge in inter-state cases.

Mauritius contended that the independence and impartiality of arbitrators should be assessed by reference to an objective standard, that *"whether circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence from the perspective of a reasonable and informed person"*[32], which was named by the tribunal as "Appearance of Bias Standard". More specifically, the appearance of bias did not require an inquiry on whether actual bias of dependence existed.[33] To support its claims, Mauritius relied on (1) international arbitration rules[34],

29 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 9. The dispute is regard to the UK's decision to establish a "Marine Protected Area" around the Chagos Archipelago.

30 Ibid., para. 15.

31 Ibid.

32 Ibid., para. 43.

33 Para. 32 Memorial on Challenge.

34 UNCITRAL Arbitration Rules, the PCA's Optional Rules for Arbitrating Disputes Between Two States, and in the respective rules of the Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, the International Centre for Dispute Resolution of the American Arbitration Association, the Arbitration Institute of the Stockholm Chamber of Commerce, IBA Guidelines, UNCITRAL Model Law 1985, Burgh House Principles on the Independence of the International Judiciary, 2011 Resolution of the Institut de Droit International on the Position of the International Judge.

(2) statements of famous professors and judges[35], (3) case laws of international commercial arbitration, investment arbitration and judicial practices[36]. Moreover, Mauritius maintained that the Appearance of Bias Standard has the status of the "general principle of law" under Art. 38 of the ICJ Statute.[37]

However, the UK disagreed with Mauritius and told a different story. First, the UK contended that no textual basis for the standard of "justifiable doubts" existed and that the very standard to justify any given challenge was embedded in the provisions regarding the selection of arbitrators (Art. 2 para. 1 and Art. 3 letter e) of Annex VII).[38] Besides, it further submitted that rules and practices applied by other courts and tribunals dealing with inter-State cases, rather than international commercial and investment arbitration,[39] should be adopted by the tribunal.[40] Since Annex VII arbitration is paralleled with the ICJ and the ITLOS as one of the compulsory dispute settlements, the applicable rules regarding the same matters (such as the disqualification of adjudicators) must be identical in these three forums.[41] Based on the rules and practices of ICJ, ITLOS, and PCIJ,[42] the UK argued that *"the principal test of conflict of interest is that* […] *the arbitrator must not have had any involvement with the actual dispute that is before the arbitral tribunal"*[43] (Specific Prior Involvement Standard). The close past relationship has never been a ground for challenging an arbitrator.[44]

35 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 60 – Judge Mensah's stated that *"appearance of bias* […] *which would govern matters before ITLOS should also be applied in an Annex VII arbitration."*

36 Ibid., para. 42.

37 Ibid., para. 58.

38 Ibid., para. 47–50.

39 Response of the UK in *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, para. 2 point v).

40 Ibid., para. 45–46.

41 Ibid., para. 48.

42 Art. 16, 17 and 24 ICJ Statute, Art. 34 Rules of the ICJ, and Art. 8 Statute of ITLOS. As for practices of the ICJ, see Advisory Opinion of the ICJ of 9 July 2004, Case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 136; Provisional Measures Order of the International Tribunal for the Law of the Sea of 3 December 2001, *MOX Plant Case (Ireland vs. United Kingdom)*.

43 Response of the UK in *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, para. 2 point iii) and 66.

44 Ibid., para. 61.

The tribunal rejected both of them. On the one hand, the tribunal denied the "Specific Prior Involvement Standard" and accepted the "justifiable doubts test" argued by Mauritius since it has been embodied in PCA Optional Rules (Art. 10)[45] and the rules of procedures of many PCA-administered cases.[46] On the other hand, the "justifiable doubts test" does not entail "appearance of bias standard", for the latter derived from private law sources which were not within the sources of international law enumerated in Art. 38 para. 1 of the Statute of the ICJ.[47] As a result, rules developed in international commercial and investment arbitration, particularly the IBA Guidelines, were deemed irrelevant and inapplicable to inter-state cases.[48] Only rules and case law with regard to the qualification of judges or arbitrators applied in inter-state context (Art. 16, 17, 24 and 36 para. 1 of the ICJ Statute; Art. 4 para. 1 of the Rules of the ICJ; Art. 7, 8 and 17 of the Statute of the ITLOS; Art. 6 para. 4, 8 para. 3 and 10 of the PCA Options Rules) were considered.[49] As will be illustrated below, the standards contained in those applicable provisions are more similar to what the UK has argued: the "Specific Prior Involvement Standard".

2.2 IUSCT: UNCITRAL Rules as the Backbone

The IUSCT operates based on three primary instruments, the Declaration of the Government of the Democratic and Popular Republic of Algeria ("IUSCT General Declaration"), the Claims Settlement Declaration of 1981, and the Tribunal's Rules of Procedure ("IUSCT Tribunal Rules").

45 Art. 10 para. 1 UNCITRAL Arbitration Rules 1976 reads: *"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."*

46 Art. 8 Eritrea-Ethiopia Boundary Commission Rules of Procedure, PCA Case No. 2001-01; Art. 6 Rules of Procedure for the Arbitral Tribunal Constituted Under the OSPAR Convention Pursuant to the Request of Ireland Dated 15 June 2001, PCA Case No. 2001-03; Art. 6 Rules of Procedure for the Tribunal Constituted Under Annex VII to the UNCLOS Pursuant to the Notification of Ireland Dated 25 October 2001, PCA Case No. 2002-01.

47 *"Tribunal is not convinced that the Appearance of Bias Standard as presented by Mauritius and derived from private law sources is of direct application in the present case."* – Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 167–169.

48 Ibid., para. 156 and 165.

49 In this regard, even public law sources such as Rome Statute and Rules of International Criminal Tribunal for the former Yugoslavia were excluded, since both of them dealt with criminal cases with individuals involved in legal relations. Ibid., para. 153–154.

In particular, Art. III.2 of the Claims Settlement Declaration provides that: *"… Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal* […] *The UNCITRAL rules for appointing members of three-member tribunals shall apply Mutatis mutandis to the appointment of the Tribunal."* [50]

Hence, the IUSCT Tribunal Rules were drafted based on the UNCITRAL Arbitration Rules of 1976 with necessary modification in the form of additional "Notes" accompanying each provision. Regarding arbitrator-challenge, the IUSCT Tribunal Rules offered two grounds: (1) justifiable doubts to the arbitrator's impartiality or independence (Art. 10), and (2) failure to act or perform the arbitrator's functions (Art. 13).[51] Both provisions incorporate the corresponding articles in UNCITRAL Arbitration Rules[52], suggesting that standards developed in international commercial rules can also apply to inter-state claims, particularly in the forum of IUSCT.

In practice, the applicability of UNCITRAL Arbitration Rules and the "justifiable doubts test" has been affirmed since the first challenge initiated by Iran. A few months after the operation of the IUSCT, Judge Mangård made an informal remark during a meeting of the arbitrators in Chamber Three, the content of which was regarded by Iran as *"accusing the Islamic Republic of Iran of condemning executions"* and *"a groundless prejudgment against a political system"*.[53] As a result, Iran argued that Judge Mangård was disqualified from rendering any fair judgment due to the political approach and intended to remove Judge Mangård unilaterally by exercising its sovereign right.[54] In other words, Iran had planned to disqualify Judge Mangård *above and outside* the procedure laid down in the UNCITRAL Arbitration Rules of 1976.[55] The IUSCT disagreed with Iran and found that:

50 Art. III.2 Claims Settlement Declaration.
51 The challenge is subject to the procedural requirement under Art. 11–12 IUSCT Tribunal Rules.
52 See Art. 10 and Art. 13 UNCITRAL Arbitration Rules of 1976.
53 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 192.
54 Ibid.
55 Ibid.

"[n]either the Claims Settlement Declaration nor any of the other instruments relating to the settlement of disputes between Iran and the United States contains anything that can be interpreted as indicating that alternative means for removing an arbitrator exist. Art. III, paragraph 2 of the Claims Settlement Declaration makes it abundantly clear that the only method by which an arbitrator may be removed from office is through challenge by a party and decision by the Appoint Authority pursuant to Article 11 and 12 of the (1976) UNCITRAL Rules."[56]

Later, Judge Moons, the Appointing Authority, upheld what had found by the Tribunal and further confirmed that: *"[i]f the High Contracting Parties wish to remove a duly Appointed arbitrator from office, the only option open to them* […] *is to use the challenge procedural provided for in articles 10 to 12 of the (1976) UNCITRAL rules …"*[57] Hence, the challenge standard (Art. 10, "justifiable doubts test") and procedure (Art. 11–12) under UNCITRAL Arbitration Rules were consolidated as the exclusive mechanism for seeking to disqualify an arbitrator.[58]

The next question is, what constitutes a justifiable doubt? Neither UNCITRAL Arbitration Rules, nor the additional Notes to the IUSCT Tribunal Rules provide detailed grounds. Even worse, except under three challenges, the targeted arbitrator withdrew from the office,[59] the left 19 challenges were all dismissed by the Appointing Authority.[60] Thus, what

56 IUSCT Decision about the Challenging of Judge Mangard of 26 January 1982, Section V, para. 11.

57 Decision on the objections to Mr. N. Mangard as a Member of the Iran-United States Claims Tribunal, lodged by the Islamic Republic of Iran, delivered by Charles Moons on 3 May 1982. Quoted from CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules).* Oxford: Oxford Commentaries on International Law, 2013, p. 193.

58 However, not all challenges were filed based on "justifiable doubts" reasons. For example, Iran's challenge against Judge Arangio-Ruiz was based on alleged overall neglect of his duties of arbitrator which constituting a failure to act. Decision of the Appointing Authority on the Challenge by Iran of Judge Arangio-Ruiz of 24 September 1991. Nevertheless, "failure to act" also constitutes a ground to challenge under Art. 13 of the UNCITRAL Arbitration Rules and the IUSCT Tribunal Rules. As a result, the UNCITRAL Arbitration Rules are still respected.

59 Judge Briner withdrew from Case No. 55 due to his close relationship with claimant. Iran withdrew Judge Kashani and Judge Shafeiei due to their physical assault on Judge Nils Mangård.

60 This statistic includes challenges in private claims since both challenges in private and public claims share the same standards. By the same token, the following examples contain all grounds that parties have invoked, including those in private claims.

we can learn from the practices is what does not constitute a justifiable doubt: informal comments on the judicial system of one party[61], violation of particular national law[62], instructing inquiry into the security account[63], specific procedural arrangements[64], the wording used by a targeted arbitrator for self-defense[65], calculated scheme[66], refusal to self-recuse[67], a phone call after the Appointing Authority finishing appointing a new third-country arbitrator[68], breach of confidentiality[69], financial dependence on one party[70], prior involvement as an arbitrator in an ICC arbitration between Iran and a US corporation[71], earlier service as general counsel of the parent corporation of one government[72].

2.3 ICJ: "Stones From Other Hills"

According to the ICJ Statute, judges can be recused from the bench for a particular case by themselves, parties to the dispute, or the President of the Court, but the grounds for disqualification in these three circumstances are quite similar. In the case of voluntary recusals, Art. 24 provides that a judge could decide not to participate in a specific case "for some special reasons", whose meaning has not been interpreted by any normative instruments and can only be clarified in practices. Within 40 cases of self-recusals, at least

61 IUSCT Decision about the Challenging of Judge Mangard of 26 January 1982.

62 Decision of the Appointing Authority on the Third Challenge by Iran to Judge Briner of 25 September 1989.

63 Decision of the Appointing Authority on the Challenge of Judge Skubiszewski of 30 August 1999.

64 Ibid., p. 445.

65 Ibid., p. 450.

66 Joint Decision of the Appointing Authority on the Challenges of Judges Skubiszewski and Arangio-Ruiz of 5 March 2010.

67 Ibid.

68 Decision of the Appointing Authority on the Challenge of Judge Charles Brower of 3 September 2010.

69 See Decision of the Appointing Authority on the Challenge of Judge Broms of 7 May 2001.

70 Decision by the Appointing Authority on the Challenge of Judges Noori, Ameli, and Aghahosseini of 19 April 2006.

71 Decision by the Appointing Authority on the Challenge of Judge Seifi of 3 September 2010.

72 Decision of the Appointing Authority on the Challenge of Judge Noori of 31 August 1990: *"even if his service as Head of the NIOI legal office [the parent corporation of the respondent] and his failure to disclose this to the President of the Tribunal were true, I do not feel this doubt can be termed justifiable doubt.*"

20 of them are raised due to judges' previous involvement in the specific disputes,[73] which is undoubtedly forbidden under Art. 17 of the Statute: *"1. No member of the Court may act as agent, counsel, or advocate in any case. 2. No member may participate in the decision of 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."*[74] Matters are provided in Art. 17 account for the vast majority of "special reason" of Art. 24. Indeed, as *Rosenne* has pointed out, *"there is an obvious potential overlap between disqualification under Art. 17 and a case of a member withdrawing, or being asked to withdraw, under Art. 24"*.[75] On top of the "previous involvement standard", other circumstances considered as "special reasons" are numbered, such as intimate personal relationships with the agent of one party,[76] appointed as *ad hoc* judge during the new round of judge-election.[77]

73 Sir Benegal Rau in *Anglo-Iranian Oil Co*; Lauterpacht in *Nottebohm*; Philip C. Jessup in *Temple of Preah Vihear*; Sir Muhammad Zafrulla Khan in *Barcelona Traction, Light and Power Company, Limited*; Judges Petren and Ignacio-Pinto in *Review of UNAT Judgment No. 158 Advisory Opinion*; Judge Oda in *Aegean Sea Continental Shelf*; Judge Bedjaoui in *Arbitral Award of 31 July 1989 (Guinea-Bissau vs. Senegal)*; Judge Weeramantry in *Certain Phosphate Lands in Nauru*; Dame Rosalyn Higgins and Carl-August Fleischhauer in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; Tomka in *Gabčíkovo-Nagymaros case*; Dame Rosalyn Higgins in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*; Dame Rosalyn Higgins and Carl-August Fleischhauer in *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; Simma in *Certain Property*; Dame Rosalyn Higgins in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*; Judge Simma and Judge Parra-Aranguren in *Maritime Delimitation in the Black Sea*; Judge Hanqin in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*. The reasons for self-recusal are not always given to the public. See GIORGETTI, C. The Challenge and Recusal of Judges of the International Court of Justice. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, pp. 18–25; see also JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012; COUVREUR, M. P. Article 17. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

74 Art. 17 ICJ Statute.

75 JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

76 INTERNATIONAL COURT OF JUSTICE. *International Court of Justice Yearbook 1956–1957*. The Hague: International Court of Justice, 1957, p. 86; Judge Jules Basdevant recused himself in *Effect of Awards made by the United Nations Administrative Tribunal (Advisory Opinion)*.

77 INTERNATIONAL COURT OF JUSTICE. *International Court of Justice Yearbook 1984–1985*. The Hague: International Court of Justice, 1985, p. 177; Judge Jennings recused himself in *Application for Revision and Interpretation of the Judgment of 24 February 1982 concerning the Continental Shelf*.

President can also "suggest" one judge to quit the bench based on "some special reason". However, in practice, only in one case did the President "suggest" the judge quit the bench.[78] In the *South West Africa case (Ethiopia & Liberia vs. South Africa)*, the President, Sir Percy Spender, announced in the hearings that Sir Mohammed Zafrullah Khan would not participate in the case, with no official explanation of this decision or statement of any reasons for it.[79]

As for disqualification requested by third parties, Art. 34 para. 2 of the Rules of the Court (ICJ) provides that a party can communicate *confidentially* to the President in writing *"any facts which it considers to be of possible relevance"*[80] to the application of Art. 17 and Art. 24 of the ICJ Statute, and which the parties believe may not be known to the Court. As a result, the "prior involvement standard" (Art. 17) and "some special reason" (Art. 24) also function as the grounds used to challenge the judges by the parties. The case law concerning the disqualifications initiated by the disputed parties is also rare (only 3 cases). In *South West Africa Case (Ethiopia vs. South Africa & Liberia vs. South Africa)*, the respondent South Africa, in a nonpublic notice, intended to challenge the compositions of the Court as a whole.[81] Other two challenges that occurred in the proceedings of the advisory opinions and all of which were filed concerning the application and interpretation of Art. 17 para. 2 of the ICJ Statute. In *Namibia Opinion*, South Africa argued that three judges had acted as representatives of their Governments in United Nations organs dealing with matters concerning South Africa.[82] In *Wall Opinion*, Israel sent a confidential letter to the President, contending

78 Art. 24 para. 2 ICJ Statute.

79 According to the subsequent declarations made by Judge Khan, the President had asked him not to participate in the case because he had at one point been nominated as an *ad hoc* judge by one of the parties, though he had not acted in that capacity. – JENNINGS, R. Article 24. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012; see also ROSANNE, S. *The Law and Practice of the International Court, 1920-2005*. Leiden: Brill – Nijhoff, 2006, p. 1058.

80 Art. 34 para. 2 ICJ Rules.

81 Order of the ICJ of 18 March 1965, *South West Africa case (Ethiopia & Liberia vs. South Africa)*, pp. 3–4. The Court had the hearing in closed session and the notice sent by South Africa has never been published.

82 Advisory opinion of the ICJ of 21 June 1971, Case *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, pp. 3, 6, 9.

that Judge Elaraby, as an Egyptian diplomat, had been involved in decisions at the General Assembly relevant to the case.[83]

3 Reasons Behind the Asymmetric Practices

This section tries to explore the reasons why states seem "careless" about the impartiality and independence of the arbitrators in inter-state cases proceeded in the arbitral and judicial contexts. Besides, this part also wants to figure out why states are highly motivated to raise challenges in the proceedings of the IUSCT as mixed claims tribunals. Following are reasons that may have an impact on the states' strategies and choices.

3.1 Historical Perspective: Authority vs. Impartiality

Although inter-state arbitration and international commercial arbitration have a long history, the origins of these two are different,[84] as may give rise to different attitudes towards the role of arbitrators. When we observe the inter-polities[85] arbitration practices dating back to the Middle Ages, the arbitrators were every so often the Pope (Holy See), the Holy Roman Emperor[86], ecclesiastics, or rulers of neighboring or neutral states.[87] Their judgments to the disputes were not based on the merits of international law, and frequently with no reasons to their decisions provided. Further, due to their involvement in political matters and intrigues at the time, they hardly could be regarded as independent or objective.[88] As a result,

83 Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, pp. 3–4.

84 See generally NUSSBAUM, A. *A Concise History of the Law of Nations*. New York: Macmillan, 1954, 376 p.; see also BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 6–67.

85 The notion of "sovereign states" arises after 16th century. – BODIN, J. *Six Books of the Commonwealth (Blackwell's Political Texts)*. New York: Macmillan, 1955, 212 p.

86 BROWER, H. C. Arbitration. *Max Planck Encyclopedias of International Law* [online]. February 2017 [cit. 2. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e11?rskey=5SQkLI&result=1&prd=MPIL

87 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 12.

88 BROWER, H. C. Arbitration. *Max Planck Encyclopedias of International Law* [online]. February 2017 [cit. 2. 5. 2021]. Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e11?rskey=5SQkLI&result=1&prd=MPIL

the validity of arbitration in this period was based on the secular and clerical authority of the Pope or the Heads of States other than their expertise or impartiality. It is noteworthy that "adjudication by the Heads" continued to exist after the 1899 and 1907 Hague Conferences when the contemporary arbitral model was established. For instance, the *Clipperton Island Arbitration*, a territorial sovereignty dispute between Spain and Mexico, was decided by Victor Emmanuel III, the King of Italy in 1931.[89]

On the contrary, international commercial/investment arbitration develops in different paths. Commercial arbitration had its beginning with the practices of the market and in the merchant gilds in Middle Ages.[90] Charters of numerous guilds, such as the Company of Clothworkers or the Gild of St. John of Beverley of the Hans House, provided mandatory arbitration of disputes among members.[91] Indeed, the spontaneously formed guilds and fairs, rather than the Pope or the King, were central to the development of commercial arbitral mechanisms.[92] Accordingly, it is the expertise, independence and impartiality of arbitrators, rather than their political authority, that justifies the validity of the decisions. By way of examples, Art. 57 of the ICSID Convention provides that the disqualification of arbitrators should base on a manifest lack of the qualities including "high moral character, recognized competence in the fields of law, commerce, industry or finance, exercising independent judgment" as required by Art. 14 ICSID Convention.[93] Also, the "justifiable doubts to the independence and impartiality" standard were first adopted in commercial arbitration rules at an international level, i.e., the UNCITRAL Arbitration Rules of 1976,

89 Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island. In: *The American Journal of International Law*, 1932, Vol. 26, no. 2, pp. 390–394.

90 WOLAVER, E. S. The Historical Background of Commercial Arbitration. *University of Pennsylvania Law Review*, 1934, Vol. 83, no. 2, p. 133.

91 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 30.

92 Ibid., p. 31.

93 In the Spanish Version, the text refers to "impartiality" not "independence". Since all language versions of the ICSID Convention are equally authentic (ICSID Arbitration Rule 56), there is a general consensus that both requirements (impartiality and independence) are mandatory. CLEIS, N. M. *The Independence and Impartiality of ICSID Arbitrators, Current Case Law, Alternative Approaches, and Improvement Suggestions*. Leiden: Brill – Nijhoff, 2017, pp. 12–13.

a comprehensive set of procedural rules for the conduct of arbitral proceedings arising out of their commercial relationship.[94] The same standard is at present accepted in many investment arbitrations.[95]

However, history is intricate. The dichotomy between the role of arbitrators in inter-state and commercial arbitration in their initial days, i.e., Pope/King vs. Expertise, may not always tell the whole story. It is proposed that even in ancient times, impartiality and independence of arbitrators were central to the state-to-state arbitral process.[96] Besides, in the later Roman Empire, the church also played a leading role in commercial arbitration, with arbitral jurisdiction exercised by Christian bishops.[97] Even though "arbitration by Head/Pope" had an ideological impact on latter inter-state arbitration, such as the absolute authority of the arbitrator must be respected, the *PCA Optional Rules* adopted in 1992, which incarcerates the UNCITRAL Arbitration Rules, has already transformed the role of arbitrators similar to that in commercial arbitration.[98] Anyway, investigating the reasons behind the asymmetric practices from the viewpoints of history just provides one possible answer.

3.2 Enforcement Mechanism of Different Categories of Arbitrations

How can the enforcement mechanism affect the willingness of parties towards the arbitrator-challenge? Two aspects are considered as relevant: first is about the effectiveness of enforcement mechanism, i.e., whether

94 As will be discussed in Part 4, the "justifiable doubts" standard has been widely shared by the domestic arbitration system.

95 See Decision on the Challenge to Mr. Judd L. Kessler of the London Court of International Arbitration of 3 December 2007, *National Grid PLC vs. the Republic of Argentina*, Case No. UN 7949; Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, of the ICSID of 12 August 2010, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa vs. Argentine Republic*, Case No. ARB/07/26, para. 43; Decision on Challenge to Arbitrator of the ICSID of 8 December 2009, *Perenco Ecuador Ltd. vs. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador ("Petro Ecuador")*, Case No. ARB/08/6, para. 54–58.

96 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 10.

97 Ibid., p. 28.

98 *"This provision (Art. 11) replicates Art. 11 of the 2010 UNCITRAL Rules, which improves on the 1976 UNCITRAL Rules by referring expressly to the continuous nature of arbitrators' disclosure obligations."* – BROOKS, W. D. et al. *A Guide to the PCA Arbitration Rules*. Oxford: Oxford University Press, 2014, p. 50.

the arbitral awards can be executed in domestic courts; and second, whether the lack of impartiality and independence of the arbitrator can be used as grounds to annul or deny recognition/implementation of the foreign awards.

3.2.1 Impartiality/Independence as the Perquisite to Enforcement

In international commercial arbitration, arbitrators' lack of impartiality and independence can be a basis for seeking to annul or deny recognizing/enforcing an arbitral award. Although Art. 34 para. 2 of the UNCITRAL Model Law or Art. V of the New York Convention does not include provisions directing specifically at the lack of independence of an arbitrator, the tribunal composed by partial and dependent arbitrators is arguably not constituted in accordance with the parties' agreement or with applicable law, then violating Art. 34 para. 2 letter a) point iv of the UNCITRAL Model Law. It is also proposed that a partial tribunal is inconsistent with conceptions of procedural (or other) public policy required in Art. 34 para. 2 letter b) point 2 UNCITRAL Model Law.[99] Similar conclusions apply to the recognition and implementation of foreign awards in domestic courts because a partial tribunal (1) is not composed in accordance with the parties agreement or the law of the country where the arbitration was seated[100], (2) makes one party unable to present his case[101], and (3) violates mandatory law rules or public policies of the recognition forum[102]. Nevertheless, several states' domestic law directly stipulates the annulment,

99 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 3564.

100 Art. V para. 1 letter d) New York Convention. Art. 13 Arbitration Law of the People's Republic of China provides that *"[a]n arbitration commission shall appoint its arbitrators from among righteous and upright persons"*.

101 Art. V para. 1 letter b) New York Convention. See also Section 4-11 comment f (2019) Restatement of the U.S. Law of International Commercial and Investor-State Arbitration: *"Ordinarily, the requirement that a party has an opportunity to present its case also implies an impartial tribunal that is willing to consider each party's presentation of its case and make a determination based on the parties' factual submissions and legal arguments."*

102 Art. V para. 2 letter b) New York Convention. For instance, Art. 1 Arbitration Law of the People's Republic of China provides that *"this Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes …"*. Accordingly, the impartiality of arbitration is regarded as "public policy" in China and then the Award will be denied recognition.

non-recognition /enforcement rules[103] and a great many foreign awards have been denied for want of impartiality and independence of the arbitrators.[104]

Anyway, in either the annulment and the non-recognition/implementation circumstances, the applicable standards are lower than those applied to remove an arbitrator. It is not sufficient merely to demonstrate "justifiable doubts" about an arbitrator's impartiality or "risks" of arbitrator bias. Instead, to take the exceptional step of denying recognition of an award, an award-debtor must provide clear evidence demonstrating both the likelihood of unacceptable bias and partiality of an arbitrator and the probability that this bias had a material effect arbitral process and tribunal's decision.[105] Evidence of doubts about an arbitrator's impartiality is not sufficient for non-recognition.

Given the enforcement of the foreign awards may be hindered by the judicial review dependent on the lack of impartiality and independence of the arbitrator, the parties may prefer to challenge biased arbitrators at the very beginning of the case as a prophylactic measure because the significant costs, time and human resources spent on it. However, lack of impartiality and independence has never been written in any rules as a prerequisite to executing an award in inter-state cases (neither in *ad hoc* arbitration, nor judicial forums, nor even the mixed claims tribunal). In other words, the quality of arbitrators cannot be used as a reason to annul or deny the enforcement of an award or judgment in inter-state cases. Accordingly, compared to the frequent challenges raised in commercial arbitration, states may feel it unnecessary to challenge arbitrators in inter-state cases.

103 Section 10 letter a) point 2 U.S. Federal Arbitration Act: *"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration* […] *(2) Where there was evident partiality or corruption in the arbitrators, or either of them"*; See also Art. 237 para. 5 Civil Procedure Law of the People's Republic of China: *"Where the respondent adduces evidence that the arbitration award falls under any of the following circumstances, the people's court shall, upon examination and verification by a collegial bench, issue a ruling not to enforce the arbitration award: The opposing party withholds any evidence to the arbitral institution, which suffices to affect an impartial award."*

104 See, e.g., Judgment of the Cour de cassation of 24 March 1998, *Société Excelsior Film TV vs. UGC-PH*, Case No. 95-17.285; Judgment of Bezirksgericht in Affoltern am Albis of 26 May 1994; Judgment of the District Court of Amsterdam of 27 August 2002, *Goldtron Ltd vs. Media Most BV*, Case No. 02.398 KG; Judgment of the Israeli Central District Court of 15 April 2012, *Vuance Ltd vs. Dep't of Material Provisions of Ministry of Internal Affairs of Ukraine*, Case No. 12254-11-08.

105 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 3939.

3.2.2 Effectiveness of the Enforcement Mechanism

As for investment arbitration proceeded according to the ICSID Convention, if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID member states *"as if it were a final judgment of a court in that State"*.[106] For cases involving non-party states to the ICSID Convention, the awards are to be recognized and implemented by reference to the New York Convention, according to which the awards of the international arbitrators can be enforced in over 160 countries.[107] It should be noticed that, unlike the international commercial arbitration convention such as the New York Convention or the UNCITRAL Model Law, the ICSID precludes any judicial review/remedy of the domestic courts and does not allow the domestic courts to refuse to implement the awards based on grounds other than those provided in the Convention itself.[108] As described by *Aron Broches*, the ICSID Convention establishes *"a complete, exclusive and closed jurisdictional system, insulated from national law"*.[109] At the end of the day, the losing parties have little control over the final awards when their assets are frozen or paid by the enforcement courts. Thus, every circumstance that may influence the outcome of the decision will cause parties' great attention and every procedural tool of the proceedings will be well-utilized.

However, the arbitral awards of the inter-state tribunal, or even a piece of judgment from a standing court, though normatively binding on the parties,[110] are not enforceable. Unlike international commercial/investment arbitration,

106 Art. 54 para. 1 ICSID Convention. Also, for cases involving non-party states to the ICSID Convention, the award can be recognized and implemented by reference to the New York Convention. See Introduction to Investment Arbitration. *International Arbitration* [online]. [cit. 5. 5. 2021]. Available at: https://www.international-arbitration-attorney.com/investment-arbitration/

107 Contracting States. *New York Arbitration Convention* [online]. [cit. 5. 5. 2021]. Available at: https://www.newyorkconvention.org/countries

108 Art. 53 para. 1 ICSID Convention: *"The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."*

109 BROCHES, A. Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution. *ICSID Review-Foreign Investment Law Journal*, 1987, Vol. 2, no. 2, pp. 287–288.

110 See Art. 11 Annex VII of the UNCLOS; Art. 59 ICJ Statute; Art. 96 UN Charter; Art. 32 para. 2 PCA Optional Rules for Arbitrating Disputes between Two States.

most inter-state disputes do not involve pecuniary obligations and cannot simply be enforced by a domestic court. Thus, even an award or judgment comes into effect, only through the subsequent/final agreements concluded by disputed parties can the disputes be regarded as being resolved.[111] However, the final agreements are reached by negotiation and every so often, they may not strictly follow the findings and recommendations from the previous judgments or awards.[112] In other words, states have more freedom to choose how to deal with the decision, as the arbitral or judicial settlement is only one part of the strategy.[113] Accordingly, parties still have control over the outcomes of the dispute "settled by the tribunals", by virtue of their economic, political and military power during the post-judicial process. After all, it is not abnormal that the losing parties totally ignore the adverse awards or judgments.[114] In conclusion, the lack of impartiality and independence of the arbitrators, which may only influence the decisions of the awards, is not that important in inter-state arbitration.

The enforcement mechanism of the IUSCT is a different story among inter-state dispute mechanisms. For one thing, the nature of the majority of claims brought before the IUSCT regards assets and pecuniary matters.[115] Even within inter-state cases, the disputes concerning the interpretation

111 A dispute is deemed unsolved when *"the possibility of an agreement between the parties proves to be unrealistic"*. – CONFORTI, B. and C. FOCAREELLI. *Law and Practice of the United Nations*. Leiden: Martinus Nijhoff Publishers, 2010, p. 197; see also BRUNO, S. et al. *The Charter of the United Nations: A Commentary, Volume I*. Oxford: Oxford University Press, 2012, p. 1150.

112 As for detailed research on the relations between judgments and final agreement, see SCHULTE, C. *Compliance with Decisions of the International Court of Justice*. Oxford: Oxford University Press, 2004, 485 p.; see also TUMONIS, V. Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement. *Wisconsin International Law Journal*, 2013, Vol. 31, no. 1, p. 41.

113 Several peaceful dispute settlement methods have been provided in Art. 33 UN Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, regional agencies, or arrangements.

114 Dispute between Argentina and Chile concerning the Beagle Channel. In: *United Nations Reports of International Arbitral Awards*, 1998, Vol. 21, p. 53; Judgment of the ICJ of 27 June 1986, *Concerning Militarily and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America)*, p. 14; Award of the PCA of 12 July 2016, *The South China Sea Arbitration (The Republic of Philippines vs. The People's Republic of China)*, Case No. 2013-19.

115 The *IUSCT General Declaration* has five Points in total and four of them relate to assets issues. In addition, according to Art. II Claims Settlement Declaration, the IUSCT has jurisdiction on private claims arising *"out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights."*

and application of the Convention are only half of the official claims relating to the purchase and sale of goods and services.[116] Accordingly, the enforcement mechanism of the IUSCT is similar to the international commercial and investment arbitration that *"[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws"*.[117] In order to prevent difficulties in Iran's implementation, the US and Iran governments established a special interest-hearing Security Account beforehand, the funds of which are *"all Iranian deposits and securities in US banking institutions in the United States, together with interest thereon"* [118] and *"are to be used for the sole purpose of securing the payment of, and paying, claims against Iran"*[119]. On top of that, Iran shall promptly make new deposits sufficient to maintain a minimum balance of US $ 500 million in the Account. The NV Settlement Bank of the Netherlands[120] is designated as *"depository of the escrow and security funds"* to ensure the operation of the Security Account *"under the instructions of the Government of Algeria and Central Bank of Algeria"*.[121] Since the implementation of the awards of the IUSCT can be directly enforced and is guaranteed by multiple mechanisms,[122] the challenges against bias arbitrators in prior are of significance relating to the amount of compensation.

3.3 Particular Reasons to the Practices of the ICJ and the IUSCT

Other than the reasons discussed above (the effectiveness of enforcement, etc.), the rare recusals in the ICJ and the frequent challenges in the IUSCT basically boil down to their unique structures and functions.

116 According to the published statistics provided by the website of IUSCT, 33 claims are about "interpretation or performance of the Algiers Declarations" with 77 claims concerning official commercial claims. – Cases. *Iran-United States Claims Tribunal* [online]. [cit. 19. 5. 2021]. Available at: https://iusct.com/cases/

117 Art. VI.3. Claims Settlement Declaration.

118 Para. 6 IUSCT General Declaration.

119 Ibid., para. 7.

120 Decision (DEC 8-A1-FT) of the Iran-United States Claims Tribunal of 17 May 1982, *The Islamic Republic of Iran vs. The United States of America*, Case No. A/1, para. 15.

121 Para. 2 IUSCT General Declaration.

122 The tribunal now has resolved almost all of the approximately 4,700 private U.S. claims. See Office of the Assistant Legal Adviser for International Claims and Investment Disputes, Iran-U.S. Claims Tribunal. *U.S. Department of State* [online]. [cit. 4. 5. 2021]. Available at: https://www.state.gov/iran-u-s-claims-tribunal/

3.3.1 Recusals of Judges in the ICJ

Why states seldom challenge judges in the forum of ICJ? For one thing, ICJ judges are nominated by national groups in the PCA, and elected by the voting process in the General Assembly and Security Council, respectively.[123] It is proposed that a successful election, to some extent, guarantees the good qualities and competence of judges so that to have them decide whether a conflict exists that should prevent them from sitting in a specific case.[124] However, qualities and best knowledge of international law have little to do with the fairness of the judges, and the reputation of the arbitrator is immaterial.[125] In addition, though judges do need to swear at the first public sitting at which the Member of the Court is present,[126] their professed intention to be independent and impartial is also considered irrelevant.[127] Perhaps the most significant reason lies in that, the ICJ consists of 15 sitting judges rather than 5 or 3 in *ad hoc* arbitration. The large scale of the bench is sufficient to accommodate the potential of one or two judges unable to sit without impacting the final outcome of a thoughtfully decided judgment. To put it another way, parties' challenges against one or two judges may have a relatively small impact on the final decisions. That may be the reason considered by South Africa when it chose to challenge the composition of the whole court in the *South West Africa Case*.

3.3.2 Challenges of Arbitrators in the IUSCT

Contrary to the rare practices of challenge in the ICJ and *ad hoc* inter-state tribunal, the frequent challenges brought by states in the IUSCT have some

123 Art. 4 ICJ Statute.

124 GIORGETTI, C. The Challenge and Recusal of Judges of the International Court of Justice. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 25.

125 See Decision on Challenge to Arbitrator of the ICSID of 8 December 2009, *Perenco Ecuador Ltd. vs. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, Case No. ARB/08/6, para. 62: *"There is nothing in the IBA Guidelines that supports a special deference to the subjective positions of arbitrators based on their level of experience or standing in the international community."*

126 Art. 4.1 ICJ Rules: *"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."*

127 Decision on Challenge to Arbitrator of the PCA of 17 December 2009, *ICS Inspection and Control Services Limited (United Kingdom) vs. The Republic of Argentina*, Case No. 2010-9, para. 5.

special reasons. First, it should be highlighted that the IUSCT came into existence as one of the measures to resolve the crisis between Iran and the US after the 1979 Tehran hostage event.[128] Two countries have severed diplomatic relations since 1980. As a result, Iran and the US do not have regular or formal channels for inter-governmental dialogues. The external political relations between Iran and the US continued to deteriorate in the following decades, with several armed conflicts. The frequent challenges filed by these two countries during the proceedings represent their poor relations and suspicions.[129] As one of the US Council described, *"the work of the Tribunal at mid-life took place against a political background that hardly seemed conducive to calmness and efficiency"*.[130]

Second, as mentioned before, if looking into the details of each challenge, we may find almost all the challenges brought by Iran and the US have implied purposes or under unique circumstances. On the one hand, since most claims up to billions of dollars were brought against Iran, the Iranian government had little motivation to speed or facilitate proceedings. The reluctance of Iran can also be proved by the conducts of Iranian arbitrators, some of whom have been documented refusing to *"sign awards or absent themselves from deliberations in an attempt to prevent the Tribunal's chambers from completing their work"*.[131] As a result, 11 out of 12 challenges filed by Iran (including those in private claims) were against the third-party arbitrator as part of a strategy to delay proceedings, or even recurrently (7 times) against the President[132] when *"his position required him to make decisions that were potentially adverse to Iran's interests"*[133] to wreak havoc on the work

128 Official introduction to the IUSCT. *Iran-United States Claims Tribunal* [online]. [cit. 9. 5. 2021]. Available at: https://iusct.com/introduction/

129 CAPLAN, L. M. Arbitrator Challenges at the Iran-United States Claims Tribunal. In: GIORGETTI, C. (ed.). *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*. Leiden: Brill – Nijhoff, 2015, p. 116.

130 CROOK, R. J. The Tribunal at Mid-life: the American Agent's views. In: CARON, D. D. and R. J. CROOK (eds.). *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*. New York: Transnational Publishers, 2000, p. 152.

131 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, pp. 278–322.

132 Four times against Krzysztof Skubiszewski and three times against Judge Briner.

133 CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 137.

of the Tribunal.[134] On the other hand, the US and its nationals have a very interest in the integrity of the Tribunal's operations. Since they noticed the incorporation of Iranian arbitrators and *"numerous indications of direct ex parte contacts between Iranian respondents and persons inside the Tribunal aimed at influencing the disposition of cases"*[135], they hardly believed in the impartiality and independence of the Iranian arbitrators. Thus, it is not surprising that all the challenges brought by the US side are targeting the Iranian arbitrators. However, perhaps the US and its nationals accepted the inevitable independence of the Iranian arbitrators, and the outcome of a successful challenge is the replacement of another "bias" Iranian arbitrator. The US only addressed arbitrators' conduct that was believed to be fundamentally intolerable, such as physical attacks by arbitrators, breaches of confidentiality of deliberations, and financial dependence, to guarantee the ordinary operation of the Tribunal.

4 The Way Before and Way Beyond: Towards Harmonization

4.1 The Way Before: Unique Characters in Inter-State Arbitrator-Challenge

4.1.1 The Relative High Standard

Until now, no arbitrator has been successfully removed by the challenge process in inter-state cases. The standards applied in inter-state practices are relatively high. As discussed above, in *Chagos Arbitration*, the tribunal adopted the "justifiable doubts standards" embedded in the PCA Optional Rules but at the same time rejected the "appearance of bias" and "specific prior

134 It has also been argued that sometimes the untimely challenges filed by Iran also prove Iran's hesitancy to accept the arbitration, such as Iran's second challenge to Judge Briner that was brought after the majority had signed the English-language version of the award, which is not only used to undermine Judge Briner's leadership, but also to circumvent the finality of the award. See CARON, D. D. and L. M. CAPLAN. *The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules)*. Oxford: Oxford Commentaries on International Law, 2013, p. 125.

135 CROOK, R. J. The Tribunal at Mid-life: the American Agent's views. In: CARON, D. D. and R. J. CROOK (eds.). *The Iran-United States Claims Tribunal and the Process of International Claims Resolution*. New York: Transnational Publishers, 2000, p. 150.

involvement" standard submitted by Mauritius and the UK respectively. The thing is, what constitutes a "justifiable doubt"? How to identify such a subjective evaluation? The tribunal neglected to demonstrate neither of the questions in the final award and the only reason for the tribunal to accept this standard is that the text of "justifiable doubts" occurs in the PCA Optional Rules. In international commercial arbitration, the "justifiable doubt" is construed as *"the existence of risks or possibilities of partiality rather than requiring a certainty or probability of partiality"*.[136] As for the degree of the risks and possibilities, a mere "appearance" of partiality by an arbitrator, instead of an actual one, is sufficient for disqualification.[137]

This conclusion is consistent with the *Explanation* embedded in the IBA Guidelines, which confirms the standards are *"the use of an appearance test based on justifiable doubts about the arbitrator's impartiality or independence"*.[138] In practices, as concluded by a challenge decision proceeded in PCA: *"In all of the jurisdictions considered by the Working group in formulating the Guidelines, there was agreement 'that a challenge to the immateriality and independence of an arbitrator depends on the appearance of bias and actual bias.' "*[139] Accordingly, the "justifiable doubts" and "appearance of bias" are considered inalienable: the "appearance of bias" constitutes the degree of "doubt".[140] Thus, that the Tribunal in *Chagos Arbitration* separates these two standards by virtue of precluding the applicability of "private standards", actually raises the threshold of arbitrator-challenge in inter-state cases, where the "appearance of bias" is insufficient to disqualify an arbitrator.

The threshold is further increased when the tribunal decided to rely on the rules and practices of the recusal of judges in the judicial forum, i.e., the "prior involvement standard". Historically, the ICJ did not implement

136 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 1911.

137 Ibid., p. 1916.

138 Explanation to General Standard 2, letter b) IBA Guidelines.

139 Decision on Challenge to Arbitrator of the PCA of 8 December 2009, *Perenco Ecuador Ltd vs. Repub. of Ecuador*, Case No. IR-2009/1, para. 43.

140 *" '[A]ppearance of bias'* […] *which would govern matters before ITLOS should also be applied in an Annex VII arbitration."* – Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 15. Citing the Statement of Judge Thomas A. Mensah, former President and Judge of ITLOS, Annex 1, p. 5.

Art. 17 and Art. 24 ICJ Statute stringently showed a quite tolerant attitude towards the "close relations" between judges and the disputed party. For example, Judge Helge Klaestad (Norway) continued to sit in the *1951 Norwegian Fisheries case (Norway vs. UK)* even though he had been a member of the Supreme Court of Norway that had decided on the compatibility of a baseline with Norwegian law.[141] Similarly, Judges Jules Basdevant (France) and Green Hackworth (US) sat in the *1952 Case Concerning the Rights of Nationals of the United States of America in Morocco (France vs. the US)*. However, they had been legal advisers to their respective ministers of foreign affairs when the case was being addressed at the diplomatic level.[142] Even nowadays, the ICJ pursues a stricter interpretation of Art. 17 ICJ Statute, general participation or involvement will not necessarily entail disqualification of a judge. For instance, as suggested in Part 2, Judge Elaraby, an officer in the Emergency Special Session from which the Advisory Opinion request had emerged, was not considered as "participating in the case".[143] The high threshold of challenge in inter-state cases has been criticized by Judge Thomas Buergenthal, that Art. 17 and 24 ICJ Statute are constructed in a most formalistic and narrow way and "an appearance of bias" should be the standard adopted by the Court.[144]

4.1.2 Appearance of Bias: A General Principle of Law?

In *Chagos arbitration*, Mauritius claims that the principle of "appearance of bias" standard forms the general principle of law and should be regarded as international law sources.[145] The tribunal, in their reasoned decision, ignored responding to this issue. Indeed, it is always hard to prove any legal concept as the *"general principle of law recognized by the community of nations"*[146]

141 COUVREUR, M. P. Article 17. In: ZIMMERMANN, A. et al. (eds.). *The Statute of the International Court of Justice, A Commentary*. Oxford: Oxford University Press, 2012.

142 Ibid.

143 Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, pp. 3–4.

144 Dissenting Opinion of Judge Buergenthal to the Order of the ICJ of 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 10.

145 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 58.

146 VÁZQUEZ-BERMÚDEZ, M. Second report on general principles of law. *United Nations Official Document System* [online]. [cit. 14. 5. 2021]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement

since one should do a comparative analysis and suggest that the very legal concept is at least recognized by *"principal legal systems of the world"*[147] if not all the nations.[148] It is impossible to investigate the challenging standards of every legal system in this paragraph-limited paper. The arbitration rules of China (Chinese law system), United States ("US"), British (Common law system), France, German, Swiss (Continent law system) will be analyzed.

Although the UNCITRAL Model Law would like member states to accept the "justifiable doubts standard"[149], there is only limited judicial authority applying these standards.[150] For example, according to Art. 34 of Arbitration Law of the People's Republic of China, the withdraw of arbitrators must rely on the real or actual circumstances listed in the same Article[151], rather than "justifiable doubts to the arbitrators". In the US, since the focus of the inquiry under the *Federal Arbitration Act* is on the annulment of an award, not the removal of an arbitrator,[152] the threshold of the challenge is very demanding. As concluded by a US Appellate Decision, *"[a]rbitration differs*

147 Ibid., para. 25–27; see also ELLIS, J. General Principles and Comparative Law. *The European Journal of International Law*, 2011, Vol. 22, no. 4, pp. 949–971; see also Judgment of the ICJ of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited,* para. 50; Judgment of the ICJ of 30 November 2010, *Ahmadou Sadio Diallo (Republic of Guinea vs. Democratic Republic of the Congo)*, para. 104.

148 Ibid., para. 28: *"Rather, a more pragmatic approach appears in practice, where States and international courts and tribunals have sought to carry out wide and representative comparative analyses, covering different legal families and regions of the world."* Judge Tanaka was of the view that *"the recognition of a principle by civilized nations* […] *does not mean recognition by all civilized nations"*, see Dissenting Opinion of Judge Tanaka to the Judgment of the ICJ of 18 July 1966, *South West Africa Cases (Second Phase)*, p. 299.

149 Art. 12 para. 2 UNCITRAL Model Law: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."*

150 BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, p. 1895.

151 Art. 34 Arbitration Law of the People's Republic of China provides: *"In one of the following circumstances, the arbitrator must withdraw, and the parties shall also have the right to challenge the arbitrator for a withdrawal: (1) The arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) The arbitrator has a personal interest in the case; (3) The arbitrator has other relationship with a party or his agent in the case which may affect the impartiality of arbitration; or (4) The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or gift from a party or agent."*

152 The U.S. Federal Arbitration Act only addresses the arbitrators' impartiality in § 10, dealing with the grounds for vacating an award, with § 10 letter a) point 2 providing that an award may be vacated if *"there was evident partiality or corruption in the arbitrators, or either of them"*.

from adjudication, among other ways, because the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award".[153] Some US courts adopting this analysis have articulated even more demanding standards, holding that, *"[t]he conclusion of bias must be ineluctable, the favorable treatment unilateral"*.[154] In England, Section 24 para. 1 letter a) of the Arbitration Act 1996 is equivalent to Art. 12 of the UNCITRAL Model Law, permitting removal of an arbitrator where circumstances give rise to *"justifiable doubts as to his impartiality"*.[155] However, in practice, a variety of standards, such as "reasonable suspicion", "real likelihood", or "real possibility" of bias have been developed by case law.[156]

In the continental law system, Art. 1456 of the French Code of Civil Procedure provides *"[t]he arbitrator should reveal any circumstance likely to affect his independence or impartiality before accepting his mission"*[157] and prefers a *"definite risk"* of bias. In contrast, the law of Germany, Belgium and the Netherlands parallels Art. 12 para. 2 of the UNCITRAL Model Law,[158] where a German court emphasized that the focus of inquiry was the existence of "justifiable doubts" about an arbitrator's impartiality or independence. The Swedish Arbitration Act is similar to the *Arbitration Act of the People's Republic of China*, where fairly detailed provisions/requirements regarding independence and/or impartiality requirements are contained.[159] But again, those circumstances require actual bias or corruption.

153 Judgment of the US Court of Appeals, Seventh Circuit of 16 July 2004, *Sphere Drake Insurance Limited vs. American General Life Insurance Company*, Case No. 03-3750.

154 See, for example, Judgment of the US Court of Appeals, Third Circuit of 6 March 2013, *James D. Freeman, Appellant vs. Pittsburgh Glass Works LLC; PGW Auto Glass, LLC.*, Case No. 12-2026.

155 § 24 para. 1 and § 33 para. 1 English Arbitration Act 1996.

156 Judgment of the High Court of Justice, Queen's Bench Division, Commercial Court of 19 October 2005, *A.S.M Shipping Ltd of India vs. T.T.M.I Ltd of England*, Case [2005] EWHC 2238 (Comm), para. 39.

157 Art. 1456 French Code of Civil Procedure.

158 § 1036 para. 2 German Arbitration Act: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."*; *"An arbitrator can be challenged if factual circumstances exist that give rise to justifiable doubts about his impartiality or independence or if he does not have the qualifications agreed upon between the parties."*; Art. 1686 para. 2 Belgian Judicial Code: *"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality …"*; Art. 1033 para. 1 Dutch Code of Civil Procedure: *"An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."*

159 § 8 Swedish Arbitration Act.

Based on the foregone demonstration, it is hardly persuasive that "the appearance of bias" or "justifiable doubts standards" have been recognized by communities of nations and then constitute a general principle of law, which is totally different from the circumstances in international commercial and investment arbitration, where, as discussed above, most arbitration rules, conventions and practices recognize the "appearance of bias" or "justifiable doubts" standards.[160]

4.1.3 The Phenomenon of Fragmentation

The rules and principles of arbitrator-challenge applied in international commercial/investment arbitration, though with slight differences among institutions' rules, are by and large similar, i.e., *"justifiable doubts to the impartiality and independence of arbitrators"*.[161] The central diversity lies in the factual circumstances as justifiable grounds towards the challenge, which can hardly cause fragmentation since the most prestigious scholars and institutions have continued to summarize and revisit the experiences (cases and materials) in practice.[162] However, in inter-state arbitration, the main principles of arbitrator-challenge are not unified in different categories of tribunals. As suggested in Part 2, grounds and procedural requirements applied in the IUSCT are exclusively based on the UNCITRAL Arbitration Rules, which the Annex VII Tribunal precludes. It is worth noticing that, in order to determine what standards are applicable in inter-state arbitration regarding arbitrator-challenge, both parties and the tribunal ignored the rules and practices of the IUSCT. Even if the reason to overview the IUSCT is that no arbitrator has been successfully removed in IUSCT, at least the *Rules of Tribunal* could add more weight to the applicability of UNCITRAL Arbitration Rules. Instead, the IUSCT seemed to be identified as a totally different branch of the arbitral system. Accordingly, the rules of arbitrator-challenge are fragmented, at least in these two tribunals. If this phenomenon continues, it is reasonable to suspect

160 See *supra* note 34.

161 Ibid. As a result, Mauritius argued that *"there is no justification in law or policy for a different or lower standard of arbitral ethics in inter-State arbitrations"*. – Reply of Mauritius in PCA, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom),* Case No. 2011-03, para. 8.

162 See *infra* notes 166 and 167.

that the rules applied to arbitrator-challenge will keep distinguished in arbitrations initiated by different conventions in different international law fields. The "difficulty of arbitrator-removal" may become an essential factor in the state's choice of court/institution if no jurisdictional issues exist. Namely, states that intend to appoint the biased arbitrator (or have more control over the arbitrators) may submit cases to forums where the standard of arbitrator-challenge is high; or, on the contrary, states that have no interest in continuing the proceedings may choose tribunals where arbitrators are easy to remove as a strategy of delay or disturb.

4.2 The Way Beyond: Harmonizing the Challenge Rules in Public and Private Disputes

The next question is, should the rules of arbitrator-challenge in inter-state cases reconcile with those in international commercial/investment arbitration or with rules of recusal from the judicial system? To refer to this question is to tell the law-applier: "please choose". The Annex VII Tribunal in *Chagos Arbitration* decidedly chose the latter. Some domestic arbitration legislation also provides that arbitrators may be challenged on the same grounds that may be relied on in challenging a national court judge. For example, the 1966 European Convention Providing a Uniform Law on Arbitration provides in Art. 12 that *"[a]rbitrators may be challenged on the same grounds as judges"*.[163]

Nevertheless, the following reasons may suggest that the arbitrary distinction made by the *Chagos arbitration* has several shortcomings and that in inter-state cases, challenge rules may better be harmonized with those developed in private rules. First, as said before, neither the parties and the tribunal has contemplated the rules and practices of the IUSCT, which applies the same UNCITRAL Arbitration Rules to both public and private claims. Suppose the IUSCT adopted the same logic as the tribunal in the *Chagos*. In that case, it is unreasonable to have a higher standard applied to the same arbitrators only because both parties are not nationals. Second, the reason that the tribunal accepted the "justifiable doubt tests" but rejected the "appearance of bias standards" seems that the tribunal only

163 Art. 12 1966 European Convention Providing a Uniform Law on Arbitration; see also Art. 378 Luxembourg Code of Civil Procedure.

regards rules written in the PCA Optional Rules, which apply to inter-state circumstances as relevant.[164] However, the 1992 PCA Optional Rules is drafted modeled on the UNCITRAL Arbitration Rules of 1976 and the challenge rules are almost the same (Art. 9–12).[165] It makes no sense that the tribunal applies rules in such a formalistic manner that only bases on the title of the Convention rather than the substantial rules.

Third, by reference to the practices and rules of standing courts, the tribunal was actually using underdeveloped practices to interpret more immature ones. As showed above, the only rule applied regarding the recusal of judges is the "prior involvement standard", the threshold of which is relatively high and only in three cases did the party tried to challenge the judges but failed. As for the ITLOS, although the normative rules are quite similar to the ICJ Statute, since its establishment, no judges have been challenged yet. However, the grounds for the challenge in international commercial and investment arbitration are much maturer. Twenty-eight circumstances have been summarized by *Gary Born* in commercial arbitration as "justifiable

164 However, the Rules of Procedure concluded by Mauritius and the UK expressly refer to *"justifiable doubts as to his/her impartiality or independence"*, but the Tribunal ignored those wordings without giving any reasons. – Art. 6 Rules of Procedure in PCA, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03.

165 Besides, in 2012, the PCA has adopted the PCA Arbitration Rules 2012, the newest set of procedural rules consolidating four prior sets of PCA procedural rules which parties may use for the arbitration of disputes involving various combinations of states, state-controlled entities, intergovernmental organizations, and private parties. The PCA Arbitration Rules 2012 have been updated in light of the 2010 revisions to the UNCITRAL Arbitration Rules and the PCA's experience with its existing procedural rules and the UNCITRAL Arbitration Rules of 1976. However, the PCA Arbitration Rules 2012 do not replace the previous PCA Rules listed above, which remain valid and available. As for more discussion on the PCA Arbitration Rules 2012, see BROOKS W. D. et al. *A Guide to the PCA Arbitration Rules*. Oxford: Oxford University Press, 2014, pp. 49–57; The challenge standard is still modeling the UNCITRAL Arbitration Rules of 2010.

doubts" to the impartiality and independence of the arbitrator.[166] The IBA Guidelines also provides "red", "orange", and "green" lists of conducts that are well-accepted in international arbitration practices. The Secretariats of the ICSID and the UNCITRAL are most recently collaborating on a Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Two), providing applicable principles and provisions addressing matters including independence and impartiality.[167] If those circumstances influence the fairness of arbitrators in commercial/investment arbitration, they may also affect the objectivity and independence of arbitrators participating in inter-state arbitration. Sometimes the most experienced arbitrators may frequently participate in public and private disputes, and it is hardly persuasive to argue that the conduct/condition of one arbitrator is unbiased in one but biased in the other. Logically, it is irrational, as well as regrettable, if all those experiences are neglected.

166 Including: Judge in Own Cause, Arbitrator's Financial Interest in the Dispute; Arbitrator's Prior Involvement in the Dispute; Arbitrator's Present Employment by Party; Arbitrator's Business Dealings with Party; Arbitrator's Personal or Family Relationship with Party; Arbitrator's Current Representation of Party; Arbitrator's Law Firm's Current Representation of Party; Arbitrator's Relationship with Counsel to Party; Prior Representation of Part; *Ex Parte* Contacts During Arbitration; Interviews of Arbitrators; Arbitrator's Actions or Expressions of Opinion During Arbitration; Recurrent Arbitral Appointments by Same Party, Appointments in Related Proceedings, Issue Conflicts, Arbitrator's Service as A Mediator, Relationship Between Arbitrators, Improper Conduct by Arbitrator(s) vis-à-vis the Parties, Arbitrator's Representation Adverse to a Party to the Arbitration, Arbitrators' Relationship With Witness, Public Expressions of Opinion, Involvement in Previous Matters Raising Same or Similar Legal Issues, Professional Organizations and Communities, Effect of Removal of One Arbitrator on Other Arbitrators, Non-Disclosure of Conflict, Law Firm "Conflicts", Barristers' Chambers, Relevance of "Affiliates" of Parties. The circumstances summarized by Gary Born include some matters provided in IBA Guidelines. – BORN, G. *International Commercial Arbitration*. Alphen aan den Rijn: Kluwer Law International, 2021, pp. 2001–2028.

167 Art. 3 Draft Code of Conduct for Adjudicators in International Investment Disputes (Version Two) provides that: *"In particular, Adjudicators shall not: (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor; (b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding; (c) take instruction from any organization, government or individual regarding the matters addressed in the IID; (d) allow any past or existing financial, business, professional or personal relationship to influence their conduct or judgment; (e) use their position to advance any personal or private interest; or (f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties."*

Another question is, since Art. 287 of UNCLOS *"gives States the option alternatively to submit a case to ITLOS, the ICJ, or arbitration under Annex VII"*[168], should the rules concerning challenge under Annex VII be regarded as *lex specialis*? Otherwise, *"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"*.[169] Notwithstanding, the arbitration mechanism and international adjudication are totally different. As discussed in Part 2, the judges of ICJ have been nominated by states groups and elected by both the General Assembly and the Security Council with special care to the area distribution. Judges can sit on the bench for nine years with the probability to be re-elected and accordingly are less controlled by the states nominating them. Also, the ICJ Statutes and Rules of Court give judges the privilege of immunity.[170] On the contrary, none of those advantages apply to *ad hoc* arbitrators. Arbitrators in inter-state arbitrations have been appointed by parties on an *ad hoc* basis to hear a specific case involving specific parties and even been paid by the parties.[171] Moreover, the difference in the number of adjudicators will cause the weight of each to be different: the smaller the number, the greater the personal voice. To make it difficult for biased arbitrators to be challenged may have a worse impact on the fairness of the arbitration than that of the judicial proceedings since the weight of the views of any particular judge is diluted. In summary, the rules about the challenge of Annex VII arbitration should not be seen as *lex specialis* in line with rules or practices of a standing court.

5 Concluding Remarks

Several preliminary conclusions may be drawn from the preceding discussion:

1. Comparing to those in international commercial and investment arbitration, the practices of "arbitrator-challenge" in inter-state cases (including party-raised recusals of judges in the ICJ) are rare. Besides, no arbitrators or judges have been successfully challenged by states.

168 Art. 287 UNCLOS.

169 Reasoned Decision on Challenge of the PCA of 1 December 2011, *Chagos Marine Protected Area Arbitration (Mauritius vs. United Kingdom)*, Case No. 2011-03, para. 168.

170 Art. 18 ICJ Statute.

171 Generally, the "expense and costs" clause of the arbitration is provided in the Rules of Procedure of each case.

2. The ideology towards the role of arbitrators (authority vs. expertise), the effectiveness of enforcement (whether it can be executed in domestic courts or whether there exist preconditions), and the special structure and function of the specific tribunal together formulate the "willingness of parties" to raise the challenge against the adjudicators.
3. The frequent challenges raised by states in public claims of the IUSCT are affected by the poor political relations between the parties, the commercial nature of the claims, and the comprehensive enforcement mechanism. Besides, most challenges are filed under rather unusual circumstances or with unique litigate purposes.
4. The "justifiable doubts to arbitrators' lack of the impartiality and independence" is the standard adopted by both the Annex VII tribunal and the IUSCT. The ICJ prefers "prior involvement standard".
5. By virtue of precluding rules applicable to private disputes, referring to Rules and Practices of the ICJ and the ITLOS, and separating the "appearance of bias" element from "justifiable doubts standard", the Annex VII tribunal actually takes a higher standard than that in the IUSCT, international commercial and investment arbitration, which mostly adhere to the "appearance of bias" standard.
6. Thus, currently, the principles and rules regarding "arbitrator-challenge" in inter-state cases are not uniformed, but somewhat fragmented.
7. The arbitrator-challenge rules in inter-state disputes should not be treated differently. Instead of referring to the rules applied in the judicial forum, the laws concerning arbitrator-challenge in inter-state cases should be harmonized with international commercial and investment arbitration, where the rules, studies, and practices are much more mature and comprehensive.

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