THE BAN OF DOUBLE HATTING IN INVESTMENT ARBITRATION: A DOUBLE-EDGED SWORD?

Abstract: International arbitration has, in recent times, made efforts to address the growing concerns surrounding the practice of double hatting – the practice of counsels representing parties also accepting appointments as arbitrators in different proceedings. While the search for the optimal tool to regulate the practice has ranged from options such as a ban on concurrent appointments to the adoption of a code of conduct for arbitrators, some scholars have questioned the rationale for regulating the practice in the first place. This paper will challenge the axiomatic criticism of the practice of double hatting, and argue that instituting a ban on double hatting will severely prejudice the diversity and quality of arbitrators in international arbitration. In making these claims, the paper will analyse the principles of conflict of interest and issue conflicts which underpin the ban on double hatting. Using these parameters, it will argue that multiple roles donned by an arbitrator does not a priori warrant regulation and disqualification, but an assessment on a case-to-case basis, and highlight the flaws in the assumptions on which the ban on double hatting is premised. The paper will then engage with the proposed reforms surrounding double hatting in the recent ISDS-UNCITRAL Code of Conduct, and bring forth the systemic barriers created for women and second generation lawyers in securing arbitrator appointments, severely impacting the diversity and quality of the pool of arbitrators, and reinforcing the "male, pale and stale" stereotype of arbitrators in international arbitration.

INTRODUCTION

The independence and impartiality of arbitrators are of vital importance both to disputing parties and the legitimacy of investment arbitration as a whole.[1] Independence relates to a decision maker's relationships with the parties, which affect his or her views or attitudes on the merits of the dispute.[2] The requirement of independence is set forth in the International Centre for the Settlement of Investment Disputes ("**ICSID**") Convention, which states that arbitrators shall be "*persons … who may be relied upon to exercise independent judgment*."[3] On the other hand, impartiality means "*complete receptivity to the parties' arguments*."[4] An impartial arbitrator is "*one who is not biased in favour of, or prejudiced against, a particular party or its case*."[5] The common assumption is that an arbitrator in international disputes must be *both* impartial and independent.[6] Indeed, the Investor-State Dispute Settlement ("**ISDS**") system was designed to be a depoliticized process meant to fill deficiencies and gaps in the relatively

[1] Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration', in Christina Binder *et al.* (eds.), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 131; August Reinisch and Christina Knahr, 'Conflict of Interest in International Investment Arbitration', in Anne Peters and Lukas Handschin (eds.), *Conflict of Interest in Global, Public and Corporate Governance*, Cambridge University Press, 2012, p. 104; David Gaukrodger and Kathryn Gordon, 'Investor-state Dispute Settlement: A Scoping Paper for the Investment Policy Community', (2012) *OECD Working Papers on International Investment*, OECD Publishing 49 <http://dx.doi.org/10.1787/5k46b1r85j6f-en> accessed 18 August 2021.

[2]See Article 3.1 of the International Bar Association Rules of Ethics for International Association, 1987; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., p. 280 (indicating that arbitrators must be independent of the parties, and that conflicts of interest operate as bars to appointment and may lead to disqualification);see also Michael Hwang and Kevin Lim, 'Issue Conflict in ICSID Arbitrations' (2011) 8 TDM 478.

[3] Article 14(1) of the ICSID Convention states the qualities required of members of the Panels of Conciliators and Arbitrators. Article 12-16 of Conciliators of and Arbitrators. Article 40 of the ICSID Convention extends these requirements to arbitrators appointed from outside the panels.

[4]Sam Luttrell, *Bias Challenges in International Commercial Arbitration – The Need for a "Real Danger"*, (Kluwer Law International, 2009) 23.

[5]Bishop Doak and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration', (1998) Arbitration International14 399.

[6]Impartiality, which is usually paired with the obligation of independence, is not explicitly called for in either the English or the French version of the Convention. The Spanish version of Article 14 para. 1 does however stipulate that arbitrators must be impartial. Since all language versions of the ICSID Convention are equally authentic, the general consensus among scholars and ICSID arbitration users that both requirements are mandatory. See Christoph Schreuer, *The ICSID Convention: A Commentary* Article 14, Cambridge University Press (2001); Noah Rubins and Bernhard Lauterburg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration', in Christina Knahr *et al.* (eds.), *Investment and Commercial Arbitration – Similarities and Divergences*, Eleven International (2010) 157.

weak domestic legal institutions of certain countries.[7] Some observers argue that investment arbitration offers a neutral and impartial forum to resolve investor-State disputes as a basis for ensuring the rule of law.[8]

In recent years, criticisms have mounted that ISDS is in a state of crisis in many parts of the world surrounding the decisionmakers.[9] Due to the nature of the party-appointment system in *ad hoc* arbitration, critics have raised concerns on whether the outcomes of arbitral awards are being influenced by arbitrators' financial or strategic career interests.[10] This sentiment was captured by Professor Joost Pauwelyn:

> *ISDS is in a state of crisis in many parts of the world, and much of the criticism is focused precisely on who is deciding ISDS cases. The investment regime is said to be governed by arbitrators, rather than states. Arbitrators are labelled as "private judges" operating in secrecy, biased in favor of large multinationals, without regard to conflicts of interest and issuing inconsistent decisions.…the world investment regime seems, at present, to have too much rule of lawyers and not enough rule of law.*[11]

[7] Susan Franck, 'The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?', 12 U.C. Davis Journal of International Law & Policy 70 (explaining that "*[i]nvestment treaty arbitration was created to provide a depoliticized dispute resolution process for the adjudication of public law rights*"); William Dodge, 'Investor-State Dispute Settlement Between Developed Countries; Reflections on the Australia-United States Free Trade Agreement' (2006) 39 Vanderbilt Journal of Transnational Law 14 ("*BITs offered foreign investors the benefits of avoiding domestic courts in less developed countries and of using a depoliticized process in which they could press their own claims without intermediation by their home states*.").

[8] Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press (2005) 265 ("*In the field of international investments, arbitral tribunals are instruments of the rule of law*"); Charles N. Browner and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law', (2008) 9 Chicago Journal of International Law 497; Sergio Puig, 'Blinding International Justice', (2016) 56 Virginia Journal of International Law 663.

[9] Pia Eberhardt and Cecilia Olivet, *Profiting From Injustice, How Law Firms, Arbitrators And Financiers Are Fuelling An Investment Arbitration Boom*, (Corporate Europe Observatory and the Transnational Institute, 2012) 30; Antoni Eliason, 'Evidence Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform' (2018) 50 Georgetown Journal of International Law 3 ("*Current challenges to the legitimacy of the system indicate that arbitrators are not perceived as [impartial]*.").

[10] Muthucumaraswamy Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Year Book of International Law 33 ("*Though neutrality is the ideal subscribed to in international arbitration, thepattern of appointing arbitrators favourable to the articulation of norms that protect the interests ofinternational business has existed for a long time. It is alleged that this pattern is inherent within thesystem of international arbitration itself, so that only persons known to be favourable to definite outcomes are chosen as arbitrators*.").

[11] Joost Paulwelyen, 'The Rule of Law without the Rule of Lawyers: Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus, (2015) 109 American Journal of International Law 763 (citing Pia Eberhardt and Cecilia Olivet), *Profiting From Injustice, How Law Firms, Arbitrators And Financiers Are Fuelling An Investment Arbitration Boom* and Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration (2011) 50 Osgoode Hall Law Journal.

Investment arbitrators have been called "private judges" who operate in secrecy, are biased in favour of big multinational companies with no regard for conflicts of interest.[12] The alleged presence of a pro-investor bias has also fuelled a growing backlash against investment arbitration.[13]

There are suggestions that it is unethical to act both as arbitrator and counsel, even in unrelated investment disputes. The damning anti-trade and anti-ISDS non-governmental organizations ("**NGOs**") report "*Profiting from Injustice*" launched an attack on the investment arbitration community, particularly targeting the arbitrators who continued to function as counsels in concurrent cases. The report stated that "*the fact that some arbitrators also act as counsel which, in some situations, can raise doubts about the arbitrator's independence and impartiality*." [14] Following this report, the United Nations Conference on Trade and Development ("**UNCTAD**") issued a Report on Recent Developments in Investor-State Dispute Settlement in 2013 with broad stroke critique of "*contradictory decisions issued by tribunals, an increasing number of dissenting opinions, concerns about arbitrators' potential conflicts of interest all illustrate the problems inherent in the system [of international arbitration]*".[15] However, it should be underscored that this UNCTAD report failed to cite any independent research or studies but instead based it on the agenda-based and unreliable 2012 anti-ISDS report *Profiting from Injustice*.

The anti-ISDS rhetoric has reached the political arena in Europe and the United States. The European Union ("**EU**") Trade Commissioner Cecilia Malmström, declared: "*We want the rule of law, not the rule of lawyers*."[16] United States Senator and former Presidential Candidate Elizabeth Warren wrote in her op-ed, that ISDS:

> *wouldn't employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgments the next. Maybe that makes sense in an arbitration between two corporations, but not in cases between corporations and*

[12]Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', *Paulwelyen* n (11) 221; see also *Paulwelyen*, n (11) 763; see also Nathalie Bernasconi-Osterwalder) *et al.*, 'Who Wins and Who Loses in Investment Arbitration - Are Investors and Host States on a Level Playing Field: The Lauder/Czech Republic Legacy' (2005) 6 Journal of World Investment & Trade, 69.

[13] Asha Kaushal), 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal, 1-2 (explaining the mounting critique against the regime and its internal contradictions).

[14] Pia Eberhardt *and Cecilia Olivet* n (9) 43.

[15] UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', IIA Issues Note, No. 1, (May 2013) UNCTAD Doc. No. UNCTAD/WEB/DIAE/PCB/2013/4, p. 26.

[16] European Commission, 'Commissioner Malmström Consulted the European Parliament on Reforms of Investment Dispute Resolution in TTIP and Beyond', News Archive, Brussels, (6 May 2015).

> *governments. If you're a lawyer looking to maintain or attracting high-paying corporate clients, how likely are you to rule against those corporations when it's your turn in the judge's seat?*[17]

It has been said that concerns about possible conflicts of interests of arbitrators pose a challenge to the independence of decision makers and thereby to the rule of law.[18] Indeed, criticisms of the current system of ISDS relating to the independence and impartiality of arbitrators are by now well-known, having been both acknowledged at the multilateral level[19] and been the subject of significant scholarly attention.

This article will examine the topical issue of the "double hatting" phenomenon, where individuals act as counsel and arbitrators in ISDS proceedings either involving similar issues, sometimes known as "issue conflict" or unrelated issues. When does double hatting become a legitimate concern? Are the criticisms valid or exaggerated? Then the article will analyze the proposed Draft Code of Conduct for Adjudicators in International Investment Disputes ("**Draft Code of Conduct**" or "**Draft Code**"), released by the United Nations Commission on International Trade Law ("**UNCITRAL**") and the ICSID as well as prohibitions on the practice of double hatting in some of the recent treaties. The crucial question is whether the Draft Code will indeed address the purported criticism of arbitrator bias or instead produce negative impacts and cause unnecessarily hurdles, hence impeding arbitrators from accepting appointments.

Before delving into the intricacies of double hatting, and the specific risks which it poses to arbitrator independence and impartiality, it is first useful to distinguish between actual bias and apparent bias. Bias is a generic term which describes a decision maker who is not impartial or independent with respect to one of the parties to the dispute or its subject matter.[20] This paper is concerned with *apparent* rather than *actual* bias, since actual bias will entitle the

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[17] Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose', *Washington Post* (25 February 2015) <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html> accessed 17 August 2021.

[18] Stephan Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) Journal of International Economic Law 656; see also Stephan Schill, 'Developing a Framework for the Legitimacy of International Arbitration' in Albert Jan van den Berg (ed.), *Legitimacy: Myths Realities, Challenges*, ICCA Congress Series (WoltersKluwer 2015) 793-794 (The author also argues that "*[i]nternational arbitration functions as a system of transnational governance that has an impact on society at large and that has to conform to generally accepted standards for governance, such as democracy, the rule of law, and human rights*.").

[19] Note by the Secretariat, 'Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues' (30 August 2018) A/CN.9/WG.III/WP.152, 5.

[20] , Hwang and Lim, '' (n 2) 475.

aggrieved party to challenge the arbitrator, as well as the award rendered by him or her,[21] and accordingly, is uncontroversial.

I. Double Hatting in Investment Arbitration: A question of two hats too many?

The most controversial issue that has sparked a lot of debates when it comes to the question of independence and impartiality of arbitrators is the switching of roles between arbitrators and counsels in different cases. This situation has also been called "*role confusion*" or "*double hatting*".[22] The risks developing from the possibility that practitioners take part in different arbitrations in diverse capacities has been labelled as "*issue conflict*". An "*issue conflict*" – also described as "*inappropriate predisposition*"[23] – is a conflict of interest stemming from an arbitrator's relationship to the subject matter of the dispute, rather than his or her relationship with the disputing parties. It becomes relevant in the context of double hatting, as the emergence of an issue conflict is heightened when arbitrators are allowed to continue their operations as a counsel as well. Legal commentators note: "*The issue is not whether a counsel or an arbitrator think it is proper, in a specific case, to wear both hats, but whether an observer would so conclude*".[24]This section will explore the criticism of double-hatting and arguments for the ban of such a practice (A) and the counter arguments that serving as counsel and arbitrator does not necessarily create a conflict of interest *per se* (B).

A. Arbitrators Acting as Counsel Purportedly Create an Issue Conflict and an Appearance of Bias

Role confusion is "*a situation where the appearance of an individual as an arbitrator in one ICSID case who acts as a counsel ... in another ICSID case may give rise to a perception*

[21] Articles 53 and 54 of the ICSID Convention provides that ICSID awards are not subject to review by national courts. However, an award may be annulled by an *ad hoc* committee of three persons (appointed by the Chairman of the Administrative Council from ICSID's Panel of Arbitrators) on a number of grounds, including the ground that there has been a serious departure from a fundamental rule of procedure (see Article 52 of the ICSID Convention). See *Klockner v. Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985,¶ 119(the *ad hoc* committee observed in relation to this ground of annulment that: "*impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(I)(d) a 'serious departure from a fundamental rule of procedure'*").

[22] Stefanie Schacherer, 'Independence and Impartiality of Arbitrators - A Rule of Law Analysis' (2018) Working Paper, University of Geneva 19 <https://archive-ouverte.unige.ch/unige:107171> accessed 18 August 2021.

[23]Laurence Boisson De Chazournes and John Cook, 'Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration' International Council for Commercial Arbitration, ICC Reports No. 3, (2016), 34.

[24] Günther Horvath and Roberta Berzero, 'Arbitrator and Counsel: The Double-Hat Dilemma' (2013) 10 TDM 2

of bias, in the sense that his or her role might be perceived to inform actions in the other".[25] The concept refers to the mere appearance or actual bias on the part of the arbitrator arising from his/her relationship with the substance of the dispute.[26] Critics of double hatting advocate for a "*separate bar*", that is, for the prohibition of arbitrators serving as counsel.[27]

Do Multiple Roles in ISDS Create an Appearance of Bias?

Critics argue that counsels acting as arbitrators in ISDS proceedings creates an appearance of bias because the person wearing both hats may be perceived as using one of his roles to inform or influence actions in the other.[28] Further, a counsel may benefit from his or her role as arbitrator through access to information and contacts that are useful for his or her practice as counsel.[29] Philippe Sands, a staunch critic of multiple roles,[30] highlighted the double-hatting dilemma:

> *it is possible to recognise the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously.*[31]

[25]Philippe Sands, 'Conflict of Interests for Arbitrator and/or Counsel', in Meg Kinnear, Geraldine Fisher, *etal* (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 655.

[26] Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication', (2008) 26 Berkeley Journal of International Law 111.

[27] Dennis Hranitzky) and Eduaro Silva Romero, 'The 'Double Hat' Debate in International Arbitration', (14 June 2010) New York Law Journal.

[28] Sands, 'Conflict of Interest for Arbitrators and/or Counsel' (n 25) 655 ("*the appearance of an individual as an arbitrator in one ICSID case who also acts as counsel (or expert) in another ICSID case may give rise to a perception of bias, in the sense that his or her role in one case might be perceived to inform actions in the other*").

[29] Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers,* (Brill Nijhof, vol. 6, 2013) 45 ("*Having sat as an ICSID arbitrator, my experience confirms that once you cross the threshold—and find yourself on the 'bench' rather than facing it—you enter a world that makes you privy to insights and contacts that may not be unhelpful to your role as counsel*"); Michael Waibel and Yanhui Wu, 'Are Arbitrators Political?' (2011) 5 ASIL Research Forum 8-9.

[30] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration (June 2017) 20 Journal of International Economic Law 321 ("*Leading the charge against the practice of double hatting from the inside is Sands, who over the past decade has repeatedly written and lectured about the legitimacy concerns tied to double hatting in international arbitration.*").

[31] Sands, 'Conflict and Conflicts in Investment Treaty Arbitration'(n 29) 31-32.

The concern is that an arbitrator might be tempted, even subconsciously, to add a portion that could later be cited in another case. In other words, arbitrators may have the possibility of deciding on, or appearing to decide on, an issue in one manner as to benefit a party that they represent in another dispute. Such an *arrière pensée* ('ulterior motive') might result in the creation of legal authority on a similar or identical point, that may be of persuasive value in another case where this arbitrator is acting as a counsel.[32] On the other hand, an arbitrator might be influenced by his or her position while acting as a counsel in another case. As a result, the switching of roles is said to affect an arbitrator's impartiality and independence and create a conflict of interest.[33] It is further argued that the dual roles performed by arbitrators gives rise to a risk of self-serving behavior.[34] Critics have cited the fact that some institutions have limited such practice. For example, the International Court of Justice ("**ICJ**") took a leadership role in eradicating this kind of a practice nearly 20 years ago in its practice directions, which precluded individuals who acted as counsel from simultaneously sitting as *ad hoc* judges. The Court of Arbitration for Sport ("**CAS**") has now also prohibited double-hatting.[35] However, it should be noted that the ICJ is a permanent international court with judicial functions which is very different from arbitration and the CAS is a very specific type of arbitration.

Critics of the international investment arbitration regime have continually argued that legitimacy concerns arise when a system of adjudication permits adjudicators to act as arbitrator in one case and as legal counsel in another.[36] Phillippe Sands comments "*One aspect that touches on the legitimacy and effectiveness of the ICSID system concerns the question of the propriety of lawyers acting simultaneously as counsel and arbitrator—in different cases of course—in cases that largely raise the same or similar legal issues*."[37] Critics find double-hatting particularly concerning in the field of investment treaty arbitration as it involves issues of public policy and interest. Professor Stephan Schill explains that investment arbitration has

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[32] William Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 648.
[33] Caline Mouawad), 'Issue Conflicts in Investment Treaty Arbitration', (2008) 5 TDM 2.
[34] Sands, 'Conflict of Interests for Arbitrator and/ or Counsel' (n 25) 667 ("*The simultaneous exercise of the function of arbitrator and counsel in ICSID proceedings is a train crash waiting to happen: it is only a matter of time before a serious problem arises, or comes to light, where the arbitrator who also acts as counsel might be said to have a "direct or indirect interest … in the outcome of the dispute.*").
[35] Philippe Sands, 'Reflections on International Judicialization' (2017) 27 The European Journal of International Law 894.
[36] Langford, Behn *and Hilleren Lie* (n 30) 321 ("*Critics of the international investment arbitration regime have continually pointed to the legitimacy concerns that arise when a system of adjudication permits adjudicators to act as arbitrator in one case and as legal counsel in another.*").
[37] Sands, 'Conflict and Conflicts in Investment Treaty Arbitration' (n 29) 29.

a public function which should be understood as "*going beyond the resolution of the individual dispute, and as having a public effect on third-party actors*."[38] Critics such as Horvath Gunther and Berzero Roberta have suggested that the practice of double hatting causes States to "*lose confidence in the system*" and this "*might be the reason at the basis of the recent withdrawal of some States from the ICSID system and poses threats to the legitimacy of the system itself*."[39] Therefore, it is crucial to ensure the independence and impartiality of the arbitrators, not only with respect to the parties to a specific proceeding, but with respect to the entire system.

While issue conflicts can arise in any type of arbitration, it is argued that the problem is particularly acute in the field of international investment arbitration due to its nature and characteristics.[40] ISDS cases often involve the interpretation of bilateral BITs containing similar, if not identical, provisions and therefore call for greater caution.[41] Unlike private arbitration proceedings, ISDS requires the application of an evolving body of international law, therefore, arbitrators in investment arbitration perform more of a "*law-making*" role.[42] In other words, in investment treaty arbitration, where decisions serve as persuasive precedent in future arbitrations, so-called 'issue conflicts' can raise system-level concerns.[43] Furthermore, awards in investor-State arbitrations are usually published and therefore exposed to careful public scrutiny. All these factors have combined to place the spotlight of issue conflict onto this particular field of international arbitration and the resulting ethical obligations. Given the public function of ISDS, critics claim that the way arbitrators operate has to be taken into account as to avoid the appearance of bias.

B. Serving Multiple Roles Does Not, by itself, Create a Conflict of Interest

Critics of the "separate bar" proposition argue that barring counsels from serving as arbitrators may deprive international arbitration of some of the best talents as individuals may opt for more lucrative roles as counsels. This would severely limit the pool of arbitrators and hence limit the parties' freedom to select the arbitrator of their choice. In ISDS, it is far from

[38] Stephan Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2011) 23 Leiden Journal of International Law 411.
[38] *ibid* 405.
[39] Horvath *and* Berzero (n 24) 13.
[40] Hwang*and* Lim (n 2) 523 ("*investment arbitrations frequently turn on the interpretation of investment treaties containing similar provisions and may repeatedly involve the same state parties. For this reason, a narrow range of recurring legal issues are often raised in investment arbitrations*").
[41]Horvath and Berzero (n 24) 16; *Philippe Sands* (n 25), 'Conflict of Interest for Arbitrators and/or Counsel' 655.
[42] Judith Levine, 'Dealing with Arbitrator 'Issue Conflicts' in International Arbitration' (2006) (61) Dispute Resolution Journal 62.
[43] Schill (n 38) 420.

evident that issue conflict, as opposed to other facts, contributed to decisions of States to withdraw from the system.[44]

1. Conflict of Interest should be Evaluated on a Case-by-Case Basis

Some legal scholars argue that it has not been demonstrated that issue conflicts have such a weighty impact on the investment arbitration system that existing rules and institutions are unable to address them.[45] From this perspective, the general ethical rules are sufficient for arbitrators to manage challenges on a case-by-case basis.[46] In this vein, Meg Kinnear, Secretary-General of ICSID, has stated: "*the real key is not, 'what are the roles you've played,' it's not about the roles you played yesterday. The key is, 'in this particular situation, is there conflict?'*".[47] Similarly, Anna Joubin-Bret, Director of UNCITRAL shared her personal view: "*I believe there is no inconsistency in representing a party in arbitral proceedings and sitting as arbitrator in other arbitral proceedings, as long as fundamental rules on conflict of interest are abided by.*"[48] According to this position, published decisions on challenges to arbitrators suggest that existing rules and institutions are managing the 'issue conflicts' problem by rejecting unmeritorious challenges, but also by sustaining challenges where the facts support justifiable doubts regarding the arbitrator's impartiality.[49] Indeed, conflict of interest should be evaluated on a case-by-case basis through disclosure, rather than viewing the entire practice as a whole as creating an appearance of bias. Just because an arbitrator serves as a counsel in an unrelated case does not, in itself, mean that the two cases would overlap in issues or that the arbitrator would not be able to uphold the duty of independence and impartiality. As the functions of arbitrator and counsel do not always conflict, the rare cases in which they do can better be managed with clear and targeted rules on conflicts of interest. Such rules would require the recusal, or (*ultima ratio*) the removal of an arbitrator in a conflicting situation.

Adrian Winstanley, former Director General of the London Court of International Arbitration ("**LCIA**") is also of the view that there is nothing problematic about acting as counsel and arbitrator because "*Problems only arise when there are connections that throw up*

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[44] *Hranitzky and Romero* (n 27).
[45] Hwang and Lim (n 2) 520; *Dennis Hranitzky and Eduaro Romero* (n 27) 2.
[46] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators. Current Case Law, Alternative Approaches, and Improvement Suggestions* (Nijhoff International Investment Law Series, vol. 8, 2017) 202-203.
[47] David Caron, 'An Interview with Meg Kinnear' (2011) American Society of International Law 432.
[48] ArbitralWomen, 'Interview with Anna Joubin-Bret' *Arbitral Women Newsletter* issue 32 (April 2019) 3 <https://www.arbitralwomen.org/newsletters/> accessed 17 August 2021.
[49] *Republic of Ghana v. Talakom Malaysia Berhard*, PCA Case No. 2003-03; *Vito G. Gallo v. The Government of Canada*, UNCITRAL, PCA Case No. 55798.

conflicts between the cases in which an individual is appearing in one capacity in one or more of the cases, and in another capacity in others".[50] Thus, a case-by-case approach with respect to conflict of interest appears as the more appropriate one. The accurate question to raise in cases where an issue of an overlapping role of counsel and arbitrator occurs is whether a reasonable observer, knowing the facts and circumstances of a particular case, would consider such overlapping as characterizing the inability to approach the case with an open mind and independent judgment.[51] Indeed, Todd Weiler has argued that "*individuals acting as arbitrators are professionals offering a private service - not officials performing a public service – and that there should be no bright-line prohibition against individuals practicing as arbitrators and counsel contemporaneously*."[52] Moreover, there has been no allegation, that the existing rules and institutions are unable to manage conflict issues.[53]

2. Counsel who Serve as Arbitrators Benefit the Parties and the Tribunal

Restricting double hatting would consequently reduce the pool of potential arbitrators that parties can select from. Therefore, this would deprive the parties of their ability to choose the arbitrator of their choice.[54] Indeed, surveys show that in 47% of ISDS cases, at least one arbitrator also serves as counsel.[55]

Service as counsel can allow for the would-be arbitrators to gain the experience and reputation necessary for arbitral appointments to follow. As ICSID Secretary General Meg Kinnear stated:

> *For ICSID arbitrators, in addition to law, competence in commerce, industry, or finance is also very relevant. Investment disputes often require an understanding of business transactions, commercial agreements, transnational legal frameworks, and investment decisions ... In addition,*

[50] International Council for Commercial Arbitration, 'Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?', in Albert Van Den Berg (ed.), *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series* (Kluwer Law International, vol. 18, 2015) 727.
[51] *ibid* 726.
[52] Luke Peterson, 'Analysis: Arbitrator challenges Raising Tough Questions as to who Resolves BIT Cases', (2007) Investment Treaty News.
[53] See *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, Challenge No. 13/2004, 18 October; *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009.
[54] Horvath and Berzero (n 24) 13 ("*preventing lawyers in arbitral proceedings from acting as arbitrators would also reduce the overall size of the pool of potential arbitrators and deprive the parties of their freedom to select as arbitrators those lawyers with deep expertise. This would, in the end, go against the fundamental principle of arbitration as an opt-in system*".).
[55] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting' 6 ESIL Reflection 3 ("*We have found that a total of 47% of cases (509 in total) involve at least one arbitrator simultaneously acting as legal counsel.").*

> *globalization and the Centre's strategic promotion have resulted in the combination of different groups of arbitrators. Since the 1980s, ICSID has partnered with international arbitration institutions such as the AAA/ICDR, LCIA, and ICC to develop, enlarge, and share their experts.*[56]

Today, there is substantial overlap between arbitrators and counsel involved in commercial arbitration and investor-State arbitration.[57] That said, experience as counsel is beneficial if not necessary for their appointments as arbitrators. To serve as arbitrator, it is crucial to have adequate professional competence and the main way to gain competence is through working as counsel.[58]Acquiring experience as counsel remains the normal path leading to appointments as an arbitrator.[59] It is equally important for a tribunal to consist of a counsel as counsels often bring technical knowledge and beneficial viewpoints that can bring counterbalance to a tribunal. A tribunal member with experience as counsel can deliver practical perspective particularly when it comes to procedural matters and tactics. Arbitrators generally find it useful to have one member of the tribunal with practical counsel experience.

3. Counsels Advocate Views that are not Necessarily their own Beliefs

The concern over the lack of independence and impartiality of investment arbitrators who serve as counsel runs contrary to the main characteristic of an advocate who is required to put forward arguments to win the client's case. Those arguments do not necessarily reflect a personal belief but rather frame the client's case in the best way possible.[60] Senior Counsel Dr. Michael Hwang is also of the view that the mere fact that "*an arbitrator is concurrently advocating a position on an issue before him in another case as counsel does not, on the sole basis of the simultaneity of the advocacy, mean that such advocacy represents the arbitrator's personal belief*".[61] Indeed, to argue a point does not necessarily mean that one believes in its

[56] For an elaboration of this evolution see Sergio Puig, 'Emergence and Dynamism in International Organization: ICSID, Investor-State Arbitration and International Investment Law' (2013) 44 Georgetown Journal of International Law 531–605.
[57] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 402.
[58] John Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension' (2019) 113 American Journal of International Law (AJIL) Unbound 288 ("*Arbitration rules rightly provide that prospective arbitrators should have professional competence appropriate to their task, and appointing parties demand no less. Although a few arbitrators have other backgrounds (government service, academia), the primary means to gain the necessary competence is service as counsel to parties in arbitration*").
[59] *International Council for Commercial Arbitration* (n 50) 726.
[60] Natasha Peter and Clotilde Lemarie, 'Is there a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?' (2008) 5 TDM 6.
[61] Hwang and Lim (n 2) 510.

soundness[62] and that one will take the same stance in a different case. As a Dutch Court stated in a case concerning the challenge of a well-known Professor and arbitrator:

> *it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-a-vis the party that argues the opposite in the arbitration.*[63]

An Arbitrator's reputation rests on his or her independence and impartiality which critically affects future selection as arbitrators and professional career as private counsels.[64] Therefore, it is not a tenable argument that a counsel or arbitrator would jeopardize his or her professional credibility and career through influence of any multiple roles.

Indeed, Professors Michael Waibel and Yanhui Wu conducted a study on bias which included arbitrators who act as counsels and found that "*arbitrators who also wear the hat of counsel to private investors are more likely to affirm jurisdiction, though there is no significant effect on their decision on liability*."[65] On the other hand, critics have not been able to come up with concrete arguments for any drastic departure of the long-held tradition other than trying to equate *ad hoc* arbitrators with judges who hold a permanent public office.

II. Proposed Solutions for Reform to Ban Double Hatting

In the course of their analysis of the topic arbitrator bias, several scholars have reached the conclusion that certain characteristics of arbitration in general, or investment arbitration more particularly, are diametrically opposed to independence and impartiality. These irreconcilable conflicts, they argue, require a comprehensive reform of the investment arbitration system, instead of a piecemeal approach. Several grounds for challenges would thereby be eliminated all at once.

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[62] Nassib Ziade, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?' (2009) 24 ICSID Review - Foreign Investment Law Journal 51.
[63] *Ghana v. Telekom Malaysia*, District Court of the Hague, Challenge No. 17/2004, Decision of 5 November 2004, p. 4, ¶ 11.
[64] Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators, (2010) 96 Cornell Law Review 90.
[65] Waibe*l and Yanhui Wu* (n 29) 34.

Professor Paulsson, for example, argues that party-appointments inherently contradict the obligation to be independent and impartial, and therefore proposes that party-appointments should be abolished, or at least be restricted to closed arbitrator panels.[66] Horvath and Berzero, as well as Bernasconi-Osterwalder *et al.* find investment arbitrators' dual functions as arbitrators and counsels to be incompatible with their obligation of independence and impartiality.[67] Thus, they propose a prohibition of such dual functions, in order to eliminate an entire range of potential conflicts.[68]The consolidation of the pool of arbitrators which such a prohibition would entail, however, raises a number of issues which will be detailed below. Most recently, the UNCITRAL Working Group III ("**WGIII**") has convened to discuss reform proposals on arbitrator appointment and ethical rules.[69]

A. ICSID and UNCITRAL Draft Universal Code of Conduct

On 1 May 2020, the Secretariats of ICSID and UNCITRAL released the first version of the Draft Code. The proposed Code had 12 articles, and included commentaries for each article, explaining the rationale for each provision as well as the tensions and concerns that each provision addressed. After receiving a number of constructive comments from multiple stakeholders, the second version of the Draft Code ("**Second Draft"**) on 19 April 2021 was released, which incorporated the suggestions and comments provided into the redrafted provisions. While the first version of the Draft Code initiated the conversation in the ISDS community about the need for reform in the appointment of arbitrators, it left a number of poignant questions unanswered, which were subsequently addressed in the Second Draft. This section will analyse the suggested reforms under the Draft Code, and critique the way in which the Second Draft has taken the mantle established by the first version forward, but still leaves significant room for further deliberation.

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[66] Jan Paulsson, 'Moral Hazard in International Dispute Resolution', (2010) 25 ICSID Review 348-352.

[67] Horvath and Berzero (n 24) 13 ("*In investment treaty arbitration, States might lose confidence in the system if they see that the same person who is entrusted with extensive powers and sitting in judgment of the State is at the same time challenging the decisions of another State with the partiality of an advocate.*"); Nathalie Bernasconi-Osterwalder, Lise Johnson) and Fiona Marshal, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' (27-29 October 2010) IV Annual Forum for Developing Country Investment Negotiators, Background Papers, New Delhi 51 ("*With the still-growing number of arbitrations, and the need for consistency and transparency within the system on such fundamental issues as the impartiality and independence of the 'judicial' decision-makers, the time seems ripe for reflection regarding the appropriateness of this dual role*").

[68] Bernasconi-Osterwalder, Johnson and Marshal, (n 67) 51 ("*This paper highlights issues related to the current dual-role phenomenon and proposes that the basic proposition in the investor-State context should be: 'No person may be appointed as arbitrator in a treaty-based arbitration brought by a foreign investor against a State ('an investor-State dispute') if he or she is acting as counsel in another investor-State dispute'.*").

[69] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), A/CN.9/935, 14 May 2018, p. 8, ¶45.

1. Definition of "*Adjudicator*"

While the first version of the Draft Code applied to all adjudicators,[70] the broad scope of the term left much to be desired in terms of specificity. The term "*adjudicators*" purposefully encompasses a broad category of existing and possible future participants in ISDS adjudicatory processes, including "*arbitrators, ad hoc committee members, candidates to become adjudicators, appeal judges, and judges in permanent bodies*".[71] The Draft Code also required adjudicators to ensure that their assistants are aware of and comply with the Code.[72] In this way, the Code sought to ensure that it could be applied across the board regardless of the type of reform which the WG III intended to achieve.

It should be noted that the use of the inclusive term "*adjudicators*" in the first version of the Draft Code failed to recognise the different roles performed by arbitrators and judges in a dispute settlement framework.[73] The position of a judge in an established court of law is one which is permanent in nature, where they hold a tenured office, and cases are earmarked for their decision based on a randomised roster, which is not affected by the parties who are to appear before them. As a result of such permanence in their appointment, judges are provided with a fixed salary for such tenured employment. In contrast, arbitrators, by the very nature of their role, are *ad hoc* appointees. Their appointments are dictated by the will of the parties, and every arbitrator appointment is subjected to a separate assessment of any conflict of interest which the arbitrator might have with the subject matter, parties to the dispute etc.[74] Thus, while permanent courts establish strict rules with respect to prohibition on judges performing multiple roles, such prohibitions follow as a consequence of the public function performed by judges, and are therefore imperative so as to uphold the public trust in such institutions. However, the same metric cannot be extended to arbitrators, who perform a strictly private function of adjudicating the dispute brought before them by the parties, and have to undergo an evaluation of their independence and impartiality against pre-existing conflict of interest guidelines. As a result, instead of establishing differential standards, which would treat arbitrators and judges on separate thresholds based on the roles they perform, the Code

[70] First Draft Code (2020), art. 2.
[71] First Draft Code (2020), art 1.1.
[72] First Draft Code (2020), art. 1.2.
[73] Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal' (*Kluwer Arbitration Blog*, 20 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/> accessed 18 August 2021.
[74] ibid.

hampered the effectiveness of the provisions framed under it by including them under the broader umbrella of "*adjudicators*".[75]

The Second Draft recognised the loophole pertaining to the inclusive definition of "*adjudicators"*, and amended the definition in Article 1 to include separate provisions for 'arbitrator' and 'judge' respectively. An 'arbitrator' is defined as "*a member of an ad hoc tribunal or panel, or member of an ICSID ad hoc Committee who is appointed to resolve an 'International Investment Dispute*", thus restricting the scope of application of the Code to those disputes which arise out of International Investment Disputes.[76]

2. Duty to disclose

In Article 3, the first version of the Draft Code included a series of general duties, such as fairness, competence and the duty to comply with any confidentiality and non-disclosure obligations. The provision reinforced the salient duty of adjudicators to be independent and impartial at all times, and avoid direct or indirect conflicts of interests, and any appearance of bias.[77]

Article 5 of the first version contained an expansive disclosure requirement relating to the widespread concern of repeat appointments in ISDS. Accordingly, disclosure is required for:

> *"(...) any professional, business and other significant relationships, within the past [five] years with: (i)The parties [and any subsidiaries, parent companies or agencies related to the parties; (ii)The parties' counsel; (iii)Any present or past adjudicators or experts in the proceeding; (iv) Any third party with a direct or indirect financial interest in the outcome of the proceeding"*

If candidates and adjudicators have any direct or indirect financial interest in: (i) the proceeding or in its outcome; and (ii) an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be decided in the ISDS proceeding, again they shall disclose them. The first version also called for disclosure of "*all ISDS [and other [international] arbitration] cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert,*

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[75] Vanina Sucharitkul (n 73).
[76] Chiara Giorgetti, 'The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement? (*Kluwer Arbitration Blog*, 29 May 2021) <http://arbitrationblog.kluwerarbitration.com/2021/05/29/the-second-draft-of-the-code-of-conduct-for-adjudicators-in-international-investment-disputes-towards-a-likely-agreement/> accessed 18 August 2021.
[77] Draft Code (2020), art 3(a).

[conciliator and mediator]" and "*a list of all publications by the adjudicator or candidate [and their relevant public speeches].*"[78] It is crucial to remember that, as per the Draft Code, such disclosure obligations are recurring, and not merely a one-time only disclosure requirement.

Such disclosure obligations under Article 5, pertaining to prior publications and public speeches *inter alia*, becomes a deterring factor for arbitrators accepting appointments, especially for senior arbitrators, who may not have recorded every speaking event or publication in their disclosure. What the provision fails to acknowledge is that the burden of showing how such a publication or speaking engagement hampers an arbitrator's independence or impartiality of an arbitrator falls on the party. As a result, it should be the prerogative of the party, and not of the arbitrator, to demonstrate through appropriate due diligence, how a particular publication or speaking engagement may impact the arbitrator's independence or impartiality. Furthermore, the effect of such an obligation was compounded by the lack of any discernible sanctions, thus making it extremely difficult for arbitrators to comply with the same, or understand the ramifications of non-compliance.

The Second Draft, while placing the regulation of repeat appointments in Article 10, continues to adopt the same approach, by allowing repeat appointments unless there is a challenge made by a party on the grounds of independence and impartiality. The robust and comprehensive disclosure requirement is maintained to assess the tenability of any challenge based on repeat appointments of an arbitrator.[79] The Second Draft also removes the disclosure obligation of publications, inserted to deal with issue conflicts, as it is believed that addressing the same can be adequately undertaken using the existing challenge mechanisms in ISDS without the need for an express provision.

3. Double-hatting

a. Draft Code Version 1

One of the most prominent changes which the first version of the Draft Code proposed was with respect to double-hatting. Article 6 of the Code stipulated that

> *"Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty]."*

[78] Draft Code (2020), art 5.
[79] Giorgetti (n 76).

Not only was a prohibition on double hatting considered imperative to implement, but the potential for a conflict of interest to arise from any concurrent representations made by the arbitrator was seen as sufficient justification to institute an "*outright ban*" on the practice. Comment 67 to the Code stated that such a ban would be suitable as it could be applied and implemented easily, and would prohibit any participation in an additional role of an adjudicator which could lead to a potential conflict of interest.

A complete prohibition on double hatting, however, would lead to a situation where the overall pool of arbitrators in the ISDS regime will be reduced substantially.[80] A pertinent example in this respect is the interpretation of the phrase "*same facts*" in Article 6. The phrase "*same facts*" could be interpreted broadly to include events impacting multiple countries at once, such as a worldwide financial breakdown, or a healthcare crisis such as the COVID-19 pandemic. Furthermore, it increases the scope for uncertainty and discretion by failing to lay down the stipulated number of years within the undertaking of such additional role is permissible, and the requirement for disclosure as well. Indeed, it would extremely difficult to ascertain ex ante, whether two matters involve the "*same facts*". The factual information could only be properly ascertained after the appointment or when pleadings are filed. The second version of the code employs the term "*same factual background*", which could add weight to the prospective arbitrator in exploring this scenario.

b. Draft Code Version 2

On the issue of double hatting, the second version of the Draft Code takes a leap forward from its predecessor. Now regulated in Article 4,[81] it gives an option to the parties to explicitly approve of multiple roles undertaken by an arbitrator without a restriction on time limit. The provision states:

> *"Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case [involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity]".*[82]

[80] Vanina Sucharitkul, 'ICSID and UNCITRAL Draft Code of Conduct's Potential Ban on Multiple Roles Could Have a Severe Impact on Gender Diversity' (*ArbitralWomen*, 11 May 2020) <https://www.arbitralwomen.org/icsid-and-uncitral-draft-code-of-conducts-potential-ban-on-multiple-roles-could-have-a-severe-impact-on-gender-diversity/> accessed 15 August 2021.
[81] Second Draft Code (2021), art 4.
[82] ibid.

Furthermore, it reduces the scope of the prohibition on multiple roles, by restricting it to counsels and experts, and to merely concurrent roles. Comment 26 explains the change: "*Article 4 reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties. Disclosure pursuant to Article 10 aims to ensure that such consent is given on an informed basis*." Therefore, the rationale is that disclosure would be the basis for the parties to assess conflict of interest, which now shifts the focus on party autonomy and the parties' right to appoint the arbitrator of their choice. Article 4 is also limited to situations of concurrent multiple roles and does not include a prohibition or limitation for a period before or after being an Adjudicator (as in the former version). The Second Draft recognizes the fallibilities with instituting a total restriction on double hatting, and seeks to regulate it bearing in mind the underlying rationale behind the same, while simultaneously ensuring that it does not curtail arbitrator appointments unfairly, thus striking a "*measured balance*".[83] While the concerns pertaining to the broad ambit of the phrase "*same facts*" continues to exist, the Second Draft still provides the discretion to the parties to decide whether multiple roles performed by an arbitrator would adversely affect his or her independence or impartiality, rather than instituting an automatic ban on double hatting.

Thus, the Draft Code makes it evident that tackling issues of bias and conflict of interest require a nuanced approach, and a full prohibition as urged in Comment 30 simply does not work. In his article, Chan Leng Sun contends that a code of conduct will not be efficient if it is too exhaustive. It could work only if it provides very general guidelines.[84] This is because detailed guidelines run the risk of "*creating confusion and even inconsistencies with court decisions*" and other competing codes.[85]

B. Prohibition against double-hatting under treaties

[83]'ICSID Publishes Revised Draft Code of Conduct for Adjudicators', (*Pinsent Masons*, 28 April 2021) <https://www.pinsentmasons.com/out-law/news/icsid-publishes-revised-draft-code-of-conduct-for-adjudicators> accessed 15 August 2021.

[84] Chan Leng Sun, 'Arbitrators' Conflicts of Interest Bias by Any Name' (2008) 5 (4) TDM [64] ("*There is danger in arbitral institutes trying to formulate more detailed or quantitative guidelines on what may or may not amount to justifiable doubts. Writing an essay on conflicts of interest is one thing. Prescribing in advance what may or may not amount to a conflict of interest is an entirely bold venture.*").

[85]Ibid [65]; see also [69] ("*There is also the risk that detailed guidelines from different arbitral institutes will clash with each other. Many arbitrators sit on the panel of more than one institute. Arbitration practitioners have to keep track of small but potentially important differences in the rules of different institutes. There is no need to add to the confusion by having competing codes on conflicts of interest. We have already seen that, even at the most general level, some institutes refer to impartiality and independence, while others refer to independence. The English Arbitration Act 1996 opted for impartiality and not independence. The ICC opted for independence and not impartiality. Case law in different jurisdictions cannot agree on the wordings of the tests: 'reasonable suspicion', 'real likelihood' or 'real danger of bias'.*").

Critics of double hatting argue that the practice of allowing arbitrators to serve as counsel raises issues regarding "*due process of law*".[86] Therefore, the practice should be prohibited and individuals should choose whether to serve as arbitrator or counsel.[87] Those advocating for the prohibition on double hatting argue that disclosures alone are not enough and an outright prohibition of double-hatting would be easier to implement.[88] Proponents of the ban adopt the broad approach that counsels acting as arbitrators would lean towards the interpretation of what is considered favourable to their client's case on same or similar issues in a case before them. Other arguments put forward include the availability of a sufficient pool of arbitrators and that economic reasons of individuals, such as the unavailability of arbitrator appointments, especially for young professionals, should not prevail over ethical standards.[89] Such arguments have found significant traction within the ISDS community, with many seeing it as a sign of the larger legitimacy crisis which the system is suffering from.

In the list of ISDS reforms, the United Nations Conference on Trade and Development ("**UNCTAD**") proposed the outright prohibition of "double hatting" of arbitrators/adjudicators simultaneously acting as counsels or experts in other ISDS proceedings irrespective of whether the cases involved the same issues in dispute.[90] The European Commission has been paying particular attention to this phenomenon. The Comprehensive Economic and Trade Agreement ("**CETA")** which replaces investment arbitration with the two-tiered investment court system ("**ICS**") consisting of tenured judges and an appellate mechanism includes a clear prohibition of double hatting. Specifically, Article 8.30 provides that "*upon appointment, [members of the tribunal] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement*".[91] The other EU Free Trade Agreements and Investment Protection Agreements ("**IPAs**") containing

[86] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 (4) *Arbitration International* 498..
[87] ibid; Sands, 'Conflict and Conflicts in Investment Treaty Arbitration' (n 29) 47.
[88] See Comment 67 of Article 6 of the Draft Code 2020 ("*[a]n outright ban is easier to implement, by simply prohibiting any participation by an individual falling within the scope of prohibition*.").
[89] Sands 'Conflict and Conflicts in Investment Treaty Arbitration' (n 29) 48..
[90] UNCTAD*, Reforming Investment Dispute Settlement*, IIA Issues Note, Note 1, March 2019, UNCTAD/DIAE/PCB/INF/2019/3, 7.
[91] CETA art 8.30 (1) ("*In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.*").

the ICS provide for a similar prohibition.[92] The prohibition in the EU trade agreements are much broader since it encompasses "witnesses".

In March 2018, in the context of their ongoing review and implementation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP")**, New Zealand, Canada and Chile issued a Joint Declaration on Investor State Dispute Settlement. The Joint Declaration provides in relevant part:

> *Intend to promote transparent conduct rules on the ethical responsibilities of arbitrators in ISDS procedures, including conflict of interest rules that prevent arbitrators from acting, for the duration of their appointment, as counsel or party appointed expert or witness in other proceedings…*[93]

In May 2018, the Netherlands published a new draft model bilateral investment treaty ("**BIT**"), the final version of which was approved on 22 March 2019.[94] The Dutch Model BIT is considered revolutionary in that it replaced party-appointment of arbitrators with institutional appointment, by providing for an appointment authority under Article 20, and mandating all arbitrator appointments to take place through the same.[95] Moreover, the Model BIT's stringent ban on double hatting has also raised controversy. Specifically, Article 20(5) states:

> *Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.*[96]

The prohibition of arbitrators who have acted as counsel for the last five years appears unnecessarily excessive. A recent treaty between Iran and Slovakia also prohibited arbitrators

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[92] EU-Vietnam IPA art 3.40 ("*In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed experts or witnesses in any pending or new investment protection dispute under this or any other agreement or under domestic laws and regulations.*"); EU-Singapore IPA art 3.11 ("*In addition, upon appointment, they shall refrain from acting as counsel, party-appointed expert or party-appointed witness in any pending or new investment protection dispute under this or any other agreement or domestic law*.").

[93] New Zealand Ministry of Foreign Affairs and Trade, 'Joint Declaration on Investor State Dispute Settlement', 8 March 2018.

[94] 'Netherlands Model Bilateral Investment Agreement' (*UNCTAD*, 22 March 2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed 16 August 2021.

[95] Marike Paulsson 'The 2019 Dutch Model BIT: Its Remarkable Traits and the impact on FDI' (*Kluwer Arbitration Blog*, 18 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/> accessed 16 August 2021.

[96] Netherlands BIT (n 94), under art 20.5, while the draft BIT abandons the system of party-appointment of arbitrators, rather than adopt the EU two-tier court model, it provides that appointing authorities should make their appointments after extensive consultations with the disputing parties (presumably through a "list" procedure). It further states that ICSID is not limited to that institution's panel of arbitrators, which is perceived in some quarters to include political appointees by states. However, it also states that its ISDS provisions will cease to apply if the European Commission's Multilateral Investment Court comes into existence.

from working simultaneously as counsel, as well as party-appointed experts or witnesses as well.[97] However, that treaty did not bar arbitrators who had worked in previous years as counsel or expert.

The stringent bar on double-hatting which extends to previous role in the past five years is unduly severe and would have negative consequences on the pool of arbitrators available to sit on cases brought under the new Dutch BIT. This means that all experienced arbitrators with their up-to-date and in-depth knowledge of investment law and expertise in investment treaty arbitration proceedings are automatically barred –irrespective of the existence of any justifiable conflict of interest. Consequently, only former judges, a limited pool of senior arbitrators and academics (who have not acted as legal counsel in the past 5 years), as well as counsels outside the investment treaty arbitration field can be selected. This makes the pool of potential arbitrators very restrictive and rather unattractive for both investors and States. This excessive exclusion of active experienced legal counsels inevitably means that potentially less experienced arbitrators, who may lack arbitration experience and procedural expertise will be selected, which arguably will not necessarily yield better quality awards.[98]

III. The Negative Impact of Banning Counsels from Serving as Arbitrators

The complete ban on double-hatting is disproportionate as it would also cover situations where there is no conflict of interest or circumstances that pose no danger of any conflict. In these situations, the ban would eliminate the positive implications of dual roles without improving arbitrators' independence and impartiality.[99] The ban would also be counterproductive as it would reduce the already small pool of arbitrators, severely impact diversity (A) and pose as a barrier to entry for second generation of arbitrators (B). The cost of a complete ban prevails over the benefits when less burdensome measures such as targeted disclosures on conflict of interest can serve as a more suitable alternative.

[97] 2016 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, art 18(5) ("*In addition, [the arbitrators] shall refrain from acting as counsel or as partyappointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law*.").

[98] Nicos Lavranos, 'The New Arbitration Rules under the 2018 Dutch Model BIT Text' LAVRANOS (Nicos), "The New Arbitration Rules under the 2018 Dutch Model BIT Text", in SNIDJERS (Hank) (eds.), *Tijdschrift voor Arbitrage*, Kluwer Law Arbitration, 2020, p. 61.

[99] ibid 202.

A. Barring Dual Roles will reduce the Pool of Arbitrators and Severely Impact Diversity

It has often been observed that appointments to ISDS are often taken up by a select club of elite "*Grand Old Men*". Indeed, at the 2014 International Council for Commercial Arbitration ("**ICCA**") Miami Conference, the international-arbitration community gathered to address the question: "Who are the arbitrators?"[100] The prevalence of the"*male, pale, and stale*" phenomenon – that is, a large majority of the individuals chosen to serve as international arbitrators are male, from North America or Western Europe, and generally quite senior, continues to be the norm in arbitrator appointments in the ISDS regime, as was agreed upon by the panellists at the conference as well.[101]

Diversity is critical to the idea of moving towards better adjudication, as varied world views, know-how, background and experiences of different individuals, male as well as female, from all corners of the world is a boon to every stakeholder concerned.[102] The importance of such diversity becomes even more pronounced in the ISDS paradigm, as investor-State disputes often involve issues of key public policy and interest. The constitution of decision makers, with respect to gender and demographic should thus reflect those who will be affected by the decision-makers. Therefore, imposing a blanket restriction on double-hatting would have the unwelcome consequence of fostering the prevailing dominance of a select few established male arbitrators, mainly belonging to Western European and North American countries, in the ISDS framework.

In a recent study conducted, wherein 249 investment treaty cases decided until May 2010 were analysed, it was found that only 6.5% of the arbitrators in those cases were

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[100] Joseph Mamounas, 'ICCA 2014. Does 'Male, Pale, and Stale' Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change' (*Kluwer Arbitration Blog*, 10 April 2014) <http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> accessed 16 August 2021.

[101] ibid; see also John Crook (n 58) 284 (discussing the concern "*that appointments to IIDS predominantly go to a small cadre of established arbitrators caricatured as 'pale, male and stale.*").

[102] Ingrid Muller, 'Diversity and Lack Thereof Amongst International Arbitrators – Between Discrimination, Political Correctness and Representativeness' (2015) 12 (4) TDM 6 ("*diversity improves decision-making, by bringing in different perspectives*"); Caley Turner, ''Old, White, and Male': Increasing Gender Diversity in Arbitration Panels' (*International Institute for Conflict Prevention and Resolution*, 2014) 11 ("*diversity, and particularly gender diversity, are essential to a fair and effective arbitration process*") <https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels/_res/id=Attachments/index=0/Old_White_and_Male_Increasing_Gender_Diversity.pdf> accessed 16 August 2021 ; 11-12 ("*Because arbitration is often used as a substitute for the judicial process, ensuring that decision makers are representative of the diverse group of individuals before them is key to ensuring fairness and public justice, as well as ensuring that disputants will accept and abide by the arbitrators' decisions.*").

women.[103] Furthermore, a survey of 353 ICSID cases conducted by the author from 2012-2019 demonstrated that of the 1,055 appointments made in those cases, only 152 women were appointed, which is only 14.4% of the total appointments. The distribution of the appointment of female arbitrators reveals an even more problematic trend. Across all the cases, only a meagre 35 individual female arbitrators were chosen from, and two of them, namely Professor Brigitte Stern and Professor Gabrielle Kauffman-Kohler, were appointed in 45.3% of the cumulative appointments of women arbitrators appointed in such cases. The lack of female representation in arbitrator appointments in the ISDS paradigm remains a dire problem.[104]

This concern has prompted efforts to increase the pool of female and minority arbitrators through the launch of the Equal Representation in Arbitration Pledge (the "**ERAPledge**")[105] in 2016. Various arbitral institutions, law firms, and corporations have signed the Pledge and committed to increase and nominate, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.[106] Currently with over 4,000 signatories, the international arbitration community has recognized the underrepresentation of women in international arbitration tribunals.[107]Arbitral institutions worldwide have placed diversity, including gender diversity, generational diversity, and regional diversity at the forefront of their agenda and have released statistical data on the improvement of diversity in the appointment of arbitrators annually.[108] For example, in 2014, the International Chamber of

[103] Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (*FDI Perspectives,* 2012), 1 <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/FDI_59.pdf> accessed 16 August 2021.

[104] Puig (n 57) 401 ("*The over- or under-representation of a particular demographic of arbitrators is an issue of constant concern among most critics and many supporters of arbitration … The deliberative process before the arbitral tribunal is likely to be crucial and, therefore, the diversity of views may be fundamental for a fair process and outcome*.").

[105] Mirèze Philippe, 'Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender Equality' (*Kluwer Arbitration Blog,* 2 June 2016) <http://arbitrationblog.kluwerarbitration.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/> accessed 16 August 2021. .

[106]ibid ("*The launch of the Equal Representation in Arbitration (ERA) Pledge on 18 May 2016 in London marks a historic moment in international arbitration. The Pledge is a call to the international dispute resolution community to commit to increase the number of female arbitrators on an equal opportunity basis*.").

[107] Ashley Jones and Stephanie Mbonu, 'The ERA Pledge surpasses 4,000 signatories' (*Practical Law Arbitration Blog*, 28 May 2020) <http://arbitrationblog.practicallaw.com/the-era-pledge-surpasses-4000-signatories/> accessed 16 August 2021 ("*The Equal Representation in Arbitration Pledge (the ERA Pledge), launched in 2016 to address the under-representation of women on international arbitration tribunals, recently surpassed a milestone 4,000 signatories in January 2020*").

[108]*E.g.* In 2013, the ICC statistics revealed that out 9% of arbitrator nominations and appointments were women whereas in 2018 the numbers rose to 18,4% in 2018. See ICC, "ICC Dispute Resolution 2018 Statistics", *ICC Publication*, no. 898E, 2019, p. 11 ("*In 2018, the number of appointments and confirmations of women arbitrators rose to 273, now representing 18.4% of all appointments and confirmations*"); ICC, "ICC Arbitration Figures

Commerce ("**ICC**") achieved gender parity in the composition of the Vice Presidents of the International Court of Arbitration.[109] In addition, in 2018, the Court Members of the ICC International Court of Arbitration composed of equal numbers of men and women.[110] These examples illustrate the significance of diversity in the international arbitration community. The increase in the gender diversity of arbitral tribunals was also brought forth by the Queen Mary University-White and Case 2021 International Arbitration Survey, which stated how 61% of the survey participants had observed a positive trend in gender diverse arbitrator appointments.[111] The survey further mentioned how the prevailing issues in addressing the issue of lack of gender diverse appointments has to be addressed at the first threshold of the nomination of arbitrators by parties. It states that the two most chosen suggested reforms for bringing more diversity in arbitrator appointments were:appointing authorities and arbitral institutions coming up with a specific policy of suggesting and appointing diverse arbitrators, and counsels suggesting a diverse set of arbitrators to their clients for potential appointment.[112]

In investment arbitration, it is quite often the case that individual arbitrators are chosen from the ranks of counsel, who have to maintain their regular practice until they receive an adequate number of arbitrator appointments to ensure that they can transition into a permanent arbitrator role in the future. For women arbitrators, it places a doubly onerous burden. Amongst the women who are appointed as arbitrators (and the statistics above show how disproportionately low those appointments are), a number of them are practicing counsels or work at law firms. Of the 46 women appointees, 32 have their curricula vitae publicly available on the ICSID website.[113] It is observed that of these 32 appointees, 21 were working in important positions at reputed law firms, or as counsels. As a result, a blanket ban on double hatting would inevitably result in excluding those women, and others from the system.

Reveal New Record for Awards in 2018, *ICC News*, 11 June 2019 ("*The number of women appointed and confirmed by arbitrations also continues to improve by nearly doubling, from 136 in 2015 to 273 in 2018*"); PHILIPPE (Mirèze), "How Has Female Participation at ICC Evolved? ICC Arbitrators, Court Members and Court's Secretariat", *ICC Dispute Resolution Bulletin*, issue 3, 2017, p. 39.

[109] Mirèze, 'How Has Female Participation at ICC Evolved? ICC Arbitrators, Court Members and Court's Secretariat' (n 108) 17 ("*Finally, for the current mandate running from 2015 until 2018 …9 female vice-presidents were nominated equaling 50% of the vice-presidency*.")

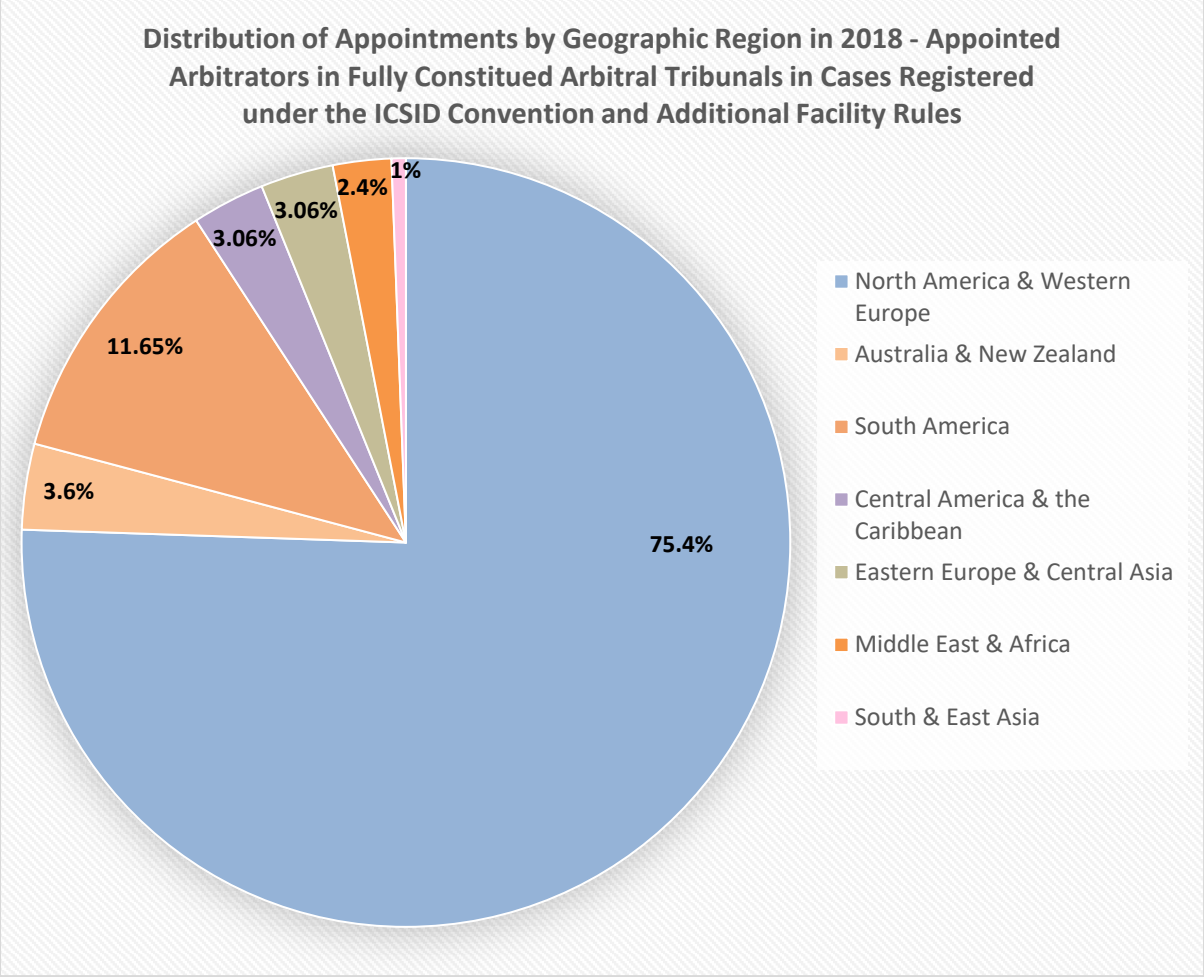
[110] ICC, 'ICC Renews Alexis Mourre as President and Nominates Court with Full Gender Parity and Unprecedented Diversity' (*ICC News*, 21 June 2018) <https://iccwbo.org/media-wall/news-speeches/icc-renews-alexis-mourre-president-nominates-court-full-gender-parity-unprecedented-diversity/> accessed 16 August 2021 ("*For the Court's 2018-2021 term, the Council also appointed 176 members from 116 countries, representing gender parity of 88 women and 88 men*").

[111]White and Case-Queen Mary University of London, School of International Arbitration, *2021 International Arbitration Survey: Adapting arbitration to a changing world*(2021) 15.

[112]ibid 18.

[113] ICSID Secretary-General, *2019 ICSID Annual Report* (2019) 25.

On the aspect of regional diversity, it is noteworthy that while the total arbitrator appointments made represent eighty-eight different nationalities. Almost half of such appointments are from the following seven countries: New Zealand, Australia, Canada, Switzerland, France, the United Kingdom, and the United States.[114] For appointments made in 2018, the percentage of ICSID arbitrators from Western Europe and North America totalled 75.4% while the percentage reached 79% when including Australia and New Zealand. In 2018, the arbitrators appointed from countries in Western Europe and North America accounted for 75.4% of the total, whereas it increased to an astonishing 79% after including Australia and New Zealand, thus further buttressing the claim that the "*pale, male and stale*" phenomenon continues to persist.[115]



As a result of this lack of regional diversity, and the predominance of arbitrators from a select few countries, parties in the ISDS system are restricted in their choice of arbitrators

[114]Data gathered from a survey of the ICSID database.
[115]Statistics gathered from a review of appointments on a case-by-case basis of arbitration cases filed in 2018 from the ICSID database.

who can best relate to the specific claims made as a result of having a familiar background as the appointing party. The proposed ban on double hatting therefore, unwittingly, ends up placing an enormous restriction on the principle of party autonomy in so far as arbitrator appointments are concerned, as they are curtailed in appointing arbitrators who can understand the parties' legal, cultural, and socio-political background, with the objective of arriving at outcomes which are cognizant of that context and background.

Given the underrepresentation, it has been suggested that parties should take advantage of the unique and practical benefits of composing an arbitral tribunal of more diverse individuals and backgrounds than have traditionally been considered for these roles.[116] Barring individuals who serve as counsel in ISDS proceedings from serving as arbitrators in investment disputes would reduce the overall pool of potential arbitrators, notably women and those from other regions, and deprive the parties of the ability to select the arbitrator of their choice. Alternatives to an outright ban include a '*time phased*' method of regulating multiple appointments, where lawyers may continue to function as counsels for a certain amount of time, until they manage to secure a sufficient number of arbitrator appointments.[117] This approach is however difficult to implement in practice. A more sustainable approach to an automatic disqualification might be for the parties to bear the burden to challenge arbitrators upon arbitrators making complete and reliable disclosures.

B. The Ban on Double Hatting would Reduce the Pool of Arbitrators and Create a Barrier for Second Generation of Arbitrators

One of the challenges of investment arbitration is the limited pool of qualified arbitrators with the skills and experience necessary to be able to handle such complex disputes. Indeed, ICSID Secretary General, Meg Kinnear emphasized "*we're very conscious that there's a need for more arbitrators*."[118] In an interview of the renowned Professor David Caron, he further elaborated:

> *One of the issues that I think many people have heard and that I heard when I talked to ICSID users, was the whole question of the rosters. Frankly, with the explosion of cases, it's awfully difficult to find enough qualified arbitrators who are available, who are not conflicted, and are all of the things you would need*

[116] ibid 122.
[117] John Crook (n 58) 284.
[118] Meg Kinnear, 'ICSID in the Twenty-First Century: An Interview with Meg Kinnear' (2010) 104 Proceedings of the Annual Meeting (American Society of International Law) 431..

> *in an arbitrator … There are also numerous vacancies on the roster or expired nominations, those kinds of issues.*[119]

Preventing lawyers in arbitral proceedings from acting as arbitrators would reduce the overall size of the pool of potential arbitrators and deprive the parties of their freedom to select as arbitrators of their choice, including senior counsel with in depth expertise who could bring valuable practical experience. This would run contrary to the fundamental principle of party autonomy, notably the freedom to select the arbitrator of their choice. With the ban, only the most seasoned arbitrators would economically be able to pursue an exclusive career as arbitrators creating a lack of diversity and increased interdependence and reappointments.[120] Barring counsels from serving as arbitrators could also deprive the arbitration community of some of the best talents as certain individuals may opt for the more lucrative role as counsel. Consequently, the prohibition of double hatting would unduly limit the number and undermine the rigor and quality of arbitrators in ISDS.[121]

Generation renewal in arbitration is significant to the arbitration community given that senior arbitrators will inevitably retire. The next generation of arbitrators, who tend to be practicing as counsel for economic reasons and to hone their expertise. Therefore, they would unlikely be able to give up their counsel profession until they receive enough appointments to serve as full-time arbitratordue to the scarcity of appointments.[122] The ban would exclude a greater number of candidates than necessary and pose a barrier to entry by preventing the renewal of the arbitrator pool. This is echoed by Comment 68 to the Draft Code, which states: "*A ban on double-hatting also constrains new entrants to the field, as few counsels are financially able to leave their counsel work upon receiving their first adjudicator nomination*." Allowing newcomers to sit alongside more senior arbitrators would enable them to gain more experience and benefit from the transition of the second generation of arbitrators. Some commentators view that the argument against double hatting by the most powerful and influential arbitrators (referred to as the "core") is very strong. However, this should not apply

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[119] ibid 421.
[120] Cleis (n 46) 203.
[121] Langford and Behn, 'The Revolving Door in International Investment Arbitration' (n 30) 322-23 ("*there is a relatively small pool of arbitrators that can sit in these types of arbitrations and that limiting qualified individuals from sitting as arbitrator due to work as legal counsel would undermine the quality and rigor of the adjudicators acting in the current system*".).
[122] Crook (n 58) 288 ("*for the few younger/female/minority lawyers who gain the first appointment, other appointments may be slow to come, if they come at all. (As noted above, the great majority of ICSID arbitrators receive only one or two appointments). Hence, most ICSID arbitrators must continue as counsel in order to pay their bills*"); see also Schill 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (n 38) 420; Horvath and Berzero (n 24) 13.

to transitioning practitioners *i.e.,* younger counsel, where a more nuanced approach is required.[123] Too stringent a restriction on the practice of double hatting would limit the already small pool of arbitrators and have negative effects on the development of a new generation of arbitrators.

CONCLUSION

An overarching ban on double hatting, which places an absolute restriction on individuals serving as counsels in investment arbitration proceedings from being appointed as arbitrators, is seen by many as the most pressing reform to rejuvenate the ISDS regime. However, such measure would not only fail to achieve its intended aim, but also harm the progress achieved in increasing diversity in arbitrator appointments in ISDS and impede the growth of the second generation of arbitrators. A broad-based ban on double-hatting, such as the ones proposed in the Netherlands Model BIT and the first Draft Code, fails to recognize that multiple roles performed by an arbitrator does not, in and of itself, pose a risk to their independence and impartiality. Caution should be exercised when considering measures that impede on party autonomy, reduce the pool of arbitrator, and negatively impact diversity. Any prohibition would significantly curtail the progress made in the ISDS regime to improve gender and regional diversity in the pool of arbitrators. Instead of imposing the onerous cost of a complete ban of double hatting on potential arbitrators and parties. This article proposes a system of tailored disclosures made by arbitrators. Through full disclosure, the parties can assess if the particular appointment would raise a conflict of interest and whether the parties would accept the appointment with knowledge of the potential multiple roles.

[123] Anthea Roberts 'A Possible Approach to Transitional Double Hatting in Investor-State Arbitration' (*EJIL: TALK!*, July 2017) <https://www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration/> accessed 16 August 2021; William Park and Catherine Rogers 'A conversation with Professor William W. (Rusty) Park—as interviewed by Professor Catherine A. Rogers: Institute for Transnational Arbitration Houston' (2018) 34 (4) Arbitration International ("*The dilemma of someone serving sometimes as council and sometimes as arbitrator presents itself differently depending on the stage of one's career. For young people coming up in the ranks, they start out as lawyers and much later transition with a first appointment as arbitrator. There will be times in one's career where we are in transition. We want people who have experience serving as lawyers when they're younger, knowing something about how the system works, and then later serving as an arbitrator. The grey period when they are transitioning from one to the other may not be easy in respect of ethical rule*").