BETWEEN ROLES: REASSESSING THE REGULATION OF DOUBLE HATTING IN INVESTMENT ARBITRATION

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Part I: Introduction

In 2009, the Court of Arbitration for Sport ("**CAS**") became the first institution to prohibit 'double-hatting' - the practice of counsel serving as arbitrators in some cases and party representatives or legal advisors in others.[1] Though the CAS's anxieties were no doubt exacerbated by the small pool of skilled lawyers available in a field as specialized as sports law, the idea quickly gained traction in broader legal circles. The same year, Professor Phillipe Sands suggested at the annual International Bar Association conference that such a ban be imported into the domain of investor-state dispute settlement ("**ISDS**"): in his view, the issues of public interest inherent to investment arbitration made it particularly important to safeguard against potential biases.[2]

This proposal ties into a broader wave of criticism directed towards the ISDS regime – a demonstrated investor bias, inconsistent and conflicting rulings, high damage awards, protracted hearing timelines, and exorbitant costs have cumulatively led to a widespread feeling that investment arbitration is now undergoing a "*legitimacy crisis*."[3] On the point of arbitrator conduct, the UN General Assembly passed a resolution asking the UN Commission on International Trade Law ("**UNCITRAL**") and the International Centre for Settlement of Investment Disputes ("**ICSID**") to collaborate on a Draft Code of Conduct for Adjudicators, the third iteration of which came out in September 2021.[4] Articles 4 to 9 of the Third Code contemplate requirements of independence and impartiality for arbitrators.[5] Article 4, in particular, improves upon its predecessors by offering disputants three options to regulate

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[1] Section 18, Code of Sports-Related Arbitration, Court of Arbitration for Sport (2010).

[2] Phillipe Sands, *Developments in Geopolitics: The End(s) of Judicialization?* 2015 ESIL CONFERENCE CLOSING SPEECH (12 September 2015.)

[3] Daniel Behn, Ole Kristian Fauchald & Malcolm Langford, *Introduction: The Legitimacy Crisis and the Empirical Turn*, in The Legitimacy of Investment Arbitration: Empirical Perspectives 1–38 (Daniel Behn, Ole Kristian Fauchald, & Malcolm Langford eds., 2022).

[4] *Possible Reform of Investor-State Dispute Settlement (ISDS): Background Information on a Code of Conduct,* UNCITRAL Working Group III (ISDS Reform), A/CN.9/WG.III/WP.167.

[5] *Third Version of the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement,* Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/1004.

double-hatting: a full prohibition, a qualified prohibition, and a mere disclosure requirement. But is this 'soft-law' solution adequate to address a problem as serious and pervasive as double-hatting? Or does the issue call for a greater degree of external, non-voluntary regulation?

This paper explores the phenomenon of double-hatting in ISDS. **Part II** discusses the legal and jurisprudential background of double-hatting. **Part III** examines criticisms and defences of the practice, with specific reference to the issues of (i) legitimacy and (ii) diversity. On the basis of the foregoing discussion, **Part IV** explores whether the 2021 Draft Code can effectively regulate double-hatting, arguing that the qualified prohibition option, though promising, needs further refining. **Part V** offers concluding remarks.

Part II: Background

Legal Framework

Following the CAS's lead, a number of International Investment Agreements ("**IIAs**") have effectuated anti-double-hatting provisions. Most of these are 'prospective' i.e., they prohibit adjudicators from acting as counsel, advisors, and/or witnesses in ongoing or new proceedings, including the Canada-European Union Comprehensive Economic and Trade Agreement [6] and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership,[7] as well the Model Bilateral Investment Treaties ("**BITs**") of Morocco,[8] Netherlands,[9] Slovak Republic,[10] and the South African Development Community.[11]

However, some legal instruments go one step further, incorporating 'retrospective' or backward-looking double-hatting regulations. For example, under the 2012 Permanent Court of Arbitration ("**PCA**") Rules, arbitrators must disclose "*…circumstances, <u>past or present</u>, likely to give rise to justifiable doubts as to my impartiality or independence*"[12] (it is worth noting that this was not present in the past four versions of the PCA Rules.[13]) Similarly, the

[6] Article 8.30(1), Canada-European Union Comprehensive Economic and Trade Agreement.
[7] Articles 9.22(6) & 28.10(1)(d), Comprehensive and Progressive Agreement for Trans-Pacific Partnership.
[8] Article 35.4, Morocco Model Investment Agreement (2019.)
[9] Article 20.5, Netherlands Model Investment Agreement (2019.)
[10] Article 18.4, Slovak Republic Model Investment Agreement (2019.)
[11] Article 29.14, South African Development Community, Model Bilateral Investment Treaty Template with Commentary (2012.)
[12] Article 12.1, PCA Arbitration Rules 2012.
[13] Loretta Malintoppi and Alvin Yap, *Challenges of Arbitrators in Investment Arbitration: Still a Work in Progress?* in Arbitration Under International Investment Agreements: A Guide to the Key Issues, Oxford University Press.

Transatlantic Trade and Investment Partnership & Trade Agreement[14] and the EU–Singapore[15] and Australia–China[16] Free Trade Agreements allow for arbitrator challenges on the basis of the non-disclosure of a past interest that reasonably creates the appearance of impropriety or bias.

But whether forward-looking or not, how have these requirements played out in practice? After all, accepting another appointment or failing to disclose a fact do not, by themselves, lead to disqualification. Aggrieved parties can launch a challenge, but they are not guaranteed to succeed. An examination of caselaw on this point amply demonstrates the same.

Jurisprudential Analysis

In the last twenty years, a number of ISDS tribunals have fielded allegations of double-hatting. A "*textbook example*" is when the arbitrator is concurrently involved in an arbitration against the Respondent State as a party representative[17] – in these instances, the mere presumption of bias is usually sufficient to lead to his disqualification. This was witnessed in *ICS Inspection and Control Services v Argentina* (2009) - though the arbitrator had disclosed his participation in the simultaneous proceedings (qualifying that the two cases were *"factually unrelated"),* it was ultimately held that his role as legal counsel could compromise his decision-making.[18] Similarly, in *Exeteco International v Peru* (2014), though the Claimant-appointed arbitrator was advising certain state-owned entities of the Respondent State, this simultaneous participation was found to give rise to objectively justifiable doubts regarding his impartiality.[19]

Unfortunately, not all cases are so clear-cut. When neither of the disputing parties is involved in the other proceeding, the threshold for apparent bias is significantly higher. This has been the case in most relevant ISDS decisions. For example, in *Telecom Malaysia v Ghana* (2004), Respondent sought to rely on the award in *Consortium RFCC v Morocco* (2001) – which the

[14] Article 3, Transatlantic Trade and Investment Partnership & Trade Agreement.
[15] Annex 9-F, ¶ 3, Code of Conduct for Arbitrators and Mediators of the EU–Singapore Free Trade Agreement.
[16] Annex 9-A, ¶ 2, Code of Conduct of the Australia–China Free Trade Agreement.
[17] Daniel Boon and Aleksander Kalisz, *Regulating Double-Hatting in Investment-Treaty Arbitration: Latest ICSID-UNCITRAL Proposals*, DAILYJUS (18 January 2022.) Available at: https://dailyjus.com/world/2022/01/regulating-double-hatting-in-investment-treaty-arbitration-latest-icsid-uncitral-proposals.
[18] PCA Case No. 2010-09, Decision on Challenge to Arbitrator (17 December 2009.)
[19] PCA Case No. AA535, Decision on Peru's Request for Disqualification of the Claimant-Appointed Arbitrator (28 October 2014.)

arbitrator, Emmanuel Gaillard, acting as RFCC's lawyer, was trying to annul.[20] Though the District Court of the Hague ultimately found in Respondent's favour, it is worth noting that its analysis rested largely on the Galliard's high degree of involvement in a number of related proceedings (according to one study, Galliard was most frequent double-hatter in the investment arbitration system[21]), and not the factual matrix *per se*.[22] Comparably, in *Vito Gallo v Canada* (2009), Claimant challenged the arbitrator on the basis of his role as legal advisor to another State Party to the North America Free Trade Agreement ("**NAFTA**"). Under the NAFTA's provisions, the third State party was entitled to make a written submission before the Tribunal. The challenged arbitrator was finally directed to either stop advising the State Party or recuse himself.[23]

There are the handful of instances where the objection has even been sustained, in most cases, challenges based on double-hatting fail. In the early case of *SGS v Pakistan* (2002),[24] the Respondent-appointed arbitrator had, as legal counsel, secured a favourable award from a Tribunal led by Respondent's lawyer in *Azinian v Mexico* (1999).[25] Claimant protested that this "*relationship …arising out of the Azinian dispute*" compounded reasonable concerns about the Tribunal's impartiality.[26] The co-arbitrators, however, rejected the challenge, holding that the overlap by itself was not adequate to disqualify the arbitrator.[27] Similar outcomes were witnessed in *Canepa v Spain* (2019), where the Claimant-appointed arbitrator was simultaneously representing a party receiving funds from the third-party financing the Claimant,[28] and *KS Invest v Spain* (2020), where the arbitrator was arguing in factually similar, parallel proceedings under Articles 10(1) & 13 of the Energy Charter Treaty.[29] In both these cases, the arbitrator had additionally not disclosed the impugned facts – yet, it was found that the apprehension of bias could not attract disqualification. Even in *Telecom Malaysia,*

[20] District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778 (5 November 2004); ICSID Case No. ARB/00/6

[21] Malcolm Langford, Daniel Behn, & Runar Hilleren Lie, *The Ethics and Empirics of Double Hatting,* 6(7) ESIL REFLECTIONS (2017.)

[22] *Supra* note 20.

[23] UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009).

[24] ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (19 December 2002.)

[25] ICSID Case No. ARB(AF)/97/2.

[26] *Supra* note 24.

[27] ICSID Case No. ARB/19/4, Decision on the Proposal for the Disqualification of Arbitrator Peter Rees (19 November 2019).

[28] ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Prof Kaj Hobér (15 May 2020).

[29] *Supra* note 20.

Galliard's resignation as RFCC's counsel was enough to shield him from further scrutiny – per the decision rejecting the second challenge, it was expected that "*an arbitrator…* [who had] *previously, in another case, defended a point of view*," would be able to maintain a professional distinction between the cases.[30] Analogously, in *Vivendi v. Argentina* (2005), Vivendi sought to rely on *Eureko v. Poland* award (2005), which Vivendi's counsel had written after the *Vivendi* proceedings had begun. Even so, the challenge was rejected. This increased threshold for bias vis-à-vis prior proceedings was reiterated in the ICISD case *Saint-Goban v Venezuela* (2013).[31]

Part III: Criticisms & Defences

A survey of 1077 investment arbitrations found that 509 (47%) cases involved double-hatting arbitrators,[32] and 190 of these cases also involved the double-hatting counsel.[33] Further, drawing from Sergio Puig's research,[34] the study demonstrated that a cohort of just 25 arbitrators from Europe and North America accounted for a staggering 412 arbitrator appointments.[35] These statistics shed light on the nature and extent of the 'revolving-door' problem in modern treaty arbitration.

Criticisms

The most obvious concern about double-hatting is its effect on adjudicators' independence and impartiality. Professor Sands presents a hypothetical: if a lawyer spends his morning arguing for or against a legal issue, and his afternoon drafting an arbitral award addressing the same issue, it is not unimaginable that he will "*…be influenced, however subconsciously*."[36] Moreover, not taking the objection seriously at a preliminary stage means that it can only be discovered and punished after the fact, seriously detracting from the finality of the arbitral process. For example, in *Bank of Montreal v. Brown* (2007), a municipal court had to intervene and remove an arbitrator who was acting as legal counsel in a separate case against one of the disputing parties; in the court's opinion, even if he felt that "*he could dissociate the two roles*

[30] ICSID Case No. ARB/97/3.
[31] ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013.)
[32] *Supra* note 21.
[33] *Id.*
[34] Sergio Puig, *Social Capital in the Arbitration Market*, 25 European Journal of International Law (2014).
[35] *Supra* note 21.
[36] 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.

in his mind… [it was] *irrelevant, as a reasonable apprehension of bias* [could not] *be confused with actual bias*."[37] More recently, just three years ago, the €128M award in the ICISD case *Eiser and Energía Solar v. Spain* (2017) became the first to be annulled on the grounds of undisclosed double-hatting.[38]

There is also a broader concern that situates double-hatting within ISDS's larger legitimacy problem. Investment arbitration necessarily involves issues of public interest, and as Shapiro & Stone Sweet theorize, these "*socially complex forms of adjudication*" require arbitrators to work harder to demonstrate neutrality.[39] There is another, more pointed criticism: the field is now dominated by twenty-five 'power brokers.'[40] One school of thought calls upon these individuals to hang up their hat and voluntarily take a step back from the practice, while the other works around it, asserting that if these arbitrators now constitute a *de facto* judiciary, then it is time to judicialize ISDS, or at least ensure it accords with appropriate court practices.

Defences

At the same time, there are those who vigorously defend double-hatting. Arbitration, by its very nature, is based on *ad-hoc* appointments. Defenders of the practice highlight that party autonomy is a cornerstone of arbitration – legal relationships are based on mutual trust, and disputants must be free to appoint counsel or adjudicators on the basis of skill, reputation, and preference. Moreover, any sort of external regulation presupposes the existence of objective standards, such as three year 'cooling-off period' contemplated by Article 4(1) of the Third Code vis-à-vis arbitrations "*…involving the same measures, the same or related parties, or the same provisions of the same treaty*."[41] Under these circumstances, lawyers find themselves unfairly unable to accept work in even unrelated proceedings.

Furthermore, even a ban on double-hatting is linked to a larger issue: that of arbitrator diversity. JR Crook points highlights the "*decentralized and user-driven context"* that a potential prohibition on double-hatting must be located in – a blanket ban is more likely to hurt new entrants to the field far more than it is to mitigate the dominance of powerful, established

[37] (2007) 359 N.R. 194 (FCA).
[38] ICSID Case No. ARB/13/36.
[39] Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: Univ. Chicago Press, 1981); Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 Comp. Polit. Studies 147 (1999).
[40] *Supra* note 21.
[41] *Supra* note 5.

arbitrators.[42] The organization ArbitralWomen, committed to increasing gender diversity within international arbitration, expressly said that the ban proposed by the Draft Code "*…would be tantamount to reversing any progress made on gender diversity by the international arbitration community, including ICSID and UNCITRAL, over the past years*."[43]

Part IV: The Way Forward

Earlier versions of the Draft Code only contemplated an outright prohibition on double-hatting, provoking much resistance. At the 44th session of the UNCITRAL Working Group II, the UK and the USA (joined by India, South Korea, Lebanon, and Bahrain, amongst others) lobbied for Article 4 to incorporate a stronger disclosure requirement instead, while the EU remained in favour of a total ban.[44] The result of these negotiations was a compromise: a choice between a full prohibition, an obligation to disclose, and the 'middle-ground' between these two options i.e., a qualified prohibition.

Analysis of the Third Code

There are a number of things the Third Code gets right. At the outset, it takes an adjudicator-focused approach, restricting the applicability of the provisions to arbitrators and appeal judges. This minimizes the scope for parties to use allegations of double-hatting as procedural tactic (such as challenging the involvement of counsel, expert witnesses, or tribunal secretaries) to frustrate the proceedings. It is worth nothing that Working Group III is expressly considering separate, specific provisions to address these roles.

Article 4 then presents the three options. An outright ban, which witnessed only initial interest from the legal community, either prohibits arbitrators from working in any other ISDS proceeding, or more generally, any other proceeding arising out of an investment treaty (such an enforcement proceeding.) On the other end of the spectrum, the disclosure option calls upon arbitrators to decide and disclose relevant facts, leaving room for a great deal of subjectivity.

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[42] John Crook, *Dual Hats and Arbitrator Diversity: Goals in Tension*, 113 American Journal of International Law (2019.)

[43] 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). Available at: https://www.arbitralwomen.org/icsid-and-uncitral-draft-code-of-conducts-potential-ban-on-multiple-roles-could-have-a-severe-impact-on-gender-diversity/.

[44] *An end to the proposed ban on double-hatting?* CIARB (15 Feb 2023). Available at: https://www.ciarb.org/news/an-end-to-the-proposed-ban-on-double-hatting/.

The qualified prohibition is more nuanced, as it imports the requirement of party consent for the adjudicator to take on another role involving the same or related parties, treaty, legal issue, or measure. This is promising, as much of the prior lack of clarity owed to divergent interpretations. The threshold for double-hatting in some challenges was as low as 'related facts,' or the same impugned legal provision. Article 4's comprehensive list is likely to eliminate major ambiguities, though one still persists: there is some confusion around whether the use of "*and*" signifies the aforementioned criteria are cumulative. This is an unlikely interpretation that would make prohibition almost impossible, and must be clarified in subsequent drafts.

However, 'measures' or 'parties' by themselves are not clear-cut terms either. For example, hypothetically speaking, in the *Telecom Malaysia* case, none of the sub-provisions of Article 4 would be attracted. The disputants, treaties, and measures sought were all different – yet the *RFCC* award was crucial to the case. Instead of waiting for the definitions to develop through caselaw, the ICISD and UNCITRAL can either revise the upcoming drafts, or issue clarificatory legal instruments, like the negotiating history or commentaries.

Moreover, Article 11 relies on adjudicators to voluntarily recuse themselves in the event of a successful challenge. Failing this, the removal mechanism of the underlying legal framework is triggered. This poses a problem at two levels: *first*, it grants the 'right of first hearing' to the arbitral institution, which is often ineffective and prioritizes the continued clientele of parties, and *second*, it risks failing where municipal courts become involved. Taking the example of *Telecom Malaysia* again, a diverging domestic legal interpretation could reduce Article 4 to a 'paper tiger.'

Part V: Conclusion

Though double-hatting is often demonized in ISDS, it is an unavoidable consequence of a system that *ipso facto* relies on out-of-court, *ad-hoc* decision-making. After all, a counsel can hardly be expected to consistently miss out on important appointments because of his or her involvement in prior or ongoing proceedings.

Speaking with reference to the broader issues of legitimacy and diversity, it would seem that a full ban is only likely to exacerbate these problems. A 'quick fix' cannot address a practice as prevalent as double-hatting – rather, any effective solution must prioritize party autonomy and mutual consent. The qualified prohibition this seems *practically* well-suited to address double-hatting – its specificity and comprehensiveness demonstrate that the system is now taking

criticism seriously. Further Drafts should carefully consider feedback from the legal community, so ISDS can serve the needs of disputants, stakeholders, and institutions alike.