

Addressing the Inadequacies: A New Multi-Faceted Solution to Double Hatting in ISDS

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ABSTRACT

In Investor-State Dispute Settlement (ISDS), ‘double hatting’, or the playing of multiple roles by arbitrators in different ISDS proceedings as counsels, expert witnesses, or tribunal secretaries, is a problematic phenomenon. This regrettable practice results in the monopolisation of power and builds up suspicions regarding such arbitrators’ impartiality which, in turn, threatens the legitimacy of the whole ISDS regime itself. Therefore, to sustain the current ISDS system as a viable dispute resolution option for investors and states, there is a need to regulate double hatting at the earliest. To that end, numerous solutions have been forwarded by scholars and international bodies alike. The recently proposed Draft Code of Conduct for Adjudicators in ISDS is a significant development in this field. However, all these solutions are either unviable or inadequate as they fail to account for the variations in the forms and intensities of double hatting.

To remedy this lacuna, this article analyses the existing proposals, including the Draft Code of Conduct, and, thereafter, develops a more comprehensive solution by inculcating measures such as compulsory disclosure requirements and temporary bans. Further, it adapts these measures to regulate, and minimise, concurrent and successive double hatting across different classes of arbitral proceedings. By doing so, this article adopts a novel, multi-faceted approach to overcome the problem on a case-by-case basis, serving its aim of bringing to the table a viable and effective solution—one that ticks the maximum number of boxes—to resolve the risks posed by double hatting.

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INTRODUCTION

When it comes to ethical regulations, the Investor-State Dispute Settlement or Investor-State Arbitration (ISDS) is a ‘no-man’s land,’¹ and ‘double hatting’—a notion lacking any unanimously agreed upon definition—is one of its most serious problems.² As a highly concentrated phenomenon³ that has gained ground over the past two decades,⁴ ‘double hatting’, for the scope of this article, refers to the playing of multiple roles by arbitrators in different ISDS proceedings, and includes both sequential and simultaneous movement between roles as arbitrators, counsels, expert witnesses and tribunal secretaries.⁵

Scholars and international bodies have put forth many different proposals to resolve this problem, including the recent Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement which is being drafted by the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).⁶ The ICSID and UNCITRAL released the first version of this Draft Code of Conduct on 1 May 2020, and its updated version on 19 April 2021.⁷

¹ Catherine A Rogers, ‘Fit and Functional in Legal Ethics: Developing a Code of Conduct for International Arbitration’ [2002] 23 Michigan Journal of International Law 341, 341.

² ICSID and UNCITRAL, ‘Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement’ (1 May 2020) para 65, 66 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct.docx> accessed 25 August 2021 (Draft Code of Conduct 2020).

³ Ariel Anderson, ‘Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks’ (2018) 49 Georgetown Journal of International Law 1143, 1157.

⁴ Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 Journal of International Economic Law 301, 326 (The Revolving Door).

⁵ *ibid* 301.

⁶ Draft Code of Conduct 2020 (n 2) para 65.

⁷ ICSID and UNCITRAL, ‘Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two’ (19 April 2021) <https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf> accessed 25 August 2021 (Draft Code of Conduct V2.0).

To aid in combating double hatting, this article argues that the currently available solutions, (including the Draft Code of Conduct) suffer from limitations, and that a more holistic, multi-dimensional approach is better suited to remedying the problem. Section I of the article begins by explaining the problems that double hatting gives rise to. It then touches upon the core values of the ISDS system that one must account for while considering any measure against double hatting. Thereafter, Section II analyses four solutions that are currently available for resolving double hatting. The article highlights the limits of absolute bans, temporary bans, the Multilateral Investment Court (MIC), and the Draft Code of Conduct as possible solutions. Then, Section III develops a novel solution to the problem at hand, and grounds it in ISDS jurisprudence. It also briefly discusses the achievements and limitations of the said proposal. Finally, Section IV of the article concludes the analysis with a note of caution against opting for solutions that are overly broad, overly narrow or, simply, impractical.

I. PROBLEMS AND PRINCIPLES

Why double hatting is problematic

The diversity crisis

Diversity is a key value that is advantageous to all adjudicatory systems.⁸ The availability of a diverse body of decision makers to choose from helps in avoiding cognitive biases and groupthink by allowing inflow of fresh and diverse perspectives, and also in strengthening the appearance of legitimacy and fairness of the adjudicatory process.⁹ Despite such an important role, the ISDS system is undergoing a grave ‘diversity crisis’, as its levels of diversity continue to remain

⁸ 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 21 August 2021.

⁹ Andrea Kay Bjorklund, ‘The Diversity Deficit in Investment Arbitration’ (EJIL:Talk!, 4 April 2019) <<https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/>> accessed 5 July 2021.

abysmally low.¹⁰

Scholars have expressed concerns over the lack of diversity across various parameters such as age, region, and gender in Investor-State Arbitration.¹¹ They point out that most of the arbitrators in ISDS were senior white men,¹² and due to their predominance in ISDS, this group of ‘pale, male and stale’ arbitrators benefits disproportionately from their ability to double hat.¹³ A cursory overview of the PITAD database¹⁴ is helpful in comprehending this deficit. It reveals that, between 2012 and 2019, more than 85% of the total appointments were occupied by men. Further, of the appointments made in 2018, three out of every four went to arbitrators from Western Europe or North America.¹⁵ Although they are slightly better represented among the class of counsels, the share of these traditionally under-represented groups is less than desirable, because the caseload is skewed in favour of Western nationals.¹⁶ This is even more so regarding women counsels.¹⁷

The phenomenon of double hatting plays an important role in causing and maintaining this disparity. It concentrates appointments and power at two levels. Firstly, among various regional, gender and age groups, it results in the over-representation of the ‘pale, male and stale’ group that partakes in multiple roles and, consequently, occupies a dominant position in the field of ISDS resulting from its sheer number of appointments. Secondly, within this group itself, the appointments are not well distributed. Indeed, scholars indicate that only a few

¹⁰ UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Kingdom of Bahrain’ (31 July 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/uncitral_wg_iii_bahrain_submission_31_july_2019.pdf> accessed 25 August 2021.

¹¹ Bjorklund (n 9); Sucharitkul (n 8).

¹² Sucharitkul (n 8).

¹³ Clarissa Coleman and Louise Bond, ‘Two Heads Are Better Than One: Double Hatting And Its Impact on Diversity In International Arbitration’ (National Law Review, 30 July 2020) <<https://www.natlawreview.com/article/twoheads-are-better-one-double-hatting-and-its-impact-diversity-international>> accessed 21 August 2021.

¹⁴ Daniel Behn and others, ‘Gender in Arbitration’ (PITAD.beta) <<https://pitad.org/index#static/illustrations>> accessed 21 August 2021.

¹⁵ Sucharitkul (n 8).

¹⁶ Langford and others ‘The Revolving Door’ (n 4) 316.

¹⁷ *ibid.*

well-established players participate in double hatting.¹⁸ As a result, the considerable number of appointments that comes their way causes disproportionate amounts of power to accumulate in this small group, hence, allowing their actions to greatly influence the system. In particular, the study undertaken by Langford and others illustrates these points as it provides a list of the top 25 double-hatters, of which not even one is a woman.¹⁹ The double-hatters' list also features certain names that appear in the lists of the top arbitrators, counsels, and expert witnesses, evidencing their significant presence across different roles in the ISDS system. This suggests that these double-hatters are capable of exerting greater influence over the ISDS system than their non-double-hatting counterparts. This unequal flow of appointments resulting from double hatting leads to fewer and, increasingly, scarce appointments for new arbitrators,²⁰ and preserves the *status quo* whereby historically over-represented groups continue to be over-represented across roles and the newcomers stay on the fringes.

This oligarchic structure of the ISDS appointment system disproportionately concentrates power in the hands of a few individuals. Indeed, only 4%, or 25, arbitrators occupy more than a third of all ISDS arbitral appointments.²¹ Moreover, of these top arbitrators, a few also feature in the list of top counsels and top expert witnesses by number of appointments.²² This scheme of appointments places the 'power-brokers,' who are some of the most influential names in the ISDS system, in key positions.²³ Their 'power' manifests in their ability to maintain 'a tight grip on the investment arbitration system and [to] exert immense influence over it'.²⁴ It also causes their actions to have an

¹⁸ See Sergio Puig, 'Social Capital in the Arbitration Market' [2014] 25 *European Journal of International Law* 387; *ibid*; John R Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension' [2019] 113 *AJIL Unbound* 284

¹⁹ Langford and others 'The Revolving Door' (n 4).

²⁰ Crook (n 18) 288.

²¹ Langford and others 'The Revolving Door' (n 4) 310.

²² *ibid* 319–20.

²³ *ibid* 328.

²⁴ Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom' (Corporate Europe Observatory and the Transnational Institute November 2012) 36 <<https://www.tni.org/files/download/profitfrominjustice.pdf>> accessed 26 August 2021; Langford and others 'The Revolving Door' (n 4) 319.

exclusionary effect on the new practitioners of the ISDS system. This is not to say that these influential players intend to exclude the newcomers. However, it is a reality of today's ISDS system that certain questionable practices do result in the concentration of appointments and power within a small group. These actions include the practice of double hatting and a related practice called 'revolving doors', in which a counsel selects 'an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as arbitrator'.²⁵

The legitimacy crisis

The diversity crisis described above is a direct effect of practices such as double hatting, and, thus, is a part of the broader 'legitimacy crisis' that faces ISDS today.²⁶ The propensity for bias amongst arbitrators in Investor-State arbitration is one of the main causes behind this crisis.²⁷ The discussion on the question of bias has developed around the principle of independence and impartiality of arbitrators.²⁸ Under this principle, while independence connotes 'the absence of an actual, identifiable relationship with one of the disputing parties, or with someone closely connected to a party',²⁹ impartiality, on the other hand, refers to the absence of bias or predisposition towards a specific party or towards specific

²⁵ Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 *Arbitration International* 495, 498.

²⁶ Tori Loven Kirkebø, 'Lawyers in Problematic Dual Role as Arbitrators' (27 October 2017) <<https://www.jus.uio.no/pluricourts/english/news-and-events/news/research-news/double-hatting.html>> accessed 12 July 2021; Thomas Dietz, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 *Review of International Political Economy* 749.

²⁷ José Manuel Álvarez Zárate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?' (2018) 59 *Boston College Law Review* 2765, 2766; Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chicago Journal of International Law* 471.

²⁸ Brower and Schill (n 27) 489; Stefanie Schacherer, 'Independence and Impartiality of Arbitrators' (Seminar Paper for International Investment Law and the Rule of Law, January 2018) <https://eur-int-comp-law.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/Schacherer.pdf> accessed 7 November 2021.

²⁹ Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators* (Nijhoff International Investment Law Series 8, Koninklijke Brill 2017) 20.

legal issues/arguments.³⁰

Double hatting violates this principle and damages the perception of legitimacy of the ISDS system, primarily in two primary ways.³¹ Firstly, the double hatting arbitrators are capable of exercising the ‘power’ to shape the ISDS legal system, including legal precedents and evaluation of facts, to gain assistance in their roles as legal counsels in situations where they argue for any specific issue while at the same time deciding upon it in another proceeding. Secondly, double hatting can raise justifiable doubts over the independence and impartiality of an arbitrator as their other roles, as counsel or expert witness, which might appear to taint their adjudicatory role. This will be the likely result, especially in cases where the tribunal is to decide the same (or similar) issues (hereinafter referred to as ‘similar issues’ cases) and in situations in which at least one of the parties is common to both the proceedings (hereinafter referred to as ‘same party’ cases).

An oft-quoted example of double hatting is the case of *Telekom Malaysia Berhad v The Republic of Ghana*.³² Professor Galliard, the claimant-appointed arbitrator, was simultaneously practicing as the counsel for the party seeking annulment of an ICSID award that related to the indirect expropriation under the Ghana-Malaysia BIT. Ghana challenged his appointment in *Telekom Malaysia* on the grounds that both proceedings concerned similar issues that Ghana was relying on the *RFCC v Morocco* award and that, therefore, Professor Galliard’s role as an arbitrator was incompatible with his role as the claimant’s counsel. The Hague District Court, hearing the challenge, accepted Ghana’s arguments and asked Professor Galliard to make a choice between his roles as arbitrator and counsel, on the ground that a perception of bias resulting from such double hatting was unavoidable, even more so because both the proceedings dealt with similar legal issues.³³

Ultimately, given that the procedural fairness of any dispute settlement

³⁰ *ibid* 21; Schacherer (n 28) 6.

³¹ Malcolm Langford, Daniel Behn and Runar Lie, ‘The Ethics and Empirics of Double Hatting’ (2017) 6 ESIL Reflections, 8 (The Ethics and Empirics).

³² *Telekom Malaysia Berhad v The Republic of Ghana*, PCA Case No. 2003-03, UNCITRAL.

³³ *Republic of Ghana v Telekom Malaysia Berhad*, Petition No HA/RK 2004.667, Decision (18 October 2004) [22] (District Court of The Hague).

system depends on the independence and impartiality of its decision-makers,³⁴ it becomes clear that the current ISDS system is facing a legitimacy crisis,³⁵ and that double hatting is one of its causes because it raises concerns about the lack of sufficient impartiality and independence of ISDS arbitrators.³⁶ Amid fears that a perception of procedural unjustness might loom large over Investor-State Arbitration, scholars often point out that double hatting is a practice whose mere existence of calls for reforms in the ISDS system.³⁷

A tussle between two core principles of ISDS

In addition to the principles of arbitrators' impartiality and independence, party autonomy is also one of the core principles of the current ISDS system.³⁸ While the former is 'of vital importance both to disputing parties and the legitimacy of investment arbitration as a whole',³⁹ the latter allows the parties to choose the arbitrators and the applicable rules of law.⁴⁰ Double hatting is a manifestation of the tussle between these two principles. The parties favour experienced repeat players⁴¹ who are 'receptive to their point of view'.⁴² These

³⁴ Cleis (n 29) 4.

³⁵ Chiara Giorgetti, 'Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals' (2016) 49 *George Washington International Law Review* 205, 206; Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 *Harvard International Law Journal* 271, 271; Langford and others, 'The Ethics and Empirics' (n 31) 6.

³⁶ Draft Code of Conduct 2020 (n 2) para 65-66.

³⁷ Michael Faure and Wanli Ma, 'Investor-State Arbitration: Economic and Empirical Perspectives' (2020) 41 *Michigan Journal of International Law* 1, 39; Steven R Ratner, 'International Investment Law through the Lens of Global Justice' (2017) 20 *Journal of International Economic Law* 747.

³⁸ International Council for Commercial Arbitration, 'Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration' (ICCA Reports, International Council for Commercial Arbitration 2016) 9-11.

³⁹ Fernando Dias Simões, 'Hold on to Your Hat! Issue Conflicts in the Investment Court System' (2018) 17 *The Law & Practice of International Courts and Tribunals* 98, 99.

⁴⁰ International Council for Commercial Arbitration (n 38) 9; See also Cleis (n 29) 13; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 37, 42.

⁴¹ Faure and Ma (n 37) 8.

⁴² International Council for Commercial Arbitration (n 38) 10.

individuals are, usually, double hatters who often play multiple roles, simultaneously and/or successively.⁴³ As a closed group of top arbitrators, this group constitutes a ‘de facto judiciary’⁴⁴ but is not subject to restrictions suited to the litigation-like nature of ISDS.⁴⁵

Double hatting is incompatible with the obligations of independence and impartiality.⁴⁶ It pits a neutral activity against a partial one as a single individual engages in, for example, the role of a counsel (advocacy) and in the role of an arbitrator (adjudication).⁴⁷ Maintaining a perception of a hard-line separation between these two roles so as not to let advocacy affect adjudication (or vice versa) is difficult not just for third persons who are witness to such double hatting but even for the actor themselves. This is even more so in concurrent ‘similar issues’ cases⁴⁸ where such an actor argues for/against an issue while simultaneously deciding the issue, or a closely related issue, in another case. In fact, the arbitrator cannot steer clear of an appearance of bias in these cases.⁴⁹ Accordingly, double hatting in these scenarios is incompatible with core values of impartiality and independence *per se*. The impact of this tussle may be seen in the low levels of diversity in ISDS. In the present system, in this struggle between party autonomy and impartiality principles, the former seems to have gained the upper hand. Evidently, disputing parties continue to appoint arbitrators freely, repeatedly, and in significant numbers from the ‘pale, male and stale’ group,⁵⁰ perhaps in ignorance of the need to ensure increased diversity which would ascribe greater legitimacy to ISDS. This lopsided scheme continues despite the parties’ capability of appointing arbitrators from under-represented groups. It adds fuel to the larger ISDS crisis because doubts are bound to arise over the sincerity of its arbitrators and over the legitimacy of the system in which they

⁴³ Langford and others ‘The Revolving Door’ (n 4) 301.

⁴⁴ Langford and others, ‘The Ethics and Empirics’ (n 31) 7; See Anderson (n 3) 1157.

⁴⁵ Rogers (n 1) 353.

⁴⁶ Cleis (n 29) 189; Simões (n 39) 101, 104..

⁴⁷ Simões (n 39) 106.

⁴⁸ UNCITRAL Working Group III, ‘Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS’ (30 August 2018) UN Doc A/CN.9/WG.III/WP.151 para 26.

⁴⁹ The Republic of Ghana (n 33) [22].

⁵⁰ Langford and others ‘The Revolving Door’ (n 4) 310; Faure and Ma (n 37) 8.

partake.⁵¹

However, even though there is some dissonance between party autonomy and impartiality principles as explained above, yet it is clear that States and international bodies had hoped that ISDS would be a system free from the appearance of bias that surrounds domestic courts.⁵² Parties, especially investors, have also preferred ISDS over traditional adjudication for this reason, as it provides them to ‘access to a fair and independent dispute settlement system’.⁵³ In light of objectionable practices like double hatting and revolving doors, it is difficult to conclude that these hopes have materialised. Nonetheless, scholars, bodies such as the ICSID and the UNCITRAL, as well as the State parties are starting to respond to these issues. The Draft Code of Conduct, along with other proposals like the MIC, directly evidences their concerns. Given all this, it becomes amply clear that the parties did not, and do not, intend to give rise to the perception of partiality of arbitrators or for doubts to emerge over the legitimacy of the ISDS system itself. Scholars, too, have proposed various solutions for regulating double hatting which seek to find the right balance between the principles of party autonomy and arbitrator impartiality. The following section discusses a few of the proposals in detail.

A look at the pre-existing solutions

This article argues that the currently available solutions to double hatting suffer from serious limitations. They are either not well suited to resolving double hatting or have serious unwanted repercussions for the ISDS system. Proposals such as self-regulation by arbitrators, and the ‘shaming’ of arbitrators by publication of lists of top-double hatthers will also face evident issues concerning their implementation and efficacy at addressing double hatting.⁵⁴ Therefore, this

⁵¹ Zárate (n 27) 2766; Brower and Schill (n 27).

⁵² Pavla Kristkova, ‘A Comparative Study of Judicial Safeguards in Relation to Investor-State Dispute Settlement’ (PhD Dissertations, Osgoode Hall Law School of York University 2020) 45.

⁵³ Eberhardt and Olivet (n 24) 11.

⁵⁴ Jeffery Dunoff and others, ‘Lack of Independence and Impartiality of Arbitrators’ (Academic Forum on ISDS Concept Paper, March 2019) 8–9; Joshua Tayar, ‘Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting’ (2019) 5 McGill Journal of Dispute Resolution 106, 114.

section only analyses the reform proposals that have garnered considerable attention, namely, absolute bans, temporary bans, the Multilateral Investment Court, and the Draft Code of Conduct.

Absolute ban

The proponents of absolute separation between roles argue that imposing a total prohibition on all forms of double hatting will not only end double hatting altogether, but will also facilitate the adoption of simplified disclosure requirements which can, seemingly, focus on a single significant question: whether the candidate has double hatted or not.⁵⁵ Further, it will end the perception that ISDS arbitrations are being driven by a small group of elite investment lawyers who engage in questionable practices, such as double hatting and revolving doors, without any restriction.⁵⁶ This will, in due course, help in evading the legitimacy crisis as described in the preceding section by compelling the double hatting practitioners to opt for or against the role of the arbitrator, once and for all. This permanent choice will therefore mark a clear distinction between roles and will limit the influence exerted by a single individual over the whole ISDS system by limiting the roles they can play.⁵⁷ Presumably, an absolute ban will also resolve the conflict between the core principles of ISDS by upholding the values of impartiality and independence, albeit at the cost of party autonomy.

Supporters of this solution also claim that ISDS has turned into an off-shore litigation hub with a small, closed group of arbitrators acting as a *de facto* judiciary, and that it is turning into a court-like regime.⁵⁸ Hence, they argue for an absolute ban on multiple roles which will help restore its appearance of independence and impartiality, and create opportunities for new practitioners.⁵⁹ Many, including Thomas Buergenthal, a former judge of the International Court of Justice, feel

⁵⁵ Dennis H Hranitzky and Eduardo Silva Romero, 'The "Double Hat" Debate in International Arbitration' (2010) *New York Law Journal*, 2.

⁵⁶ Eberhardt and Olivet (n 24) 36; Hranitzky and Romero (n 55) 2; Cleis (n 29) 202; Draft Code of Conduct 2020 (n 2) para 67.

⁵⁷ Eberhardt and Olivet (n 24) 36; Langford and others 'The Revolving Door' (n 4) 319.

⁵⁸ Rogers (n 1) 353.

⁵⁹ Hranitzky and Romero (n 55).

that ‘arbitrators and counsel should be required to decide to be one or the other’⁶⁰ to avoid situations where double haters might decide disputes in a manner that will help them in other cases where they are acting as counsels. Even the Draft Code of Conduct considers that such a proposal to be ‘easier to implement’.⁶¹ However, it cautions against its overly broad and exclusionary nature, which unnecessarily narrows down the class of arbitrators, thereby undermining party autonomy and preventing them from exercising the freedom to appoint an arbitrator of their choice.⁶²

Admittedly, an absolute ban on double hatting offers certain advantages over other proposals. Such a ban acts as a sieve or a bottleneck that allows only those individuals who choose not to engage in double hatting to pass through and act as arbitrators, thereby, restoring lost confidence in ISDS.⁶³ An absolute ban in this manner prohibits the rest of the practitioners from acting as decision makers in any ISDS dispute. Given this linearity in its approach, it is a solution that is easy to enforce and simple enough to not cause confusion.⁶⁴ In addition, an absolute prohibition will require all practitioners—irrespective of their experience—to choose their future course of work. In effect, only those individuals who can look away from the monetary advantages that practice as counsel has to offer would choose to act as arbitrators, thereby, safeguarding the values of integrity and independence among decision makers.⁶⁵ Furthermore, by ensuring such qualities, an absolute ban will ultimately indicate that the principle of impartiality and independence of arbitrators is of more significance than the principle of party autonomy, and that the latter may be curtailed for the realisation of the former. Another argument in support of an absolute prohibition relates to the fact that ISDS is a judiciary-like framework,⁶⁶ which necessitates restrictions similar to those that are placed on judges.

⁶⁰ Buerghenthal (n 25) 498; Cleis (n 29) 202; Langford and others ‘The Revolving Door’ (n 29) 323.

⁶¹ Draft Code of Conduct 2020 (n 2) para 67.

⁶² *ibid* para 68.

⁶³ Michael Hwang SC and Kevin Lim, ‘Issue Conflict in ICSID Arbitrations’ (2011) 8 *Transnational Dispute Management*, 32.

⁶⁴ Draft Code of Conduct 2020 (n 2) para 67.

⁶⁵ Cleis (n 29) 202.

⁶⁶ Langford and others, ‘The Ethics and Empirics’ (n 31) 7; See Anderson (n 3) 1157.

However, an absolute ban is not a cure-all remedy, and it is apposite to look at its limitations to judge its utility. Firstly, a complete ban will dry up the pool of currently available and future arbitrators,⁶⁷ even though ‘the pool has kept growing since 1990s’.⁶⁸ This will be because an absolute ban forces practitioners to choose, and a majority of them will likely opt for roles other than that of an arbitrator. By making this choice, not only will they be opting for counsel work (which is the more lucrative option), but they will also be free to act in the roles of expert witness, etc., by virtue of not being bound by the absolute ban. On the contrary, the arbitrator will have to make-do only with their remuneration. Therefore, presumably, a large number of current and future practitioners will probably give up on the role of the arbitrator, as their finances would otherwise shrink.⁶⁹ In other words, for this ban to work while simultaneously maintaining the integrity of the arbitration system, it requires an assumption that a majority of the current arbitrators would set aside their own financial concerns and abandon their more lucrative career options. However, this assumption is unrealistic and, therefore, a total ban on multiple roles would be untenable.

Secondly, and related to the first point, such a ban will further concentrate power in the hands of the ‘power-brokers’.⁷⁰ Under an absolute ban system, only those practitioners can afford to practice as arbitrators who can expect a steady income from arbitral appointments or those who have other sources of income. Given the top-heavy concentration of arbitral appointments, they will further accumulate in the hands of the top few as most of the remaining individuals, who have acted as arbitrators, have done so only once or twice during their whole careers.⁷¹ This fact will discourage them from practicing solely as an arbitrator because they might not receive any arbitral appointments in the future, especially when competing against well-known and experienced ‘power-brokers’.

Thirdly, an absolute ban will unnecessarily narrow down the class of available arbitrators to the detriment of diversity and inclusivity of the ISDS

⁶⁷ NG Ziade, ‘How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?’ (2009) 24 ICSID Review 49, 57–58; Hranitzky and Romero (n 55).

⁶⁸ Adrian Lai, ‘Discussion Paper for the Session on Appointment of Arbitrators and Related Issues’ (ISDS Reform Conference: Mapping the Way Forward, 2019) 1, 18.

⁶⁹ Ziade (n 67) 57–58; Hranitzky and Romero (n 55).

⁷⁰ Langford and others ‘The Revolving Door’ (n 4) 19; See also Puig (n 18).

⁷¹ Crook (n 18) 288.

system.⁷² Newcomers, if they opt for the arbitrator's role, will not only have to wait for appointments which might never arrive, but will also have to forego their means of gaining experience in the field.⁷³ The fact that parties favour repeat players does not help either.⁷⁴ If anything, it exacerbates the problem, as, even within the remaining arbitrators, the 'pale, male and stale' group is likely to gain disproportionate number of appointments due to its historic advantage. That is to say, an absolute ban will come about at the cost of arbitrators who belong to traditionally underrepresented classes, such as female arbitrators.⁷⁵ In fact, given that almost one-third of female arbitrators currently engage in double hatting,⁷⁶ a total prohibition will compel them to give up on their practice as arbitrators which will bring their numbers down to a record low.

Fourthly, such a prohibition will deal a serious blow to the principle of party autonomy (a core ISDS principle) and to the parties' right to choose arbitrators by removing 'highly valued and experienced jurists from the arbitration market'.⁷⁷ An example of this would be when the parties who would have preferred a particular arbitrator would, owing to the absolute prohibition on double hatting, have to search for a replacement simply because the former is acting as a counsel in an unrelated case which might not have any bearing on the parties' dispute. In this manner, the guillotine will fall on proceedings which are free from conflicts of any kind. This will force the parties to make-do with their second-choice arbitrators who, the parties' opinion, might not be as capable as the first-choice arbitrators and whom the parties' may regard as 'blank-minded' vis-à-vis the dispute.⁷⁸

Fifthly, an absolute ban is an impractical solution as it does not consider various realities of the current ISDS regime, including factors such as the heavy

⁷² Draft Code of Conduct 2020 (n 2) para 68.

⁷³ Crook (n 18) 288.

⁷⁴ Faure and Ma (n 37) 8.

⁷⁵ Sucharitkul (n 8).

⁷⁶ *ibid.*

⁷⁷ Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 104.

⁷⁸ Cleis (n 29) 202.

workload that ‘has continued to grow’,⁷⁹ and the absence of a permanent roster of arbitrators in the ISDS system. To fully understand the problems that this lapse will cause, it is necessary to first place it in proper context. As explained above, most of the ISDS practitioners (including experienced individuals) are *unlikely* to opt for the role of the arbitrator and, as a result, it is likely that a considerable portion of expertise and experience will become unavailable once a ban is in place.⁸⁰ If this situation were to occur in the context of the Court of Arbitration for Sport’s (‘CAS’) Code of Sports-related Arbitration,⁸¹ or under the EU-Canada Comprehensive Economic Trade Agreement (CETA),⁸² then it would not have posed much of a problem. This is because permanent rosters ensure a continuous flow of expertise in both the systems. S.13 of the CAS’s Code of Sports-related Arbitration provides for a permanent roster comprising of a minimum of 150 arbitrators. Meanwhile, the CETA, under its art. 8.27.2, provides for a permanent 15-member tribunal.

On the other hand, the ISDS is a fragmented system which spans across numerous instruments and bodies without any central authority,⁸³ negating any possibility of the constitution of a permanent tribunal to decide investor-state disputes. Thus, if the States were to import an absolute ban into ISDS, it will lead to fewer available arbitrators who are competent enough to gain the confidence of the parties.⁸⁴ Indeed, given the increase in ISDS cases in terms of their ‘size and complexity as well as number’,⁸⁵ an expertise-depleted small group of expertise-depleted arbitrators will have to face great challenges.

Finally, such over-encompassing bans are not justified when better, narrower alternatives are available, such as those which focus on only those cases

⁷⁹ Matthew Hodgson and Alastair Campbell, ‘Damages and Costs in Investment Treaty Arbitration Revisited’ [2017] *International Journal of Commercial & Treaty Arbitration*, 1.

⁸⁰ Ziade (n 67) 58.

⁸¹ CAS Code of Sports-related Arbitration (01 July 2020)(CSA) s 18.

⁸² Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally entered into force 21 September 2017) (‘CETA’) art 8.30.1.

⁸³ Sergio Puig, ‘The Death of ISDS?’ (*Kluwer Arbitration Blog*, 16 March 2021) <<http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/>> accessed 20 August 2021.

⁸⁴ Gómez (n 77) 104.

⁸⁵ Hodgson and Campbell (n 79) 1.

where justifiable doubts arise regarding the arbitrator's impartiality.⁸⁶ Solutions such as streamlined temporary bans, both before and after acting as an arbitrator, sufficiently narrow concurrent bans that prohibit simultaneous double hatting, and broad objective disclosure requirements that help avoid confusion and late in the day challenges (as envisaged in the solution proposed in Section III of this article) are far more suited to addressing double hatting.⁸⁷ Such solutions target the most problematic instances of double hatting and, at the same time, provide sufficient freedom to practitioners and parties, without damaging the availability and diversity of arbitrators. This approach, unlike an absolute ban, avoids any form of indiscriminate carpet-bombing of the ISDS system which might do more harm than good.⁸⁸

Multi-lateral investment court

As an alternative to ISDS, the EU has proposed the establishment of a Multilateral Investment Court (MIC).⁸⁹ Although no final framework for the MIC exists as of now, the EU's treaties which already provide for the MIC as the dispute settlement mechanism can help sketching out a rough outline. These treaties include the 2015 Transatlantic Trade and Investment Partnership (TTIP),⁹⁰ the EU-Vietnam FTA (EUVFTA),⁹¹ the EU-Canada Comprehensive Economic and Trade Agreement (CETA),⁹² the EU-Singapore Investment

⁸⁶ Hwang SC and Lim (n 63) 32.

⁸⁷ Dunoff and others (n 54) 9.

⁸⁸ Cleis (n 29) 202.

⁸⁹ European Commission, 'A New EU Trade Agreement with Japan' (July 2018) <https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf> accessed 10 July 2021. See also European Commission, 'The Multilateral Investment Court Project' (January 2021) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>> accessed 10 July 2021.

⁹⁰ European Commission, 'Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce' <https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 27 August 2021 ('TTIP').

⁹¹ Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (signed 30 June 2019, entered into force on 1 August 2020) ('EUVFTA').

⁹² CETA (n 82).

Protection Agreement (EUSIPA)⁹³ and the EU-Mexico Trade Agreement (EUMTA).⁹⁴ Grouping together these treaties indicates that the proposed MIC will comprise of a first instance permanent tribunal and an appellate tribunal.⁹⁵

As to the composition of the first instance tribunal, the CETA provides for a 15-member tribunal composed through equal participation—five members will be nationals of the EU member States, five will be nationals of Canada, and the remaining five will be nationals of third countries.⁹⁶ A similar distribution is also contemplated by the EUVFTA, where the tribunal comprises of nine members.⁹⁷ These members are appointed for a fixed term⁹⁸ by special committees under the respective agreements, which shall comprise of the EU Trade Commissioner and the Ministers who oversee foreign trade of the concerned nations. As for remuneration, the tribunal members would receive a retainer fee on a monthly basis, paid by the contracting parties.⁹⁹

Divisions of three members will hear the cases, and a third country national will preside over any such division.¹⁰⁰ An appeal against the decision arrived at by this division would go to the Appellate Tribunal of the MIC within 90 days of the issuance of the award. Grounds for challenge could include both legal errors and errors in the appreciation of facts. The appointment of members to the Appellate Tribunal would take place on a pattern similar to the first instance tribunal.¹⁰¹

In relation to double hatting, these treaties provide that members of the

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Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part (signed 19 October 2018, entered into force 21 November 2019) ('EUSFTA').

⁹⁴ European Commission, 'New EU-Mexico Agreement: The Agreement in Principle' (23 April 2018) <https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156791.pdf> accessed 27 August 2021.

⁹⁵ Juan Pablo Charris-Benedetti, 'The Proposed Investment Court System: Does It Really Solve the Problems?' (2019) 42 *Revista Derecho del Estado* 83.

⁹⁶ CETA (n 82) art 8.27.

⁹⁷ EUVFTA (n 91) art 12 (2).

⁹⁸ Lai (n 68) 31.

⁹⁹ CETA (n 82) art 8.27.12, 8.27.13.

¹⁰⁰ EUVFTA (n 91) art 12.8; CETA (n 82) art 8.27.8.

¹⁰¹ EUVFTA (n 91) art 13.2.

MIC tribunals 'shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Tribunal/of the Appeal Tribunal',¹⁰² and that '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 or domestic law'.¹⁰³ This implies an absolute prohibition on double hatting that will disallow the members from engaging in or from continuing activities that might interfere with their adjudicatory functions as a member of the MIC.¹⁰⁴

Owing to such provisions, the supporters of this proposal have asserted that the MIC is *the* answer to the ISDS regime's main problems,¹⁰⁵ namely, the lack of an appellate mechanism, doubts over arbitrators' impartiality, and the incapability of party-appointed *ad hoc* arbitrators to decide public law disputes.¹⁰⁶ They argue that the MIC resolves the limitations of the ISDS system by, firstly, providing for an appellate mechanism which will allow the appellate tribunal to rectify any legal and factual errors committed by the first instance tribunal, which would lead to greater consistency and coherency.¹⁰⁷ It would alleviate the concerns relating to an award being based on extraneous grounds because the arbitrator had indulged in double hatting. Secondly, the supporters of the MIC believe that it guarantees the impartiality of the members of the tribunal, because the MIC formulates clear rules and prohibits members from assuming any other roles during their term on the tribunal.¹⁰⁸ This prohibition resolves the doubts related to the propensity for bias arising from simultaneous double hatting. Thus, by limiting the grounds which might cause justifiable doubts over the MIC members' impartiality, the prohibition immunises the MIC from the legitimacy crisis that ISDS is currently

¹⁰² EUSFTA (n 93) art 3.9.15, 3.10.13; EUVFTA (n 91) art 12.17, 13.17; TTIP (n 90) art 9.15, 10.14.

¹⁰³ CETA (n 82) art 8.30; EUVFTA (n 91) art 14.1; TTIP (n 90) art 11.

¹⁰⁴ Gómez (n 77) 109.

¹⁰⁵ Lucy Reed, 'International Dispute Resolution Courts: Retreat or Advance' (2017] 4 McGill Journal of Dispute Resolution 129, 135; Lai (n 68) 31.

¹⁰⁶ Łukasz Kulaga, 'A Brave, New, International Investment Court in Context: Towards a Paradigm Shift of the ISDS' in XXXVIII Polish Yearbook of International Law 2018 (Institute of Law Studies PAS 2019) 120–21.

¹⁰⁷ Kulaga (n 106) 133–34.

¹⁰⁸ Charris-Benedetti (n 95) 94–95; Kulaga (n 106) 129–32.

experiencing. In other words, it adopts a system with full-time adjudicators, who will not act as counsels in any case and, eliminates the appearance of biases arising out of double hatting by enforcing ‘the strictest ethical standards’ possible.¹⁰⁹

Thirdly, the MIC does away with party-appointments and mandates that State parties appoint the members.¹¹⁰ This is in line with the belief that the present system of appointments in ISDS is flawed in two ways: firstly, that it indicates a clash between party autonomy and arbitrators’ impartiality, and secondly, that it leads to ‘doubts about the objectivity of a decision’ rendered by the *ad hoc* ISDS arbitrators.¹¹¹ These supporters also maintain that the replacement of party-appointments with State-appointments will ensure that the members will lack a strong interest in reappointments, as they will not be seeking to cultivate a clientele who might seek their services as counsel.¹¹² In short, the supporters argue that, cumulatively, the provisions for appeals, fixed remuneration, proportional representation in the tribunals, random rotation-based allocation of cases, and a clear prohibition on multiple hatting gave the MIC an appearance similar to traditional courts.¹¹³ These provisions limit the factors that could affect the MIC members’ adjudicatory role and, thereby, ensure that the members remain impartial, independent and avoid behaviour that could result in justifiable doubts, akin to the judges of the traditional courts.¹¹⁴

In light of such claims, the MIC might, *prima facie*, appear to be a viable solution to double hatting and other problems. However, it has a number of shortcomings which raise questions over its actual efficacy. Firstly, the proposal goes against the principle of ‘*nemo debet esse iudex in propria causa*’, i.e., no one may be a judge in his own cause. This fundamental principle of natural justice applies to all judicial and quasi-judicial proceedings,¹¹⁵ and forms the basis for the values

¹⁰⁹ Colin M Brown, ‘A Multilateral Mechanism for the Settlement of Investment Disputes: Some Preliminary Sketches’ (2017) 32 ICSID Review-Foreign Investment Law Journal 673, 679, 687.

¹¹⁰ Charris-Benedetti (n 95) 98–105.

¹¹¹ Kulaga (n 106) 129.

¹¹² Gómez (n 77) 109.

¹¹³ Charris-Benedetti (n 95) 102–05.

¹¹⁴ Gómez (n 77) 109.

¹¹⁵ *Voestapline Schienen Gmbh v Delhi Metro Rail Corpn Ltd* (2017) 4 SCC 665.

of impartiality and independence of adjudicators.¹¹⁶ The MIC proposal does not closely follow the spirit of this principle, because, irrespective of the random composition of the three-member divisions, State-appointed members would constitute those divisions and decide the investors' claims against their appointers: the States. In fact, given the belief that *ad hoc* arbitrators are, supposedly, incapable of managing 'the legal construction of the public sphere without rigorous supervision by courts',¹¹⁷ it is likely that the members appointed to the MIC will not act as impartial adjudicators but as overseers appointed by States who will be at the defending end in investor-State disputes brought up before the MIC. It will thus become difficult, if not impossible, to avoid the perception that the MIC is 'biased against investors'.¹¹⁸ If the States will be the sole appointing authority under the MIC, it is highly likely that investors will not have faith in such state-appointed judges.¹¹⁹ Indeed, the claim that the state-appointed members would be more impartial than party-appointed arbitrators (the defending State also has a say in their appointments) does not seem to be a valid claim.

Secondly, it is possible that, given the public nature of ISDS arbitrations, decisions could be based on concerns beyond the facts and the law.¹²⁰ In other words, the state-appointed members who receive retainer fees from the States might find it difficult to avoid justifiable doubts over their impartiality, as their membership would render them dependent on the remuneration only because of the ban on playing any other role. This is especially true for those seeking a

¹¹⁶ United Nations Office on Drugs and Crimes, 'Commentary on the Bangalore Principles of Judicial Conduct' (September 2007) 68 <https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentary_on_the_Bangalore_principles_of_Judicial_Conduct.pdf> accessed 21 August 2021.

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G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 152-183.

¹¹⁸

'The Proposals of the European Commission for Investment Protection and an Investment Court System: Remarks by Judge Stephen M. Schwebel of May 17, 2016 at Sidley Austin, Washington, D.C.' (ISDS Blog) <<http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf>> accessed 20 August 2021.

¹¹⁹ Lai (n 68) 34.

¹²⁰ Ziade (n 67) 50; See Jose E Alvarez, 'To Court or Not to Court' (Institute for International Law and Justice) <<https://www.iilj.org/working-papers/to-court-or-not-to-court/>> accessed 10 July 2021.

renewal of appointments because, presumably, the States would be constantly scrutinising them.¹²¹ Therefore, the members' arbitrators would be exposed to accusations of deciding investors' claims in a way that pleases the States in order to be reappointed to the MIC.¹²²

Thirdly, given the history of international courts being perceived as manifestations of the larger State's powers, the MIC, too, if viewed as an attempt at promoting the interest of the EU,¹²³ could create 'new political dimensions'¹²⁴ that contradict the core values of the ISDS system.¹²⁵ Such an institution would raise suspicions among developing nations who might view it as a set of 'supra-national courts reputed for trying to impose Western versions of justice on non-Western cultures'.¹²⁶ Furthermore, by doing away with party-appointments, the MIC is likely to limit the role of disputing parties while relatively increasing the influence of the remaining States party to the system, which might cause certain States and other stakeholders to regard the MIC's members as representing specific political views, depending on the States that had appointed them.¹²⁷ Owing to these factors, it is probable that the MIC proposal would lack support among developing nations and, therefore, would not be able to 'render internationally recognized and enforceable decisions'.¹²⁸

Fourthly, the diversity problem, as pointed out in Section I of this article, still stands. The provisions relating to the appointment of the MIC members do

¹²¹ *ibid* 50; See Alvarez (n 120).

¹²² Cleis (n 29) 195.

¹²³ Zárate (n 27) 2789.

¹²⁴ Anderson (n 3) 1155.

¹²⁵ Lai (n 68) 34.

¹²⁶ The Chartered Institute of Arbitrators, 'CI Arb at UNCITRAL Working Group III on ISDS Reform: Efficiency, Decisions, and Decision Makers' 15 <https://www.ciarb.org/media/6285/ciarb-uncitral_discussion-papers_digital-0819.pdf> accessed 26 August 2021.

¹²⁷ Fernando Dias Simões, 'UNCITRAL Working Group III: Would an Investment Court De-Politicize ISDS?' (*Kluwer Arbitration Blog*, 25 March 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/03/25/uncitral-working-group-iii-would-an-investment-court-de-politicize-isds/>> accessed 22 August 2021.

¹²⁸ The Chartered Institute of Arbitrators (n 126) 15.

not explain how the MIC will secure or enhance age or gender diversity.¹²⁹ At the moment, as can be deduced from the EU treaties listed above, there is no impediment that prevents the MIC from developing features strikingly similar to the current ISDS system. In fact, the MIC may very well turn out to be a group of senior white men and the levels of diversity may either stay the same or, due to the limited strength of the MIC roster,¹³⁰ deplete further. Therefore, ensuring satisfactory levels of diversity appears to be an easier task under the current ISDS regime, where the group of available arbitrators is considerably larger, than under the limited-roster MIC. Nevertheless, it is possible that the MIC will not only be able to ensure regional diversity (as the EU treaties do) but will also incorporate provisions for age and gender diversity, thereby increasing the representation of under-represented classes. However, because of the limited roster size, the absolute number of arbitrators who belong to the under-represented categories, such as female arbitrators, is highly likely to shrink and remain worse than the numbers in the existing ISDS regime.

Fifthly, the MIC remains susceptible to the same criticisms as the absolute because as the restriction under the MIC is also in the form of an over-encompassing prohibition. The only difference is that the MIC ban will be applicable on a member only for the duration of their term, while an absolute ban is not subject to any similar limit. Understood in this way, the MIC prohibitions are overly broad concurrent bans that prohibit MIC members from taking up any other occupation, because such indulgences might influence their adjudicatory roles.¹³¹ This ban, however, might dissuade experienced individuals from becoming an MIC member at all. As is evident from the EU treaties discussed previously, the proposed MIC will likely prohibit members from taking up any other occupation or, at the very least, from acting as counsel or expert witness in any other investment dispute. This is a prohibition of a wide amplitude, because it requires the practitioners who want to become MIC members to choose (much

¹²⁹ Lai (n 68) 35; Langford and others 'The Revolving Door' (n 4) 309; See also Susan D Franck, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2014) 53 Columbia Journal of Transnational Law 429.) 309; See also Susan D Franck, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2014) 53 Columbia Journal of Transnational Law 429.

¹³⁰ Charris-Benedetti (n 95) 102-103.

¹³¹ Gómez (n 77) 109.

like under an absolute ban) between the role of the arbitrator and the other roles of counsels, expert witnesses, etc. Consequently, many of them are more likely to *not* opt for the arbitral role because the other option (of not being a member and, thus, being beyond the ban) is the more profitable one.¹³² It would allow them to continue to engage in multiple roles, while the MIC member is barred from doing so for the duration of their term. In short, if the State parties were to draft the MIC prohibition on double hatting on the lines of the previous EU treaties, then, it might cause an exodus of experience and expertise away from the MIC roster to the other roles.

Sixthly, the MIC's concurrent ban suffers from another limitation: its limited duration. The ban, naturally, does not regulate post or pre-membership engagements. A member is free to act as a counsel and, to take a rather extreme example, appear on behalf of a State before the MIC or any other tribunal immediately after their term as an MIC member ends. The concurrent ban also does not prevent the States from appointing a former State-appointed counsel (whose engagement may have ended just a few days prior) as a member. In simpler terms, an individual can decide a claim as an MIC member today and appear as a State-appointed (or Investor-appointed) counsel tomorrow under the MIC system. This is a serious shortcoming because it is likely to foster suspicions of bias in the minds of investors, States and the general public alike. Surprisingly, the current ISDS system also suffers from the same lacunae and the MIC has not, so far, dealt with it. However, the solution proposed in this article takes note of this shortcoming and provides for vesting periods to resolve it.

Seventhly, the MIC will require huge investments from the State parties,¹³³ even more so, if serious problems were to occur in this 'unique and unprecedented' establishment.¹³⁴ In other words, the MIC proposal might not be much of an improvement over the current ISDS system, as, firstly, the disputing parties will continue to appoint counsels whose fees amounts to around 75% of the costs of proceedings. Secondly, the States would have to pay adequate amounts to the members of the MIC tribunals as the restriction on playing multiple roles will restrict their other means of income. In addition, if adequate

¹³² Ziade (n 67) 57–58; Hranitzky and Romero (n 55).

¹³³ Anderson (n 3) 1156.

¹³⁴ Puig (n 83).

remuneration is not provided, then it is likely that a considerable number of experienced ISDS arbitrators might opt for the roles of counsel instead. Thus, the pool of eligible candidates would be even smaller and more inexperienced than what is available under the current ISDS system.¹³⁵ When taken together, it is likely that even though the MIC could result in lower per case cost, the overall costs might not differ much from the current system. On a similar note, since appeals lie from first instance decisions to the appellate tribunal, it is likely that host states and investors alike will file appeals against all decisions that go against their interests,¹³⁶ which further adds on to the costs of arbitration.

Temporary bans

Temporary bans prohibit arbitrators from taking up roles in other ISDS proceedings, for certain duration before and/or after any given case, irrespective of the similarities or dissimilarities of those cases. These bans, if incorporated in the ISDS system, would target instances of successive double hatting,¹³⁷ and would prove to be more advantageous than an absolute ban, owing to their temporary nature.¹³⁸ Specifically, a temporary ban will bar ISDS practitioners who currently serve as arbitrators from resuming practice as counsel immediately after their present engagement ends. A specified amount of time would have to pass before they can partake in other roles. Nonetheless, given the fact that most practitioners only receive one or two appointments in their whole careers,¹³⁹ a temporary ban offers a great advantage over other proposals discussed in this section. It allows the current ISDS arbitrators to revert to counsel work in the absence of further appointments as arbitrator, albeit subject to temporary limitations. It also provides them with an opportunity of acting as arbitrators again in any future proceedings, if such opportunities arise. In other words, contrary to an absolute ban, the choices made by ISDS practitioners under a temporary ban regime are not final.

¹³⁵ Simões (n 39) 113.

¹³⁶ Charris-Benedetti (n 95) 106.

¹³⁷ Cleis (n 29) 204.

¹³⁸ Dunoff and others (n 54) 9.

¹³⁹ Crook (n 18) 285, 288; Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?' (2014) 35 *University of Pennsylvania Journal of International Law* 431, 459.

The International Court of Justice's Practice Directions also contain provisions that translate to such temporary prohibitions on ICJ *ad hoc* judges, indicating the usefulness of such bans.¹⁴⁰ Firstly, Practice Direction VII requires the parties to refrain from nominating individuals who have acted as agent, counsel or advocate in another ICJ case within the past three years before the date of their nomination.¹⁴¹ Additionally, Practice Direction VIII mandates the parties to not nominate individuals who, by their proposed appointment, would have double hatted within the past three years.¹⁴² Even though framed in recommendatory language,¹⁴³ State parties have followed the ICJ Practice Directions VII and VIII, with no reported violation till date. Notably, similar provisions which create distance between the bench and the bar are present in the 2019 Dutch Model BIT, which provides for a five-year ban.¹⁴⁴ Scholars have lauded both of these instruments,¹⁴⁵ and the Draft Code of Conduct also considers temporary restrictions as an option in combating double hatting.¹⁴⁶

However, critics of temporary bans point out that this measure suffers from certain limitations. Firstly, if implemented as a standalone measure against double hatting, they are likely to be as ineffective as absolute prohibitions.¹⁴⁷ For instance, if States were to adopt a ban as provided under the 2019 Dutch Model BIT or the

¹⁴⁰ International Court of Justice Practice Directions (adopted on 31 October 2001, last amended 20 January 2021) ('ICJ Practice Directions') Practice Direction VII, VIII.

¹⁴¹ ICJ Practice Directions (n 140) Practice Direction VII; See also Cleis (n 29) 205; Fiona Marshall, 'Defining New Institutional Options for Investor-State Dispute Settlement' (2009) International Institute for Sustainable Development, 12.

¹⁴² ICJ Practice Directions (n 140) Practice Direction VIII; See also Cleis (n 29) 205; Marshall (n 141) 12.

¹⁴³ Paolo Palchetti, 'Making and Enforcing Procedural Law at the International Court of Justice' (Questions of International Law, 31 July 2019) <<http://www.qil-qdi.org/making-and-enforcing-procedural-law-at-the-international-court-of-justice/>> accessed 26 August 2021.

¹⁴⁴ The Kingdom of the Netherlands, 'Netherlands Model Investment Agreement' (UNCTAD Investment Policy Hub 2019) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>> ('Dutch Model BIT') art 20.5.

¹⁴⁵ Marshall (n 141) 12; Marike RP Paulsson, 'The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI' (Kluwer Arbitration Blog, 18 May 2021) <<http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/>> accessed 11 July 2021.

¹⁴⁶ Draft Code of Conduct 2020 (n 2) para 71.

¹⁴⁷ Cleis (n 29) 205.

ICJ Practice Directions into the ISDS system, it would effectively render a majority of the current-day practitioners incapable of taking up the role of the arbitrator because arbitral appointments would require them to not have acted in other roles in the past three to five years—a pre-condition that they cannot *per se* fulfil by reason of their current practice. A broad temporary ban is likely to permanently exclude them from arbitral roles. This highlights the impact that a temporary ban can have on the ISDS diversity crisis. The exclusionary effect of the ban would adversely affect the under-represented categories of ISDS practitioners because they, primarily, rely on roles other than that of the arbitrator and take up the few arbitral appointments that happen to come their way.¹⁴⁸ An unnecessarily wide-scoped temporary ban is likely to have an adverse effect on the levels of diversity among ISDS arbitrators. However, this result is avoidable if the scope is restricted to the problematic cases only. Accordingly, the proposal forwarded in this article adopts a limited approach.

Secondly, it would also require them to give up on their practice as counsel after the proceedings have ended for a similar duration, quite similar to Practice Direction VIII. In short, although temporary bans will allow ISDS practitioners to shuffle between various roles, an over-encompassing prohibition is likely to discourage most of the practitioners from acting as arbitrator, much like absolute bans.¹⁴⁹ The duration and nature of the ban would be the factors to consider carefully. Although a ban restricted to cases of a similar nature would be beneficial, a ban prohibiting double hatting in all cases, irrespective of their similarity or dissimilarity, would render the ISDS arbitrators without any work for a considerable duration before and after the proceedings. They would not be able to resume practice immediately after their service as arbitrators. Such abstentions would turn out to be fruitless as the next appointment as an arbitrator might never arrive,¹⁵⁰ and they would have to, eventually, revert to counsel work after an unwanted pause.

Given the long duration of an ISDS proceeding¹⁵¹ and the temporary gap

¹⁴⁸ Crook (n 18) 288.

¹⁴⁹ Cleis (n 29) 205.

¹⁵⁰ Crook (n 18) 285, 288; Giorgetti (n 139) 459–60.

¹⁵¹ Hodgson and Campbell (n 79) 3.

between appointments,¹⁵² temporary bans would force the newcomers to depend on practice as a counsel, which would exclude them from gaining appointments. This would directly contribute to the concentration of appointments in the hands of the powerbrokers. Such over-encompassing bans, howsoever temporary, would be akin to absolute bans,¹⁵³ and would only worsen the situation in terms of diversity and equitable distribution of power. Indeed, an over-bearing temporary ban would discourage current ISDS practitioners and newcomers, who are key sources of diversity, from acting as arbitrators by forcing them to choose between two options: either take up an arbitral appointment and become subject to a temporary prohibition or refuse the appointment and continue to practice in various roles without bearing the brunt of the ban. As would have been the case under an absolute ban and the MIC, the latter of the two options will clearly be far more profitable than the former¹⁵⁴ and this forced choice will result in a lower number of available arbitrators. Meanwhile, parties would continue to favour repeat ‘pale, male and stale’ practitioners causing the levels of diversity to plummet.¹⁵⁵ The capability of influencing ISDS system would further condense within the ‘power brokers’ as the number of arbitrators falling outside this group is likely to be thinned down and the latter’s share of arbitral appointments would inadvertently flow towards the former class.

Furthermore, critics who argue against the adoption of temporary bans into the ISDS system and highlight that the ICJ Practice Directions VII and VIII, insofar as they provide for vesting periods for *ad hoc* judges, are exceptions to the general practice followed by other adjudicatory bodies. Other dispute settlement institutions, including the Permanent Court of Arbitration, the World Trade Organisation, the Arbitration Institute of the Stockholm Chamber of Commerce and the ICSID, do not restrict their adjudicators from taking up other professional activities after the end or before the beginning of any proceeding.¹⁵⁶ Even the MIC proposed by the EU lacks any provision to regulate practice after the term of a member is over and, impliedly, allows successive double hatting.

¹⁵² Caroline Simson, “‘Double-Hatting’ Gets Spotlight After €128M Award Nixed’ (18 June 2020) <<https://www.law360.com/articles/1284546>> accessed 20 August 2021.

¹⁵³ Cleis (n 29) 205.

¹⁵⁴ Ziade (n 67) 57–58; Hranitzky and Romero (n 55).

¹⁵⁵ Faure and Ma (n 37) 8.

¹⁵⁶ Cleis (n 29) 205.

Vesting periods work well for the ICJ as its permanent members ensure a steady flow of expertise, which is impossible in the ISDS system because of three key factors: the fragmented nature of ISDS system, the lack of a permanent roster, and the absence of a central body.

The Draft Code(s) of Conduct for Adjudicators in ISDS

Article 6 of the 2020 Draft Code of Conduct regulates double hatting, and forwards numerous solutions, including outright bans, simple disclosure requirements, phased approaches, concurrent bans, and temporary limitations.¹⁵⁷ It does not favour any approach more than the others, although it warns against adopting the absolute ban and the phased approach.¹⁵⁸ The solutions enshrined under Article 6 take this cautionary approach, as the provision only provides a choice between a temporary ban and simple disclosure requirements as tools to restrict double hatting. The Comments to the provision indicate that any form of solution to double hatting must be well-defined and streamlined—it must not be overly broad or burdensome to ‘exclude a greater number of persons than necessary . . . [and] interfere with the freedom of choice of adjudicators and counsel by States and investors’,¹⁵⁹ especially with regard to younger arbitrators.

Furthermore, the 2020 Draft Code of Conduct qualifies the choice between temporary bans and disclosure requirements by introducing the requirement of delineating the category of cases to which such bans or disclosure requirements will apply.¹⁶⁰ Thus, it overcomes a major limitation of temporary bans, namely over-broadness, by restricting it to certain cases. At the same time, it is necessary to remember that the States can narrow down the disclosure obligation under Article 6, and, hence, its efficacy will depend on the category of cases to which it will apply.

By requiring States to outline the scope of these measures, the Draft Code of Conduct again ensures that its provisions remain clearly defined and

¹⁵⁷ Draft Code of Conduct 2020 (n 2) para 67-71.

¹⁵⁸ *ibid* 68.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid* art 6, para 72.

constrained within strict limits.¹⁶¹ Overall, Article 6 is a noteworthy proposal as it recognises the problem of defining double hatting and encourages the interested parties to think carefully about the nature of roles it will cover and the class of cases (same parties/same facts/same treaty) it will regulate.¹⁶²

Contrasting this broad provision with Article 4 of the 2021 Draft Code of Conduct V2.0 uncovers that this provision bears little semblance to its predecessor because it provides a concurrent ban as the only measure to address simultaneous double hatting as counsel/expert witness and as arbitrator.¹⁶³ It fails to address the instances of successive double hatting that the 2020 Draft Code of Conduct's Article 6 had sought to regulate through temporary bans—it simply does away with such temporary limitations.¹⁶⁴ This leaves the successive donning of multiple hats unregulated, even in proceedings between the exact same parties and with similar factual matrices. Given that successive practice in the above cases is a problematic form of double hatting,¹⁶⁵ the decision to remove temporary bans and disclosure requirements as possible measures from the draft is difficult to understand as it leaves the new provision with an extremely restricted scope.

To make matters worse, it gives the parties an option to consent¹⁶⁶ and suggests that 'double-hatting could be acceptable with informed consent of the disputing parties'.¹⁶⁷ This has the potential of legitimising the phenomenon as it undermines the gravity of the problems caused by an arbitrator's concurrent practice as counsel/expert witness, which has been widely accepted as causing an undeniable appearance of bias.¹⁶⁸

Regardless, a number of States have indicated support for the consent clause

¹⁶¹ *ibid* para 66.

¹⁶² *ibid* para 67.

¹⁶³ Draft Code of Conduct V2.0 (n 7) para 27.

¹⁶⁴ *ibid*.

¹⁶⁵ International Bar Association Guidelines on Conflicts of Interest in International Arbitration (13 October 2014) ('IBA Guidelines') 20-21.

¹⁶⁶ Draft Code of Conduct V2.0 (n 7) art 4.

¹⁶⁷ *ibid* para 26 (emphasis added).

¹⁶⁸ The Republic of Ghana (n 33) [22].

and have highlighted the importance of the party autonomy principle.¹⁶⁹ Their support, when understood as their opinion on the conflict between the core values of ISDS system as explained in Section I, may be construed as establishing the pre-eminence of party autonomy. It may also be taken as a suggestion that, despite the problematic nature of double hatting, certain experienced individuals who are ‘qualified and capable of handling [cases] alongside other commitments’ should be allowed to practice it.¹⁷⁰ However, a few states have expressed concerns over the effectiveness (owing to the inclusion of the consent clause) of the Draft Code of Conduct V2.0’s Article 4.¹⁷¹ These concerns are justified and the addition of such an exception is difficult to understand for two reasons: redundancy and the derogation of the core ISDS values.

Firstly, it is highly probable that the consent clause will turn out to be redundant. A non-appointing party is unlikely to consent to an appointing party’s proposal of choosing a practitioner who is concurrently arguing on behalf of the appointing party or is arguing on a relevant issue in a different proceeding. Resultantly, the consent clause might turn out to be an unworkable provision. Alternatively, even if parties were able to come to an agreement, the clause (and, ultimately, Article 4) would not have changed anything substantial in the present system that lacks any provision similar to Article 4. Currently in ISDS, the appointing-party is free to appoint its arbitrator and the non-appointing party is free to then challenge the appointment on grounds mentioned in the applicable arbitral rules and instruments, such as the ICSID Convention¹⁷² and the UNCITRAL Arbitration Rules.¹⁷³ Moreover, in contrast to the system that would prevail once the Draft Code of Conduct becomes applicable, there are no legal prohibitions on double hatting in the current ISDS scheme. Therefore, the non-appointing party is free to impliedly consent to the appointment of an arbitrator who, for instance, may be simultaneously representing the appointing party in another case based on the same factual matrix. In this example, the absence of

¹⁶⁹ ICSID and UNCITRAL, ‘Draft Code of Conduct for Adjudicators in International Investment Disputes – Version Two: Comments by Article/Topic as of September 3, 2021’ 80-85 (03 September 2021) accessed 05 October 2021 (‘Comments by Article/Topic V2.0’).

¹⁷⁰ *ibid* 85.

¹⁷¹ *ibid* 83.

¹⁷² ICSID Convention (n 40) art 37, 57.

¹⁷³ UNCITRAL Arbitration Rules (15 December 1976) UN Doc A/31/98, art 8-10, 12.

any challenge against the arbitrator can be understood as a proof of the implied acceptance of the appointment. Surprisingly, Article 4 does not bring any significant changes here. It merely requires that the parties, instead of implicitly agreeing to an appointment (evidenced from the decision to not challenge it), have to explicitly agree on the same. In summary, with or without Article 4, the situation remains the same and the arbitrator remains free to double hat concurrently if the parties agree to it. The consent clause in Article 4, therefore, makes the provision redundant and renders the attempts at regulating serious forms of double hatting unsuccessful.

Secondly, and most importantly, even though parties are unlikely to consent, if they were to agree on appointing a concurrent double hatter as an arbitrator, the appointment would be in violation of the core values of impartiality and independence that were discussed in Section I of this article. This is already true of the present ISDS mechanism, and the drafters of the Draft Code of Conduct (2020) have recognised the legitimacy issues that double hatting raises.¹⁷⁴ The practice of double hatting is also a major impediment to the efforts aimed at increasing diversity in ISDS, as explained previously in this article. Despite this, the situation under Article 4 remains largely unchanged from the current system. In the face of the legitimacy and diversity crisis, Article 4's consent clause gives birth to the possibility that double hatting, in its most detestable forms, might continue under States' sanction. The attempts at increasing diversity will likely be rendered useless as power and appointments will continue to accumulate within the ranks of 'power-brokers' and double-hatters. In addition to these risks, certain comments in the Draft Code of Conduct V2.0 have also insisted upon treating experienced individuals as different from the rest of the arbitrators.¹⁷⁵ However, this differential treatment of 'capable' arbitrators as exceptions to the principles of impartiality, independence and natural justice does not bode well for the legitimacy of the ISDS system. Indeed, Article 4 does not address the diversity and legitimacy crisis, outlined earlier in this article, but instead maintains the problematic *status quo* which will only worsen the crisis.

States, through their comments, have insisted on the party autonomy

¹⁷⁴ Draft Code of Conduct 2020 (n 2) para 65.

¹⁷⁵ Comments by Article/Topic V2.0 (n 170) 85.

principle and on the capability of the practitioners as a justification for allowing double hatting. Their insistence may be interpreted as an expression of their willingness to ignore the appearance of bias that arises from simultaneous double hatting.¹⁷⁶ Their standpoint is not in line with the postulation that ‘justice must not only be done, but must also be *seen to be done*’.¹⁷⁷ In this respect, the Supreme Court of India has iterated that party autonomy cannot be ‘exercised in complete disregard of these principles,’ and that:

There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties’ apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.¹⁷⁸

In other words, the inclusion of the consent clause is an appalling policy decision that undercuts the basic principles that guide adjudicatory processes worldwide and is likely to raise serious doubts over the ISDS mechanism’s legitimacy. To be exact, a practitioner’s capability and the parties’ autonomy are not the only factors that the States should account for when drafting a provision to regulate double hatting. The perception of justness, impartiality and legitimacy are also equally, if not more, important considerations. Article 4 as it stands now, however, does not contain these principles. Accordingly, there is a need to modify it and balance competing values.

Concurrent bans are also present under the 2014 IBA Guidelines which consider that, in certain cases, parties cannot consent to simultaneous double hatting and that ‘justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence’ in such circumstances.¹⁷⁹ The ICJ Practice Direction VII also contemplates a concurrent ban devoid of any exceptions.¹⁸⁰ Thus, in light of such considerations, parties should not be allowed to consent to concurrent double hatting in the most problematic cases, though in cases which

¹⁷⁶ *The Republic of Ghana* (n 33) [22].

¹⁷⁷ *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 (emphasis added).

¹⁷⁸ *Perkins Eastman Architects DPC v HSCC (India) Ltd* AIR 2020 SC 59.

¹⁷⁹ IBA Guidelines (n 165) 5.

¹⁸⁰ ICJ Practice Directions (n 140) Practice Direction VII.

do not bear any relation to each other, they may be allowed to consent. However, Article 4 of the Draft Code of Conduct V2.0 evidently lacks this nuanced approach as it does not negate the possibility of the parties consenting to the most egregious forms of double hatting.

A minor redeeming point for this new provision is that it avoids an overly broad prohibition on concurrent practice, and provides an option to prohibit it only in cases where the facts (or at least one of the parties) are the same with the parties' consent.¹⁸¹ For these reasons, it can be broadly concluded that the new provision regulating multiple roles is much more restrictive and limited in scope and efficacy than its predecessor. Unlike previous proposals such as absolute bans, the concurrent ban under Article 4 avoids a broad hard-line approach which would have prohibited all forms of concurrent double hatting, including cases where justifiable doubts were unlikely to arise. However, this restrictiveness is also a glaring weakness of the provision as its scope is much restricted when compared to Article 6 of the 2020 Draft Code of Conduct. Another point of note is that Article 4 benefits from the disclosure obligations placed under Article 10 of the Draft Code of Conduct V.2.0. These obligations are not fine-tuned to address double hatting in particular (unlike the solution proposed further in this article), but when viewed in conjunction with the concurrent ban provided by Article 4, they provide some, albeit very little, respite from double hatting.

Nonetheless, when viewed in totality, both the versions of the Draft Code of Conduct, despite their inadequacies, act together as an 'ethical checklist'.¹⁸² The fact that Article 4 of the Draft Code of Conduct V2.0 is a stripped-down version of its predecessor and yet addresses concurrent double hatting, indicates that simultaneous double hatting is the most problematic form of double hatting, especially in cases with the same issues or parties. Further, drafts can help classify and differentiate between cases of double hatting. While the 2020 version differentiates between 'same party', 'same treaty' and 'same issues' cases,¹⁸³ the 2021 version only provides for the latter two.¹⁸⁴ This classification serves the

¹⁸¹ Draft Code of Conduct V2.0 (n 7) para 31.

¹⁸² Richard M Mosk, 'Attorney Ethics in International Arbitration' (2010) 5 *Berkley Journal of International Law Publicist* 32, 35.

¹⁸³ Draft Code of Conduct 2020 (n 2) art 6.

¹⁸⁴ Draft Code of Conduct V2.0 (n 7) art 4.

purpose of determining the applicability of possible remedies to double hatting and underscores the importance of balancing various competing interests in ISDS. This classification will be better defined and utilised for proposing a well-rounded and effective solution to double hatting in the next section of this article. On a more idealistic note, the Draft Code of Conduct, in both of its versions, identifies the need to regulate double hatting.¹⁸⁵ This recognition itself shall serve as a reminder of the core values of impartiality and independence, both to the parties and to the arbitrators/candidates. It will play a part in maintaining high standards of impartiality by encouraging them to self-regulate and avoid appointments that will be tantamount to double hatting. Therefore, the Draft Code of Conduct is a fair first step as it showcases that the parties truly intend to enter into a ‘pragmatic discussion’¹⁸⁶ of the problem of multiple roles. It can only be hoped that it will lead to the development of more effective means of regulating double hatting,¹⁸⁷ keeping in sync with the core values of the ISDS arbitration system.

Now, it is difficult to constitute ethics into hard and fast rules,¹⁸⁸ or to force upon arbitrators the expectation of possessing ‘open minds’ and viewing the cases with total impartiality because there will always be inherent biases in individuals.¹⁸⁹ Nevertheless, it is imperative to not allow the legitimacy crisis to gain more ground either. In that vein, the solutions discussed above face various difficulties in combating this crisis. In light of this, the next section outlines a four-pronged solution to double hatting which will at least deal with, if not completely alleviate, these problems.

¹⁸⁵ Draft Code of Conduct 2020 (n 2) para 65; Draft Code of Conduct V2.0 (n 7) para 26-30.

¹⁸⁶ See Meg Kinnear, ‘Remarks by Meg Kinnear’ (2018) 112 Proceedings of the ASIL Annual Meeting 121.

¹⁸⁷ Mosk (n 183) 35.

¹⁸⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Order on Composition of the Court) (Dissenting Opinion of Judge Buergenthal) 30 January 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040130-ORD-01-01-EN.pdf>> accessed 12 July 2021 [10]–[11].

¹⁸⁹ Jan Paulsson, ‘Ethics, Elitism, Eligibility’ (1997) 14 Journal of International Arbitration 13, 15.

II. OUTLINING A WAY OUT OF DOUBLE HATTING

The proposed solution and its four conditions

The proposal is a set of four conditions that can act in cohesion to curb double hatting. By doing so, it blends and avoids the limitations of the already proposed solutions,¹⁹⁰ and builds upon the provisions of the 2014 IBA Guidelines on Conflict of Interest,¹⁹¹ the Draft Code of Conduct (2020),¹⁹² a number of ISDS decisions, and other relevant instruments such as the Arbitral Rules of various institutions.

Building upon these sources, the proposal embodies four conditions out of which an individual seeking appointment (X) must fulfil three, before the parties appoint them as an arbitrator in an ISDS proceeding. The mandatory requirements are as follows:

1. X must not have acted as counsel, or in any other relevant role, in ‘same party’ cases for three years prior to the proceedings (‘Condition One’).
2. X must not concurrently act as counsel, or in any other relevant role, in ‘same party’ cases and in cases which raise ‘similar issues/facts’ (‘Condition Two’).
3. X must compulsorily disclose his/her previous three (or five) years’ engagements, in ‘same party’ and ‘same treaty’ ISDS proceedings, as a counsel, or in any other relevant capacity (‘Condition Three’).

In addition to these three requirements, an *ex-post* vesting period may also be imposed to the effect that:

¹⁹⁰ The Government of the French Republic, ‘Towards a New Way to Settle Disputes Between States and Investors’ (May 2015) 15 <www.diplomatie.gouv.fr/IMG/pdf/20150530_isds_papier_eng_vf_cle09912d.pdf> accessed 11 July 2021; Gómez (n 77) 112; See also Cleis (n 29) 201–06.

¹⁹¹

IBA Guidelines (n 165).

¹⁹² Draft Code of Conduct 2020 (n 2) art 6.

4. X, who has been so appointed in any ISDS proceeding, shall not act as counsel, or in any other relevant role, in ‘same party’ cases for the following three years from the end of the present engagement (‘Condition Four’).

Of the above four conditions, Condition One is an *ex-ante* temporary ban applicable only in ‘same party’ cases, where there is at least one common party between any two arbitrations. Condition Two is a highly circumscribed concurrent ban, whereas Condition Three carries broad disclosure obligations, and thereby errs on the side of caution. Recently, the Annulment Committee in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*¹⁹³ favoured this approach in its decision as it concluded that the undisclosed relationships between the claimant-appointed arbitrator and claimants’ expert witness established a manifest appearance of bias. Furthermore, Condition Four is an *ex-post* temporary ban which, just like the first condition, is applicable only in ‘same party’ proceedings. In this manner, the proposed solution holistically addresses double hatting at various stages of an arbitration proceeding.

The proposal’s four conditions are framed on lines of the List system provided under the IBA Guidelines¹⁹⁴ so as ‘to provide better and more relevant guidance’¹⁹⁵ to interested parties and to arbitrators. Scholars have also recommended importing the IBA Guidelines into the ISDS system¹⁹⁶ to prohibit appointments in heavy conflict situations.¹⁹⁷ The Guidelines classify situations that may occur in an ISDS arbitration into three non-exhaustive lists: Red, Orange, and Green, in order of decreasing threat to the impartiality and independence of arbitrators.¹⁹⁸ While the Green List covers non-problematic cases,¹⁹⁹ the Orange List lists out situations which may ‘in the eyes of the parties,

¹⁹³ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain*, ICSID Case No ARB/13/36, Decision on The Kingdom of Spain’s Application for Annulment (11 June 2020) [223].

¹⁹⁴

IBA Guidelines (n 165).

¹⁹⁵ Hwang SC and Lim (n 63) 33.

¹⁹⁶ *ibid.*

¹⁹⁷ Cleis (n 29) 205.

¹⁹⁸ IBA Guidelines (n 165) 2, 17-19.

¹⁹⁹ *ibid.* 18.

give rise to doubts as to the arbitrator's impartiality or independence'.²⁰⁰ The Red List is comprised of the most serious cases that 'give rise to justifiable doubts as to the arbitrator's impartiality and independence' and is divided into Non-Waivable Red List and Waivable Red List.²⁰¹ Under the latter of these two sub-lists, the parties can expressly consent to the appointment of an arbitrator even though such an appointment may appear problematic, whereas no such right is available with the parties in the former case.

In other words, the acceptance of a situation that falls under the Non-Waivable Red List cannot 'cure the conflict' as this List bases itself on the principle that no person can be his or her own judge.²⁰² The solution proposed in this article employs this classification of Lists to simplify the process of ascertaining whether justifiable doubts exist, and to relate the proposal to the existing ISDS system in which the IBA Guidelines hold considerable relevance.

Under the proposed solution, if any of the first two conditions are not fulfilled, then, as in Non-Waivable Red List cases, an arbitrator must resign if he has already been appointed, irrespective of whether the other party agrees or not.²⁰³ Non-compliance with this guideline results in the disqualification of the arbitrator under the IBA Guidelines. Similarly, under Condition Three, the appointment would be deemed accepted by the parties if no party objects within 30 days of the disclosure, just like Orange List cases.²⁰⁴ Further, in a challenge to an arbitrator, either a violation of any of the first two Conditions or a manifest lack of qualities²⁰⁵ must be proven. Condition Four, on the other hand, has the capability of rendering the prior arbitral award susceptible to annulment and of the subsequent tribunals themselves taking action, as they have done in recent times,²⁰⁶ to regulate the counsel (who has violated Condition Four).

²⁰⁰ *ibid* 17.

²⁰¹ *ibid* 17.

²⁰² *ibid*.

²⁰³ *ibid*.

²⁰⁴ *ibid*.

²⁰⁵ ICSID Convention (n 40) art 57.

²⁰⁶ Charles B Rosenberg and M Imad Khan, 'Who Should Regulate Counsel Conduct in International Arbitration?' (*Kluwer Arbitration Blog*, 18 April 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/04/18/who-should-regulate-counsel-conduct-in-international-arbitration/>> accessed 10 July 2021.

Accordingly, the next sub-section argues that double hatting, in ‘same party/parties’ (Conditions One, Two and Four) and in ‘similar issues’ (Condition Two) case, is problematic *per se*. It proceeds under the belief that double hatting ought to result in disqualification in certain categories of cases because such practice contradicts the key values of impartiality and independence of adjudicators. These arguments must be understood in the context of the legitimacy and diversity crisis pointed out earlier in this article. Practices such as double hatting, revolving doors and repeat appointments contribute to this crisis by resulting in the consolidation of power in the hands of a few ISDS practitioners and by allowing the party autonomy principle to prevail over the other core values of ISDS. The proposed solution strives to deal with these problems and to control this crisis by taking a middle path: it does not absolutely prohibit double hatting, nor does it legitimise it. The following sub-section develops on these arguments with a prime focus on establishing the legality and legitimacy of the four Conditions of the proposal.

Grounding the proposal in ISDS jurisprudence

The following discussion places the aforementioned four conditions in the ISDS jurisprudence by drawing upon legal instruments, arbitral decisions, and academic literature. The aim behind this endeavour is to ascribe legitimacy to the proposed solution. Firstly, the broad disclosure requirements under Condition Three are discussed. Secondly, the ban on concurrent practice in multiple roles (Condition Two) is considered. Finally, Conditions One and Four, which are in nature temporary bans, are taken up together for discussion.

(1) Condition three: broad disclosure requirements

Condition Three of the proposed solution provides for disclosures akin to Article 10(2)(a) of the Draft Code of Conduct V2.0, although the terminology and phrasing differ. This difference allows it to present itself chiefly as a measure to resolve double hatting by bringing to the fore the similarity of certain aspects (treaty/parties) of given proceedings vis-à-vis the arbitrator’s previous practice in different roles. In this manner, the proposed solution recognises disclosures as central to maintaining the perception of independence and impartiality of

arbitrators.²⁰⁷ Disclosures of past relationships and service, though not particularly effective on their own, can help by allowing parties to make informed choices relating to the appointment and to challenge arbitrator candidates,²⁰⁸ who are unlikely to approve the appointment of a candidate they deem as partial and biased. Further, it is notable that scholars have also expressed their support for a broad, mandatory disclosure regime²⁰⁹ that will cause early challenges and reduce the risk of re-hearings if any late-in-the-day challenge were to succeed.²¹⁰

As the broadest requirement, Condition Three contemplates disclosure obligations and, in doing so, opts for the ‘same treaty’ and the ‘same parties’ standards. To fall under the ‘same treaty’ standard, two or more proceedings must arise under the same treaty.²¹¹ This standard does not cover cases which concern the same (or strikingly similar) treaty provisions as such instances are better covered under the ‘similar issues’ standard. As previously stated in Section I of this article, the ‘same party’ standard is to cover situations in which at least one of the parties is common to both the proceedings. This standard is much broader than the one proposed under Article 6 of the Draft Code of Conduct (2020), which would have required the presence of the same *parties*,²¹² thereby exempting problematic situations where an arbitrator appointed in a case may act as counsel in another case which concerns only one of the parties to the previous conflict.

It is worth noting that the ‘same treaty’ and ‘same party’ standards are objective standards of disclosure, as they merely require an objective judgment of whether a certain state of affairs exists. Thus, Condition Three avoids placing a heavy burden on the arbitrator candidates²¹³ by not opting for the ‘similar issues’

²⁰⁷ Noah Rubins and Bernhard Lauterburg, ‘Independence, Impartiality and Duty of Disclosure in Investment Arbitration’ in Christina Knahr and others (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2010) 156.

²⁰⁸ Rubins and Lauterburg (n 207) 156.

²⁰⁹ See Anderson (n 3); Kinnear (n 187) 126; Simson (n 152).

²¹⁰ Kinnear (n 187) 126; Hwang SC and Lim (n 63) 32; Sucharitkul (n 8).

²¹¹ Draft Code of Conduct 2020 (n 2) para 66.

²¹² *ibid* para 72.

²¹³ Romain Zamour, ‘Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in *Devas v India* and Its Impact’ in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Koninklijke Brill 2015) 239.

standard which would catch the candidates unaware. It would also require them to judge whether the issues they *might* be dealing with in the proposed arbitration are similar to the issues that they have already dealt with previously. In other words, they would have to apply the ‘likely to be relevant’²¹⁴ test for deciding the relevancy of probable issues—a difficult question better raised at the challenge stage.²¹⁵

Recently, the Annulment Committee in *Eiser Infrastructure* has stressed the need for stricter and broader disclosure criteria, as under Condition Three. The Committee noted that Dr Alexandrov, the claimant-appointed arbitrator, should have disclosed his relationship with the claimant’s experts, the Brattle Group.²¹⁶ The Committee distinguished the case at hand from *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*,²¹⁷ on the basis that the tribunal in the latter knew about Dr Alexandrov’s relationship with the expert witness.²¹⁸ The lack of disclosure in *Eiser Infrastructure* was an important consideration as, according to the Committee, disclosures are a part of the ‘fundamental rule of procedure’.²¹⁹ The Committee also rejected the claimant’s argument that Spain was or should have been aware of the relationship between the claimant-appointed arbitrator and the expert witness. Further, it noted that not only was there an absence of a relevant disclosure but also that the claimant had not shown that Spain was aware of the aforesaid relationship.²²⁰ Accordingly, the Committee annulled the award on the grounds that the failure to comply with a fundamental rule of procedure and the improper constitution of a tribunal fulfilled the requirements for annulment under Article 52(1)(a) and (d) of the ICSID Convention. In doing so, the Committee emphasised that the lack of impartiality or independence of an

²¹⁴ International Council for Commercial Arbitration (n 38) 55. See also *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India*, PCA Case No 2013-09, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator (Sept. 30, 2013) [58].

²¹⁵ Zamour (n 214) 239–40.

²¹⁶ *Eiser Infrastructure* (n 194) [228].

²¹⁷ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision of Co-Arbitrators.

²¹⁸ *Eiser Infrastructure* (n 194) [212].

²¹⁹ *ibid* [228]–[229], [239].

²²⁰ *ibid* [190].

arbitrator is the greatest threat to the legitimacy of the proceedings.²²¹ In relation to disclosure requirements, the Committee expressed preference for a broader standard of disclosure and enunciated that, '[t]he *ongoing obligation to disclose cannot be construed narrowly in favour of the arbitrator* . . . The risks and possibilities of conflict of interest, inherent in double hatting, dictate caution'.²²² Scholars have also recognised that broader obligations will lead to more rigorous and comprehensive disclosures.²²³

The duration of three to five years placed in Condition Three's disclosure requirement might appear to be arbitrary. However, this duration is in line with the limits placed on the disclosure of past engagements under the Orange List²²⁴ (which covers situations such as past service as counsel for or against a party) of the well-accepted IBA Guidelines,²²⁵ the ICSID's proposed amended arbitration declaration,²²⁶ the Draft Code of Conduct,²²⁷ documents such as the ICJ Practice Directions VII and VIII, Article 9 of the Code of Conduct for Members and Former Members of the CJEU, and the Burgh House Principles on the Independence of the International Judiciary. It is submitted that the imposition of such limitations is reasonable as, firstly, past relationships beyond a period of three to five years may be presumed to be 'too remote' to cause any justifiable doubts.²²⁸ Secondly, such temporary limitations can help ease the burden placed by broad disclosure obligations on the arbitrators.

²²¹ *ibid* [175].

²²² *ibid* [223] (emphasis added).

²²³ Josep Gálvez and others, 'Dangerous Liaisons in International Investment Arbitration: The Annulment of the Eiser v Spain ICSID Award' (Kluwer Arbitration Blog, 12 July 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/07/12/dangerous-liaisons-in-international-investment-arbitration-the-annulment-of-the-eiser-v-spain-icsid-award/>> accessed 14 July 2021.

²²⁴ IBA Guidelines (n 165) 22-24.

²²⁵ Margaret Moses, 'The Role of the IBA Guidelines on Conflicts of Interest in Arbitrator Challenges' (Kluwer Arbitration Blog, 23 November 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/11/23/role-iba-guidelines-conflicts-interest-arbitrator-challenges/>> accessed 25 August 2021.

²²⁶ International Centre for Settlement of Investment Disputes, 'Working Paper #4: Proposals for Amendment of the ICSID Rules' (February 2020) 241 <https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf> accessed 26 August 2021.

²²⁷ Draft Code of Conduct 2020 (n 2) art 5(2)(a), para 47.

²²⁸ Draft Code of Conduct 2020 (n 2) para 47

It is important to view Condition Three in conjunction with the existing requirements of impartiality and independence as enshrined in instruments such as the ICSID Convention²²⁹ and the UNCITRAL Rules.²³⁰ The disclosure obligations already provided in various arbitral rules²³¹ and the 2014 IBA Guidelines are also notable. When considered together, these provisions are sufficient to cover cases that fall beyond the scope of Condition Three's three (or five) year limit. In other words, Condition Three is not aimed at replacing existing disclosure obligations which mandate continuing disclosures and disclosures of all questionable circumstances,²³² but rather is meant to supplement them by specifically highlighting situations that are likely to raise justifiable doubts, especially due to double hatting.

Furthermore, in relation to Conditions One, Two and Four, questions about the reasoning behind choosing varying standards arise. It will be appropriate to first discuss Condition Two, and then take up the remaining two as the latter are in the nature of temporary bans while the former is a concurrent ban.

(2) Condition two: a ban on concurrent practice

Condition Two prohibits simultaneous double hatting in cases which share at least one common party ('same party' cases), and in cases which raise 'similar issues' or have comparable factual matrices ('similar issues/facts' cases). As for the first category of cases that Condition Two seeks to regulate, it is notable that concurrent practice as an arbitrator and as a counsel in 'same party' cases is a serious form of double hatting.²³³ Arbitrators have been asked to choose between adjudicatory and other roles in *Vito G. Gallo v Government of Canada*,²³⁴ and ICS

²²⁹ ICSID Convention (n 40) art 14(1).

²³⁰ UNCITRAL Arbitration Rules (n 174) art 10(1).

²³¹ ICSID Rules (Rule 6); UNCITRAL Arbitration Rules (n 174) art 9; Arbitration Rules of the Stockholm Chamber of Commerce (2017) art 18 <https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf> accessed 24 August 2021.

²³² Rubins and Lauterburg (n 207) 159.

²³³ IBA Guidelines (n 165) 20-21.

²³⁴ *Vito G. Gallo v Government of Canada*, PCA Case No 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC (4 October 2009).

Inspection and Control Services Limited (United Kingdom) v Republic of Argentina,²³⁵ on the ground that concurrent practice in cases with similar factual matrices risks creating²³⁶ and reinforcing²³⁷ ‘justifiable doubts’ as to the arbitrator’s ‘impartiality or independence’. In the former case, the State-appointed arbitrator simultaneously provided legal advice to Mexico, which could have made submissions in the case by virtue of it being a party to NAFTA. The claimant challenged his appointment. The Deputy Secretary-General of ICSID asked the challenged arbitrator to continue either as an arbitrator in the case or as advisor to Mexico.²³⁸ Similarly, in *ICS Inspection*, the Appointing Authority upheld the challenge against the arbitrator who was concurrently representing a claimant against Argentina in an otherwise unrelated case.²³⁹ The Condition Two prohibits this form of double hatting under the ‘same party’ standard which resonates with the Appointing Authority’s decision.

However, some may raise questions over whether limiting concurrent bans to ‘same party’ and ‘similar issues’ cases is truly desirable, especially considering that the Draft Code of Conduct V2.0 provides an all-encompassing concurrent ban.²⁴⁰ Nonetheless, not all instances of double hatting cause justifiable doubts over impartiality. The proposed solution already covers the most problematic situations through its four conditions, with each regulating a distinct form of double hatting within specified categories of cases and allows ISDS practitioners to continue to play multiple roles in instances where no concerns over their impartiality arise. Further, it even regulates cases where the same treaty is up for consideration, as such cases may qualify as ‘similar issues/facts’ cases depending on the circumstances. Thus, Condition Two is sufficiently broad so as to address various forms of double hatting and is simultaneously narrow enough to not hinder concurrent practice in cases that do not relate or have anything substantial in common with each other. By doing so, it avoids the shortcomings of the proposals discussed in Section II such as absolute bans which are unreasonably

²³⁵ *ICS Inspection and Control Services Ltd. (United Kingdom) v Republic of Argentina*, PCA Case No 2010-9, Decision on Challenge to Arbitrator (17 December 2009).

²³⁶ *Vito* (n 234) [31].

²³⁷ *ICS Inspection* (n 235) 5.

²³⁸ *Vito* (n 7).

²³⁹ *ICS Inspection* (n 2).

²⁴⁰ Draft Code of Conduct V2.0 (n 7) art 4.

broad and over-encompassing.²⁴¹

In addition to regulating ‘same party’ cases, Condition Two also tackles double hatting in cases that raise ‘similar issues/facts’. The reason behind such focus is that participation in these cases in multiple roles is bound to cast an ‘impossible...to avoid’ appearance of bias,²⁴² and is, consequently, incompatible with an arbitrator’s role. It has been held that concurrent service in ‘similar issues/facts’ cases creates an appearance of bias and suggests an ‘obvious lack of impartiality’²⁴³ in decisions such as *The Republic of Ghana v Telekom Malaysia Berhad*,²⁴⁴ *Blue Bank International & Trust (Barbados) v Bolivarian Republic of Venezuela*,²⁴⁵ and *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*.²⁴⁶ In *Blue Bank*, the challenge was upheld on the ground that a third party would perceive an appearance of bias due to the similarity of issues and that it was highly probable that the arbitrator challenged would be able to decide upon issues that are relevant in the other case where he is appearing as a counsel, if he were to continue as an arbitrator in the case.²⁴⁷ On the other hand, the Arbitral Tribunal rejected the challenge in *Saint-Gobain*. However, it still observed that concurrent double hatting could ‘potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator.’²⁴⁸

Well-known jurists, such as Phillipe Sands, also believe that legitimacy concerns often arise because of ‘unacceptable’²⁴⁹ double hatting in ‘similar issue’ cases, as one role is bound to be, or at least it will appear to be, coloured by

²⁴¹ Draft Code of Conduct 2020 (n 2) para 68

²⁴² *The Republic of Ghana* (n 33) [22]; *Kirkebo* (n 26).

²⁴³ *Blue Bank International & Trust (Barbados) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (12 November 2013) [68]–[69].

²⁴⁴ *The Republic of Ghana* (n 33) [22].

²⁴⁵ *Blue Bank International* (n 243) [68]–[69].

²⁴⁶ *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, 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) [84].

²⁴⁷ *Blue Bank International* (n 243) [68]–[69].

²⁴⁸ *Saint-Gobain* (n 246) [84].

²⁴⁹ Philippe Sands, ‘2015 ESIL Annual Conference Final Lecture: Developments in Geopolitics—The End(s) of Judicialization?’ (EJIL:Talk!, 2015) <<http://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/>> accessed 10 July 2021.

another.²⁵⁰ Furthermore, it is necessary to clarify that *previous* advocacy in ‘similar issues’ cases should not be a ground for prohibiting double hatting and for disqualifying an arbitrator. Indeed, legal professionals ‘inevitably encounter and form views on particular issues in the course of their work.’²⁵¹ Therefore, a previously advocated position is not akin to ‘a personal belief’ and should not be a ground for disqualification.²⁵²

Condition Two is comprised of two aspects: the objective (‘same party’ standard) and the subjective (‘similar issues/facts’ standard). While determining the former is easy, the latter would require the application of tests such as the ‘likely to be relevant’ test.²⁵³ Admittedly, in certain cases, this subjectivity might lead to differences in opinions over the question of similarity which might, then, result in a deadlock between the arbitrators hearing a challenge. However, mechanisms are in place for resolving such deadlocks under leading arbitral instruments which provide for intervention by relevant authorities.²⁵⁴

(3) *Conditions one and four: temporary bans*

The IBA Guidelines places past service by within three years of the initiation of the present proceeding by an arbitrator as counsel, or in any other role, for a party to the present proceeding in its Orange List.²⁵⁵ Appointments made in situations that meet the prescribed criteria are considered objectionable and are prohibited under various instruments.²⁵⁶ The ISDS arbitration system can also

²⁵⁰ Langford and others, ‘The Ethics and Empirics’ (n 31) 8; 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* (2012) 31–32.

²⁵¹ International Council for Commercial Arbitration (n 38) 35.

²⁵² *Republic of Ghana v Telekom Malaysia Berhad*, Petition No HA/RK 2004.778, Decision (5 November 2004) [11] (District Court of The Hague); *Saint-Gobain* (n 246) [77], [80]–[81]; Gómez (n 77) 98; International Council for Commercial Arbitration (n 38) 35.

²⁵³ International Council for Commercial Arbitration (n 38) 55. *CC/Devas* (n 215) [58].

²⁵⁴ ICSID Convention (n 40) art 58; UNCITRAL Arbitration Rules (n 173) art 12.

²⁵⁵ IBA Guidelines (n 165) 22.

²⁵⁶ Paulsson, ‘The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI’ (n 145). See ICJ Practice Directions (n 140) Practice Direction VII, VIII; Study Group on the Practice and Procedure of International Courts and Tribunals, ‘Burgh House Principles on the Independence of the International Judiciary’ (2004) (International Law Association) art 10, 13.3; Dutch Model BIT (n 144) art 20.5.

benefit from a similar preventive provision that places an *ex-ante* temporary ban (as enshrined under Condition One). Since present service would, naturally, count as ‘past service’ in future proceedings, it might raise doubts over the arbitrator’s impartiality if the arbitrator indulges in double hatting in the near future, i.e., within three years of the end of the present proceeding (as per Condition Four). Therefore, *ex-post* temporary bans, much like their *ex-ante* counterparts, should be adopted into the ISDS system.

Admittedly, as previously discussed in Section II, the ISDS regime cannot directly import regulatory provisions such as the ICJ Practice Directions. This is because the two systems of dispute settlement differ from each other and, also, because there might be concerns about the low number of arbitrators that are available in ISDS.²⁵⁷ Nonetheless, it is notable that Conditions One and Four provide for vesting periods only in ‘same party’ cases which is only one of the many categories of investor-state arbitrations and, thus, do not threaten the expertise that is currently available in the ISDS system.²⁵⁸

There are a number of reasons behind limiting vesting periods only to ‘same party’ cases and not extending them to ‘similar issues’ cases. To begin with, as stated in the preceding sub-section, a previously advocated position should not be attributed to counsels as their personal belief,²⁵⁹ owing to the nature of the legal profession whereby counsels act as mediums for the parties to participate in any adjudicatory process. As held in *St. Gobain Performance Plastics Europe*, ‘it is at the core of the job description of legal counsel . . . that they present the views which are favourable to their instructor and highlight the advantageous facts of their instructor’s case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case.’²⁶⁰

On the contrary, connections and relationships with parties may sustain overtime, and, with no means of verifying their non-continuance and, in this case, it is difficult to raise a presumption of the counsel being free from these relations.

²⁵⁷ See Cleis (n 29) 205.

²⁵⁸ *ibid.*

²⁵⁹ *Republic of Ghana v Telekom* (n 252) [11]; *Saint-Gobain* (n 248) [77], [80]-[81]; Gómez (n 77) 98; International Council for Commercial Arbitration (n 38) 35.

²⁶⁰ *Saint-Gobain* (n 247) [77], [80]-[81].

However, once a reasonable period elapses, it may be presumed that the past relationships due to their remoteness will not affect the impartiality and independence of the arbitrator.²⁶¹ This presumption is rebuttable if circumstances that raise justifiable doubts exist. Finally, the preceding sub-section has iterated that it is difficult for candidates to determine whether two cases have similar issues before participating in its proceedings. It is due to these factors that Conditions One and Four are only restricted to 'same party' cases.

Achievements and limitations of the proposal

The principle that the appearance of fairness is as important as fairness itself guides courts and tribunals all over the world.²⁶² It is important to sustain this appearance as it lends credibility to the judicial proceedings in the public eye and increases their trust in dispute settlement mechanisms. This appearance of legitimacy and credibility persuades the parties to rely upon these adjudicators institutions, time and time again.²⁶³ The preliminary step towards achieving such high levels of credibility in the ISDS arbitration system is recognizing that its practitioners (the arbitrators, the counsels and others) are its most important constituents, especially in relation to its legitimacy.²⁶⁴ The importance of these actors is further exemplified by the rationale behind the creation of the ISDS system: domestic courts were, or at least appeared to be, 'inextricably associated with national interests'.²⁶⁵ In light of these facts, it is understandable that any irregularity, or even an appearance of any irregularity, is bound to give rise to grave concerns about the tenability of the ISDS system.²⁶⁶ To resolve such irregularities, states have highlighted the need for a more nuanced solution.²⁶⁷

²⁶¹ Draft Code of Conduct 2020 (n 2) para 48.

²⁶² *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259; Abimbola Akeredolu and Chinedum Ikenna Umeche, 'Arbitrators' Impartiality and Independence: Commentary on *Gobowen v AXXIS*' [2018] 34 *Arbitration International* 1, 4.

²⁶³ Joseph R Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' [2008] *Berkley Journal of International Law* 111, 113; Giorgetti (n 35) 237.

²⁶⁴ Faure and Ma (n 37) 37.

²⁶⁵ *ibid* 39.

²⁶⁶ *ibid* 38.

²⁶⁷ UNCITRAL, 'Draft Code of Conduct: Comments by Article & Topic as of January 14, 2021' (14 January 2021) 114-132 <<https://uncitral.un.org/sites/uncitral.un.org/files/media->

The solution outlined in this article takes into account the importance of the appearance of fairness. It comprises of four streamlined and well-defined conditions, each of which embodies a different measure with varying scopes of application. Not only does the proposed solution amalgamate various currently suggested reforms, but it also does away with their limitations. Thus, it comes out as a more proportionate and effective alternative to the other options that were discussed earlier in Section II, including the Draft Code of Conduct V2.0's Article 4, as the solution fleshed out in this article deals with potential conflicts on an individual, case-by-case basis.²⁶⁸

It is important not to force the ISDS arbitrators to choose between their career as arbitrators and as counsels because such a requirement would, as previously mentioned, give rise to 'a whole new set of problems without the benefit of effectively remedying the problems.'²⁶⁹ It is also important to act cautiously and not replace experienced and knowledgeable minds with that of the 'most naïve and incompetent'²⁷⁰ or with that of 'very young children.'²⁷¹ Any action facilitating a displacement of this nature would be perilous to ISDS arbitrations as multi-million dollar claims might come to be decided by inexperienced individuals who would be lacking not only in expertise and nuance but also in parties' confidence. Accordingly, the solution also factors in the significance of the principle of party autonomy and carefully balances it against the principle of impartiality and independence. This is evident from the fact that it does not restrict double hatting in all cases and, instead, focuses on the areas that are likely to result in doubts over the legitimacy of the system. It secures sufficient freedom for the parties to choose their favoured arbitrators, and also allows practitioners to continue practicing in the ISDS field, albeit under certain restrictions.²⁷² Thus, the proposed solution allows newcomers to act in multiple roles and gain experience, provided that such practice does not raise concerns over their impartiality. In this manner, the four-pronged solution facilitates the

documents/uncitral/en/code_of_conduct_-_comments_by_article_-_update_01.14.21.pdf> accessed 11 July 2021.

²⁶⁸ Cleis (n 29) 205.

²⁶⁹ Hranitzky and Romero (n 55) 2.

²⁷⁰ William W Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629, 653.

²⁷¹ Paulsson, 'Ethics, Elitism, Eligibility' (n 190) 15.

²⁷² Hranitzky and Romero (n 55) 2.

inflow of new perspectives and will contribute towards a more diverse group of ISDS practitioners.

Nevertheless, the solution forwarded by this article is imperfect and has its limitations. Firstly, and most importantly, its efficacy depends wholly on what one understands by the term ‘double hatting’—an unnecessarily narrow definition of this would reduce the effectiveness of the proposed solutions. The 2020 Draft Code of Conduct recognises this lacuna.²⁷³ Secondly, it does not directly address the ‘revolving doors’ practice that Langford and others have highlighted in their study.²⁷⁴ As double hatting is still allowed in most cases, except where regulated by the conditions, practitioners are capable of exchanging favours by appointing each other in rotation. Thirdly, the *ex-post* bans, in the absence of specific rules for the counsels, will prove to be difficult to enforce. However, this might not turn out to be problematic in the near future as international arbitral tribunals have sought to regulate counsel activities on the basis of their inherent powers,²⁷⁵ and the recent annulment of the arbitral award in *Eiser Infrastructure* on grounds of double hatting will hopefully act as a sufficient deterrent, though it might only have a limited effect.

Finally, the question of enforcement of *ex-post* bans leads to the question of the enforcement of the whole Draft Code of Conduct itself. While a final version is still a long way off, it is uncertain how the States will adopt it into the fragmented ISDS field. A possible option is through a Mauritius Convention²⁷⁶-style framework that will apply the rules framed under the Code of Conduct to all international investment agreements on an ‘opt-out’ basis, with parties being obligated under the instrument to accept certain minimum reforms.²⁷⁷ However,

²⁷³ Draft Code of Conduct 2020 (n 2) para 66.

²⁷⁴ Langford and others ‘The Revolving Door’ (n 4).

²⁷⁵ Rosenberg and Khan (n 207).

²⁷⁶ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) (Mauritius Convention).

²⁷⁷ Columbia Center on Sustainable Development, ‘Reforming the International Investment Regime through a Framework Convention on Investment and Sustainable Development’ (6 October 2020) 18–20 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf> accessed 26 August 2021.

the manner in which the drafters have removed a number of possible solutions from the Draft Code of Conduct is not a positive sign. If they were to further trim down the measures against double hatting, it is likely that the final Mauritius Convention-style Code of Conduct might be ineffective at remedying double hatting, especially when parties would be able to opt-out of whatever limited measures it would contain.

CONCLUSION

The practice of double hatting is a major shortcoming in the ISDS' appearance of legitimacy. It encroaches on the impartiality and independence of adjudicators, causes the emergence of issues of due process of law and creates doubts about the whole regime itself, such that its mere existence calls for reforms.²⁷⁸ Given the fact that this problem is a highly concentrated one,²⁷⁹ any and all measures aimed at remedying it must take care to not adversely affect the diversity and inclusiveness of the ISDS system, as these are inherently valuable goals.²⁸⁰

Keeping in mind these competing considerations, the solution outlined in this article has tried to remedy double hatting through a relatively narrow but holistic approach. By taking account of the peculiarities of the ISDS arbitration system and of the strengths and weaknesses of the currently available solutions, it has attempted to overcome their limitations. Though far from perfect, the solution can prove to be a helpful tool to resolve double hatting more effectively, given its multi-faceted approach to the problem.

Ultimately, as Puig and Shaffer note, '*[a]ll institutional processes are imperfect, and all of them are imperfect in different ways.*'²⁸¹ The ISDS is no different. The framers of the 2020 Draft Code of Conduct recognised this, as they had provided for a number of alternative solutions to reduce these blemishes.²⁸² However, the

²⁷⁸ See Faure and Ma (n 37) 57; Buergenthal (n 25) 498.

²⁷⁹ Langford and others 'The Revolving Door' (n 4) 2; Faure and Ma (n 37) 38.

²⁸⁰ Faure and Ma (n 37) 57; Bjorklund (n 9).

²⁸¹ Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 *American Journal of International Law* 361, 362 (emphasis added).

²⁸² Draft Code of Conduct 2020 (n 2) para 65-72.

second version of the Draft Code of Conduct²⁸³ seems to be missing the point as it adopts a narrow outlook towards double hatting and leaves problematic instances of double hatting unaddressed, unlike its predecessor. Thus, there is a need to revisit the original 2020 draft, which, admittedly, has been a guiding light in the development of the solution proposed in this article. As States' comments on the provisions of the second version pour in,²⁸⁴ one can only hope that the States will not restrict themselves to the narrow lanes of the Draft Code of Conduct V2.0 and will instead opt for a well-balanced, optimal solution that does not compromise on the core values of the ISDS system.

²⁸³ Draft Code of Conduct V2.0 (n 7).

²⁸⁴ ICSID and UNCITRAL, 'Draft Code of Conduct for Adjudicators in International Investment Disputes – Version Two: Comments by State/Commenter as of May 25, 2021' (25 May 2021) accessed 11 July 2021.