HANG UP THE DOUBLE HAT: SAFEGUARDING LEGITIMACY IN INVESTMENT ARBITRATION

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The steadfast notions of justice have concomitantly carried with them the schemes of impartiality and independence of an adjudicator. The roles rendered by an adjudicator and an advocate need to be mutually exclusive in order to preserve the identity of third-party dispute adjudication. If the two roles, for some reason, are intermingled, it results in ostensible perceptions of conflict of interest. Double-hatting is one such problem besieging International Investment Arbitration whereby the same individual renders the role of an arbitrator and adjudicator, either simultaneously or sequentially. This situation gives rise to systemic legitimacy concerns based on lack of impartiality and independence of an adjudicator who has an inherent interest in the outcome of the dispute. Investment arbitration as a juridical paradigm is predicated in public international law; therefore, these disputes arguably have a bearing on one another. When an arbitrator has a pre-existing relationship with the subject matter of the dispute, it engenders issue conflicts. Double-hatting as a practice is perceived as 'deplorable' in the investment dispute settlement regime. However, this endeavour focuses on demonstrating that with the requisite measures incorporated in the procedural schemes, this practice can be extenuated. The relevant stakeholders in this firmament have taken steps to prevent this practice by imposing codes of conduct for disclosure and recusal obligations for adjudicators to nip this menace at the bud. This paper discusses the general notions of double-hatting, how it is inimical to attaining justice and then explores solutions to dual-hatting by discussing various institutional safeguards and sui generis solutions.

Keywords: *Double-hatting, Investment Arbitration, Issue Conflicts, Disclosure, Code of Conduct for Arbitrators.*

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I. INTRODUCTION

"I view double hatting—sometimes acting as counsel, other times serving as an arbitrator—as an important strength of the international arbitration system."

- *Gary B. Born*[1]

The cornerstone of any third-party adjudication apparatus is realised when it can emancipate itself from the perceptions of partiality and prejudice. The ideal of impartiality and independence emanate directly from the cardinal principle of natural justice. The precept of "*nemo in propria causa judex, essedebet"* that is: *"no one should be made a judge in his own cause, the rule against bias"* is indelibly seated in modern legal systems. The rule against bias encompasses the predisposition or prejudice against a party which is inimical in achieving a fair result or outcome. Additionally, it also involves a reasonable perception or apprehension of bias.[2] This is owed to the fact that if any procedural safeguard to preclude bias is compromised, an inkling of bias might creep in. The practice of double-hatting is an objectionable practice whereby an individual renders the role of an arbitrator in a particular dispute and as a legal counsel or representative in another.

'Dual hatting' or 'double-hatting' as an expression, stems from the popular adage, 'to wear two hats.' The aphorism can be traced back to the mid-nineteenth century. The idiomatic utterance of wearing two hats is an allusion to the hats worn by two different uniforms. It highlights a practice whereby an individual renders two or more distinct roles or positions under a system which may result in a conflict of interest and an ostensible perception of bias among other institutional legitimacy issues. The controversial practice of dual hatting is arguably interdisciplinary and can be witnessed being practiced in various fields. In particular, when two roles with distinct functions are required to be performed by the same individual, it can be tantamount to double-hatting. For instance, when a management role in an organisation is rendered by the same individual who is an executive in another company of the same group. This can generally allow for cost and operational efficiencies.[3] This practice is also termed as 'role confusion' in international arbitration.[4] In the field of international arbitration, it refers to being an arbitrator and a counsel simultaneously but may extend to other roles such as acting as an expert witness or some other associated role in separate proceedings.[5]

In numerous disciplines, the practice of double-hatting complements the accompanying role without the emanating interest conflict issues, as the roles performed are mutually exclusive from the other.[6] Particularly, dual-hatting is preponderant in many

[1]Jenna Greene, 'From Hitchhiking Across Africa to International Arbitration Star: A Q&A with Wilmer's Gary Born, Gary Born on Double-Hatting'(*The AM Law Litigation Daily*, 14 May 2018) <https://www.law.com/litigationdaily/2018/05/14/from-hitchhiking-across-africa-to-international-arbitration-star-a-qa-with-wilmers-gary-born/> accessed 20 August 2020.

[2]*R vSussex Justices, Ex parte McCarthy*[1924] 1 KB 256.

[3]Gareth Thomas, 'Tess Lumsdaine, Giselle Yuen, Hong Kong: Executive double-hatting and deemed employment risks' (*HSF Notes*, 16 October 2020)<https://hsfnotes.com/employment/2020/10/16/hong-kong-executive-double-hatting-and-deemed-employment-risks/#page=1> accessed 6 November 2021.

[4]United Nations ('UN'), *UNCITRAL Working Group III (ISDS Reform) Secretariat Note on Possible reform of investor-State dispute settlement (ISDS): Ensuring Independence and impartiality on the part of arbitrators and decision makers in ISDS*(A/CN.9/WG.III/WP.151, 2018) .

[5]Dennis Hranitzky and Eduardo Romero, 'The 'Double Hat' Debate In International Arbitration: Should advocates and arbitrators be in separate bars?'(2010) New York L J, Litigation Section (14 June 2010).

[6]Gary Neilsonand JulieWulf, 'How Many Direct Reports?' (*Harvard Business Rev*, April 2012) <https://hbr.org/2012/04/how-many-direct-reports> accessed 27 August 2020.

management and Human Resources (HR) positions[7] and is frequently acclaimed to have improved business metrics since the same individual is involved in management roles and strategic business decisions founded on greater experience and scope.[8] Other demonstrations of this practice are exhibited in military command chains and military operations.[9] Nonetheless, this practice is gauged in a different light in the dynamic facets of law, partly because it is inconsistent with the inveterate yardsticks of natural justice and equity.[10] The role of an adjudicator combined with the role of an advocate is diametrically opposed to what is envisaged under rule of law. Thus, despite being prevalent, the practice of dual-hatting is spurned in the sphere of arbitration practice.

The early murmurings of double-hatting as a practice in international arbitration started surfacing at the advent of this century.[11] In the firmament of law, double-hatting has been an undesirable taint on the journey of transforming the legitimacy of international arbitration as a credible and impartial system of dispute resolution.[12] This practice has become pervasive in the adjudication of investment treaty disputes which encompass both institutional and *ad-hoc* arbitrations.[13] Furthermore, this practice extends into rendering multiple roles in international investment treaty arbitration, whereby an individual plays several roles as arbitrators, counsel, tribunal secretaries, and expert witnesses within the fissiparous ad-hoc adjudication paradigm.[14] The oscillation between these roles can be fulfilled sequentially or simultaneously and has been dubbed as a *'revolving door'* in international investment arbitration.[15]

The ubiquity of dual-roles rendered by experienced practitioners in international investment arbitration have seemingly morphed this practice into something innocuous and benign.[16] Indeed, it is not uncommon that senior practitioners actively represent parties as counsel and simultaneously render the role of arbitrators in other cases. However, the question that is invariably mooted is whether this practice is acceptable in the realm of adjudication since independence and impartiality are an imperative precondition in both common-law and civil-law jurisdictions.[17] Double-hatting can be overcome without any

[7]Craig Donaldson, 'What's Behind the Rise of Double Hatting for HR leaders?'(*Inside HR*, 15 December 2015) <https://www.insidehr.com.au/whats-behind-the-rise-of-double-hatting-for-hr-leaders/> accessed 27 August 2020.

[8]MonalisaDeka, 'The New Genre in Leadership: Double-hatting'(*People Matters*, 29 August 2016) <https://www.peoplematters.in/article/leadership/the-new-genre-in-leadership-double-hatting-13968> accessed 27 August 2020.

[9] Peter Singer, 'Double-Hatting Around the Law: The Problem with Morphing Warrior, Spy and Civilian Roles'(*Brookings*, 1 June 2010) <https://www.brookings.edu/opinions/double-hatting-around-the-law-the-problem-with-morphing-warrior-spy-and-civilian-roles/> accessed 27 August 2020

[10]*Ridge v Baldwin*[1964] AC 42

[11] Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harvard Intl L J 271.

[12] C Coleman and L Bond, 'Two Heads Are Better Than One: Double Hatting And Its Impact on Diversity In International Arbitration'(*10 NLR, No 212*, 30 July 2020) <https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international> accessed 27 August 2020.

[13] International Centre for Settlement of Investment Disputes ('ICSID'), 'Double Hatting, Code of Conduct Background Papers'(World Bank 2021) <https://icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf> accessed 7 May 2021.

[14] ibid.

[15]Malcolm Langford et al, 'The Revolving Door in International Investment Arbitration' (2017) 20 J Int'l Econ L (2) 301, 301.

[16] Joshua Tayar, 'Safeguarding the Institutional Impartiality of Arbitration in the Face of Double-Hatting'(2019) 5 MJDR 105, 107

[17] UN, *United Nations Basic Principles on the Independence of the Judiciary* (1985).

substantial overhaul by implementing appropriate safeguards, which are not inimical to the purpose and benefits of pursuing arbitration in the first place.

Impartiality and independence are the cornerstone of any adjudicatory edifice. These principles are the *raison d'être* in the realisation of rule of law. The presence of these principles is further acknowledged under the general principles of international law within the ambit of Art. 38(1)(c) of the Statute of the International Court of Justice ('ICJ').[18] The argument against double-hatting has been aptly condensed by eminent jurist and pioneer Philippe Sands QC into the phrase *"questions of perceived bias"*[19] in the ethics of arbitrator appointment *vis-à-vis* dual-hatting which ostensibly casts aspersions on the intrinsic notions of independence and impartiality in international and domestic arbitration regimes. Particularly this practice is prevalent in Investor-State Dispute Settlement ('ISDS') mechanisms.[20]

This tendency, ultimately, erodes the legitimacy and credibility of arbitration as an alternative to institutional litigation. Thereby, this practice relegates the notions of natural justice to the fringes by prioritising other material interests.[21] The deep-rooted practice of double-hatting goes against the grain of impartiality and independence entrenched in the procedural due process of seeking justice.[22] There are numerous concerns that stem from this role confusion. For instance, if an active counsel renders the role of an arbitrator or adjudicator, then he may have a preexisting relationship to an issue in the dispute (if not with the parties themselves). This would ultimately beg the question – whether this pre-existing relationship on an issue on which the arbitrator has decided and ruled upon, might inhibit the arbitrator's ability to impartially and neutrally decide the dispute. Since the endeavour of an arbitrator is to render consistent opinions,[23] parties seeking decisions to a similar effect might appoint an arbitrator on this consideration- to elicit a similar reasoning owing to an earlier ruling in an analogous issue. This is termed as an 'issue conflict' in arbitration where the arbitrator has a preexisting association with the subject matter of the dispute. [24]

The scheme of impartiality encompasses the postulates of neutral predisposition and its perception thereof in the indelible precept of natural justice: *"not only must justice be done, it must also be seen to be done."*[25] For understanding the problem engendered by double-hatting, a primer of its backdrop might be useful. As mentioned earlier, the problem of dual-hatting transpired at the dawn of this century. The concerns were raised time and again.[26] Philippe Sands QC, while addressing his fellow legal cohorts in 2015,[27] exhorted

[18] UN, *Report of the Special Rapporteur ParamCumaraswamy, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* (E/CN.4/1995/39, para. 34, 1995).
[19]Lacey Yong, 'Double Hatting Under New Scrutiny'(Global Arbitration Review, 5 June 2017) <https://globalarbitrationreview.com/double-hatting-under-new-scrutiny> accessed 27 August 2020
[20] ICSID (n 14).
[21]Malcolm Langford et al, 'The Ethics and Empirics of Double Hatting' (2017) 6(7) ESIL Reflection 1, 1.
[22] P Radler, 'Independence and Impartiality of Judges' in D Weissbrodt and R Wolfrum (eds), *The Right to a Fair Trial* (Springer 1998).
[23] International Institute for Sustainable Development ('IISD'), 'Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel'(IV Annual Forum for Developing Country Investment Negotiators Background Papers 2010) <https://www.iisd.org/system/files/publications/dci_2010_arbitrator_independence.pdf> accessed 7 May 2021.
[24] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014).
[25]*Ex parte McCarthy* (n 3).
[26] Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 Arbitration Intl 495, 498.
[27]Phillipe Sands, 'Developments in Geopolitics: The End(s) of Judicialization? (Closing Speech)'(ESIL Conference, 12 September 2015)

them to curb this *"deplorable practice"* where "*the same individual sitting as arbitrator in one case and acting as counsel in another"* induces circumstances where they may find themselves deliberating with their fellow arbitrators with the perception that *"one or more of them is actually litigating the very point that they are seeking to write an award on."*

Throughout history, the notions of justice concomitantly carried with them the idea of impartiality and independence.[28] For it is an adjudicator who protects the implosion of the justice delivery system. The practice of dual-hatting sullies the legitimacy of arbitration by challenging the very conception of the adjudicatory role. Numerous arbitral institutions have released regulations to prune this widespread practice *inter alia* through their code of conduct, self-policing rules and guidelines. This paper attempts to explore the numerous facets of this problem by tracing the dichotomy of the adjudicatory and advocacy roles *vis-à-vis* the international investment arbitration regime which is discussed in Part II of this article. Subsequently, in Part III, the existing standards and rules on double hatting adopted by various institutions and systems around the world are examined. Lastly, in Part IV, the author provides plausible solutions coupled with certain *sui generis* approaches to constructively limit this truly menacing problem in the realm of international investment arbitration.

II. DOUBLE-HATTING: A THREAT TO INTERNATIONAL INVESTMENT ARBITRATION

Black's Law Dictionary defines bias as a *"condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in a particular case."*[29] Thus, bias or prejudice precludes an adjudicator to decide on a dispute with an open mind, as a result of being predisposed or inclined towards a party due to underlying interests germane to the issues or the parties themselves. Impartiality, independence and neutrality of an adjudicator are integral to procedural fairness in any adjudicatory scheme. This segment supplements a conspectus to the conundrum of double-hatting and how it undermines ISDS *via* the embedded notion of apparent bias or the perception thereof. Additionally, this segment covers the inveterate ideas of incompatible roles of adjudicator and advocate and the preemption of issue conflicts under various arbitration arrangements which are examined through various seminal interpretations.

A. SAFEGUARDS AGAINST BIAS: INDEPENDENCE, IMPARTIALITY AND NEUTRALITY

Bias can be subdivided into actual and apparent bias. This essay discusses the nuances apposite to apparent bias and should not be construed otherwise. Since the proof for actual bias exercised by the arbitrator will always qualify the right of a party to challenge the award rendered by the prejudiced arbitrator. Moreover, the rule against actual bias is predicated on facts which can be proved merely by evidence bereft of legal tests or principles.[30] Hence, the standards and yardsticks for actual bias are straightforward.

The concepts of 'independence' and 'impartiality' are typically construed as being legally synonymous. However, there is an elementary distinction between the two terminologies. It can be explained by elucidating on the converse terms of 'partiality' and 'dependence'.

[28] UN, *Final Report by the Special Rapporteur Louis Joinet, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers* (E/CN.4/Sub.2/1993/25).
[29] *Black's Law Dictionary* (4th edn, 1971).
[30] M Hwang and K Lim, 'Issue Conflict in ICSID Arbitrations' (2011) 8 TDM (5) 1, 2.

Article 3.1 of the International Bar Association ('IBA') Rules of Ethics for International Arbitrators expounds the terms as follows:[31]

> *"Partiality arises where an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject matter of the dispute.Dependence arises from relationships between arbitrator and one of the parties, or with somebody closely connected with one of the parties."*

Thus, impartiality describes the state of mind where the arbitrator is unbiased in the context of the subject-matter of the dispute and has no predilections in the dispute and displays *"complete receptivity to the parties' arguments"*[32]. Similarly, independence is attained when the arbitrator has no ties with the counsels, co-arbitrators or the parties. This invariably instills confidence in the system of arbitration. Neutrality is another crucial requisite to an adjudicatory mechanism. In the same vein, neutrality implies that at the commencement of the dispute, the arbitrator begins with a 'clean slate' devoid of any predisposition.[33] Eventually, as the dispute progresses, the arguments facilitate the inclination of the adjudicator towards a particular party to ultimately arrive at an award, by taking a side.

Another conspicuous facet which is corollary to these concepts is the 'incompatible roles of adjudicator and advocate'.[34] This issue is further discernible in international treaty arbitration. Typical conditions that ensure impartiality are lacking in investment treaty arbitration since arbitrators are largely drawn from the same pool of legal counsel.[35] The general incompatibility of these roles was extrapolated by the Supreme Court of Canada *"the occupation of practising law is per se incompatible with the function of a judge"*.[36] Similarly, the ICJ has recognised that the exercise of these roles, either sequentially or simultaneously is incompatible *per se*.[37] Other illustrative safeguards against bias include the duty of an arbitrator to *"disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence"* provided under the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration ('Model Law').[38] Therefore, it is evident that certain substantive safeguards exist when it comes to precluding bias directly.

B. THE PERPLEXING ISSUE OF 'ISSUE CONFLICTS'

A seminal paper by Ziadé defines issue conflict as *"a conflict stemming from the arbitrator's relationship to the subject matter of the dispute."*[39] Issue conflicts come to light when an individual actively takes a stance in relation to a recurrent issue. As discussed earlier, if an active counsel renders the role of an arbitrator or adjudicator, the arbitrator of the dispute might have a preexisting relationship to an issue in the dispute (not with the parties themselves). The contended question which stems from this is- whether a pre-existing

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[31]IBA, *IBA Rules of Ethics for International Arbitrators* (1987), art 3.1.
[32] Sam Luttrell, 'Bias Challenges in International Commercial Arbitration- The Need for a "Real Danger" Test' (2009) Kluwer Law International, 3, 15.
[33] CatherineRogers, 'Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct' (2005) 41 Stan J Int'l L 53.
[34]Tayar(n 17) 108.
[35] IISD (n 24) 1.
[36]*R v Lippé*[1991] 2 SCR 114, 144.
[37] ICJ, *Practice Directions VII-VIII'ICJ Directions*' (2002).
[38] UNCITRAL, *Model Law on International Commercial Arbitration*(2006)art 12(1).
[39]N Ziadé, 'How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?' (2009) 24 ICSID RevFILJ (1) 49, 49.

relationship might inhibit the arbitrator's ability to impartially and neutrally decide the dispute. This results in an 'issue conflict' in arbitration where the arbitrator has a preexisting association with the subject matter of the dispute.[40] Thus, concerns unravel, casting aspersions on the capacity of the individual in approaching these issues with an open mind. An individual's prior exposure to the subject-matter prompts heightened apprehensions towards international arbitration, especially in ISDS arrangements. Since an 'issue conflict' already presupposes a conflict or problem, another befitting term which can be used in transposition is 'inappropriate predisposition'.[41] Standing international tribunals have exhibited a high threshold for disqualification on the grounds of prejudgment by a particular decision-maker in a dispute.[42] For instance, the ICJ in the *Wall* case, observed that prior criticism openly expressed by Judge Elaraby whilst dealing with Israel's conduct in the occupation of Palestine, did not preclude him from rendering an advisory opinion at the solicitation of the UN General Assembly.[43] In the same spirit, the International Criminal Tribunal for the Former Yugoslavia,[44] the Special Court of Sierra Leone,[45] the International Criminal Tribunal for Rwanda,[46] the International Criminal Court[47] have assigned a lofty threshold for disqualification on the grounds of prejudgment. However, this standard cannot be applied *mutatis mutandis* to international arbitration tribunals. The perceived predisposition in issue conflicts is more significant when an arbitrator renders an award which conforms with his earlier involvement in a similar issue. This creates a direct perception of overlapping legal influence from a prior involvement in another arbitration. While the ICJ standards apply to public statements or opinions which have relatively lesser weightage than legal involvement involving treaty interpretation.

The first ISDS dispute which entailed a published decision concerning issue conflicts was *Telekom Malaysia v. Ghana* ('Telekom Malaysia').[48] Prof. Emmanuel Gaillard's role as arbitrator was challenged by Ghana before the Hague District Court[49] (the seat of arbitration was Netherlands) in a flurry of challenges on the premise that he was simultaneously rendering the role of counsel in another ISDS arbitration of *RFCC v. Morocco* ('RFCC').[50] Ghana alleged that the bifurcation of roles was incompatible and Ghana was counting on the RFCC award in its submissions. The question involved was whether the arbitrator's roles as adjudicator and counsel were incompatible given his duty to assert all objections as counsel

[40]IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004)

[41]Am Society of Intl L, Intl Council for Commercial Arbitration (ASIL-ICCA), *Report Of The ASIL-ICCA Joint Task Force On Issue Conflicts In Investor-State Arbitration* (2016).

[42] Ina Popova and Jessica Polebaum, 'Emerging Expectations for Arbitrators: "Issue Conflict" in Investor-State Arbitration and Beyond'(2018) 41 Fordham Int'l LJ (4) 937, 939.

[43]*Legal Consequences of the Construction of a Wall*(Order on Composition of the Court) para 8(2004) <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> accessed 21 August 2020.

[44]*Prosecutor v Furundzija*, Case No IT-95-17/1-A (Appeals Chamber Judgment) paras 164-168, 197- 205 (2000).

[45]*Prosecutor v. Sesay*, Case No SCSL-04-15-T (Decision on Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case) paras 8-11 (2008).

[46]*Prosecutor v. Nahimana*, Case No ICTR-99-52-A (Judgment on Appeal) paras 76-80 (2007).

[47]*Prosecutor v. Nourain*, Case No ICC-02/05-03/09 (Decision on the Defence Request for the Disqualification of a Judge) paras 12-14 (2012).

[48]*Telekom Malaysia Berhad v. The Republic of Ghana*, PCA Case No 2003-03, UNCITRAL, Settled (2003).

[49]*Republic of Ghana v. Telekom Malaysia Berhad*, Hague District Court, Challenge No13/2004, Petition No HA/RK 2004.667, reprinted in ASA BULLETIN (Kluwer Law Int'l 2005 23(1)) 186, 192 (18 October2004); Challenge 17/2004, Petition No. HA/RK/2004/778 (5 November 2004).

[50]*Consortium RFCC v. Kingdom of Morocco*, ICSID Case No ARB/00/6 (Decision on Annulment) (18 January2006).

and his duty as an arbitrator to be unbiased in his consideration of the merits of the case.[51]The Hague District Court ordained Prof. Gaillard to abjure either one of his roles for fairness. He ultimately relinquished his role as counsel in the RFCC case. Thus, the primary point of contention which arose was the ostensible perception of conflict or bias which was ultimately rectified through his renunciation of one of his roles.

C. WHEN IS DOUBLE-HATTING PROBLEMATIC?

It is incontrovertible that when two parties approach a third-party for the resolution, trust, *inter alia*, has a pivotal bearing. The paramount ethos of trust is inseparable from the postulates of neutrality, expertise, independence and impartiality.[52] Parties generally tend to draw from a pool of arbitrators whose expertise, eminence and preferences are well settled for their backdrop.[53] Thus, a single individual can possibly play multiple roles (of counsel and arbitrator) over a sustained period of time. Moreover, this practice is not problematic in the international arbitral practice of commercial arbitrations as they are structured as one-off disputes that do not require tenured appointments and treaty interpretations.[54] In addition, the arbitration of these disputes is premised on parties consenting to the arbitrators, usually after which, the issue of bias ceases. Unsurprisingly, dual-hatting does not pose a legitimacy crisis in the context of international commercial arbitration. Yet, this position comes with a caveat that if the commercial arbitration transpires into a public nature, these concerns may surface.

However, international investment and ISDS arbitrations are of a different ilk altogether. ISDS disputes are more *"public than private"*[55] being heavily reliant on public international law for their interpretation and categorically encompass the involvement of multiple stakeholders and their interests. Further, international treaties, the participation of states (as sovereign or otherwise), intermingling of complex domestic issues of public policy, add to the onerous task of exhibiting neutrality and impartiality by an arbitrator.[56]

Of late, international investment treaty arbitration has transformed into a juridical system of precedents which entails reasoning of arbitral awards and investment treaties involving analogous provisions purporting similar issues. This court-like manifestation inadvertently breeds legitimacy concerns by virtue of its public nature. Double-hatting is an indication of one such concern which is proliferating with the roles of arbitrators being accorded to a select assemblage of senior and esoteric lawyers in the ISDS system. Other concerns that are raised include bestowing incentives to arbitrators in lieu of deciding cases for future appointments. Yet, with the proper safeguards and measures, it is viable for an arbitrator to have the requisite impartiality and independence.

[51]*Telekom Malaysia Berhad v The Republic of Ghana*, District Court, The Hague, Challenge No 17/2004, Petition No HA/RK 2004.778 para 1 (2004).
[52] Alec Sweet, 'Judicialization and the Construction of Governance' (1999) 32 Comp Polit Studies 147.
[53]Langford et al (n 22) 6.
[54] ibid 7.
[55] ibid.
[56] N Rubins and B Lauterburg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration' in C Knahr et al (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven Int'l Publishing 2010).

III. A PRIMER ON THE EXISTING STANDARDS AND GUIDANCE

It is imperative that *"in order to maintain its legitimacy in the eyes of its users, and the public at large, international arbitration must ensure that its decision makers are perceived as trustworthy and independent."*[57]

For achieving these unwavering precepts, ISDS stakeholders and institutions need to (i) delineate the principle of impartiality and independence of an arbitrator; (ii) set out rules to preclude bias and dependence by requiring disclosure by arbitrators on issues that raise contentious apprehensions of independence and impartiality; and (iii) circumscribe procedural measures to challenge arbitrators predicated on perception of bias or dependence.[58] The intent of this segment is to provide an illustrative overview on the current trends of preempting double-hatting and issue conflicts under the ISDS regime.

The watershed moment in addressing the problem besieging ISDS arbitration disputes was the release of the IBA Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') in 2004.[59] These Guidelines were formulated to induce uniform standards in decisions linked with conflict of interests *vis-à-vis* objections, disclosures and challenges. The IBA Guidelines categorically enumerated three non-exhaustive colour-coded lists (Red, Orange and Green) pertaining to disclosure by an arbitrator to bolster the perception of impartiality and independence by setting yardsticks for disclosure.[60] Although the IBA Guidelines are mere soft law standards that do not overrule any applicable national law, they have had a seminal bearing on international arbitration by acknowledging this pernicious legitimacy concern. These guidelines were further updated in 2014 where the ambiguities of the earlier version were clarified.[61]While the guidelines do not include any direct provisions concerning double-hatting, a number of instances that could constitute double hatting are delineated in the guidelines. Through the means of these guidelines, double-hatting can be markedly restricted, with an increased need of disclosure obligations to enhance detection of potential conflict of interests. Still, the degree to which double hatting can warrant a challenge of an arbitrator depends on the extent of the perception of bias enabled by these concurrent roles.

In the same token, analogous to the ICJ Practice directions,[62] the Court of Arbitration for Sports ('CAS') in 2009, amended their rules[63] and explicitly prohibited the *"double-hat counsel/arbitrator role"* to limit conflict of interest issues and emphatically curtail challenge petitions. The primary justification furnished by CAS was that *"the parties are likely to believe that arbitrators will favor lawyers before whom they are likely to appear in other cases."*[64] Arbitration rules of the International Chamber of Commerce ('ICC') also recommend the disclosure of roles by an arbitrator for preempting doubts on the

[57] Natasha Peter and ClotildeLemarie, 'Is There a Different Yardstick for Arbitrator Bias in Investment Treaty Arbitrations?' (2008) TDM Vol5 (4) 1, 1.
[58]Rubins and Lauterburg (n 57).
[59] IBA (n 41) art. 4.1.1.
[60]Matthias Scherer, 'New Case Law From Austria, Switzerland and Germany Regarding the IBA Guidelines on Conflicts of Interest in International Arbitration' (2008) 5 TDM (4) 1, 1.
[61]IBA, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014).
[62]*ICJ Directions* (n 38).
[63]CAS, *Code of Sports-related Arbitration* ('CAS Regulations') (2010)art S18.
[64]D Hranitzky et al (n 6).

independence and impartiality of the arbitrator.[65] The European Commission recently advocated for the institution of a 'Multilateral Investment Court'[66] for ISDS. The proposal intended to ban double-hatting in a similar fashion to CAS Rules by appointing arbitrators[67] for *"full-time, long-term and non-renewable positions, without outside activities"*[68] which imputes attributes akin to judiciary in a court-like model.

Other relevant developments in this field include the Dispute Settlement Understanding ('DSU') of the World Trade Organization ('WTO') which ordains the members to be *"independent and impartial, shall avoid direct or indirect conflicts of interest"*[69]to fortify the integrity of the DSU mechanism. In similar vein, the rules of Permanent Court of Arbitration ('PCA'), the Stockholm Chamber of Commerce, the Cairo Regional Centre for International Commercial Arbitration also set out ethical codes and guidelines to prevent this role confusion.[70] Against the backdrop of international courts and tribunals, the United Nations Basic Principles on the Independence of the Judiciary[71] and the non-binding Burgh House Principles[72] set the cadence for propriety by international courts and corollary judicial impartiality to be followed. Further, the Statute of the ICJ[73] also prohibits certain extrajudicial activities apart from the aforementioned Practice directions on dual-hatting.[74] Rules of the European Court of Human Rights ('ECHR') dictate that the Judges of the ECHR *"shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office."*[75]

No description is complete without discussing the rules of eminent institutions in the ISDS paradigm. ICSID is the premier institution for ISDS recourse, established under the auspices of the ICSID Convention.[76] Article 14 (1) of the ICSID Convention[77] espouses, *inter alia,* the impartiality and independence of arbitrators. Additionally, Rule 6(2) of the ICSID Arbitration Rules highlights the duty of disclosure by an arbitrator to disclose potential conflicts that might raise questions on rendering independent judgments.[78] A common alternative to the ICSID Rules are the UNCITRAL Arbitration Rules,[79]which are along the similar lines of the Model Law.[80]Under Article 11[81], the UNCITRAL rules furnish disclosure obligations of an arbitrator to disclose any situations which may raise 'justifiable doubts'

[65]ICC, *Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (2017) para 20.
[66] European Parliamentary Research Service, *Multilateral Investment Court: Overview of the reform proposals and prospects* (PE 646.147, 2020) 1, 3.
[67]C Coleman (n 13).
[68]European Parliamentary Research Service (n 67).
[69]WTO,*Rules of Conduct for the Understanding of Rules and Procedures Governing the Settlement of Disputes* (1996) art 8.
[70] PCA, *Arbitration Rules* (2012)11–13; Arbitration Institute of the Stockholm Chamber of Commerce, *The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*(2017) art 18; Cairo Regional Centre for International Commercial Arbitration, *Arbitration Rules*(2011) art 11.
[71]UN, *United Nations Basic Principles on the Independence of the Judiciary* (1985).
[72] International Law Association et al, *The Burgh House Principles on The Independence of The International Judiciary* (2004) principle 8.1.
[73] Statute of the ICJ (1945) art 16.1.
[74]*ICJ Directions* (n 38).
[75] ECHR, *Rules of Court of the ECHR* (2018) rule 4.
[76]*Convention of the Settlement of Investment Disputes Between States and Nationals of Other States at Washington* ('ICSID Convention') (1966).
[77]ICSID Convention (1966) art 14 (1).
[78]ICSID, *Arbitration Rules* (2006) rule 6 (2).
[79]UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (2013) art 11.
[80]UNCITRAL (n 39).
[81]UNCITRAL (n 80).

with regard to their veritable ethical integrity. The touchstone of testing independence and impartiality under the UNCITRAL Arbitration Rules is the *"justifiable doubts"* test[82] which has been applied while challenging the award of arbitrators. Failure in disclosure can warrant a challenge under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('New York Convention').[83]

Specific requirements might be set-out in investment treaties pertaining to disclosure obligations in the context of ISDS or prohibiting double-hatting altogether. For instance, the European Union ('EU')- Canada Comprehensive and Economic Trade Agreement ('CETA') categorically bans double-hatting as a means to bolster independence and impartiality in dispute settlement.[84] It provides:

> *"upon appointment, [arbitrators] 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."*[85]

Other illustrations on disclosure obligations incorporated into investment agreements includes the EU-Singapore Free Trade Agreement, that stipulates that the arbitrator must disclose any issues that may raise concerns *"likely to affect his or her independence or impartiality, or that might reasonably create an appearance of impropriety or bias in the proceeding."*[86] There are numerous examples for disclosure obligations in investment treaties. However, CETA serves as a distinct paradigm of imposing a blanket ban on dual-hatting.

Further, the Mauritius Convention on Transparency[87] has ushered reform into the fragmented ISDS regime, which has prompted numerous States to take steps in reformulating and rethinking their extant investment treaties and developing model templates for negotiating future agreement. In this light, the Netherlands released its Model Investment Agreement ('Dutch Model'), which serves as a vanguard in the transformation of the ISDS arrangement.[88] A conspicuous feature of the Dutch Model is that it proscribes double-hatting under Article 20 (5) where arbitrators *"shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement."*[89]These illustrations make it perspicuous that various purposeful attempts have been made by relevant bodies to truncate double-hatting legitimacy concerns at the international level.

The standards explored are an illustrative outline of the current framework and guidance to fend off the aspersions of legitimacy caused by double-hatting. Other means of challenging

[82]*Vivendi Universal v. Argentine Republic* (Decision on the Challenge to the President of the Committee of 3)(2001) ICSID Case No ARB/97/3, paras 20–21.
[83] Convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York (1958) art V(2)(b).
[84] EU-Canada CETA, *Code of Conduct for Arbitrators and Mediators* (2016) annex 29-B.
[85] ibid art 8.3.
[86] EU-Singapore Free Trade Agreement, *Code of Conduct for Arbitrators and Mediators* (2018) annex14-B, para 3.
[87]UN,*Convention on Transparency in Treaty-based Investor-State Arbitration* (2015).
[88]MarikePaulsson, 'The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI'(Kluwer Arbitration Blog, May 18 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/?doing_wp_cron=1589907058.9868829250335693359375> accessed 4 August 2020.
[89] Netherlands Model Investment Agreement (2019) art 20 (5).

arbitrators for their lack of independence and impartiality exist,[90] but the aim of this segment was to supplement a rundown on the prevailing measures to deter double-hatting under various circumstances.

IV. STEPS TOWARDS REFORM: POTENTIAL SOLUTIONS AND GOING FORWARD

Reforms in the ISDS configuration are imperative to bolster its legitimacy and procedural propriety. One solution touted to curb this menacing obstacle and duly concurred by Philippe Sands QC is the need to effectuate new standards prohibiting the *"practice of arbitrators serving as counsel"*[91] and setting-up *"separate bars"* for counsels and arbitrators in similar spirit to the CAS Rules.[92] However, converse arguments to this proposition can ensue where this action may *"deprive the international arbitration community of some of its best talents who, when forced to choose, may opt for the more lucrative role of counsel."*[93] An outright ban can arguably give rise to situations where the 'male, pale, and stale' club (an allusion to the situation where international arbitration is predominated by a group of senior white men) would become more prominent.[94] This would have an inimical and unwelcome bearing on the gender and regional diversity in the ISDS system and would be detrimental in the entry of second generation practitioners into the folds of arbitrator practice.[95] Thus, it is not feasible to foist an outright ban on the pool of arbitrators and counsel predicated on the pretext that it is *"easier to implement*."[96] With proper safeguards, it is possible for an arbitrator to achieve the requisite impartiality and independence and preclude the conflicting nature of double-hatting.

The above deliberation makes it increasingly challenging to arrive at a sustainable solution. Contentious issues require a cautious assessment of all potential eventualities. Since it involves a broad spectrum of stakeholders and their concomitant interests, the approach should tread delicately in deliberating over plausible solutions. The UNCITRAL Working Group-III (ISDS Reform) ('WG-III') was constituted with a mandate to explore and recommend potential reforms in the ISDS apparatus. The WG-III expressed a need for reform but stressed that the entire reform must not compromise the salutary benefits derived from ISDS itself. First, the benefits of the existing system, such as its *"flexibility and neutrality should be preserved."* Second, a balance of interests of respective stakeholders must be ensured while considering a solution. Last, solutions must be de-politicised as the primary benefit derived from the current ISDS apparatus is its dissociation from political influence.

The WG-III, while deliberating the plausible solutions, exhorted arbitral institutions to render a greater role in the appointment of arbitrators and formulate rules for transparency and accountability in procedures. There was an emphasis on developing codes of conduct for

[90]Maria Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (8 Nijhoff International Investment Law Series, Brill 72, 153-4, 157, 2017); S Luttrell (n 33).
[91] Hwang et al (n 31) 31.
[92]Hranitzky et al (n 6).
[93]Ziade (n 40) 57-58.
[94]VaninaSucharitkul, '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 30 August 2020.
[95] ibid.
[96] ICSID-UNCITRAL, *Draft Code of Conduct for Adjudicators in Investor-state Dispute Settlement*(1 May 2020) comment 67.

arbitrators, soft law standards and other requisite ethical guidelines for arbitrators. In this backdrop, the UNCITRAL and ICSID Secretaries have in collaboration, recently developed a Draft Code of Conduct for Adjudicators in Investor-state Dispute Settlement ('Draft Code')[97] with a view to addressing concerns of independence and impartiality. The Draft Code also highlights the duty of adjudicators to perform their roles with *"integrity, fairness, efficiency and civility."* The Draft Code is a comprehensive compilation of issues related to adjudicator ethics in the ISDS system with an aim to bolster the pillars of independence and impartiality.

A. THE DRAFT CODE: A PURPOSIVE AND MITIGATING SOLUTION

The WG-III published its report[98] on its deliberations during its 38th Session held in Vienna. The report discussed the desirability of reforms in ISDS, especially in relation to three issues beleaguering the ISDS set-up. The conversation revolved around the constitution of an advisory centre, the need for a *"code of conduct for decision-makers"*[99] and third-party funding. For the purpose of this endeavour, only the discussion on the code of conduct is germane to double-hatting. More recently, in May 2020, the ICSID and UNCITRAL secretariats jointly published the Draft Code accompanied with commentary for public comment. The Draft Code is an undertaking in lieu of the deliberations of the WG-III report[100]. It reflects the mandate of the report and contains detailed stipulations and conditions coupled with applicable principles and standards for adjudicators. The report also envisages a code that is binding and enumerates concrete rules and not mere directions or guidelines. It is drafted after taking into consideration the different standards found in treaties, codes and courts.[101]

The Draft Code is applicable to *"adjudicators"* in ISDS and therefore, encompasses within its spectrum all types of adjudicators including judges, arbitrators, and those who *"adjudicate ISDS cases, regardless of whether they are arbitrators, members of annulment committees, members of an appeal mechanism or judges on a bilateral or multilateral standing mechanism (permanent court)."*[102] Article 3 delineates the obligations of adjudicators which is further expounded from Articles 4 to 9. The Draft Code, once finalised, can be a directive 'soft law' to relevant parties or can arguably be integrated into investment treaties, consent agreements, procedural regulations and among other instruments for it to transpire into something binding.

A salient feature of the Draft Code is the regulations it imposes on the practice of dual-hatting under Article 6, titled: "*Limit on Multiple Roles.*"[103] The Article does not prohibit double-hatting altogether, albeit the commentary espouses that an outright ban would have been *"easier to implement"*[104], it would exclude the brightest minds in the field and their valuable contributions form purposefully contributing. As an extenuating solution, it proposes disclosure obligations or recusal as solutions to dual-hatting and role confusion. The Draft Code warrants the disclosure or recusal by an adjudicator when he/she has been involved in prior cases involving the same parties/ facts or when the adjudicator has participated in

[97] ibid.
[98] UN, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session* (A/cn.9/1004, 2019).
[99] ibid para 51.
[100] ibid paras 51-78.
[101] ICSID-UNCITRAL (n 97) comment 7.
[102] ibid comment 5.
[103] ibid art 6.
[104] ibid comment 67.

proceedings involving the same treaty.[105] It addresses the need for an adjudicator to refuse competing obligations once they are appointed or before accepting any appointment. The Draft Code aligns with the existing rules and standards in limiting double hatting as discussed in Part III. As a part of effectuating ISDS reforms and bolstering its legitimacy, the Draft Code potentially decides the position on the contentious issue of double hatting. It ushers in a much needed change in the propriety to be displayed by arbitrators in investment arbitration.

While the Draft Code is brought to fruition, it would be useful to exemplify the impact it will have on investment arbitration practice. This is a vital stride in integrating and consolidating the fissiparous system of ISDS without compromising the salutary benefits, flexibility and efficacy of the existing system. The answer for curtailing double-hatting is not a sweeping or blanket ban, rather, double-hatting as a practice vitalises the ISDS apparatus since it engenders *"collegiality and cooperation"*[106] among practitioners rendering different roles. The Draft Code is a momentous step towards addressing the legitimacy concerns stemming from dual-hatting and will be instrumental in reforming the functioning of the ISDS arrangement and restoring its envisaged credibility.

B. EXPLORING OTHER OPTIONS

'Self-regulation' and 'self-policing' accompanied with enhanced transparency and institutional reforms can clear the path in restricting conflicts emanating through double-hatting.[107] Another potential solution which has been discussed is the need for strict disclosure obligations from binding instruments. In a recent article, the maxim *"if in doubt, disclose"*[108]was considered in the context of arbitrator integrity and resultant duty to disclose potential conflicts of interests. The direction towards finding a solution should resonate with the Draft Code and should not compromise the advantages and the ethos of ISDS as a system.

Recusal and disclosure should be the minimum ethical standards for professional practitioners to achieve the *sine qua non* of impartiality and independence. Moreover, with the transcendental shift that is being witnessed in the sphere of dispute resolution, the proliferation of consensual and non-adjudicatory dispute resolution such as mediation, consultation, ombudsman processes and negotiation are actively being incorporated into various treaties and ISDS arrangements, holds the power to remarkably mitigate the potential legitimacy concerns caused by dual-hatting.

Another potential solution is the implementation of stringent rules to regulate arbitrator appointments using an *'ethical wall test'* in qualifying arbitrator appointments. Regulation of double-hatting can be implemented *via* an ethical wall which enumerates procedural checks and compliance requirements for arbitrators to determine their independence and impartiality. These checks can serve as preemptive measures for the qualification of an arbitrator prior to the appointment process. The ethical wall will be founded on relevant disclosure by the adjudicator and will test whether the ethical standards have been breached with regard to dual-hatting through their prior involvement in other proceedings. Essentially, ethical standards can be breached where prior substantial involvement in a case can be a ground for disqualification or non-appointment. However, the entirety of this ethical wall can potentially

[105]Ayca Koksal, 'ICSID Sets New Ethical Standards For Adjudicators' (*Mondaq*, 21 July 2020) <https://www.mondaq.com/turkey/international-trade-investment/967392/icsid-sets-new-ethical-standards-for-adjudicators> accessed 30 August 2020.
[106] Greene (n 1).
[107] Langford et al (n 54) 11.
[108]Robert Pé, '"If In Doubt, Disclose?": Arbitrator Conflicts, Challenges And Repercussions' (2020) 9 IJAL (1) 170, 180.

be subject to stringent disclosure requirements. Accordingly, the parties can subsequently ratify and validate this prior engagement through consent without objections to appointment. This proposed test can further be scheduled into categories varying from mandated disclosure to optional disclosure at the behest of the arbitrators. This precludes a complete ban on dual-hatting but effectively puts in safeguards to discern double-hatting. This preventive measure will significantly taper down the numbers of arbitrator challenges and consequently, save resources, time and expenses. Relevant stakeholders can incorporate the *ethical wall test* in their rules, into treaties and other binding instruments or can be a guiding soft law for parties and their appointment making process.

V. CONCLUSION

"Integrity has no need of rules."

- Albert Camus, The Myth of Sisyphus

There will inevitably be a solution to this complication. As the role of public scrutiny in ISDS increases, the demands for transparency, accountability and impartiality must be fulfilled. From CAS to the Draft Code, the prolonged journey of pruning double-hatting and the resultant legitimacy concerns can be resolved at last. The WG-III proposal has constructively sought to usher reform to the ISDS paradigm. In addition to the Draft Code, a lucid structure should be evolved for grounds of arbitrator disqualification through dialogue and consultation.

While a complete separation of counsel and adjudicator is not suitable, double-hatting can be rendered ineffective beyond the prescribed remit of apparent bias. Stricter disclosure requirements as enunciated by the dictum *'if in doubt, disclose'* and mandates warranting recusal are sustainable and amicable solutions, which do not alter the nature of ISDS serving dispute mechanisms. Preemptive tests such as the *'ethical wall test'* as a standard to disqualify arbitrators can be another alternative. Well, winds of change are coming, and what they might entail is increasingly becoming crystalline with the materialization of the Draft Code.