

SYMPOSIUM: A FOCUS ON ETHICS IN INTERNATIONAL COURTS AND TRIBUNALS

DUAL HATS AND ARBITRATOR DIVERSITY: GOALS IN TENSION

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This essay outlines a quandary facing international investment dispute settlement (IIDS): the tension between the wish to curb “dual hatting” and the wish to increase the diversity of those appointed as arbitrators in IIDS cases. Thoughtful observers are concerned by the effect on IIDS, either in fact or as a matter of appearance, of lawyers who wear “dual hats”—one as arbitrator in IIDS cases, and a second as counsel representing clients in other IIDS matters. Concurrently, other thoughtful observers are concerned that appointments to IIDS predominantly go to a small cadre of established arbitrators caricatured as “pale, male and stale.”¹ This concern has prompted efforts to increase the pool of female and minority arbitrators. However, these individuals would be drawn primarily from the ranks of younger practicing lawyers who must continue to practice unless and until they receive sufficient appointments to make full-time service as arbitrators economically feasible.

Dual Hatting

Critics view dual hatting as highly suspect, rife with potential for arbitrators, whether acting unconsciously or in knowing disregard of their ethical obligations, to render decisions that advance either the interests of their clients or their own interests in attracting or retaining clients. Those with a less harsh view nevertheless see the situation as creating an appearance of impropriety that adds to IIDS’s ill odor among its many critics.

Dual hatting has come under fire in the U.S. political area. Senator Elizabeth Warren, no friend of IIDS, attacked the Trans-Pacific Partnership in part because of the perceived risks of dual hatting:

IIDS could lead to gigantic fines, but it wouldn’t employ independent judges. Instead, highly paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next. Maybe that makes sense in an arbitration between two corporations,² but not in cases between corporations and governments. If you’re a lawyer looking to maintain or attract high-paying corporate clients, how likely are you to rule against those corporations when it’s your turn in the judge’s seat?³

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¹ Michael D. Goldhaber, *Madame La Presidente – A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?*, 1(3) TRANSNAT’L DISP. MGMT. (2004).

² Senator Warren’s aside illustrates an important distinction. Most international arbitration involves private commercial disputes between business concerns. Such “B to B” disputes typically involve the interests of the arbitrating parties and not broader community interests. Such international commercial arbitration has not been a subject of significant public concern and debate. See Günther J. Horvath & Roberta Berzero, *Arbitrator and Counsel: The Double-Hat Dilemma*, 10(4) TRANSNAT’L DISP. MGMT. 5, 19 (2013).

³ Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015).

The alarm has been sounded as well in the upper reaches of the international legal community. As Philippe Sands, a frequent critic of dual hatting, declared:

We ... need to address the deplorable practice of the same individual sitting as arbitrator in one case and acting as counsel in another, giving rise to situations in which you might find yourself deliberating with your fellow arbitrators in the knowledge that one or more of them is actually litigating the very point that you are seeking to write an award on. That is unacceptable.⁴

These concerns are impacting governments' policies. Article 8 of the recent Canada-European Union Comprehensive Economic and Trade Agreement (CETA) establishes the framework of a permanent investment tribunal to be composed of fifteen arbitrators appointed by the CETA parties. Under CETA Article 8.30.1, upon appointment to the tribunal, 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."

What Are the Numbers?

While a good deal of IIDS is carried on with the support of the Permanent Court of Arbitration and other institutions, the International Centre for Settlement of Investment Disputes (ICSID) is the most prominent such institution and has the highest caseload. However, the population serving as arbitrators in ICSID's IIDS cases is relatively modest in size. ICSID's 2018 Annual Report records that in the fiscal year ending June 30, 2018, 143 individuals from 42 nationalities were appointed to serve as arbitrators, conciliators, or ad hoc committee members in 91 ICSID cases.⁵ Experience suggests that many of these persons also serve as arbitrators in IIDS cases administered by the PCA and other institutions. Hence, the overall population of persons who serve as arbitrators in IIDS cases is modest, numbering a few hundred.

Initial efforts to quantify this population paint "a picture of a system which is not diverse or representative"⁶ and reveal that most arbitrators fall into one of two categories. On the one hand, a small number of individuals "tend to be reappointed time and again."⁷ On the other hand, most IIDS arbitrators are not frequent players, receiving only a few appointments in a career. The writer's nonscientific review of ICSID's database of ICSID arbitrators suggests that the great majority of those appointed at ICSID have received only one or at most two appointments.⁸

How many arbitrators wear two hats? Scholars associated with the University of Oslo's PluriCourts Centre recently sought the answer, utilizing PluriCourts' extensive database of IIDS cases. They found that in 509 of 1077 known investment cases (47 percent), at least one arbitrator simultaneously served as counsel in another investment case; in 190 of these cases both an arbitrator and a counsel were double-hatting.⁹ The authors also found that "[d]ouble hatting is a practice that is dominated by a small group of arbitrators with numerous arbitral appointments but a comparatively smaller amount of simultaneous legal counsel work."¹⁰

⁴ Philippe Sands, *Reflections on International Judicialization*, 27 EJIL 885 (2017).

⁵ Int'l Ctr. for Settlement of Inv. Disp., *2018 ANNUAL REPORT* 32 (2018) [hereinafter ANNUAL REPORT].

⁶ Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PA. J. INT'L L. 431, 458 (2013) (footnote omitted).

⁷ *Id.*

⁸ Int'l Ctr. for Settlement of Inv. Disp., *Arbitrators, Conciliators and Ad Hoc Committee Members*.

⁹ Malcolm Langford et al., *The Ethics and Empirics of Double Hatting*, 6(7) ESIL REFLECTION 3 (2017).

¹⁰ *Id.* at 4.

Ethical Frameworks and Control Mechanisms

Concerns about dual hatting ultimately reflect the belief that existing ethical constraints and control mechanisms are insufficient to curb the risk or appearance of self-serving behavior by dual-hatted arbitrators.

If conscientiously observed, the existing constraints ought to provide substantial checks on self-serving behavior. Under Articles 14 and 40(2) of the ICSID Convention, for example, arbitrators “shall be persons of high moral character and recognized competence . . . who may be relied upon to exercise independent judgment.” Article 6(2) of ICSID’s Arbitration Rules requires that arbitrators affirm their independence and impartiality and provide a statement of past and professional business and other relationships “that might cause [their] reliability for independent judgment to be questioned,” and it imposes a continuing disclosure requirement.¹¹ The rules of many arbitration institutions are similar, as are the UNCITRAL Arbitration Rules, which govern many non-ICSID IIDS cases.

Hence, existing standards dictate that a prospective arbitrator should decline a proffered appointment that may raise questions about the arbitrator’s independence or impartiality, which (according to judicial and challenge decisions) are cast into question when arbitrators also serve as counsel in other cases involving the same issues. In a much-noted case, the District Court of the Hague required an arbitrator to choose to serve either as arbitrator or counsel in separate matters involving a common issue.¹² Another arbitrator was removed due to his role as advocate in another case involving a common issue.¹³ Nevertheless, some arbitrators do not perceive service in both roles as raising such ethical concerns, particularly in cases not involving common issues.

The international arbitration community has developed soft law instruments intended to increase parties’ knowledge of potential arbitrators’ interests and connections. Best known are the International Bar Association’s (IBA’s) Guidelines on Conflicts of Interest in International Arbitration, intended to reflect “best current international practice.”¹⁴ While not legally binding, arbitrators and others assessing disclosure obligations regularly consult the IBA Guidelines. They set out general standards with both subjective and objective elements. A prospective arbitrator should decline appointment if she questions her own impartiality or independence in a case (subjective), and if there are circumstances that would raise justifiable doubts about her independence and impartiality (objective). The general standards are paired with a trio of illustrations of situations potentially requiring disclosures, identified by colors (red, orange, and green). Red list circumstances are disqualifying, although some can be waived by the parties. Nonwaivable red list circumstances include, for example, appointing as arbitrator a party’s legal representative or an attorney who regularly receives significant income from advising the party. Orange list matters must be disclosed; green list matters need not be disclosed.

Obligations to decline certain appointments and to provide disclosures of problematic circumstances are given teeth by international arbitration’s primary control mechanism: virtually all rules potentially applicable to IIDS include some form of challenge procedure by which a party can seek removal of an arbitrator based on justifiable doubts about the arbitrator’s independence or impartiality.¹⁵

In practice, however, few challenges are upheld. In ICSID, the 2018 Annual Report recounts eighteen challenges of arbitrators lodged during the fiscal year. One arbitrator resigned, one challenge was accepted, and sixteen were

¹¹ ICSID Arbitration Rule 6(2).

¹² *The Republic of Ghana/Telekom Malaysia Berhad, Arrondissementsrechtbank [Rb.]*, District Court, The Hague, Challenge No. 13/2004, Petition No. HA/RK 2004.667. See CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 320, §§ 8.25–8.26 (2014).

¹³ Luke Eric Peterson, *In an Apparent First, an Arbitrator Is Disqualified from Tribunal After State Objects to His Serving as Counsel to Investor on Parallel Case Where Jurisdiction Over Intra-EU Claims Was at Issue*, INV. ARB. REP. (Dec. 13, 2018).

¹⁴ Int’l Bar Ass’n, *IBA Guidelines*, Introduction, para. 4 (2004).

¹⁵ See *CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS* (Chiara Giorgetti ed., 2015).

rejected.¹⁶ The London Court of International Arbitration's (LCIA's) informative database of challenge proceedings under the LCIA's Rules includes thirty-two cases between 2010 and 2017. Of these, only six were upheld and a seventh upheld in part.¹⁷ The International Chamber of Commerce's (ICC's) Court of Arbitration received forty-eight challenges to arbitrators in 2017; only six were accepted.¹⁸

The significance of the generally low rate of acceptance of challenges is not clear. Skeptics may see the low numbers of successful challenges as evidence of an arbitration establishment protecting its own. Some challenge decisions do indeed reflect concern that overly rigid enforcement—for example, by disqualifying arbitrators on account of their past scholarly writings—could have adverse consequences for the system.¹⁹ On the other hand, arbitrating parties, particularly those unfamiliar with or hostile to IIDS arbitration, can be prone to unjustified challenges. And parties may lodge challenges for tactical reasons: to delay, intimidate arbitrators, or lay groundwork for a future attack on an unfavorable award. In the end, the small number of successful challenges leaves uncertain the effectiveness of arbitration's principal mechanism for ensuring independence and impartiality.

The Challenge of Diversity

Looming on the other side of the table is the reality that those appointed in IIDS cases are predominantly Caucasian males from Europe and North America. “[A]lthough about 85% of [ICSID] cases are brought by an investor from a developed country against a developing country, only about one-third of the arbitrators come from developing countries.”²⁰ According to a recent survey by an international law firm, “the majority of men appointed (the number of women being small in number) are Caucasian men of advancing years and . . . minority ethnicities and candidates of non-Western geographic origin are blatantly under-represented, as are younger practitioners.”²¹

There is more empirical data regarding appointments of women as arbitrators. An analysis of 249 known investment cases through May 2010 by a leading critic of IIDS indicates that just 6.5 percent of 631 total appointments were to women. Further, three-quarters of these appointments went to just two prominent arbitrators.²² Other analyses have come to similar conclusions.

This situation has led to initiatives within the international arbitration community aimed at increasing the number of women appointed to tribunals. A noteworthy expression of this is the Pledge, an initiative subscribed to by over three thousand counsel, arbitrators, users of IIDS, and others that “seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity.”²³ There may be progress toward increasing the numbers of women appointed as arbitrators, but it is limited. The press release announcing the ICC Court of Arbitration's 2017 Annual Report is indicative, noting that “in 2017, of all arbitrators nominated or appointed by parties, co-arbitrators or the Court, 16.7% were women,” a 1.9 percent increase over the prior year.²⁴

¹⁶ [ANNUAL REPORT](#), *supra* note 5, at 34.

¹⁷ London Ct. of Int'l Arbitration, [Challenge Decision Database](#).

¹⁸ Int'l Chamber of Commerce, [ICC Court Releases Full Statistical Report for 2017](#) (July 31, 2018).

¹⁹ *See, e.g., Urabaser S.A. v. Arg.*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, para. 46 (Aug. 12, 2010).

²⁰ [Giorgetti](#), *supra* note 6, at 459.

²¹ Berwin Leighton Paisner, [International Arbitration Survey 2016: Are We Getting There?](#), BRYAN CAVE LEIGHTON PAISNER (Jan. 12, 2017).

²² Gus Van Harten, [The \(Lack of\) Women Arbitrators in Investment Treaty Arbitration](#), Columbia FDI Perspectives No. 59 (Feb. 6, 2012).

²³ [EQUAL REPRESENTATION IN ARBITRATION](#).

²⁴ Int'l Chamber of Commerce, *supra* note 18.

If “male, pale and stale” arbitrators are to give way for more diverse appointments, the new arbitrators must come from somewhere. Arbitration rules rightly provide that prospective arbitrators should have professional competence appropriate to their task, and appointing parties demand no less. Although a few arbitrators have other backgrounds (government service, academia), the primary means to gain the necessary competence is service as counsel to parties in arbitration. And for the few younger/female/minority lawyers who gain the first appointment, other appointments may be slow to come, if they come at all. (As noted above, the great majority of ICSID arbitrators receive only one or two appointments.) Hence, most ICSID arbitrators must continue as counsel in order to pay their bills. “Not all arbitrators can afford to make a living from being arbitrators alone.”²⁵

Thus, any sort of blanket presumption against dual hatting in IIDS—assuming that this could be accomplished in the system’s decentralized and user-driven context—would have the unwelcome effect of reinforcing the existing dominance of the field by a relative handful of established male arbitrators.

What Is To Be Done?

If dual hatting at some level is an evil, what is to be done? Langford, Behn, and Lie suggest that the guillotine should fall on potential dual hatting early in any lawyer’s transition from counsel to arbitrator: “once a counsel obtained their first or even second arbitrator appointment, they should desist from accepting future counsel appointment as they ease into a new role.”²⁶ As indicated, this does not align well with the realities of IIDS appointments; most arbitrators receive only one or two ICSID appointments.

In any case, how would such a limitation come about? The decentralized IIDS system has no central regulator capable of enacting a global rule. A few institutions, including the ICJ and the Court for Arbitration for Sport, have limited dual hatting,²⁷ but their jurisdictional reach is limited. A few countries also have taken steps, but their effect is not clear. CETA entered into force provisionally in 2017, but it awaits approval by national and regional parliaments in Europe;²⁸ further, it is uncertain whether investors will utilize an eventual CETA tribunal or seek other dispute settlement mechanisms.

Arbitration institutions could develop guidance or rule changes aimed at reinforcing ethical requirements or assuring broader disclosures by prospective arbitrators. More drastic action by the institutions, however, would bring to the forefront the dilemma suggested here. Significantly limiting dual hatting would narrow the range of potential appointments, leading to even greater concentration of IIDS cases in the hands of a few established arbitrators.

As dual hatting receives increasing visibility and criticism, the greatest impetus for change may come not from regulatory action, but from a few prominent individuals’ decisions to wear a single hat. Noting that IIDS appointments disproportionately go to a relative handful of arbitrators, Langford, Behn, and Lie contend that “[i]f about 10 to 15 individuals agreed to stop double hatting, there would both a dramatic drop in the number of cases and, most likely, a rapid delegitimization of the process.”²⁹ The writer knows of several prominent arbitrators who have in recent years left large law firms to concentrate on service as arbitrators, although this may reflect not so much their concerns about dual hatting as their wish to escape large firms’ client conflicts that may prevent them from accepting appointments. In a parallel vein, some arbitrators have reportedly resigned from panels considering the

²⁵ Horvath & Berzero, *supra* note 2, at 13.

²⁶ *Id.* at 10. Anthea Roberts suggests a less draconian transition process. Anthea Roberts, [A Possible Approach to Transitional Double Hatting in Investor-State Arbitration](#), EJIL:TALK! (July 31, 2017).

²⁷ Horvath & Berzero, *supra* note 3, at 14–15.

²⁸ EU-Canada Comprehensive Economic and Trade Agreement.

²⁹ Langford et al., *supra* note 9, at 11.

impact of a recent European Court of Justice decision on intra-EU IIDS cases, in light of their concurrent service as counsel in other cases involving the issue.³⁰

Although the evidence is anecdotal, something may be in the wind. If so, this organic solution may be preferable to more drastic action by arbitration institutions. Great care is needed to ensure that any measures directed at dual hatting do not also become barriers to new and more diverse arbitrators seeking their place in IIDS.

³⁰ Luke Eric Peterson, *Three Crowns Lawyers Step down from Serving on Arbitral Panels that Are Charged with Looking at Implications of Achmea Decision*, INV. ARB. REP. (Aug. 8, 2018).