



**WOLLEGA UNIVERSITY SCHOOL OF GRADUATE STUDIES
SCHOOL OF LAW**

**DOUBLE HATTING IN INTERNATIONAL INVESTMENT AR-
BITRATION: ITS LEGAL STATUS, CHALLENGES AND IM-
PLICATION UNDER ETHIOPIAN LEGAL SYSTEM**

LLM THESIS

BY: YADATA TASAMA

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NEKEMTE, OROMIA, ETHIOPIA



WOLLEGA UNIVERSITY SCHOOL OF GRADUATE STUDIES

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ARBITRATION: IMPLICATION, LEGAL STATUS AND CHAL-
LENGES UNDER ETHIOPIAN LEGAL SYSTEM**

**A Thesis Submitted to Wollega University School of Law in Partial Fulfill-
ment of the Requirement for Degree for Masters of Law LL.M in Internation-
al Business and Economic Law**

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DEDICATION

This thesis is dedicated to Jale Bulti, Olit Yadata and Fenan Yadata, my wife, daughter and son respectively.

STATEMENT OF THE AUTHER

I hereby declare that I am the sole author of this master thesis and not used any source without recognition by citation, which are primarily listed in references. This Thesis is submitted in partial fulfillment of the requirement of Masters of Law degree at Wollega University and never submitted to any other institution by any person for award of bachelor of degree, diploma or certificate.

Yadata Tasama

March, 2024

Acronyms and Abbreviations

AAA-African Arbitration Association

BITs-Bilateral Investment Treaties

ICSID-International Center for Settlement of Investment Disputes

ICC-International Chamber of Commerce or International Criminal Court

LCIA-London Court of International Arbitration

IBA-International Bar Association

UNCITRAL-United Nations Commissions on International Trade Law

ESIL-European society of International law

ISDS-Investor State Dispute Settlement

ECHR-European court of Human Rights

CAS-Court of Arbitration for the Sport

CETA-Comprehensive Economic and Trade Agreement

CPTPP- Comprehensive and Progressive agreement for Trans Pacific Partnership

FIPA-Foreign Investment Protection Agreement

ICS-Inspection and Control Services

NAFTA-North American Free Trade Agreement

CCSI-Colombia Center on Sustainable Investment

UNCTAD-United Nation Conference on Trade and Development

DAFT-Department of Foreign Affairs and Trade

CFI-Corporate Finance Institute

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Table of Contents

DEDICATION	i
STATEMENT OF THE AUTHER.....	ii
Acronyms and Abbreviations	iii
ACKNOWLEDGEMENT	iv
Table of Contents.....	v
Abstract	ix
Chapter One	1
Introduction.....	1
1.1) Background of the Study.....	1
1.2) Statement of the problem	3
1.3) Research questions	4
1.4) Objectives.....	4
1.4.1 General objective.....	4
1.4.2 Specific objectives	4
1.5) Methodology	4
1.6) Literature Review	5
1.7) The scope of the study.....	8
1.8) Significance of the study.....	8
1.9) Limitation to the Study.....	8
1.10) Organization of the Study.....	9
Chapter Two.....	10
Investor State Dispute Settlement, Impartiality and Independence of Arbitrators	10
2.1 Introductory Remarks on ISDS	10
2.2 Critics of ISDS	13
2.2.1 Legitimacy crisis: Independence and Impartiality in Focus	14
2.2.2 Regulatory chill.....	15
2.2.3 Lack of Transparency, Consistency and predictability.....	16
2.2.4 International Investment Treaty vis-à-vis Domestic Courts	18
2.2.5) Excessive Legal Cost and lengthy proceeding.....	18

2.3) Arbitrators' Code of Conduct.....	20
2.3.1) Independence and Impartiality of Arbitrators.....	21
A) Independence and Impartiality of arbitrators under International Center for Settlement of Investment disputes (ICSID).....	21
B) Independence and Impartiality United Nations Commission on International Trade Law (UNCITRAL) Rules	22
C) Independence and Impartiality under Istanbul Arbitration Center.....	24
D) Independence and Impartiality under International Center for Dispute Resolution	24
E) Independence and Impartiality under International Chamber of commerce (ICC)	25
F) Independence and Impartiality under London Court of International Arbitration (LCIA)	25
2.3.2) Limits on Multiple Role.....	26
2.3.3) Confidentiality	26
2.3.4) Disclosure Obligations.....	26
2.3.5) Integrity, Diligence and Competence	26
2.3.6) Ex Parte Communication	27
Chapter Three.....	28
Status of Double Hatting under Ethiopian Legal System and Implication of Its Regulation	28
3.1) Definition of Double Hatting	28
3.1 Debate on Double Hatting: Argue for and Against.....	29
3.1.1 Argue for Double Hatting	29
3.1.2 Argue Against Double Hatting	30
3.2) Regulation of Double Hatting	34
3.2.1 International Court of Justice.....	35
3.2.2 Court of Arbitration for the Sport (CAS).....	37
3.2.3 EU-Canada Comprehensive Economic and Trade Agreement.....	37
3.2.4 Comprehensive and the Progressive agreement for Trans Pacific Partnership	37
3.2.5 International bar Association (IBA) Guidelines on Conflict of Interest.....	38
3.2.6 The Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA)	39
3.2.7 United State-Mexico-Canada Free Trade Agreement (USMCA).....	39
3.2.8 Argentina-Chile Free Trade Agreement	40

3.2.9	European Union –Singapore Investment Protection Agreement	40
3.3)	Model Investment Agreement and Regulation of Double Hatting	42
3.3.1	Netherland Model of Investment Agreement	42
3.3.2	South African Bilateral Investment Treaty Model.....	42
3.4	Decided Cases and double hatting	43
3.4.1	ICS Inspection and control Services Ltd (UK) V. Argentina	43
3.4.2	Telecom Malaysia V. The Republic of Ghana.....	43
3.4.3	Vito Gallo V. Government of Canada	44
3.4.4	RSE Holding AG v. Republic of Latvia	44
3.5	Approaches to Regulate Double Hatting in Investor-State Dispute Settlement.....	45
3.5.1	Self-regulation	45
3.5.2	Encouraging Challenge Procedure and Duty of Disclosure	46
3.5.3	Absolute Ban.....	47
3.5.4	Establishing Multilateral Investment Court.....	47
3.5.5	Temporary ban	50
3.5.6	Enhancing National, Regional and International Laws Governing the Issue	50
3.5.7	Enhancing Transparency.....	51
3.6	Joint Work of the Secretariat of ICSID and UNCITRAL	51
3.7	Double Hatting ISDS under Ethiopian Legal System, Implication of its Regulation for Ethiopian Legal System	54
A)	ISDS under Ethiopian Laws.....	54
B)	Experience of other Countries and international Agreements in Regulation of Double Hatting.....	54
3.7.1	Status of Double Hatting Under Ethiopian Laws	56
i)	Status of Double Hatting under Ethiopian BITs	56
A)	Bilateral Investment Treaty between Ethiopia and United Kingdom	56
B)	Bilateral Investment Treaty between Ethiopia and Algeria	57
C)	Bilateral Investment Agreement between China and Ethiopia	57
D)	Bilateral Investment Treaty between Government of Republic of France and Ethiopia	57
E)	Bilateral Investment Treaty between Government of the State of Qatar and Ethiopia..	58
F)	Bilateral Investment Treaty between Government of the State of United Arab Emirates and Ethiopia.....	58

G) Bilateral Investment Treaty between Government of Finland and Ethiopia.....	58
ii) Status of Double Hatting under International Convention Ratified by Ethiopia	60
iii) Status of Double Hatting under Ethiopian Domestic Laws	60
3.7.2) Implication of Regulation of Double Hatting for Ethiopian Legal System.....	63
3.8) Ethiopia’s Challenge to Regulate Double Hatting	64
3.8.1) Absence of Code of Conduct of arbitrators	64
3.8.2) Lack of arbitration Center which Represent Ethiopia.....	64
3.8.3) Existing Laws and Bargaining Power	65
Chapter Four	66
Conclusion and Recommendation	66
4.1) Conclusion.....	66
4.2) Recommendation.....	68
REFERENCES	69

Abstract

Nowadays, foreign direct investment is the backbone of the economy of the least-developed countries and developing states as it is the means to generate foreign currency. It mainly operates through bilateral investment treaties. Most of the time developed countries are rule makers while least developed countries are rule takers. Due to different reasons, disputes may arise between the host state and foreign investors. This dispute usually ends through arbitration. It is considered an effective method to end disputes. Investor-state Dispute Settlement (ISDS) is the mechanism that enables individual investors to bring suits against states. Recently, the ISDS system has been criticized for legitimacy problems, among others, lack of independence and impartiality because of the practice of double hatting. The practice of double hatting is when an individual plays two or more different roles at the same time. That is when an appointed arbitrator is appointed as defense counsel or expert witness and vice versa. The objective of the study is to expand the existing knowledge regarding double hatting, and the implication of this regulation of double hatting for the Ethiopian legal system to assess Ethiopian laws whether double hatting is regulated or not. Doctrinal research methodology is used in this thesis as it is an appropriate method for insight analysis and reasoning of appropriate laws used in this thesis. Despite various law reforms, it is found that Ethiopian laws do not regulate the practice of double hatting expressly except for requiring impartiality and independence from arbitrators in general terms. Therefore, it is recommended that the future Ethiopian Bilateral Investment treaty should include the clause that prohibits the practice of double hatting or she should enact her own Bilateral Investment Model Law which prohibits double hatting.

Keyword: double hatting, Investor-State Dispute Settlement, Impartiality, independence, Arbitrators' code of conduct.

Chapter One

Introduction

1.1) Background of the Study

International investment plays a major role in the economic development of states. International investment operates based on bilateral investment treaties (BITs). Whenever the agreed-upon terms of these BITs are enforced smoothly, there will be no investment dispute. However, due to public regulatory acts governing environmental protection, public health, economic regulation, economic, social, environmental, and politically sensitive topics such as distribution of energy, allocation of natural resources, environmental regulation, hazardous waste disposal, taxation, financial regulation, public procurement, regulatory shifts that trigger investment treaty disputes, abrupt policy changes, political, social, and economic upheaval¹ and nationalization or remanucipalisation².

Dispute settlement through arbitration is a common way of ending investment disputes. However, investor-state dispute settlement attracts criticisms such as arbitrators' legitimacy, the lack of transparency of the proceedings³, the practice of double hatting⁴; and the unpredictability, lack of coherence, and inconsistency of arbitral awards⁵ from international legal scholars, host state governments, NGOs, and other stakeholders.

¹ Charles H. Brower II, *Politics, Reason, and the Tracing of Investor-State-Dispute Settlement*, 49 Loy. Univ. Chi. L.J. 270, 272 (2017) (Investment Treaty Disputes are Political Disputes), available at <https://lawcommons.luc.edu/luclj/vol49/iss2/4/.pdf>

² Vera Wegmann & David Hall, *Unsustainable Political Economy of Investor-State Dispute Settlement*, 87, Int'l Rev. Adm. Sci. 480, 481-482, (2021), (introduction), available on, <https://journals.sagepub.com/doi/full/10.1177/00208523211007898.pdf>

³ Soares Caio Cesar, *Investor-State Dispute Settlement: An Analysis of the Reform Proposals on Its Institutional Structure*, UIBE, 1, 15-17 (2017) (The criticism: true fear or misconceptions?) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984581.pdf. This is whether three appointed individuals have sufficient legitimacy to assess the validity of the state's acts. The legitimacy problem is primarily concerned with procedural rule of law, i.e., the lack of impartiality and independence of the arbitrators.

⁴ Mohit Kumar Tanwar, *Addressing the Inadequacies: A New Multifaceted Solution to Double Hatting in ISDS*, 7L.Sch.Econ. L. Rev. 115, 121 (2021) (why double hatting is problematic), available on <https://lawreview.lse.ac.uk/articles/219.pdf>

⁵ Muhammad H. Negm, *Transparency and Consistency in Investor-State Arbitration: Adding New Ingredients to an Old Recipe of ISDS Reform* (2021), available on <https://afaa.ngo/page-18097/10501488>, last accessed on February 25, 2024, at 10:00 PM. The arbitration tribunal applies rules, for example, international treaties and bilateral investment treaties, designed to govern a broad range of situations with their own differing rules. Interpreting these two different rules may result in an inconsistent arbitral award with similar facts.

One of the main criticisms of ISDS is double hatting, the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short period⁶. The practice of double hatting, sometimes called ‘role confusion’⁷.

Some scholars of international investment law argue still for the viability of the practice of double hatting and discuss the adverse effect of its prohibition or limitation. For example, Arbitral Women board member *Vanina Sucharitkul* argued that a blanket ban of double hatting is tantamount to reversing progress made on gender diversity⁸.

Different methods are provided to discourage the practice of double hatting. These methods include enhancing transparency, litigation and self-regulation (when individuals agree not to participate in double hatting), institutional reform⁹; establishing multilateral Investment court¹⁰, duty of disclosures¹¹ and regulation by BITs model Law (for example, Dutch BIT Model)¹². The IC-SID-UNCITRAL secretariat is jointly drafting the arbitrators’ code of conduct, in which the fifth and the recent works limits the practice of double hatting¹³. Ethiopia neither made her own BIT model laws to prohibit or limit the practice nor inserted the clause that prohibits or limits the practice in her BITs in the past or recent though it is to be regulated globally..

⁶International Center for Settlement of Investment Dispute (hereinafter ICSID), *Code of conduct-back ground papers-double hatting*, (2021), [https://icsid.worldbank.org/sites/default/files/Background_Papers_Double_Hatting_\(final\)_2021.02.25.pdf](https://icsid.worldbank.org/sites/default/files/Background_Papers_Double_Hatting_(final)_2021.02.25.pdf)

⁷United Nations Commission on International Trade Law (hereinafter UNCITRAL), 36th Sess., Possible Reform of Investor-State Dispute Settlement (ISDS): Insuring *Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS*, U.N. Doc. A/CN.9/WG.III/WP.151 at 6 (Aug. 30, 2018). *Working Group III: Investor-State Dispute Settlement Reform | United Nations Commission on International Trade Law*

⁸ Louise Bond and Clarissa Colman, *Two heads are better than one: double hatting and its impact on diversity in international arbitration*, K&L GATES, (Feb. 10, 2023, 04:40 AM), <https://www.klgates.com/two-heads-are-better-than-one-double-hatting-and-its-impact-on-diversity-in-international-arbitration-7-30-2020>

⁹Malcolm Langford et al., *The Ethics and Empirics of Double Hatting*, 6*Eur. Soc’y. Int’l. L.* 1,1-2 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008643.pdf

¹⁰ Agata Zwolankiewicz, *Multilateral Investment Court: a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements?*, 9*Gron.J.Int’l. L.* 195, 206 (2021), (Structure of Multilateral Investment Court) <https://ugp.rug.nl/GROJIL/article/view/37958.pdf>

¹¹ Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas*, 33 *Leiden J.Int’l.L.* 819, 819–822 (2020) <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/katia-fach-gomez-key-duties-of-international-investment-arbitrators-a-transnational-study-of-legal-and-ethical-dilemmas-new-york-springer-2019-222-pp-11439-isbn-9783319981277/29498D58D92F8EB33B297072200B66FF.pdf>

¹² Netherland’s Model Investment Agreement (2019), art. 20/5, available on <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>

¹³ International Center for Settlement of Investment Disputes [ICSID], *Possible reform of investor-state dispute settlement (ISDS) Draft Codes of Conduct and Commentary*, A/CN.9/WG.III/WP.223,art.IV, (November 23, 2022) [WP_223_advance_copy.pdf \(worldbank.org\)](https://www.worldbank.org/icsid/WP_223_advance_copy.pdf) .pdf

1.2) Statement of the problem

The double hatting is currently one of the hot issues to be regulated in international investment dispute settlement through arbitration. Double hatting is the practice by which a lawyer wears double or more hats in international investment arbitration. That is, if he/she served as an advocate today, he/she become an arbitrator or defense council or expert witness in other day. He simply changes his/her hat.

Double hatting is criticized for its effects on independence and impartiality of the arbitrators theoretically and practically. The dispute may arise between the host state and investor in the course of the operation. The common way to end an investment dispute is through arbitration.

This arbitration tribunal usually consists of three members, where each party selects one arbitrator, and the presiding arbitrator is selected either by agreement of the parties, the party-appointed arbitrators, or more often by a neutral appointing authority. The qualifications and arbitral skills of the arbitrators can have a significant impact on the conduct and development of the arbitration.

In this arbitration panel, there are the most prestigious and well-known arbitrators of international investment disputes, who are double hatters. They are rare in numbers. As a result, the same person acts as an arbitrator, expert witness, or defense counsel. Acting in such a way was considered prestigious in the past, though it has become subject to debate currently. The world is on the verge of limiting or banning the practice. Some states took unilateral measures by enacting model laws. Unfortunately, the practice of double hatting is not regulated in Ethiopia, which needs to reform the laws to regulate it.

The primary focus of the study is to extend the existing international knowledge about double hatting in international investor-state dispute settlement in relation to the current Ethiopian legal system. The study tried to bring the attention of Ethiopian lawmakers and the Ethiopian Investment Commission to the growing attention of the world to regulating the practice of double hatting in international investor-state dispute settlement. The study leads to the best practices for the country and the solution to the problem.

1.3) Research questions

- ✓ Why do we need to regulate double hatting?
- ✓ What is the implication of regulation of double hatting for Ethiopian legal system?
- ✓ What is the status of double hatting under Ethiopian laws?
- ✓ What challenges Ethiopia to regulate double hatting?

1.4) Objectives

1.4.1 General objective

The general objective of this research is to expand the existing knowledge of double-hatting analysis with the Ethiopian legal system and the implications of international scenarios for the Ethiopian legal system.

1.4.2 Specific objectives

The specific objectives of the research include:

- ✓ To analyze why we need to regulate double-hatting in investment dispute settlement
- ✓ To assess the implication of regulation of double hatting for Ethiopian legal system
- ✓ To identify the status of double hatting under Ethiopian laws
- ✓ To assess challenges that will face Ethiopia to regulate double hatting in international investment dispute settlement

1.5) Methodology

Doctrinal methodologies are applied in this research since the research is all about the law itself and examines the evolving or developing rule or law. Because it is an appropriate method to gain insight into the analysis and legal reasoning of international agreements, state legislation (model law), and decided cases (case law), the research is doctrinal. Therefore, relevant laws of Ethiopia, decided cases at the international level that are related to the topic, articles and journals on websites, and different books are analyzed. Outrighting the practice of double hatting at international investor-state dispute settlement is a recent phenomenon and may be new to the Ethiopian legal system. As a result, primary sources, such as some Eth-BITs, are discussed. Furthermore, model laws on BITs of some countries, such as the Dutch Investment Model Law, the South African Model Law, and the Canadian Investment Model Law, are discussed. We need to assess

these model laws, as they are the first countries to enact model laws to regulate the practice of double hatting. A code of conduct enacted by international organizations and guidelines are also discussed. Additionally, secondary sources such as law books, magazines, journal articles, magazines, speeches at conferences, and other relevant secondary sources are also used.

1.6) Literature Review

International investments are those made outside of the scope of domestic markets. It refers to the allocation of funds in assets, securities, or projects outside one's home country aiming to diversify portfolios, capture opportunities in global markets, and offer the benefit of diversifying one's investment portfolio, allowing investors to spread their risk across different markets and economies¹⁴. Developing states usually give incentives to attract foreign direct investment. They do that for job opportunities, to reduce unemployment rates, to develop human skills, to facilitate technology transfer, to increase exports, to maintain exchange rate stability, to increase capital flow, and for other advantages¹⁵. This international investment operates based on bilateral or multilateral investment treaty.

This international investment treaty may be breached for different reasons. This dispute usually ends through investor-state dispute settlement (ISDS). Whenever bilateral investment treaties are breached, investors bring multimillion-dollar legal claims before an arbitration tribunal. Usually, bilateral investment treaties are violated due to financial crisis management, expropriation (regulatory effort), currency devaluation, policy changes, and bargaining power during initial negotiation¹⁶, environmental, political, and economic crises in host states and other emergency measures. The vast majority of investor claimants are from high-income countries, whereas the majority of cases are against lower and middle-income countries¹⁷. Especially developing countries are the most frequent respondent states in ISDS cases, while developed nations and western

¹⁴ Samina, Sabir et al., *Institutions and FDI: Evidence from Developed and Developing Countries* 5Fin.Innov. (2019), <https://ifin-swufe.springeropen.com/articles/10.1186/s40854-019-0123-7> .pdf

¹⁵ Stefan Calimanu, *Sixteen advantages and disadvantages of Foreign Direct Investment*, Research FDI (Oct.26,2023 09:26 PM) <https://researchfdi.com/resources/articles/foreign-direct-investment-advantages-disadvantages/>

¹⁶ Tuuli-Anna Huikuri, *Constraints and Incentives in the Investment Regime: How Bargaining Power Shapes BIT Reform*, 18 *Rev. Int'l. Org.* 361, 375–376 (2022) (Additional Attributes of BIT Outcomes), <https://link.springer.com/article/10.1007/s11558-022-09473-1> .pdf

¹⁷ United Nations Conference on Trade and Development (UNCTAD), *Investor-State Dispute Settlement Cases: Facts and Figures 2020*, U.N. Doc., Issue 4 (2021), https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf

countries such as the USA, the Netherlands, and the UK are the most frequent home states of claimants¹⁸. The developed nations have highly qualified and experienced lawyers. They have more bargaining power because they are economically developed; the bilateral investment treaty agreed with developing and least developed countries puts them in a more advantageous position.

The parties usually agree in BITs to bring their dispute to an arbitration tribunal. Arbitration has advantages like a consensual nature and party autonomy in its procedures (allowing parties to choose the tribunal, language of the dispute, and venue), neutrality of the forum and procedures, finality of the decision reached by tribunals, ease of enforcing the award internationally, saving costs, reducing delays, providing a wide range of solutions to disputes, maintaining business relationships between parties, confidentiality to only parties, and saving time and resources in courts compared to formal litigation¹⁹.

Though it is good compared to formal litigation, international investment arbitration has been characterized as a network of secret or “shadow” courts dominated by a clique of elite arbitrators motivated by wealth acquisition, in which multilateral corporations unleash law firms on some of the poorest countries in the world, forcing multimillion-dollar settlements or winning awards that are even larger, sometimes more than an impoverished nation’s entire annual budget for health, education, and public security²⁰.

The appointed arbitrators are from small clubs. A small pool of arbitrators are appointed and re-appointed in the vast majority of international investment arbitration by wearing double or multiple hats²¹. The same person is chosen as arbitrator, defense counsel, conciliator, or expert witness in similar cases or issues. This concept is called double hatting or role confusion. Double hatting in international investment arbitration and its legal status is currently a hot issue for in-

¹⁸ *Id.*

¹⁹ CAROLE MURRAY ET AL., SCHMITTHOFF THE LAW AND PRACTICE OF INTERNATIONAL TRADE, 579, 585 SWEET & MAXWELL (12th ed. 2012)

²⁰ Robert Howse, *International Investment Law and Investment: Conceptual Framework*, 1-2 (Inst. Int’l L. Just., Working Paper No. 2017/1 Mega Reg. Series, 2017) <https://www.iilj.org/publications/international-investment-law-arbitration-conceptual-framework/.pdf>

²¹ Premier on International Investment Treaties and Investor-State Dispute Settlement, CCSI (May 29, 2023), <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> (last updated, January 2022)

ternational tribunals and other stakeholders. That is why the agenda of regulating double hatting is given to WG III as the core reform of procedural matters in ISDS to create a single rule²².

In recent years, an individual has acted as an arbitrator, defense counsel, expert witness, or conciliator without any challenge in an international investor-state dispute settlement. Even so, it was considered prestigious since some well-known international lawyers are selected repeatedly and wear double or multiple hats. Wearing double or multiple hats has been the subject of debate in international investor-state dispute settlements for the last three decades. The practice limits the wide selection of arbitrators to only white men and specific clubs wearing hats. Therefore, the young new international lawyers lost the way to engage in international investment arbitration cases.

International scholars put forth their opinions on how to relieve themselves from the practice. However, the means they forwarded are similar but not identical. States are also using the unilateral BIT model to limit or ban the practice of double hatting. Some states have manifestly banned the practice. The International Bar Association, though it is a soft law, bans the practice of double hatting. The ICSID and UNCITRAL secretariat are jointly drafting the arbitrators' code of conduct, in which the fifth and most recent works limit the practice of double hatting²³.

The percentage of people who practice double hatting is high. As an article published by the European Society of International Law (ESIL), through January 2017, from a total 1077 investment cases, 509 (47%) cases involved arbitrator-defense counsel double hatting. From that, 319 cases involved arbitrators only double hatting, and 118 cases involved defense counsel only double hatting, i.e., when an individual is involved with a minimum of two international investment arbitration cases in a minimum of two different roles for a given role²⁴.

²² Malcolm Langford et al., *UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. World Inv. & Trade, 167, 176 (special issue) (2020) (The Rise of Reform), https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en.pdf

²³ International Center for Settlement of Investment Dispute [ICSID] & United Nation Commission on International Trade law [UNCITRAL], Code of Conduct For Adjudicators in International Investment Disputes Version 4, (July 2022), CoC_V4_ENG.pdf (worldbank.org)

²⁴ Langford et al. *supra* note 9, at 3-4

1.7) The scope of the study

The study covers some best practices from different corners of the world and the measures taken by respective international associations and organizations to regulate the practice of double hatting in international investment arbitration. The study was not extended to include commercial arbitration. Additionally, the study is limited to examining and assessing the Ethiopian legal system towards the practice of double hatting and forwarded solutions for identified problems. Moreover, the study did not include state-state investment dispute settlement. Therefore, the study analyzed the practices of some countries and measures taken by international organizations.

1.8) Significance of the study

Currently, Ethiopia is attracting huge investment from different corners of the world. There are various bilateral investment treaties concluded between Ethiopia and foreign countries. If a dispute arises between an investor and the host state, the most effective way to settle the dispute is through arbitration. The international arbitrators engage in different legal professions at the same time, which increases their independence and impartiality. Consequently, some states banned the practice of double hatting, and the joint work of UNCITRAL and ICSID on the code of conduct of arbitrators is in process. The Ethiopian laws, including the bilateral investment treaty, say nothing about the practice. Thus, this thesis is helpful for Ethiopian lawmakers to regulate the practice of double hatting. It helps negotiators of bilateral investment treaties fill the existing gaps before the conclusion of BITs, including the enactment of arbitrators' codes of conduct. Additionally, it paves the way for further research as it addresses the existing challenges regarding the issues.

1.9) Limitation to the Study

As the writer is a government employee, there was a time limitation. Secondly, there was a financial problem because most newly edited online books are expensive. Recently published papers and journals are also protected because the writer had no access to any of them. Thirdly, the residence of the writer is where the internet doesn't work regularly. Fourthly, there are no inside (our country's) written materials on the issue. Therefore, these reasons limited the quality of the work. However, the writer exerted his full potential to avoid the limitations.

1.10) Organization of the Study

This thesis is divided into five chapters. The first chapter deals with an introduction with the subdivision background of the study, statement of the problem, literature review, objectives of the study, research questions, methodology of the study, scope of the study, and significance of the study. Chapter two discusses investor-state dispute settlement, impartiality, and the independence of arbitrators. Double-hatting is discussed in Chapter 4, and finally, Chapter 5 deals with the conclusion and recommendation.

Chapter Two

Investor State Dispute Settlement, Impartiality and Independence of Arbitrators

2.1 Introductory Remarks on ISDS

Foreign (international) investment is an investment between a country (host state) and nationals of foreign states (home state). It is outside of domestic markets and may be direct (when investors purchase a physical asset such as a plant, factory, or machinery in a foreign country) or indirect (when investors buy shares in foreign companies that trade on their respective stock exchanges)²⁵.

ISDS clauses normally stipulate that, if an investor and the host state fail to resolve their dispute through consultation or negotiation within a specified period of time (which is known as the ‘cooling-off period’), the investor may directly submit to arbitration a claim that the host state has violated one or several obligations under the investment treaty²⁶.

Investor-state dispute settlement (ISDS) is a mechanism in a free trade agreement or investment treaty that provides foreign investors with the right to access an international tribunal to resolve investment disputes²⁷. ISDS is a complex dispute resolution mechanism that involves parties, counsel, and adjudicators from diverse jurisdictions who are admitted to the practice of law under diverse rules and who have undergone different legal training and education²⁸. It enables foreign investors to bring lawsuits against host states in international tribunals and claim compensation in case the terms of the treaty are breached²⁹. Here, it is understandable that there should be an investment treaty between the investors and host countries to talk about investor-state investment disputes.

²⁵ Foreign Investment, CFI (Oct. 28, 2023, 04:00 PM), <https://corporatefinanceinstitute.com/resources/economics/foreign-investment/>

²⁶ CHEN YU, DISPUTE SETTLEMENT AND REFORM OF INTERNATIONAL INVESTMENT LAW: LEGALIZATION THROUGH ADJUDICATION LAW, INTRODUCTION, at 3, (Edward Elgar Publ’g 2023) (e-book)

²⁷ About Foreign Investment, DFAT (Oct. 26, 2023, 03:00 AM) <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement>

²⁸ Chiara Giorgetti, *The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: A Low Hanging Fruit in the ISDS Reform Process*, 14 J. Int’l. Disp. Settlement, 176, 177–178 (2021), <https://academic.oup.com/jids/article/14/2/176/6432507.pdf>

²⁹ Huikuri, *Supra* note 16, at 362.

When we see the nature of investment treaties, usually bilateral investment treaties are shaped by the state with stronger bargaining power (powerful capital-exporting countries such as European countries and the US) to protect their investors, while the weaker party in negotiations is largely a rule-taker. These powerful nations insert expansive protections such as strong ISDS- mechanisms, sunset clauses ensuring treaty protections long after possible treaty termination, and vague definitions of investments and investor nationality³⁰.

Due to the sensitive nature of international investment, investment treaties may be breached due to environmental³¹, change in political administration³², human rights³³, policy changes³⁴, economic crisis³⁵ and other factors.

³⁰Huikuri, *supra* note 16, 368-369

³¹ Kezhen Su & Wei Shen, *Environmental Protection Provisions in International Investment Agreements: Global Trends and Chinese Practices*, 15 *Sustainability*, 1, 1-3 (2023), <https://www.mdpi.com/2071-1050/15/11/8525.pdf>

³²Brower II, *supra* note 1, at 275-276. The motivations for the regulatory shifts that trigger investment treaty disputes, such as changes in political administration, abrupt changes in policy, and political, economic, and/or social upheaval in host states, may lead to investor-state disputes.

³³Barnali Choudhury, *Human Rights Provisions in International Investment Treaties and Investor-State Contracts*, Edward Elgar, 1, 1-7 (forthcoming 2020) <https://ssrn.com/abstract=3643407> .pdf . Barnali Choudhury, *Human Rights Provisions in International Investment Treaties and Investor-State Contracts*, Edward Elgar, 1, 1-7 (forthcoming 2020) <https://ssrn.com/abstract=3643407> .pdf . International investment has immense potential to affect human rights. The private sector (corporations) believes that the duty to protect human rights rests only on states and that international investment agreements rarely focus on human rights. Therefore, international investment law views the issue of human rights beyond its purview while constraining the states to regulate human rights. In case a dispute arises, states opt between human rights protection, which may result in compensation for investors, or investment commitments, which may affect human rights.

³⁴Jonathan Bonnitcha and Zoe Phillips Williams, *The Impact of Investment Treaties on Domestic Governance in Developing Countries*, 46 *Law & Policy*, 140, 141-142 (2024), <https://onlinelibrary.wiley.com/doi/full/10.1111/lapo.12234> International investment agreements impact changes in domestic institutional structure, law, policy and the decision-making process. See also Kyla Tienhara et al., *Investor-State Disputes Threaten the Global Green Energy Transition*, 376 *Sci.*, 701, 701-702 (2022), <https://www.science.org/stoken/author-tokens/ST-467/full> .pdf. The policy changes to regulate oil and gas production will generate \$340 billion in investor-state legal claims. This huge amount of compensation has the potential to deter states from changing their existing investment agreements. If a state makes laws that limit the production of gas and oil, foreign investors may bring a claim against such states if an investment agreement exists.

³⁵ Christian Bellak & Markus Leibrecht, *Do Economic Crises Trigger Treaty-Based Investor-State Arbitration Disputes?*, 24 *J.Intl.Econ.L.*, 127, 134-137 (2021), <https://academic.oup.com/jiel/article-abstract/24/1/127/6151734?redirectedFrom=fulltext.pdf>. In the case of an economic crisis, the host state breaches an obligation under an international investment agreement in order to improve the economy by taking immediate regulatory policy measures. For example, Argentina froze tariffs, Paraguay suspended bank operations to restructure the financial sector, the EU took regulatory measures like bailouts of financial institutions in Belgium, the Czech Republic, Cyprus, or Greece to regulate the debt crisis, and retrospectively abolished financial incentives for the production of electricity from renewable energies after the financial crisis in Spain and Italy.

This investor-state dispute may be resolved through negotiation, conciliation, diplomatic channels, formal litigation, and arbitration. Arbitration is a popular and effective method of dispute settlement due to its consensual nature and the prominence given to party autonomy in its procedure, i.e., allowing parties to choose arbitrators, tribunals, forums, applicable law, and language of arbitration. The enforceability of an award carries a tremendous advantage over other methods of dispute settlement. Parties usually agree on the procedure for selecting arbitrators in a dispute resolution clause. Arbitration could take place through ad hoc tribunals, typically under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or under the auspices of one of the various institutions that administer international arbitration.³⁶

Often, the parties to a treaty insert an arbitration clause with their own consent in their bilateral investment treaty. It is the way to get rid of formal litigation. They also determine the jurisdiction of the arbitration tribunal. The consent in a bilateral investment treaty may be established by the legislation of the host states, an agreement between the host state and investor, and an agreement between the host state and the state national of investors. The arbitration clause may contain elements such as the governing laws of arbitration, the seat of arbitration, the number of arbitrators, the law governing the arbitration procedures, and other issues.

Depoliticizing of the dispute, independence, a neutral and qualified tribunal, flexibility and simplicity of the procedure, expeditious award, controlled arbitration procedure by parties, and its efficiency are the major advantages of arbitration when compared with formal litigation.³⁷ Thus, arbitration is best option to solve the investment dispute than other options.

However, recognizing it as the most efficient dispute resolution, the practice of arbitration is not without criticism from international investment scholars. Lack of arbitral proceeding transparency (while protecting the privacy and confidentiality of the case), insufficiency of impartiality and independence of arbitrators, high cost, and referring a large number of cases to the same arbitra-

³⁶KATIA YANNACA-SMALL, *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES*, at 58 (2018) (ebook)

³⁷Ani Simonyan, *Advantages and Disadvantages of Investor-State Dispute Settlement Through Arbitration*, 131 Bull. Yerevan State Univ., 131, 132-134 (2022), https://journals.ysu.am/index.php/bulletin-ysu-jurisprudence/article/view/sp1_2022_pp131-141 .pdf

tors are some of the disadvantages of ending investor-state dispute settlement through arbitration.³⁸

2.2 Critics of ISDS

As we see above, ISDS is a mechanism that enables individual investors to sue sovereign states in case of a breach of bilateral investment treaties. Even though it is considered a good option to resolve foreign investment disputes, there are also some critics of it. One of the main problems of investor-state dispute settlement is legitimacy. To mention some problems among the legitimacy crisis, the system is afflicted by pro-investor bias, undue secrecy, conflicting jurisprudence, and a high level of compensation; developing countries pay excessive legal costs and are frequently the losers; state regulatory autonomy on sensitive issues has been challenged; and its contribution to public goods is not evident³⁹. Due to this legitimacy crisis, arbitral centers, some states, and NGO's tried to initiate reform and took some measures like withdrawal from the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and certain investment treaties, development of new model treaties, replacement of arbitration with a court-like system, substantive reform of existing treaties, and revision of procedural rules, though some defend that these concerns are exaggerated and the system attracts more support than is acknowledged, protects vulnerable investors, and promotes investment and rule of law⁴⁰. Among others, the defenders of the system argue that the problem of double hatting will be cured by incremental reforms of the current investor-state dispute settlement, addressing the issue through soft and hard laws⁴¹. The working group III drafted an ethical code of conduct for arbitrators accepting this approach. Another criticism of ISDS is that it provides better rights than domestic investors. Moreover, it is criticized for lengthy legal proceedings and excessive legal costs. Finally, it is criticized for the practice of double-hatting. Some critics of ISDS are briefly discussed below.

³⁸ *Id.*, 134-138

³⁹ Langford *et.al*, *Supra* note 22, 168-171

⁴⁰ *Id.*

⁴¹ *Id.*, at 184

2.2.1 Legitimacy crisis: Independence and Impartiality in Focus

Legitimacy crisis in investor–State dispute settlement (ISDS) mechanisms, among other issues, is causing many countries to establish new treaties so as to shape future treaty making and put forward new and innovative ideas in response to external challenges⁴².

In investor-state dispute settlement, parties have the autonomy to select an arbitrator based on their wishes for ad hoc or institutionalized arbitration. Those selected arbitrators should be impartial and independent as to their work in arbitration. A public perception of a lack of judicial impartiality and independence is of course problematic for the legitimacy of the ISDS system as a whole, which may emanate from the appointment of arbitrators by the disputing parties, which creates doubts about the arbitrators' neutrality and fuels concerns that they might tend to defend the views of the parties who appoint them, and most existing investment arbitration rules do not provide for very detailed rules on the required qualifications and ethical requirements that could be used for guaranteeing the independence and impartiality of the adjudicators⁴³.

These ethical duties are affected by the practice of double or multiple hatting. Double hatting is one of the most common criticisms of the current ISDS system, which is professional rotation, in which more than one legal role takes place and the same individual consecutively or simultaneously serves as both arbitrator and lawyer in several investment arbitration cases⁴⁴. The practice of multiple hats (double hats) enables legal experts working in investment arbitration to act not only as legal counsel and arbitrator but also as expert witnesses, court secretary, and adviser to third-party funders, government officials, corporation board members, or lobbyists⁴⁵. It is suggested that double hatters interpret IIA in a way that favors them in other cases, acting in a different role⁴⁶. This makes the public lose trust in the ISDS system since it affects the independence and impartiality of arbitrators.

⁴² Yuwen Li et.al, *Agree or Agree to Disagree: China–EU Comprehensive Agreement on Investment (CAI) Negotiation and the ISDS Reform*, 8 China J. Compar. L. 635,636, (2020), available on, <https://academic.oup.com/cjcl/article-abstract/8/3/635/5814855>

⁴³ MAKANE M. MBENGUE & STEFANIE SCHACHERER, (eds.), *FOREIGN INVESTMENT UNDER COMPREHENSIVE ECONIMICA AND TRADE AGREEMENT*, STUDIES IN EUROPEAN ECONOMIC LAW AND REGULATION, Vol. 15, at 192 (Springer, 2019) (e-book).

⁴⁴Gomez, *supra* note 36, 102-103

⁴⁵ *Id.*

⁴⁶ *Id.*

Third-party funding can also affect the impartiality and independence of an arbitrator. Since third-party funding is financing a part or all of the costs of the arbitral proceedings for one of the parties to the dispute in return for a certain percentage of the compensation obtained by award or settlement, it may entail the problem of conflict of interests when, for example, the arbitrator of the case being funded has worked as an adviser to or has a recurring business relationship with the funder.⁴⁷

Investor-state dispute settlement is a one-party structure in which an investor can sue host states in breach of BITs, in which arbitrators are paid for hourly service. Arbitration tribunal independence and impartiality are also required in ISDS⁴⁸. Pro-state results may create disincentives for investors to file future claims; fewer cases would lead to fewer opportunities to serve as arbitrators. “Pro-investor” results, on the other hand, are thought to be likely to incentivize the filing of additional cases, creating the possibility of additional work for arbitrators⁴⁹ and arbitration tribunals. The counterargument on this issue is that the arbitrator's reputation for impartial and independent judgment is critical for arbitrators to earn appointments in the future, which incentivizes them to avoid reaching arbitrary or biased decisions⁵⁰

2.2.2 Regulatory chill

Regulatory chills refer to the possibility that investment treaties discourage states from adopting legitimate regulatory measures in practice⁵¹. The international investment treaty restricts the national government's ability to regulate issues in their territory. Investor-state dispute settlement is criticized for its negative effects on the prerogatives of the states to regulate activity within their own territory. Investment treaties unduly affect the right to regulate, even in taking measures to protect public interest, such as environmental protection regulation, though to what extent the investment treaty causes regulatory chill is controversial and subject to debate⁵². Moreover, Gold-

⁴⁷ Yu, *supra* note 26, at 9.

⁴⁸ KRITON DIONYSIOU, *CETAS INVESTMENT CHAPTER: A RULE OF LAW PERSPECTIVE*, *STUDIES IN EUROPEAN AND INTERNATIONAL ECONOMIC LAW*, Vol. 13, at 29 (Springer 2021) (ebook)

⁴⁹ Jeffrey L. Dunoff et al., *Lack of Independence and Impartiality of Arbitrators*, Academic Forum on ISDS Concept Paper No. 2019/6, at 11 (Pluricourt 2019), available on https://pure.uva.nl/ws/files/45274160/Dunoff_Giorgetti_et_al_Lack_of_Independence_and_Impartiality_of_Arbitrators_2019_03.pdf

⁵⁰ Yu, *supra* note 26, at 10.

⁵¹ JONATHAN BONNITCHA ET AL., *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME*, at 239 (Oxford University Press, Sept. 20, 2017) (e-book)

⁵² *Id.*, at 239 See also, Mary Zhao, *Investor-State Dispute Settlement Reform: Reconsidering the Multilateral Investment Court in the Context of Disputes Involving Intellectual Property Law*, 44 Colum. J.L. & Arts, 545, 558 (2021),

smith explains that ISDS in general and BITs improperly restrict the ability of governments to make decisions and set policy in a way that is in the best interests of their citizens by giving large foreign investors the ability effectively to hold governments for ransom over any changes that would have an impact on those investors' businesses⁵³. Confusion about the exact demarcation between legitimate regulation and a violation of an investment treaty may lead to regulatory chill.

2.2.3 Lack of Transparency, Consistency and predictability

It is the norm to keep information confidential in commercial arbitration, as it is mostly concerned with trade secrets. Consequently, the litigation is not transparent. Investment arbitration borrows from commercial arbitration, and the lack of transparency becomes one of the main critics of ISDS since it precludes legal scholars and the public at large from knowing and debating its procedure⁵⁴. Keeping an arbitral proceeding secret may be to avoid external criticism or to use it as a tactic to win the case. Consequently, justice is administered behind closed doors, even if it involves public interest⁵⁵. Gold Smith presented his speech in 2019 on Tel Aviv Arbitration Day, February 25, 2019, stating that ISDS is criticized for being an undemocratic secret court system that hides the activities of big business and prevents the proper, transparent regulation of industry⁵⁶.

Instead of aiming for systematization, harmonization, and legal certainty, arbitrators are merely seen as dispute resolution service providers with mostly little concern for achieving coherence, transparency, and consistency⁵⁷. The problem of transparency is attributed to the parties' autonomy, which allows parties to determine to what extent the case should be transparent and procedural gaps to govern the same.

available at <https://journals.library.columbia.edu/index.php/lawandarts/article/view/8196>. The threat of ISDS creates regulatory chill, which is the fear of implementing measures to protect economic, social, and environmental rights.

⁵³ Lord Peter Gold Smith, QC, *International Arbitration at Crossroads: Tel Aviv Arbitration Day*, PC (February 25, 2019) https://www.debevoise.com/-/media/files/news/2019/tel_aviv_arbitration_day_speech.pdf?rev=7146c9d8755d459bb716bddcaf70b455&hash=4EFF1D8943F5A53D6DF3C880E9D5D26E.pdf

⁵⁴ Bonnitcha et.al, *supra* note 51.

⁵⁵ Henrique Sachetini & Rafael Cadeco, *The Investor-State Dispute Settlement System Amidst Crisis, Collapse, and Reform*, 6 Wash. Coll. L. J. & L. Rev., 20.30 (2019), available on <https://digitalcommons.wcl.american.edu/ab/vol6/iss1/4/>.pdf

⁵⁶ Smith, *supra* note 53.

⁵⁷ Dionysiou, *supra* note 48, at 23-25; Rachel Cahill-O'Callaghan et al., *Influence in investor-state dispute settlement: a dynamic concept*, 14 J.Int'l.Disp.Settl.24,27 (2023), available on <https://academic.oup.com/jids/article/14/1/24/7069227>.pdf

The ambiguously construed standards of treatment in IIAs, coupled with the absence of an appellate mechanism, contribute to greater legal uncertainty and unpredictability⁵⁸. In this case, an inconsistent or conflicting arbitral award may be given with the same (similar) legal issues, the same factual events, or a divergent award may be given by a different tribunal, though the dispute is the same⁵⁹. For instance, in *Emilio Agustin Mafezini v. Spain* and *Gas Natural SDG, S.A. v. Argentina*, the Tribunals explicitly acknowledged the applicability of the MFN clause for procedural benefits, whereas in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Jordan* and *Plama Consortium Limited v. Bulgaria*, the Tribunals explicitly rejected the application of the MFN clause to procedural matters⁶⁰. To overcome the problem of lack of transparency in ISDS, the CETA and CPTPP enacted provisions dealing with transparency that require all key documents connected with the ISDS proceedings to be made available to the public (subject to the reduction of confidential or protected information) and the hearings to be open⁶¹.

UNCITRAL Rules on Transparency in Treaty-Based Investor-State Dispute Settlement require the publication of relevant information at the commencement of the ISDS proceedings, the publication of documents relating to the investment treaty arbitrations, the tribunal's discretion to allow a non-disputing third person to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute, and hearings for the presentation of evidence or for an oral argument to be public-saving confidential information⁶².

⁵⁸ Dionysio, *supra* note 48, at 24

⁵⁹ Mbengue & Schacherer, *supra* note 43, at 188. Arbitral tribunals have rendered inconsistent awards or decisions with regard to the interpretation not only of similarly drafted provisions under different investment treaties but also of the same treaty provision in the presence of virtually identical or very similar facts. From a procedural perspective, the non-permanent nature of arbitral tribunals and the lack of a genuine review mechanism seem to be the main causes of this problem. *See also* Dionysio, *supra* note 48 at 25–26.

⁶⁰ Yuwen Li & Cheng Bian, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 Neth. Int'l L. Rev., 503,521 (2020), <https://link.springer.com/article/10.1007/s40802-020-00182-3>.pdf

⁶¹ Comprehensive Economic and Trade Agreement, (hereinafter CETA), Can.-EU., art. 9, Oct. 30, 2016, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement_en; *see also*, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, (hereinafter CPTPP), art. 24, Mar. 8, 2018, <https://www.instituteforgovernment.org.uk/explainer/comprehensive-and-progressive-agreement-trans-pacific-partnership>

⁶² UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, art., 1–5, Apr. 1, 2014, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf>. (hereinafter, UNCITRAL Rules on Transparency)

2.2.4 International Investment Treaty vis-à-vis Domestic Courts

According to these critics, international investment frameworks allow investors to bring claims against foreign states without exhausting local remedies, making them better than domestic investors since international investment agreements pass by the requirement of exhausting local remedies, while domestic investors have no right to bring suits against states based on international investment arbitration⁶³. Only covered investors benefit from the substantive and procedural protections of an investment treaty. Domestic investors, as well as foreign investors not covered by any investment treaty, have no rights under investment treaties, which is unfair⁶⁴. Proponents of this argument assert that this differential treatment (giving greater rights than domestic investors) is unfair, and it is privileges accorded by the least developed nation to multi-lateral corporations at the expense of local investors⁶⁵. This happens when domestic laws provide greater rights than investment agreements. Most of the time, the least developed nation makes such laws to attract foreign investments at the expense of local investors. The domestic laws of developed nations do not confer better substantive rights for foreign investors.

2.2.5) Excessive Legal Cost and lengthy proceeding

Though there is no universal definition of excessive legal cost, legal cost includes counsel costs, expert costs, arbitrator fees, and arbitration center venue fees⁶⁶. Legal cost is determined by the complexity and novelty of the case, the number of procedural, jurisdictional, merits, and damages issues that the arbitral tribunal has to determine, and the number of parties and their conduct throughout the proceeding⁶⁷. This will be cured by reducing the length of the proceeding (limiting the maximum page number of claims, rejecting unwarranted discovery requests of documents or imposing an adverse burden of proof for that, requesting an expert report on international law except in special conditions, discouraging submission of legal authorities publicly available), agreeing on one member tribunal, issuing non-binding guidelines as to the arbitrator's fee, the

⁶³ Gabrielle Kaufman-Kohler & Michele Potesta, *Investor-State Dispute Settlement and National Courts: Current Frame Work and Reform Options*, EUR. Y.B.INT'L ECON.L. 8 (special issue) (2020), <https://link.springer.com/book/10.1007/978-3-030-44164-7>

⁶⁴ Bonnitcha et.al, *supra* note 51 at 152

⁶⁵ Kaufman and Potesta, *supra* note 63, 8-9

⁶⁶ Daniel Behn et al., *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. World Inv. & Trade, 188, 197 (2020), https://brill.com/view/journals/jwit/21/2-3/article-p188_2.xml?language=en.pdf

⁶⁷ Gabriel Bottini et al., *Excessive Costs and Recoverability of Costs Awards in Investment Arbitration*, 21 J. World Inv. & Trade, 251, 253 (2020), file:///C:/Users/Administrator/Downloads/22119000-12340173.pdf

apportionment of costs and dismissal of frivolous claims, establishing the reasonableness of the amount of the overall claim, making a consistent decision through an appeal mechanism, and establishing a multilateral investment court⁶⁸.

Lengthy proceeding is also another point of criticism of the current ISDS system. The average duration of proceeding is 3.73 years (without including the amount of time that is often spent at the enforcement stage of the proceedings in domestic courts, which can take upwards of five years depending on the number of appellate review stages that are possible in a particular domestic system) or through the annulment process in ICSID cases (average of about 2 years), as research conducted in 2018 found⁶⁹.

2.3) Approaches to Overcome Critics of ISDS

We have discussed the critics of ISDS above. There are approaches mentioned to overcome the problem of ISDS. The UNCITRAL Working Group III, after agreeing on ISDS reform, provided four reform options⁷⁰: improvement of the current investor-state arbitration system (for instance, by modifying the appointment rules or enacting rules of conduct and/or ethics for arbitrators); addition of an appellate mechanism to the current investment arbitration regime; introduction of a multilateral investment; and no ISDS at all, with two sub-scenarios, namely (i) recourse to domestic courts only and (ii) state-to-state arbitration. The first approach is the incrementalist view, which argues the current system is overblown and argue that investor-state arbitration is the best option and can be maintained by instituting modest reforms that would redress specific concerns, while the second is the systematic reformers view, which argues retaining the ability of the investors to bring claims internationally but replacing the existing system with a multilateral investment court with an appellate body⁷¹.

This approach is presented by the European Commission. Accordingly, the arbitration will be governed by international law rather than *lex arbitri*. Secondly, it will be permanent rather than ad hoc. Thirdly, it will alter the finality of awards via an appellate mechanism. Finally, it will deviate from party autonomy by randomly appointing a roster of permanent adjudicators for each

⁶⁸ *Id.*, 257-266.

⁶⁹ Behn *et.al*, *supra* note 66, 209-210.

⁷⁰ JULIAN CHAISSE ET.AL, HAND BOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY, 617 (2021) (e-book)

⁷¹ Sachetm & Cadeco, *supra* note 55

case⁷². The EU implemented a permanent tribunal in a bilateral investment treaty with Canada⁷³, Vietnam⁷⁴, Singapore⁷⁵ and Mexico⁷⁶. The third option is the view of paradigm shifters (no ISDS)⁷⁷. Their view is to replace the existing investor-state dispute settlement with a state-state dispute settlement, domestic court, or other alternative dispute settlement such as mediation, negotiation, and diplomatic channels. During the ICSID reforms, countries like Australia, India, Indonesia, and Malaysia decided to go against ISDS provisions in their new IIA's⁷⁸.

Angela Ray T. Abala argued that mediation is well-positioned to address dissatisfaction with investor-state arbitration, as ISDS offers a faster and less expensive alternative and provides an environment that is more conducive to preserving business relationships⁷⁹.

2.3) Arbitrators' Code of Conduct

The international tribunals have their own code of conduct. Those codes of conduct include independence and impartiality, limits on multiple roles, confidentiality, diligence, competence, and fairness. The international tribunals govern arbitrators' codes of conduct differently. The writer deeply discusses only independence and impartiality since these code of conducts have direct links to the title of this thesis.

⁷² Zareen Qayyum, *The Enforceability of Proposed Reforms to Investor-State Dispute Settlement*, 35 Foreign Inv.L. J. (Issues 1-2) 253,261 (Spring 2020), available on, <https://academic.oup.com/icsidreview/article-abstract/35/1-2/253/5900774.pdf>

⁷³ CETA art.8.27 (5), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22017A0114%2801%29>

⁷⁴ EU-Vietnam Investment Protection Agreement, (hereinafter EVIPA) EU-Viet, art., 15.23, June 30, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-nam-investment-protection-agreement-2019->

⁷⁵ EU-Singapore Free Trade Agreement (hereinafter EUSFTA), EU-Sing.,art.14.20(2,3) Oct. 19, 2018 <https://www.mti.gov.sg/Trade/Free-Trade-Agreements/EUSFTA>

⁷⁶ EU-Mexico Trade Agreement (hereinafter, FTA.EU-Mex.), EU-Mex., sec. X, art., 11/2 Apr. 21, 2018 <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/9f9e6630-7c43-49df-8a5f-653a23839b94/details> This agreement is not finalized and becomes binding on member states. It will be effective after it is finalized and all technical procedures are completed.

⁷⁷ Sachetm & Cadeco, *supra* note 55

⁷⁸ Chaisse *et.al*, *supra* note 70, at 608

⁷⁹ Angela Ray T. Abala, *The Role of Expert Advisory Mediation in Addressing Practical and Political Barriers to ISDS Mediation*, 2 Disp. Resol. Rev., 12–14 (2023), available on: <https://drr.scholasticahq.com/article/68301-the-role-of-expert-advisory-mediation-in-addressing-practical-and-political-barriers-to-isds-mediation.pdf>

2.3.1) Independence and Impartiality of Arbitrators

Independence and impartiality are among the main arbitrators code of conduct. As double hatting is mainly criticized for its negative effect on independence and impartiality among the arbitrators' code of conduct, we need to discuss its status under different arbitration rules.

An absence of a common ISDS Code of Conduct led states to make their own ethical rules and codes for those who engaged in the ISDS system⁸⁰. This led to a difference in its regulation. However, the principles of independence and impartiality of arbitrators are the basic and common elements in arbitrators' codes of conduct across the world. Every code of conduct considers these principles. The existence of effective and independent investor-state dispute resolution is an important factor for companies in determining where to invest. That is why international associations and institutions insert it as the ethical duty of ordinary court judges and arbitrators. These ethical duties usually appear in the rules of procedure for investment arbitration. In international investment arbitration, a lack of independence and impartiality may result in moral hazard on the part of arbitrators since they need to vote for those who appointed them. Inappropriate contact between them, multiple appointments, which carry the message that the arbitrator has the tendency to decide for those who are appointed repeatedly, issue conflict (holding a known position on the issue), and double hatting are the main issues that affect these principles⁸¹. The rules of arbitrators' code of conduct made to insure the principles of impartiality and independence are discussed here under.

A) Independence and Impartiality of arbitrators under International Center for Settlement of Investment disputes (ICSID)

It has been the world's leading institution for the settlement of investment disputes since its conclusion in 1965 in Washington. The ICSID itself does not act as an arbitrator but maintains panels of specially qualified persons from which arbitrators shall be selected by the parties and provides necessary facilities for the conduct of proceedings⁸². The International Center for the Settlement of Investment Disputes (ICSID) requires a high standard of independence and impartiali-

⁸⁰ Georgetti, *supra* note 28, at 177.

⁸¹ Chaira Giorgetti, *Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions*, 3 Eur. J. Int'l. L., (2019) <https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/.pdf>

⁸² MURRAY ET AL, *supra* note 19, at 598

ty from the adjudicator⁸³. Arbitrators should be of high moral character, have recognized competence in the fields of law, commerce, industry, or finance, and be relied upon to make independent judgments. Article 58 of the ICSID Convention states that “the decision on any proposal to disqualify... [an] arbitrator shall be taken by the other members of the Commission or Tribunal, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the chairman shall take the decision⁸⁴”. Rule 9(1) of the ICSID Arbitration Rules states that “a party proposing the disqualification of an arbitrator... shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons⁸⁵”. The secretary general transmits the proposal to the Chairman of the Administrative Council as per Art. 9/2 of the arbitration rules of ICSID. The chairman (president of the World Bank) decides on a proposal of disqualification using his best efforts within 30 days of receiving proposals⁸⁶. This unusual approach is influenced by the *Kompetenz-Kompetenz* principle, which stipulates that each tribunal is entitled to decide matters concerning its own competence⁸⁷. Thus, the two unchallenged arbitrators have the power to decide on challenged arbitrator.

B) Independence and Impartiality United Nations Commission on International Trade Law (UNCITRAL) Rules

The United Nations Commission on International Trade Laws (UNCITRAL) prepared and adopted a Model Law on International Commercial Arbitration in 1985⁸⁸. The UN General Assembly revised these rules on December 6, 2010, to reflect the current practice in international arbitration⁸⁹. The UNCITRAL Arbitration Rules provide that “if three arbitrators are to be ap-

⁸³ International Center for Settlement of Investment Disputes (ICSID), *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ICSID/15 (April 2006), Art. 14, 40, https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (hereinafter ICSID Convention on the Settlement of Investment Dispute)

⁸⁴ ICSID Convention on the Settlement of investment Dispute, art.58

⁸⁵ ICSID Arbitration Rules, Art., 9/1, available on <https://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm#r09>

⁸⁶ ICSID Arbitration Rules ,art.9/5

⁸⁷ Bhatti Saadia, *competence-competence*, available on <https://jusmundi.com/en/document/publication/en-competence-competence> (last accessed on ,May 27, 2024)

⁸⁸ MURRAY ET AL. *Supra* note 19, at 600, *see also, see also*, UNCITRAL Model Law on International Commercial Arbitration (1985), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf

⁸⁹ MURRAY ET AL. *Supra* note 19, at 601

pointed, each party shall appoint one arbitrator, and then the two arbitrators appointed shall choose the third arbitrator, or who will act as the presiding arbitrator of the arbitral tribunal⁹⁰.

As an arbitrator is approached to be an arbitrator, he or she should disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator may be challenged if circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence⁹¹. The duty of disclosure (disclosure requirement) continues throughout the proceeding. The violation of these requirements results in the removal and replacement of an arbitrator through the challenge procedure⁹². According to Articles 11–13 of the UNCITRAL Arbitration Rules, a party intending to challenge an arbitrator may send notice of challenge to other parties, mentioning any circumstances that give rise to doubt, including failure to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality within 15 days of knowing the circumstances in which all parties may agree on that challenge⁹³. The challenged arbitrator may also accept and draw in case he or she believes there is doubt as to his or her independence and impartiality. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may opt to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge from the appointing authority⁹⁴.

The principles of independence and impartiality of arbitrators prohibit contact of arbitrators with parties in the course of proceeding, the appointment of arbitrators who possess a view that supports the appointing party, non-diverse arbitrators and centered toward a certain world view, multiple or repeat appointments by the same party or by the same law firm in successive or par-

⁹⁰ United Nations Commission on International Trade Law *United Nations Commission on International Trade Arbitration Rules*, (2013), art., 9 (1), UNCITRAL *Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)*, UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration.pdf (hereinafter, UNCITRAL arbitration rules)

⁹¹ UNCITRAL Arbitration Rules, art 11

⁹² Chiara Georgetti *et al.*, *Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*, 21 J. World Inv. & Trade L., 441, 447 (the existing regulatory frame work) (https://brill.com/view/journals/jwit/21/2-3/article-p441_8.xml .pdf)

⁹³ UNCITRAL Arbitration Rules, art.11-13

⁹⁴ UNCITRAL Arbitration Rules, art.13 (4)

allel investor-state arbitrations or in proceedings against the same host state, double hatting or role confusion⁹⁵.

Moreover, in response to ISDS reform from member states, UNCITRAL gave UNCITRAL the mandate to prepare an arbitrator code of conduct for Working Group III. In 2018, the Working Group reached a consensus on the necessity of reforming ISDS. In 2019, the member states of WGIII requested the UNCITRAL Secretariat undertake, together with the Secretariat of the International Center for Settlement of Investment Disputes (ICSID), preparatory work for an ISDS Code of Conduct, focusing on the implementation and enforceability of such a code⁹⁶. At this initial stage, there was an argument about whether the code should be soft (guidelines) or hard (binding) code⁹⁷. It is argued that mandatory code is needed since non-binding codes (guidelines) have limited success, like the IBA Guidelines. The public interest in ethical issues strengthens the need for binding and comprehensive codes, and tribunals may disregard soft laws⁹⁸. As a result, the joint secretariat of ICSID and UNCITRAL drafted binding code of conduct in different sessions.

C) Independence and Impartiality under Istanbul Arbitration Center

According to the Istanbul Arbitration Center (ISTAC), the arbitrators should be independent and impartial. The arbitrators should disclose to the secretariat any circumstances that will raise justifiable doubts about their independence and impartiality. They should remain impartial and independent until the proceeding ends⁹⁹.

D) Independence and Impartiality under International Center for Dispute Resolution

The International Center for Dispute Resolution (ICDR) was established as one of the divisions of the American Arbitration Association (AAA) in the United States of America and works in dispute settlement across the world. According to Article 14 of the Rule of International Arbitration, the arbitrators should be independent and impartial. This article also refers to the code of

⁹⁵ Georgetti et.al, *supra* note 92, 453-459

⁹⁶ Available on, [uncitral-ids-code-of-conduct-presentation.pdf](https://www.uncitral.org/uncitral/ids/code-of-conduct-presentation.pdf) (iisd.org)

⁹⁷ Chaira Georgetti, *A Common Code of Conduct for Investment Arbitrators?* 113 Am. Soc'y. Int'l.L. 217, 217 (2019), *A Common Code of Conduct for Investment Arbitrators? | Proceedings of the ASIL Annual Meeting | Cambridge Core* .pdf

⁹⁸ *Id* at 218

⁹⁹ Istanbul Arbitration Center [ISTAC], *Istanbul Arbitration Centre Arbitration Rules*, Art. 12, <https://istac.org.tr/en/dispute-resolution/arbitration/arbitration-rules/> .pdf

ethics for arbitrators in commercial disputes¹⁰⁰. The ethics of arbitrators in commercial dispute settlement also require the arbitrators to be independent and impartial. If they violate the ethical code of conduct, they shall be disqualified¹⁰¹.

E) Independence and Impartiality under International Chamber of commerce (ICC)

The International Chamber of Commerce is founded to serve world business by promoting trade and investment and is based in Paris, France. It is the world's largest arbitration center. The parties are free to appoint arbitrators. Article 12 provides that if the parties have not agreed on the number of arbitrators, the International Court of Arbitration of the ICC (the Court) appoints a sole arbitrator. According to the rule of arbitration, the arbitrator must be and remain impartial and independent of the parties involved in the arbitration, and if there is doubt in the eyes of the parties to that effect, the arbitrator should disclose it to the secretariat¹⁰².

F) Independence and Impartiality under London Court of International Arbitration (LCIA)

The London Court of International Arbitration (LCIA) was established at the end of the 19th century in London and is the second world arbitration center next to the International Chamber of Commerce. According to its rule, the arbitrators should remain impartial and independent of the parties at all times. They cannot be an advocate, representative, or advisee for a party¹⁰³. Therefore, an arbitrator should work free of external control, bias, and predisposition towards a party. This feature is one of the main characteristics of international investment arbitration. According to the London Court of International Arbitration, an arbitrator cannot be a legal representative or advisee for a party, which means that it is expected of that arbitrator to work only with the issue at hand.

¹⁰⁰International Center for Dispute Settlement (hereinafter ICDS), *International Dispute Resolution Procedures (amend.)*, (March 1, 2021), art.14 (1) <https://www.icdr.org/> .pdf

¹⁰¹International Center for Dispute Settlement (hereinafter ICDS), *Commercial Arbitration Rules and Mediation Procedures* (September 2005), r.17, [Commercial Arbitration Rules and Mediation Procedures Sept. 15, 2005.pdf \(icdr.org\)](https://www.icdr.org/) .pdf

¹⁰²International Court of Arbitration [ICC], *International Chamber of Commerce Rules*, (January 1, 2021), art. 11(1-2), [icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf \(iccwbo.org\)](https://www.iccwbo.org/).pdf

¹⁰³London Court of International Arbitration [LCIA], *London Court of International Arbitration Rules* (October 1, 2020), art.5.3, [LCIA Arbitration Rules 2020](https://www.lcia.org/) .pdf

2.3.2) Limits on Multiple Role

According to Article 4 of the UNCITRAL Code of Conduct for arbitrators in international investment dispute resolution, unless the parties agree otherwise, an arbitrator cannot act concurrently as a legal representative or expert witness in any other proceeding the same measures, the same or related party, or the same provision of the same instrument of consent¹⁰⁴.

2.3.3) Confidentiality

According to CETAs' arbitrators' code of conduct, an arbitrator or former arbitrator shall not disclose non-public information concerning proceeding acquired during proceeding except for the purpose of proceeding¹⁰⁵. The UNCITRAL Arbitrators Code of Conduct also prohibits a former arbitrator or candidate from disclosing information, deliberation, or draft decision acquired in proceeding except in compelled legally¹⁰⁶. International Court of Arbitration rules also prohibit disclosure of the work of the court by everyone who participates in whatever capacity¹⁰⁷. The witness, representative, and expert witness are required to protect the confidential information, such as arbitral tribunal deliberations and other proceedings acquired during the proceeding, unless it is required by law, which should remain confidential according to Article 30 of the London Court of International Arbitration rule¹⁰⁸.

2.3.4) Disclosure Obligations

A candidate or an arbitrator has an obligation to disclose any circumstances that are likely to raise justifiable doubts about the independence and impartiality of that arbitrator¹⁰⁹. This obligation is to ensure integrity and fairness and avoid conflict of interest in the arbitration process. The prominent aim is to secure the independence and impartiality of an arbitrator.

2.3.5) Integrity, Diligence and Competence

An arbitrator should be free from bias. She/he should be neutral. An arbitrator should conduct proceedings competently, skillfully, with a high standard of integrity, fairness, and qualities nec-

¹⁰⁴ UNCITRAL Arbitration Rule art.,4

¹⁰⁵ CETA Annex 29 B, art., 17

¹⁰⁶ UNCITRAL Arbitration Rule art.,8

¹⁰⁷ ICC Appendix I article 8, Appendix II art.1

¹⁰⁸ LCIA Arbitration Rules,art.,30 available on , https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Preamble

¹⁰⁹ UNCITRAL Arbitration Rule art.,11

essary to perform his duties¹¹⁰. An arbitrator should perform his duties diligently and devote sufficient time to the proceeding¹¹¹.

2.3.6) Ex Parte Communication

Unless permitted by the instrument of consent or agreement of the disputant parties, ex parte communication is prohibited¹¹². This is to avoid unfair advantage for a party securing impartiality. If ex parte communication is permitted, the impartiality of an arbitrator is compromised and leads to bias and unfairness. That is why ex parte communication is prohibited under any arbitration rules.

¹¹⁰ UNCITRAL Arbitration Rule art., 6 ; CETA annex 29 B art.,7

¹¹¹ UNCITRAL Arbitration Rule art., 5

¹¹² UNCITRAL Arbitration Rule art.,7 ; CETA annex 29 art.,10

Chapter Three

Status of Double Hatting under Ethiopian Legal System and Implication of its Regulation

3.1) Definition of Double Hatting

One of the most difficult issues concerning the regulation of double hatting is the absence of a clear definition of it. International tribunals and scholars define the term differently. Different definitions cover different scopes and elements. Some definitions are provided here. International Center for Settlement of Investment Dispute (ICSID), defines it as follows:

Double hatting is generally understood in the context of investor state dispute settlement (ISDS) as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short period .Often it refers to being an arbitrator and a counsel simultaneously, but may extend to other roles such as acting as an expert witness or mediator in separate ISDS proceedings¹¹³

An arbitrator Mauro Rubino-Sammartano defines double hatting as:

Double hatting is the practice of arbitrators who also carry on other activities, such as counsel or expert witnesses. This means that someone who acts as arbitrator in some proceedings acts “the subsequent day” (so to say) in other proceedings, for example, as counsel or expert witness, possibly even in front of arbitrators who have been acting as counsel before him in the above referred to arbitral proceedings ¹¹⁴.

Gold Smith describes double hatting as:

Double hatting is when a private lawyer is on one day a supposedly neutral arbitrator and on the other an advocate dedicated to promoting an argument that could be inconsistent

¹¹³International Center for Settlement of Investment Dispute [ICSID] ,*Code of conduct-back ground papers–double hatting*,(2021), [https://icsid.worldbank.org/resources/publications/code-conduct-background-papersm .pdf](https://icsid.worldbank.org/resources/publications/code-conduct-background-papersm.pdf)

¹¹⁴Mauro Rubino-Sammartano, *Global Arbitration: Double Hatting*, 9 Arb., Int'l, 338–339 (2014) [International Arbitration Law by Mauro Rubino-Sammartano | Arbitration International | Oxford Academic \(oup.com\)](https://www.oup.com/academic/product/global-arbitration-double-hatting-9780190246111)

with a decision he, in his role as arbitrator in the other case, could be called upon to make¹¹⁵.

As we see above, double hatting is defined as an individual playing the role of both an arbitrator and a legal counsel simultaneously. So, we can define double hatting as a person who holds two roles: being a judge and simultaneously acting as an arbitrator; or an arbitrator acting as defense counsel, expert witness, or appeal (annulment) committee at the same time. It is contested whether it should be eligible to encompass dissimilar facts, legal issues, or different parties. Some model laws simply prohibit acts without reference to time or facts. However, it was noticed that the absence of a clear definition of double hatting complicated its regulation.

3.1 Debate on Double Hatting: Argue for and Against

3.1.1 Argue for Double Hatting

Legal scholars are divided into two main categories: whether double hatting should be banned or not. Those defenders of the status quo of double hatting argue that practical experience as counsel brings added value to the role of arbitrator and makes double haters less dependent. Banning this practice would remove highly valued and experienced arbitrators from the arbitration market. If arbitrators must be completely sanitized from all possible external influences on their decisions, only the most naïve or incompetent arbitrators would be available¹¹⁶. Omer Er, in an interview with Miley's International Arbitration Report, argued that it is unnecessary to have rules like those of the Court of Arbitration for Sport since the practice of double hatting is not a common problem. For practical purposes, disputes around double hatting are few; a reputable arbitrator could not cause anyone to question his or her impartiality; no one can appoint an arbitrator whom they do not trust; it limits the parties' autonomy to appoint arbitrators; and restricting double hatting should not be viewed as a trigger to establish diversity in arbitration¹¹⁷.

¹¹⁵ Lord Peter H. Goldsmith, *Keynote Address to the Atlas Conference: International Business Disputes in an Era of Receding Globalism*, 34 GA. State Univ. L. Rev. 765,788–789 (2018) (ISDS), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2932&context=gsulr> .pdf

¹¹⁶ Gomez, *supra* note 44, at 104

¹¹⁷ Omer Er, et al., *International Arbitration Experts Discuss: The Practice of 'Double Hatting'*, 39 MEALEY'S Int'l. Arb. Report, September 2023, available on https://www.millerchevalier.com/sites/default/files/2023-10/2023-09-23_Mealeys_Sanchez_Lapetina.pdf

Jovana Crncevic urged that it is necessary to limit the practice of double hatting to insure independence, impartiality, impartiality and fairness of arbitral decision-making in ISDS. However, however placing too many restrictions on double hatting imposes barriers on future generations of arbitration practitioners trying to secure arbitrator appointments. With no arbitrator diversity, appointments of arbitrators would be reserved only for those who are already in a position to make a living exclusively as arbitrators, which is, of course, a more established and smaller group of individuals¹¹⁸.

Laura Yvonne Zeilnski argued that the proposal of UNCITRAL in Version four to limit multiple roles (double hatting) is a bad idea. According to her view¹¹⁹, First, the proposal does not correctly address the alleged problems of alleged double hatting; it is not clear whether double hatting always creates conflict of interest; it does not apply to the tribunal secretariat and assistants; and it says nothing about the interpretation of terms. Secondly, the proposal adds more problems by aggravating diversity problems, reducing the pool of qualified arbitrators, and violating the principle of party autonomy. Thirdly, she argued that the IBA Guidelines on Conflicts of Interest, the orange list, will regulate double hatting and that the proposal is unnecessary. On the other hand, most scholars urge at least regulation of double hatting, as it affects the independence and impartiality of an arbitrator if it remains unregulated. Their premises are discussed hereunder.

3.1.2 Argue Against Double Hatting

Those who argue against the practice of double hatting raise its drawbacks and argue against its practice. Double hatting has been the main reason for criticism of international investment dispute settlement due to its negative impact on the independence and impartiality of arbitrators. Double hatting is considered an unscrupulous and iniquitous bargain in which the hat changers promise mutual back-scratching. The practice of double-hatting has not significantly decreased over time, although it is not widespread and is limited to a small number of influential actors¹²⁰.

The reasons against this practice are well known: there is a risk of issue conflict, which may jeopardize the independence and impartiality of arbitrators. With the corresponding increase in

¹¹⁸ *Id.*

¹¹⁹ Zeilnski Laura Yvonne et al., *Yes or No: The UNCITRAL WGIII Proposal on Limiting Multiple Roles is a Good Idea?* 16 *Inv.Treaty Arb. & Int'l L.*, 123, 125 (2021), available on <https://arbitrationlaw.com/library/yes-or-no-uncitral-wgiii%C2%A0proposal-limit-multiple-roles-good-idea-chapter-6-investment-treaty.pdf>

¹²⁰ Langford et.al, *supra* note 9, at 26

the number of arbitrator challenges, arbitration parties may feel that their most basic procedural rights have been affected, which in turn leads many stakeholders to question the integrity of the whole ISDS¹²¹. The main drawbacks of double hatting include:

3.1.2.1 Discouraging diversity

In international investment arbitration, there is no age, gender, or geopolitical diversity. The arbitrators are white, male (between 2012 and 2019, around 85% were male, and the top 25 double hatatters were men), and from some specific regions, particularly from North America and Europe, which is overrepresentation and accumulation of powers in some small group or club¹²². Western nationals and law firms clearly dominate the field. Nearly all of the most prominent and repeatedly appointed arbitrators in ISDS cases are men from the Global North with significant prior experience in ISDS cases, no gender diversity, and no geographical representation¹²³. Moreover, almost without exception, the non-Western continent only represents their home state as in-house counsel (for example, Argentina) or only acts as respondent state counsel within their home state's region (for example, Mexico and the Czech Republic)¹²⁴. As a result, it is considered pale, male, and stale. Well-known double hatatters fringe out the newcomers to the system by influencing the system with their popularity.

The decision-making process should be diverse, representative, and inclusive so that diversity among decision-makers may improve the fairness and quality of the decisions they render, laying the foundation for the legitimacy of the arbitration system¹²⁵. The arbitrators in ISDS should be diversified in gender and equitable in geographical representation, while in contrast, ISDS is dominated by male and Western (through August 2018, only 35% of the 695 individual arbitrators who have sat in at least one ISDS case were from non-Western states) high-profile individuals¹²⁶. This happens due to the repeated reappointments of individuals who have prior experience. Those who have prior experience are double-handed. The mechanism of appointments

¹²¹ Gomez, *supra* note 44, at 103

¹²² Tanwar, *supra* note 4, at 118

¹²³ Langford et al., *Supra* note 22, at 182

¹²⁴ Malcom Langford, et al., *The Revolving Door in International Investment Arbitration*, 20 *J. Int'l. Econ. L.* 301, 316 (2017), *Revolving Door in International Investment Arbitration* | Journal of International Economic Law | Oxford Academic (oup.com) .pdf

¹²⁵ Andrea K. Bjorklund, et al., 'The Diversity Deficit in International Investment Arbitration', 21 *J. World Inv. & Trade*, 410, 413 (2020), https://brill.com/view/journals/jwit/21/2-3/article-p410_7.xml .pdf

¹²⁶ *Id.* at 429-430

also leads to a deficit of diversity in the way that if the claimant appoints highly-known individuals, the respondent falls under the same logic, and if the claimant selects less-known arbitrators, the respondent takes this as a chance and appoints the well-known arbitrators¹²⁷, who are mostly double-handed. Since females were not appointed as arbitrators in the in the early 1990s and 2000s, females were accounted for as not experienced, as few women hold recorded experience¹²⁸. Therefore, a lack of diversity and inclusiveness weakens the normative legitimacy of the ISDS system itself.

3.1.2.2 Compatibility problem with the Principles of Impartiality and Independence

Independence needs freedom from actual and identifiable contact from disputing parties, which may pressurize a person to make an independent decision. Impartiality refers to being free from bias or predisposition towards a party. As we discussed in previous sections, as a party is free to appoint arbitrators of their choice, the arbitrators may profess to favor the party that appointed them. This results in the existence of two well-differentiated groups of frequent arbitrators, one with a track record of being appointed by investors and the other with a track record of being appointed by states, significantly more likely to make decisions that would be favorable to investors and states, respectively¹²⁹.

As a result, the independence and impartiality of arbitrators will be endangered as an arbitrator will be appointed as legal counsel simultaneously. This affects the legitimacy of investor-state dispute settlement and the sincerity of the arbitrators. However, if the principles of independence and impartiality are considered, the principles of party autonomy will come into question. Therefore, the regulation of double hatting is necessary to balance these two principles. Some argue this criticism is not accurate; rather, it is based on generalized distrust and an unfounded presumption of bad faith by arbitrators, as the arbitrator will decide whether or not to obey his or her ethical duties (independence and impartiality)¹³⁰. They argue that there are multiple cases in which highly qualified judges are mostly impartial and not party-friendly and that independence

¹²⁷ *Id.* at 426-427

¹²⁸ *Id.* at 416 These women are Gabrielle Kaufmann-Kohler and Brigitte Stern who account for 57% of all appointments given to female arbitrators.

¹²⁹ JOSÉ LUIS GÓMARA *TOWARDS A PERMANENT INVESTMENT TRIBUNAL? FROM REGIONALISM TO MULTILATERALISM, IN* FOREIGN INVESTMENT AND INVESTMENT ARBITRATION IN ASIA, 337–344 (Carlos Esplugues ed., 2017) (ebook)

¹³⁰ *Id.* at 346

and impartiality will be attained “on the bench” or with no re-appointment possibility¹³¹. In short, concurrent or consecutive service by an individual as both advocate and arbitrator on different investment arbitral proceedings (double hatting) has been found to be problematic and can potentially raise doubts as to the impartiality and independence of the concerned individual in his or her role as arbitrator¹³².

3.1.2.3 It Generates Conflict of Interest

Double hatting is when highly paid corporate lawyers go back and forth between representing corporations one day and sitting in judgment the next day¹³³. Issue conflicts concern an “actual or apparent bias of the arbitrators stemming from their previously expressed views on a question that goes to the very outcome of the case to be decided, i.e., conflict arises from the arbitrators' relationship to the subject matter of the dispute¹³⁴. It will be where an arbitrator also acts as an academic or a legal counsel in a different case, and it generates conflict of interest as their previous position when acting as a defense counsel or their argument made in an academic paper, for example, could be a sign of a position they would be likely to defend in a future case¹³⁵.

Whenever the double hatters work on two cases concurrently and access confidential information, they will influence the outcome of the cases to a greater extent.

According to the IBA Guidelines, a conflict of interest exists—and an individual should not serve as an arbitrator—if “facts or circumstances exist that, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to doubts about the arbitrator’s impartiality or independence and, by such doubts, would reach the

¹³¹ EI-IILCC Study Group, *Reform of Investor-State Dispute Settlement: Current State of Play at UNCITRAL*, ZEuS Zeitschrift für Europarechtliche Studien [ZZES] 15,41-42 (2022), <https://www.nomos-elibrary.de/10.5771/1435-439X-2022-1-15/reform-of-investor-state-dispute-settlement-current-state-of-play-at-uncitral-jahrgang-25-2022-heft-1?page=1.pdf>

¹³² CHAISSE, *et. al*, *supra* note 70, 1185-1186.

¹³³ John R. Crook, *Dual Hats and Arbitrator Diversity: Goals in Tension*, 113 Am. J. International Law Unbound, 283,284 (2019) (Dual Hatting), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/dual-hats-and-arbitrator-diversity-goals-in-tension/FC6538AE5CBDF495577F94D8F51AFA0F.pdf>

¹³⁴ Arbitration Answered, *Time to Hang Up One's Hat?*, <https://www.arbitrationanswered.com/articles-and-essays/blog-post-title-one-eagmp>, last accessed on Jul. 2, 2023, at 09:40 PM.

¹³⁵ Sachetm & Cadeco, *supra* note 55, at 30

conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision¹³⁶.

Katelyn Horne exemplifies the condition in which conflict of interest happens : the double-hatting arbitrator might be tempted to rule on a legal issue in such a way as to create precedent in support of his argument as counsel in another case; the double-hatting arbitrator might be reluctant to rule on a legal issue in such a way as to contradict an argument that he has made, is currently making, or anticipates making as counsel in another case; and the double-hatting arbitrator may have a financial interest in resolving issues in such a way as to make himself attractive to serve as counsel for future clients (e.g., interpreting treaty protections in a way that favors either investors or States)¹³⁷.

A double hatter in this case benefits from work at the same time and has duties to serve those who appointed him as arbitrator, defense counsel, or in other roles that his impartiality affected. The arbitrator thinks about the benefits he will gain from the job or arbitration, which may contradict his argument when he serves as defense counsel. 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 clients¹³⁸. Therefore, he faces there is conflict of interest.

3.2) Regulation of Double Hatting

Professor Philip Sands, on his lecture of 2015 on European Society of International Law (ESIL) said,

“We also 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

¹³⁶ Katelyn Horne, *True or false? The Time Has Come To Prohibit Double-Hatting?*, 14 Inv. Treaty Arb. & Int'l.L., 93, 101 (2021), <https://arbitrationlaw.com/library/time-has-come-prohibit-double-hatting-chapter-4-investment-treaty-arbitration-and .pdf>

¹³⁷ *Id.*101-102

¹³⁸ Crook, *supra* note 133, at 283

seeking to write an award on. That is unacceptable. The ends of judicialization in this context seem to be prioritizing the interests of certain stakeholders. This is perhaps not a popular thing to say, but we have to address the reality of what is happening.”

Philip Sands, ESIL Annual Conference final lecture, Development in Geopolitics,-The Ends of Judicialization?, Available on , <https://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/>

Professor Phillip Sands believes the practice of double-hatting should be stopped. The practice of double hatting got more attention after this final lecture, and the professor himself had some doubt as to the time for its prohibition. Double-hatting is practiced by a highly visible and powerful core of some of the most influential actors in the system. The practice of double hatting (changing the hats), the situation in which we find some lawyers serving as arbitrators, legal counsel, and expert witnesses in various cases, is considered one of the most biting criticisms against ad hoc ISDS¹³⁹. The absence of a clear definition of double hatting is a problem for its regulation. That is, whether double hatting are limited to arbitrator/counselor, arbitrator/expert witness, arbitrator/other function in the arbitration panel, or arbitrator/judge. However, it is believed that the phenomenon of double-hatting impairs the community’s perception of the impartiality of ISDS proceedings and is broadly recognized as an issue that must be addressed in the reform of ISDS¹⁴⁰.

3.2.1 International Court of Justice

The International Court of Justice (ICJ) entertains any civil case with the consent of the parties. The statutes of the court prohibit the judges of court from any other professional work. The ICJ statute, Article 16, provides that: “*No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.*” This provision is not clear as to the line between the judicial and extrajudicial activities of ICJ judges. However, the ICJ Practice Directions VII state that parties should refrain from nominating persons who are acting as agents, counsel, or advocates in another case before the Court or have acted in that ca-

¹³⁹ Georgetti, *supra* note 92, at 345.

¹⁴⁰ Yu, *supra* note 26, at 9

capacity in the three years preceding the date of the nomination¹⁴¹. Furthermore, parties should likewise refrain from designating an agent, counsel, or advocate in a case before the court. According to Practice Direction VIII, parties should refrain from designating as agent, counsel, or advocate in a case before the court a person who, in the three years preceding the date of the designation, was a member of the court, judge ad hoc, registrar, deputy registrar, or higher official of the court.

H.E. Mr. Abdulqawi A. Yusuf, the former ICJ president, in his speech to UN General Assembly 2018 said that,

“Over the years, the Court has taken the view that, in certain circumstances, its members may participate in arbitration proceedings. However, in light of its ever-increasing workload, the Court decided a few months ago to review this practice and to set out clearly defined rules regulating such activities. As a result, members of the Court have come to the decision last month that they will not normally accept to participate in international arbitration. In particular, they will not participate in investor-State arbitration or in commercial arbitration”¹⁴²

According to the 2017 International Institute for Sustainable Development (IISD) report, seven judges and thirteen former judges have been acting as arbitrators. The ICJ judges acted as arbitrators for 10% of treaty-based investment treaties¹⁴³. However, these cases are started before the decision is made not to take the arbitrator's role. H.E Mr. Peter Tomka, the former ICJ president, was appointed arbitrator by China in a case *Macro Trading Co., Ltd. v. Peoples Republic of China* case¹⁴⁴ in which he resigned later on. He served as the president of the tribunal in *Rus Hydro v.*

¹⁴¹ International Court of Justice [ICJ], *Practice Directions VII* (February 7, 2002), [Practice Directions | INTERNATIONAL COURT OF JUSTICE \(icj-cij.org\).pdf](https://www.icj-cij.org/practice-directions)

¹⁴² Marie Davoise, *Can't you fight moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes*, (Apr. 28, 2023, 09:05 PM) <https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>

¹⁴³ Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch *Is moonlighting a problem? The Role of ICJ Judges in ISDS* (Apr. 28, 2023, 04:10 PM) <https://www.iisd.org/system/files/publications/icj-judges-isds.commentary.pdf>

¹⁴⁴ *Macro Trading Co., Ltd. v. People's Republic of China*, (Japan/China), Discontinued, ICSID Case No. ARB/20/22 (2021), September 10, 2021, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/22>

*Kyrgyzstan*¹⁴⁵case, which is decided in favor of investor in 2022. H.E Mr. *Joan E. Donoghue*, who was elected ICJ president in 2021, acted as the president of arbitrators in *ICL Europe v. Ethiopia*, which was awarded in 2021¹⁴⁶. However, we have to notice that, all of the above cases started before the speech of A. Yusuf in 2018 to UN General Assembly.

3.2.2 Court of Arbitration for the Sport (CAS)

The Court of Arbitration for Sport (CAS) was established on April 6, 1983, in New Delhi to adjudicate disputes arising in the sport arena. According to CAS rules, arbitrators are prohibited from being a defense council for any party, and if they fail to do so, their independence and impartiality will become doubtful, which will be the reason for their removal from their position upon challenge¹⁴⁷.

3.2.3 EU-Canada Comprehensive Economic and Trade Agreement

The *EU-Canada Comprehensive Economic and Trade Agreement* (CETA), which was agreed upon between the European Union and the government of Canada and entered into force in 2017, expressly prohibits the practice of double hatting under Art. 8.30.

It says,

“Upon appointment, they [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 agreement¹⁴⁸”

According to this agreement, if a person is appointed as an arbitrator under CETA, he or she will not be appointed as defense counsel or expert witness in any other international agreement. The scope of this prohibition is wide, as a person cannot wear a double hat under any other agreement other than CETA.

3.2.4 Comprehensive and the Progressive agreement for Trans Pacific Partnership

The Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP or TPP) is a free trade agreement (FTA) that was signed on March 8, 2018 in Santiago, Chile. It entered in-

¹⁴⁵ *RusHydro v. Kyrgyz Republic* (Russia/Kyrgyzstan) Award, PCA Case No. 2018-21, July 2022, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/951/rushydro-v-kyrgyzstan>

¹⁴⁶ *ICL Europe Coöperatief U.A. v. Ethiopia* (Netherlands/Ethiopia), Award, PCA Case No. 2017-26, 9,2021, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/814/icl-europe-v-ethiopia>

¹⁴⁷ Court of Arbitration for Sport, [CAS], *Arbitration Rules For The 2022 FIFA World Cup Qatar Final Round*, art 13-14, 2022, <https://digitalhub.fifa.com/m/47ef3004972d4b3a/original/Arbitration-Rules-for-FIFA-World-Cup-Qatar-2022-CAS.pdf>

¹⁴⁸ CETA, art., 8.30

to force on December 30, 2018 for some countries and entered into force later for other countries as soon as they acceded, regulating dispute settlement. Accordingly, up on selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel, party-appointed expert, or witness in any pending or new investment dispute under the agreement¹⁴⁹.

3.2.5 International bar Association (IBA) Guidelines on Conflict of Interest

The IBA Guidelines on Conflicts of Interest contain general standards designed to ensure the impartiality and independence of arbitrators in international arbitration¹⁵⁰. The IBA guidelines require the arbitrators to remain independent and impartial until the award is rendered or the proceeding is terminated for any other reason. However, there is no binding force as it is soft and low. It will be binding on the parties whenever they choose its application. Lists of circumstances are included in guidelines and coded as red, orange, and green.

The IBA Guidelines red list is classified as waivable and non-waivable. Waivable Red List conditions can be waived by the parties. If any Non-Waivable Red List conditions exist, an arbitrator should not accept an appointment¹⁵¹. The guidelines regulate various situations, which cast doubt on the impartiality and independence of arbitrators. For example, when an arbitrator or his firm regularly advises a party or an affiliate of the party and the arbitrator or the firm derives significant financial income therefrom, it is a red list that falls under the non-waivable lists¹⁵². The orange lists highly put the arbitrator partial and dependent, such as giving legal advice or providing an expert opinion on the dispute to a party or an affiliate of one of the parties; or the arbitrator currently represents or advises one of the parties or an affiliate of one of the parties; or the arbitrator represents or advises the lawyer or law firm acting as counsel for one of the parties when the arbitrator has, within the past three years, served as counsel for or against one of the parties on an unrelated matter. Green lists are specific situations where no appearance and no actual conflict of interest exist from an objective point of view, and thus the arbitrator has no duty to disclose.

¹⁴⁹ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, § B, r.3(d), 8, 2018, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018) | International Investment Agreements Navigator | UNCTAD Investment Policy Hub .pdf [Hereinafter CPTPP or TPP]. The code of conduct is enacted based on the chapter 9 section B of the TTP agreement.

¹⁵⁰ International Bar Association Guidelines on Conflicts of Interest in International Arbitration, pt., I, ¶ 1, October 23, 2014, <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> [hereinafter IBA Guidelines on Conflict of Interest]

¹⁵¹ IBA Guidelines on Conflict of Interest, Pt. II, ¶ 2

¹⁵² CPTPP, *supra* note 149

The Orange List 3.1.5 and 3.3.1 of the IBA Guidelines are usually cited by parties who challenge an arbitrator's multiple appointments by the same party or law firm¹⁵³. The list determines when the frequency of repeat appointments may give rise to justifiable doubts as to an arbitrator's impartiality or independence. Section 3.1.3 and Section 3.3.7 of the IBA Guidelines require an arbitrator who "has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties¹⁵⁴ or has within the past three years received more than three appointments by the same counsel or the same law firm" 155 to promptly disclose the relevant circumstances to the parties¹⁵⁵. However, a mere repeated appointment may not disqualify an arbitrator unless the doubts are proved in relation to the case at hand.

3.2.6 The Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA)

The government of Canada updated and modernized its policy on investment negotiation in 2021. This Foreign Investment Promotion and Protection Agreement Model Art. 30/6 requires the arbitrators to be governed by the code of conduct annexed to the model¹⁵⁶. Rule 3(d) of the annex stipulates that arbitrators should disclose the existence of any relationship, interest, or other matter that is likely to affect the independence and impartiality of the arbitrators, and the measure to that effect is reasonable man standard. The arbitrator should refrain from being a defense counsel or expert witness for the party or other party under the agreement or any other international investment¹⁵⁷.

3.2.7 United State-Mexico-Canada Free Trade Agreement (USMCA)

The United States-Mexico-Canada (USMCA) agreement is a trade agreement signed among the United States of America, the United Mexican States, and Canada that replaced the North American Free Trade Agreement (NAFTA) on July 1, 2020. This agreement governs various issues tying these states together, including investment issues. However, chapter fourteen of the agreement, which is concerned with investor-state dispute settlement, is not applicable in Canada

¹⁵³ IBA Guidelines on Conflict of Interest, *supra* note 150, § 3

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Canada's Foreign Investment Protection Agreement Model, art., 30/6, (May 18, 2021), Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model (international.gc.ca) .pdf. [Hereinafter, FIPA Model], see also FIPA Model, Arbitrator Code of Conduct for Dispute Settlement § I, Art., 3, 2021 Model FIPA (international.gc.ca) .pdf

¹⁵⁷ *Id.*

since it has reservations about that part. Under this agreement, if an investment dispute occurs between the United States and Mexico, it will be resolved through the arbitration process stipulated in this agreement. According to the rule stipulated in this agreement, the appointed arbitrators should comply with International Bar Association Guidelines on Conflict of Interests and shall not act as defense counsel or as party appointed expert or witness in any pending arbitration under annex to chapter fourteen (investment) of the agreement¹⁵⁸. It is evident from this article that a person may not hold dual or multiple roles while the proceeding is going on. This implies that, unlike other model laws or rules, a person may be appointed as an arbitrator without waiting for some time after the proceeding is finalized.

3.2.8 Argentina-Chile Free Trade Agreement

According to the Free Trade Agreement between the Republic of Argentina and Chile (2017), arbitrators must have experience in public international law, rules, international investment agreements, or in the settlement of disputes arising from international investment agreements. The arbitrators must be impartial and independent, as well as comply with the code of conduct of Chapter Eighteen (dispute settlement) in complementary ways with the International Bar Association Guidelines on Conflict of Interest in International Arbitration. At the time of appointment, they should refrain from acting as advisors, experts appointed by a party, or witnesses in any pending investment dispute, in accordance with this chapter or any other international agreement¹⁵⁹. This agreement restricts the arbitrator holding two or more powers or jobs at the same time.

3.2.9 European Union –Singapore Investment Protection Agreement

The European Union and the Republic of Singapore (EUSIPA) agreed to an investment protection agreement on November 21, 2019. The agreement regulates investor-state dispute settlement under Chapter three. Accordingly, the members of the tribunal, including mediators, should refrain from acting as counsel, party-appointed expert, or party-appointed witness in any pending or new investment protection dispute under this or any other agreement or domestic law. Any

¹⁵⁸United States-Mexico-Canada Free Trade Agreement, Nov. 30, 2018, Ch. 14 D, art., 14 D.6/5, [14-Investment.pdf \(ustr.gov\)](https://ustr.gov/policy-and-law/14-Investment.pdf) .pdf (hereinafter USMCA)

¹⁵⁹ Argentina-Chile Free Trade Agreement, Arg.-Chile, Nov. 2, 2017, art., 8.28 (2) <https://edit.wti.org/document/show/bf9aa665-cb2a-472f-849d-090e28b096fb> .pdf [hereinafter Argentina-Chile FTA]

member of the tribunal, including mediators, will not act as representatives of one of the disputing parties in investment disputes before the tribunal or appeal tribunal.¹⁶⁰

In general, despite most scholars arguing for double-hatting regulation, some scholars still argue for the practice, arguing that its prohibition prevents a small pool of qualified individuals from being the defense counsel, which would undermine the quality and rigor of adjudicators in acting in the current system. They also urge that it is difficult to get qualified and well-known arbitrators since being an arbitrator is not tenured.

The percentage of people who practice double hatting is high. As an article published by the European Society of International Law (ESIL), through January 2017, from a total of 1077 investment cases, 509 (47%) cases involved arbitrator-defense counsel double hatting. From that, 319 cases involved arbitrators only double hatting, and 118 cases involved defense counsel only double hatting when an individual is involved with a minimum of two international investment arbitration cases in a minimum of two different roles for a given role¹⁶¹. The figure shows the influence of arbitrators compared with the defense council. There are some proposed ways out proposed by scholars. Self-regulation (individuals' agreement not to engage in double hatting), enhancing transparency, including the negative effect of double hatting, mandatory disclosure, and avoiding double hatting through BITs are some examples.

A state can make its own BIT model. Some states banned the practice under their BIT model. The 2019 Dutch Model Bilateral Investment Treaty completely banned the practice of double-hatting¹⁶². The International Court of Justice (ICJ) decided on extrajudicial works of judges, as the judges of the court should not participate in arbitration¹⁶³. South Africa and Canada are among the countries that regulate the practice. This practice is criticized for not waiting for the

¹⁶⁰EUSIPA, Code of Conduct for Members of the Tribunal, Appeal Tribunal, and Mediators, app. 7, app. 7, art. 17, <https://edit.wti.org/document/show/eff5dbcb-3018-4df1-9843-dd8ffde9a6e9>

¹⁶¹Langford *et.al*, *supra* note 9.

¹⁶² Netherland (Dutch) Model Investment Agreement, (Mar. 22, 2019), art., 20(5), [https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download .pdf](https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.pdf) [hereinafter Dutch Model Agreement]

¹⁶³Gómez, *supra* note 11, at 819

ICSID and UNCITRAL draft codes of conduct for adjudicators in investor-state dispute settlement¹⁶⁴.

3.3) Model Investment Agreement and Regulation of Double Hatting

Double hatting is governed by regional and international agreements. Some countries regulate double hatting unilaterally by legislating a bilateral investment treaty model. From those countries, the writer opted for one country from a developed country (the Netherlands) since she advances another developed country and South Africa as she is the best example for African countries in regulation of double hatting.

3.3.1 Netherlands Model of Investment Agreement

The Netherlands Model of Investment on Reciprocal Promotion and Protection of Investments Agreement, which was published in March 2019, regulates the practice of double hatting under Art. 20/5. It prohibits members of the Tribunal not to 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 agreement¹⁶⁵. This model law limits the practice with time so that an arbitrator will not act as defense counsel before the end of five years. As a result, as per these model laws, an arbitrator is appointed if and only if he or she did not act as defense counsel within the last five years.

3.3.2 South African Bilateral Investment Treaty Model

Published in 2012, the South African Development Community (SADC) Model Bilateral Investment Treaty under Art. 13 require the arbitrators to be impartial and independent; specifically, it disallows the arbitrators from being defense counsel concurrently with their work of arbitration in actual or potentially treaty-based arbitration involving a foreign investor and a state¹⁶⁶.

¹⁶⁴Eric De Brabandere, *The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform*, 36 ICSID Rev., 319, 335 (2021) (Modernizing Investor-State Dispute Settlement), [2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform | ICSID Review-Foreign Investment Law Journal | Oxford Academic \(oup.com\)](#) .pdf

¹⁶⁵Dutch Model Agreement, *supra* note 162 art.20/5

¹⁶⁶ Southern African Development Community Model Bilateral Investment Treaty, Aug. 17, 2017, Art. 29.13, [SADC Model BIT \(2012\), Electronic Database of Investment Treaties \(EDIT\) \(wti.org\)](#). pdf [hereinafter SADC Model BIT]

3.4 Decided Cases and double hatting

There are some cases decided by an international arbitration tribunal on an arbitrator who wears a dual hat. The tribunal decided the case when the opposite party challenged an arbitrator on the disclosure requirement and the other party substantially cast doubt on the independence and impartiality of an arbitrator. Though these cases have no precedent, they will show the position of the international tribunal if similar cases are initiated.

3.4.1 ICS Inspection and control Services Ltd (UK) V. Argentina

In *ICS inspection and control Service Ltd v. Argentina*¹⁶⁷ to IBA rules to resolve the disputes, and Mr. Stanimir A. Alexandrova, who was appointed by the claimant (UK), discloses that he and his law firm were involved in the ICSID case of *Campaniade Aguas del Aconquija S.A. and Vivindi S.A. v. Argentina Republic* on the side of the UK, and argued this did not affect his impartiality and independence. Since the respondent (the Republic of Argentina) claims there are justifiable doubts about his independence and impartiality, the Permanent Court of Arbitration finally decided that the situation raises doubts about the independence and impartiality of Mr. Alexandrova based on the orange list of IBA Rules Section 3.4.1. According to the rules, if the arbitrator's law firm is currently acting adversely toward one of the parties or an affiliate of one of the parties, there are justifiable doubts as to the arbitrator's impartiality or independence. As per Section 3.1.2 of the Rules, if the arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter, the independence and impartiality of the arbitrator are in question.

3.4.2 Telecom Malaysia V. The Republic of Ghana

In the case between Telecom Malaysia and the Republic of Ghana¹⁶⁸, The respondent challenged Professor Emmanuel Gaillard on his dual role as arbitrator (appointed by the claimant) and defense counsel for *RFCC v. Morocco*, in which he argued for the annulment of the decision and relied on the respondent. As a result, Professor Gaillard quit his job as attorney for the RFCC on the order of the tribunal, as the situation affected independence and impartiality.

¹⁶⁷ICS Inspection and Control Services Ltd. (UK) v. Argentina (UK/Argentina), Award, PCA Case No. 2010-9 (December 17, 2009), *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9 | italaw*

¹⁶⁸Decisions on Respondent Challenge to Arbitrator Emmanuel Gaillard (Telekom Malaysia v. Ghana), Award, 2004 P.C.A., Case No. 2003-03 (July 12) *Telekom Malaysia v. Ghana | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub*

3.4.3 Vito Gallo V. Government of Canada

In the case of the Vito Gallo V. Government of Canada¹⁶⁹, Mr. J. Christopher Thomas was appointed as arbitrator by the respondent on an investment issue based on Chapter 11 of NAFTA. The claimant requests the withdrawal of his position as arbitrator as there will be justifiable doubts as per Article 10/1 of the UNCITRAL rules that there is an attorney relationship with the government of Mexico, which is a member of the NAFTA. The tribunal directs him to opt between being an arbitrator and advising the state party to NAFTA.

3.4.4 RSE Holding AG v. Republic of Latvia

The main issues of this investor-state dispute arose under the Energy Charter Treaty, in which RSE Holding AG (Switzerland Company) brought claims against the Republic of Latvia, arguing the state changed its regulatory framework applicable to electricity produced in combined heat and power plants via Article 10/1 of the Energy Charter Treaty¹⁷⁰. The case is brought before the Permanent Court of Arbitration. A final decision is not reached on the main issue. The challenge for an arbitrator is instituted based on Articles 9 and 11 of the UNCITRAL Rules. The challenge is that Ms. Amy Frey, who is appointed by RSE Holding AG, is challenged by Latvia (the respondent) on the ground that there will be a conflict of interest as she is currently working as defense counsel, which is similar to the current case and will cast doubt on her independence and impartiality. Though the claimant and MS. Amy Frey argue in similar ways that this condition will not affect her independence and impartiality, the tribunal accepted the challenge brought before it, and the claimant substituted another person¹⁷¹.

In this decision, it is evident that Article 11 of the UNCITRAL Rules governs the issue of double hatting as Ms. Amy Frey is challenged and removed for her dual role, i.e., being appointed as arbitrator while she is appointed as defense counsel by another party.

There are also other cases in which the arbitrators are challenged due to their role, i.e., being double hatters. For example, in FREIF *Eurowind Holdings v. Spain*, which is submitted under

¹⁶⁹ Decision on Challenge to Mr. J. Christopher Thomas, QC (Vito Gallo V. Can.), judgment, 2009 P.C.A., Case No. 2008-03 (October 14), [ita0352.pdf \(italaw.com\)](https://ita0352.pdf.italaw.com)

¹⁷⁰ Cabinet of the Republic of Latvia, *An International Arbitration Has Been Initiated Against Latvia Regarding an Alleged Investment in Renewable Energy* (Dec. 3, 2023, 02:30 PM), <https://academic.oup.com/icsidreview/advance-article-abstract/doi/10.1093/icsidreview/siad030/7452186?redirectedFrom=fulltext>

¹⁷¹ Decision on the Challenge to Ms. Amy Frey (RSE Holding AG v. Republic of Lat.) 2022 P.C.A., case No. AA861, (June 24), <https://www.mk.gov.lv/en/media/14318/download?attachment>

the Stockholm Chamber of Commerce (SCC), Mr. Kaj Hober is challenged by his concurrent role as defense counsel under the same treaty, though whether or not the challenge is accepted is not identified as the case is not yet published¹⁷². Generally, from the above cases, we understand that the practices of double hatting highly affect the independence and impartiality of arbitrators, so the tribunal ordered the double hat arbitrators to quit one of their jobs.

3.5 Approaches to Regulate Double Hatting in Investor-State Dispute Settlement

The current investor-state dispute settlement has many deficits. Among others, inconsistency and unpredictability of the awards as it has no effect of *stare decisis* or precedent effects; independence and impartiality of the adjudicators as they are prone to decide in favor of investors for further reappointment and practice of double hatting; and lack of transparency¹⁷³. In the initial stage of the session of WG III, four reform option scenarios are provided to reform ISDS. These are improving the existing Investors-State Arbitration System (AI Improved), adding appellate mechanisms to the current investment agreement regime, introducing a multilateral investment court with or without appeal, and rejecting the current ISDS: recourse to domestic court only or recourse to state-state arbitration with or without prior mandatory recourse to mandatory court¹⁷⁴. Others also urge specific ex ante prohibitions to limit the most egregious double-hatting; for example, the arbitrator serves as a counsel in a concurrent proceeding, in which one of the counsels to a party in the present dispute serves as an arbitrator, or the arbitrator serves as a counsel in a concurrent proceeding, in which the same legal questions are determinative¹⁷⁵.

3.5.1 Self-regulation

According to this view, the community can rely on the arbitrators themselves to self-correct by curbing or abandoning the practice of double-hatting. It means that if a few prominent double hatatters abandoned wearing double or multiple hats, that practice may be accepted by other double hatatters who are ashamed of it. However, it is believed that relying on the arbitrators to take such action of their own accord seems ill-advised, for reasons¹⁷⁶ arbitrators who have the poten-

¹⁷² Horne, *supra* note 136, at 107.

¹⁷³ Agata Zwolankiewicz, *Multilateral Investment Court: a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements?*, 9 Groningen J.Int'l.L., 195, 206 (2021), .pdf

¹⁷⁴ Langford et al, *supra* note 22, at 176

¹⁷⁵ Jeffrey Dunoff et al., *Lack of Independence and impartiality of Arbitrators*, Working Group 6, (2019), https://pure.uva.nl/ws/files/45274160/Dunoff_Giorgetti_et_al_Lack_of_Independence_and_Impartiality_of_Arbitrators_2019_03.pdf

¹⁷⁶ Horne, *supra* note 136, 109-110

tial to make the greatest impact are those who engage in or have engaged in the most significant amount of double-hatting. It would be against the interests of these arbitrators—some of whom have consistently engaged in (and benefitted financially from) double-hatting for nearly 20 years—to suddenly declare that the practice of double-hatting is in any way inappropriate or undesirable; lack of interest to abandon other jobs (hat) despite some double-hatters did; and finally, the measures taken should have the status of international norm, which is still not created. Leaving the decision to individuals inherently results in inconsistent approaches and does not address the double-hatting tension in a uniform way¹⁷⁷.

3.5.2 Encouraging Challenge Procedure and Duty of Disclosure

The parties in conflict have the right to challenge an arbitrator if there is doubt as to the independence and impartiality of the arbitrator. The selected arbitrator shall be removed if the doubt is proven. The encouraging challenge procedure needs much effort from both parties. The duty of disclosure is to expose if an arbitrator has previously entertained similar issues or holds another position. If this requirement is strictly considered, the practice of double hatting will be regulated. In duty of disclosure, the degree of personal connections (financial, personal and business) that require disclosure, the timeframe for the cases that can be disclosed, and the kinds of cases in which the adjudicator is or was involved that require disclosure shall be considered ¹⁷⁸. However, this method is not effective, as these proposals for disqualification are rarely successful. Under the ICSID challenge procedure, out of 146 arbitrator challenges that have been made public, only five have been upheld from 1999–2019¹⁷⁹. These may be because the parties rely on the information disclosed by the arbitrators without having complete profiles of the arbitrators, and the challenge claim is resolved by other members of the tribunal who may themselves be double hatters¹⁸⁰. Generally, the design of the arbitrator challenge system, as well as its actual functioning in practice, are such that the arbitrator challenge system has not and cannot serve as a sufficient check on the practice of double-hatting that is decided to have a prominent system to regulate.

¹⁷⁷ Er. et al, *supra* note 117, at 108

¹⁷⁸ Giorgetti, *supra* note 22, at 181

¹⁷⁹ Natalie Pita, *Sail We Must: Why ICSID Proceedings Should Not Lie at Anchor for Arbitration Challenges*, 30 Duke J. Comp. & Int'l. L. 165, 187, 194–207 (2019), <https://scholarship.law.duke.edu/djcil/vol30/iss1/5/> .pdf

¹⁸⁰ Horne, *supra* note 127, 108–109

3.5.3 Absolute Ban

According to the proposers of this idea, imposing an absolute prohibition will end all forms of double hatting¹⁸¹. This approach ensures independence and impartiality on the positive side. It is criticized for its limitation of party autonomy, as the parties are not free to appoint the arbitrator of their choice, and fringe experienced arbitrators in this subject are on the negative side. It also makes the practitioners decide whether to be a defense counsel or arbitrator, which makes them not be arbitrators as it is not a full-time job and makes them opt for other professions. Moreover, this approach may create a power broker as it concentrates power in the hands of a few individuals who are experienced and well known internationally (the current top double haters) and opt to be arbitrators¹⁸². A complete restriction on double-hatting could negatively affect diversity and reduce the available pool of possible new arbitrators in the field, as a few lawyers could stop practicing as soon as they get their first appointment (over inclusive)¹⁸³.

3.5.4 Establishing Multilateral Investment Court

The aim of establishing a permanent international investment court is to provide a framework for the resolution of international investment disputes that is permanent, independent, and legitimate; predictable in delivering consistent case law; allowing for an appeal of decisions; cost-effective; transparent and efficient; and allowing for third-party interventions¹⁸⁴. In this case, the current ISDS system should be eliminated¹⁸⁵. The supporters of the establishment of a permanent tribunal with permanent arbitrators would structurally ensure the independence of the adjudicators, who would be freed from incentives related to possible reappointments¹⁸⁶. Consistency may also be assured. The European Parliament concluded that investment disputes should rather be settled by a standing judicial body than by ad hoc panels in arbitral proceedings. The UNCITRAL Working Group III is also working on the establishment of this body. At the regional level, the Arab Investment Court, which entered into force in 1988 among its signatories, is a prominent example¹⁸⁷.

¹⁸¹Tanwar, *supra* note 4, 125

¹⁸²Tanwar, *supra* note 4, at 127

¹⁸³Georgetti, *supra* note 92, at 467.

¹⁸⁴Gomara, *supra* note 129, at 372.

¹⁸⁵Langford et al, *supra* note 22, at 174

¹⁸⁶Gomara, *supra* note 129, at 356.

¹⁸⁷Gomara, *supra* note 129, at 355.

The establishment of a permanent body could ensure the coherent and consistent application of international investment law, contribute to its further development, and help alleviate many of the other legitimacy concerns the present ISDS system faces. According to *Agata Zwolankiewicz*, the main reasons for seeking a change and introducing an institutionalized judicial system are the predictability of judgments, the independence and impartiality of judges, the appellate stage, and more control over the costs of the proceedings and their length¹⁸⁸.

The creation of such a body would be an appropriate way to address the constitutional challenge of the present ISDS system¹⁸⁹ as it replaces treaty-based investor-state arbitration. This is meant to ensure the adjudicators' independence and impartiality by avoiding situations where conflicts of interest may arise, often referred to as repeat appointments and double hatting, if full-time judges are appointed¹⁹⁰. The Commission of the European Union proposed the establishment of a permanent multilateral investment court that entertains investment disputes as an independent tribunal with a tenured, highly qualified judge. According to the proposal, the judges should respect strict ethical duties, and any country outside of the European Union will join the court if they wish. It is a good proposal to guarantee the independence and impartiality of arbitrators, transparency in the selection of arbitrators, and better control over the quality of arbitrators appointed. Thus, the legitimacy crisis will be solved. Moreover, it solves the problem of the unpredictability and inconsistency of the awards so that stable and consistent jurisprudence will be created, especially through the appellate body¹⁹¹.

However, if this court is established and starts operation, it is questionable whether the geological equality among arbitrators between developed nations and poorest countries will be assured or whether the past legacy, i.e., geological inequality, will continue. Moreover, it is hard to imagine the United States, for instance, acceding to compulsory jurisdiction by a multilateral court waiving sovereign immunity¹⁹². The comprehensive, independent, impartial, and permanent investment tribunal with first instance plus appellate division is advocated by Europeans with the

¹⁸⁸Zwolankiewicz, *supra* note 173, at 204-205

¹⁸⁹Giuditta Cordero-Moss, *Independence and Impartiality: Myths and Reality*, KLUWER ARBITRATION BLOG (July 23, (Jul.23, 2023, 10:10 AM), [Independence and Impartiality: Myths and Reality - Kluwer Arbitration Blog](#)

¹⁹⁰ *Id.*

¹⁹¹Zwolankiewicz *supra* note 173 , at 206-207

¹⁹²Antonia Eliason, Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform, 50Geo. J. Int'l. L., 1, 11 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235769#paper-citations-widget

power to hear disputes over investments between an investor and a state that will accept its jurisdiction¹⁹³. This multilateral investment court is included in the CETA and EU-Vietnam FTA, by which the CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial, and permanent investment tribunals inspired by the principles of public judicial systems in the European Union and its Member States and Canada¹⁹⁴.

The establishment of a permanent international body is fueled by the EU, while the USA and Japan opposed the reform in the first instances and insist on the maintenance of the current trend (bilateral reforms) of ISDS; Brazil embraced the ombudsman model followed by state-state arbitration; and South Africa opted for national courts for protection¹⁹⁵. Following the proposals by the EU, some of its member states included a permanent investment court in their recent BITS.

The United States delegation expresses the establishment of a multilateral investment court as a one-size-fits-all approach, and it is not necessary, feasible, or desirable to seek to develop a uniform model of investment protection at the multilateral level. The United States would not support any effort to develop such a model through the Working Group III process¹⁹⁶.

The TTIP proposed something altogether more innovative: the creation of a permanent investment court, which would see the establishment of a panel of fifteen permanent judges who would sit in divisions of three to hear each case brought by an investor against a State¹⁹⁷.

As there would be deficiencies in the body, this multilateral investment court, for example, might well be populated with decision-makers who are comfortable with the 'prior experience norm', and currently, these are mostly older white men from the Global North¹⁹⁸. Rule 8.27 of CETA is an example of this unfairness: only five judges are left for third countries, while five are from EU members and the remaining five are from Canada. It is also not efficient if the countries are reluctant to join the court. Moreover, it abolishes party appointment (party autonomy) with state

¹⁹³Georgios Dimitropoulos, *Investor-State Dispute Settlement Reform and Theory of Institutional Design*, 9 J. Int'l Disp. Settl. 534,543 (2018), <https://academic.oup.com/jids/article-abstract/9/4/535/5037248.pdf>

¹⁹⁴Gomara, *supra* note 129, at 356.

¹⁹⁵Gomara, *supra* note 129, at 359.

¹⁹⁶Gomara, *supra* note 129, at 365-366.

¹⁹⁷ Goldsmith, *supra* note 106, at 788

¹⁹⁸Bjorklund, *et.al.*, *supra* note 43, at 22

appointment. The determination of the numbers of supporting staff, secretariats, arbitrators, and third-party funders remains for the future. The judges hold full-time positions and would be precluded from engaging in other remunerated professional activities (with the possible exception of teaching). Thus, the MIC judges would not engage in the practice of double-hatting.

3.5.5 Temporary ban

According to the US position, ISDS reform is possible through more limited procedural reforms of investor-state arbitration than establishing a multilateral investment court; unlike the EU position¹⁹⁹. 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 cases²⁰⁰. This is more advantageous when compared to an absolute ban as it is temporary. This could address the argument that a permanent ban is unfair for those taking on a first investment arbitration appointment after the temporary ban. The current draft ICSID and UNCITRAL also follow this approach. The writer of the thesis also believes in this approach. Because the new arbitrators will have a chance to be arbitrators while other top double haters are banned for some duration. Secondly, it does not totally exclude the expert or highly qualified arbitrators from their job. Thirdly, the freedom of parties will not be absolutely barred. Fourthly, it will not create geographical and political dimensions in a multilateral investment court.

3.5.6 Enhancing National, Regional and International Laws Governing the Issue

As we have discussed above, some international agreements completely ban the practice of double hatting. According to Article 8.30(1) of the CETA rules, the members of the tribunal should be independent, and up on appointment, they shall refrain from acting as counsel, party-appointed experts, or witnesses in any pending, new investment dispute under this or any other international agreement. The scope of this limitation extends to other international agreements. This approach is wide in the sense that it restricts the arbitrators from acting as defense counsel or expert witnesses under another investment agreement. This approach bans the greatest number of arbitrators and hinders the freedom of choice of parties. This regulation does not seem temporary.

¹⁹⁹Stephan W. Schill, *Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?*, 19 J. World Inv. & Trade, 1 (2018), https://brill.com/view/journals/jwit/19/1/article-p1_1.xml?language=en&ebody=previewpdf-63165.pdf

The Comprehensive and Progressive Agreement for Trans Pacific Partnership, Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA), the United States-Mexico-Canada Free Trade Agreement (USMCA), and the European Union-Singapore Investment Protection Agreement prohibit holding dual or multiple roles, i.e., prohibiting the practice of double hatting.

3.5.7 Enhancing Transparency

In recent times, the practice of double hatting has been considered a reputation for those who engage in it. However, after the practice got due attention from international legal scholars and international institutions, the positive incentives for the practice were reduced. The continuous enhancement of transparency through the reporting index of double hatting, as it affects impartiality and independence, will further reduce the practice as the parties are discouraged from selecting high profiles of double hatting.

As national regulations, South Africa, the Netherlands, and Canada, as examples, made their own model laws prohibiting the practice of double hatting. This enables the contracting parties to know the practice is prohibited in further investment agreements²⁰¹.

3.6 Joint Work of the Secretariat of ICSID and UNCITRAL

As we have discussed above, the practice of double hatting in investor-state disputes is at a crossroads. Starting from the inception of ideas to regulate double hatting, some countries adopted unilateral laws by enacting model laws. Some regulate it regionally. The United Nations entrusted the task of drafting arbitrators' codes of conduct to Working Group III of UNCITRAL, in which drafting rules on double hatting became one of the agenda items²⁰².

The Working Group III faced dilemmas with institutional reform that shifted from parties appointed to standing multilateral investment courts with appointed judges. Standing multilateral investment court will inevitably result in consistency of the decisions while, oppositely, affecting

²⁰¹ Langford *et.al*, *supra* note 8, at 11-12

²⁰² UNCITRAL, Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, 6 November 2018, A/CN.9/64, p. 11, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf

the freedom of parties to appoint arbitrators and increasing the duration of the proceeding²⁰³. The proponent of state-appointed judges in standing-alone courts argues that it is the party appointment of arbitrators that leads to a lack of independence and impartiality, while the proponent of party appointment believes that this mechanism by which parties have say in the procedure will increase confidence in the current ISDS trend. Some states, including South Africa, civil society observers, and some academies criticize the work of Working Group III for its focus on only procedural matters, largely excluding substantive issues and the and the overriding wishes of some least developed states, while substantive reform should be the center of reform or where battle lies, and the Group made this dilemma the center of discussions²⁰⁴. Therefore, the draft code of conduct came up with different ideas for each session.

The first draft code of conduct for adjudicators in investor-state disputes prepared by the secretariat of UNCITRAL and ICSID highlights the situation in which adjudicators refrain from acting in multiple roles, such as defense counsel, expert witness, and judge²⁰⁵.

The second version of the code of conduct shrinks the scope of the first version. The second version permits double-hatting with the consent of the parties²⁰⁶. The third version came up with three options: complete ban, modified ban, and full disclosure, with the option to challenge double hatting²⁰⁷. The fourth Version also bans the practice of double hatting modifying the situa-

²⁰³ Julian Arato *et al.*, *The Investor-State Dispute Settlement Reform Process: Design, Dilemmas, and Discontents*, 14 J. Int'l. Disp. Sett'l., 127, 128 (2023). <https://academic.oup.com/jids/article/14/2/127/7110230> .pdf

²⁰⁴ *Id* at 128-129. This substantive issue includes the fair and equitable treatment standard or scope of the most favored nation's treatment. According to the critics, core concerns cannot be addressed without accompanying substantive reform, and the distinction between the two is illusory.

²⁰⁵ International Center for Settlement of Investment Disputes [ICSID] and United Nations Commission on International Trade Law [UNCITRAL]-*Draft Text Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Version One, Annex A* (May 1, 2020), Art. 6 [Annex A Code Conduct.pdf \(worldbank.org\)](#) .pdf

As per Article 6 of Annex A of the first draft code of conduct, an adjudicator would not act as legal counsel, expert witness, judge, or in any other relevant role (regarding an investment dispute) at the same time. The draft code tries to limit the extent of double hatting to the same parties (or facts) or the same treaties. That is, adjudicators may be appointed as legal counsel if the two roles are under different treaties or the facts of the dispute are unrelated. But this happens if and only if this draft code is ratified as it appears currently.

²⁰⁶ International Center for Settlement of Investment Dispute [ICSID] and United Nations Commission on International Trade Law [UNCITRAL], *Draft Code of Conduct for Adjudicators in International Investment Dispute, Version two*, (April 19, 2021), <https://icsid.worldbank.org/resources/code-of-conduct> .pdf

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

²⁰⁷ International Center for Settlement of Investment Disputes [ICSID] and United Nations Commission on International Trade Law [UNCITRAL], *Draft Code of Conduct for Adjudicators in International Investment Disputes, Version Three* (September 19, 2021), art. 4. <https://icsid.worldbank.org/resources/code-of-conduct> .pdf

tions considered as double hatting under its predecessor²⁰⁸. The fifth version, which is the last updated version of the draft code, paves the way for the party to decide whether they agree to permit the double hatting²⁰⁹. This fifth draft provision aimed at preventing four overarching multiple-role scenarios²¹⁰. First, it prohibited arbitrators from acting *concurrently* as legal counsels or expert witnesses in other cases involving the same measures, the same (or related) parties, as well as the same provisions. Second, it prohibited arbitrators from acting as legal representatives or expert witnesses in cases concerning *the same measure for three years* after the end of their tenure as arbitrators in a case. Third, they would also be barred from performing these tasks *for a year* in cases where *the same provisions of the same instrument* are involved. Finally, concerning double hatting in cases concerning *similar legal issues*, arbitrators shall consult with the parties and ensure that they do not act in violation of their independence and impartiality obligations.

According to UN arbitrators' code of conduct, Article 4, an arbitrator shall not act concurrently as a legal representative or an expert witness in any other international investment dispute or related proceeding involving the same measures, and the former arbitrator shall not act as a legal representative or expert witness in any other international investment dispute or related proceeding involving the same measures²¹¹. However, the parties may agree otherwise.

The first option is full prohibition, and it reads as follows: “An adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID case [or in any other proceeding relating to the application or interpretation of [the same] investment treaty] unless the disputing parties agree otherwise. The second option is modified prohibition. It says: ‘ Unless the disputing parties agree otherwise, an adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID (or other proceeding) involving a) the same measures; b) (substantially) the same legal issues as one of the same disputing parties or its subsidiary, affiliate, parent entity, state agency, or state-owned enterprise; and d) the same treaty. On the third option, the adjudicators disclose whether they concurrently act as a legal representative, expert, or in any other role on cases involving the same or related parties, the same measures, or (substantially) the same legal issues as at issue in the IID.

²⁰⁸ International Center for Settlement of Investment Disputes [ICSID] and United Nations Commission on International Trade Law [UNCITRAL]: *Draft Code of Conduct for Adjudicators in International Investment Disputes*, Version 4 (July 2022), Art. 4, [CoC_V4_ENG.pdf \(worldbank.org\)](#).pdf

²⁰⁹ International Center for Settlement of Investment Disputes [ICSID] and United Nations Commission on International Trade Law [UNCITRAL], Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Code and Commentary, Version 5, A/CN.9/WG.III/WP.223, Art. 4, [WP_223_advance_copy.pdf \(worldbank.org\)](#).pdf

²¹⁰ International Institute for Sustainable Development [IISD]: *Nothing is Agreed Until Everything is Agreed The Code of Conduct and Reflections on the 44th Session of the UNCITRAL Working Group III*, “*Nothing is agreed until everything is agreed*”: The Code of Conduct and Reflections on the 44th Session of the UNCITRAL Working Group III—Investment Treaty News ([iisd.org](#)), last accessed on June 2, 2023, at 3:00 PM

²¹¹ UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, Art., 4 (1-2), available on https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf

3.7 Double Hatting ISDS under Ethiopian Legal System, Implication of its Regulation for Ethiopian Legal System

A) ISDS under Ethiopian Laws

Starting from its draft, the interpretation of bilateral and multilateral investment treaties needs deep knowledge. Except for focusing on attracting foreign direct investment, least-developed countries do not consider the legal terminology provided in a treaty since the developed nation (capital-exporting country) makes the treaty itself²¹². Though some tribunals were established in Ethiopia a long time ago, they are not widely used. There is no international case entertained by these tribunals. The competence of the adjudicators will be measured and challenged by the case they entertain. It is obvious that even the investor considers the knowledge of adjudicators in international law when choosing arbitrators. As we have seen in previous section Ethiopia ratified the 1958 New York Convention (which is formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral and, is a key international treaty that facilitates the enforcement of arbitration awards across borders. The arbitration award rendered in Ethiopia will be executed across all signatory countries.

Some of the arbitration tribunal established in Ethiopian includes Addis Ababa Chamber of Commerce and Sectoral Associations Arbitration Institute (AACCSA AI)²¹³, Ethiopian Arbitration and Conciliation Center (EACC)²¹⁴ and Ethiopian Mediation and Arbitration Center,²¹⁵. They primarily entertain domestic cases. Their legal and institutional framework and set up to handle complex international dispute is under developed

B) Experience of other Countries and international Agreements in Regulation of Double Hatting

In the current trend, despite UNCITRAL Working Group III working to reform investor-state dispute settlement, the states are taking measures like termination, negotiation, and making

²¹²Endryas Tekalegn, *Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap*,10Beijing L. Rev.,115,121 [Evaluating Investor-State Dispute System under Ethiopia's Bilateral Investment Treaties: Looking a Workable Roadmap \(scirp.org\)](https://www.scirp.org/journal/evaluation-investor-state-dispute-system-under-ethiopia-s-bilateral-investment-treaties-10beijing-l-rev-115121)

²¹³ Available on, <https://addischamber.com/arbitration/about-arbitration-institute/>

²¹⁴ Available on , <https://www.abbyssinialaw.com/study-on-line/adr/ethiopian-arbitration-and-conciliation-center>

²¹⁵ Available on , <https://www.highergov.com/awardee/ethiopian-mediation-and-arbitration-center-46096451/>

BITs²¹⁶. The Netherlands made her own BITs model, which is called the Dutch BITs model (2019). This model prohibits double hatting under Art. 20 (5)²¹⁷. Double hatting is prohibited under art.30/6 of Canadian FIPA model²¹⁸. South Africa also prohibited double hatting under its 2012 SADC BITs model, Art. 29 (13)²¹⁹.

The Moroccan government also made the BITs Model in 2019, which has features like the home state right to sue investors and the prohibition of double hatting under Art. 35.4, which states that ‘for greater certainty, no member of the arbitral tribunal may exercise at the same time the function of arbitrator in a dispute under this agreement and as counsel in any other pending or potential arbitration involving a foreign investor and a state²²⁰. The Colombian BITs model (2017) also prohibits arbitrators from wearing double hats in investor-state dispute settlements²²¹.

The India Model BIT (2015) also indirectly prohibits wearing double hats. Article 19 (1,10) of the India BITs Model obliges an arbitrator to disclose circumstances that give rise to doubt on his impartiality and independence, like existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators, and prevents an arbitrator from being appointed. If the arbitrator is a lawyer in the same law firm as the counsel to one of the parties, the arbitrator is acting concurrently with

²¹⁶ Arpan Banerjee & Simon Weber, *The 2019 Morocco Model BIT: Moving Forward, Backward, or Roundabout in Circles?*, 36 ICSID Rev. 536,537 (2021) <https://academic.oup.com/icsidreview/article/36/3/536/6549213>

²¹⁷ Dutch Model BIT (2019), Art.,20(5), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> it says ‘...Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.’

²¹⁸ Canadian FIPA Model (2021) ,art.30/6

²¹⁹ SADC Model BITs (2012), art., 29 (13), <https://edit.wti.org/document/show/904957c4-fcdd-49e9-ac81-3e7f1c090feb> It provides that the arbitrators appointed to resolve disputes under this agreement must, at all times during the arbitration... cannot act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a state.

²²⁰ Moroccan BITs Model (2019), Art., 35.4, available on <https://edit.wti.org/document/show/b5908c50-ef94-4902-b71d-12024f285ef8> It reads, ‘...No member of the Arbitral Tribunal may serve simultaneously as an arbitrator in a dispute arising under this Agreement and as counsel in another pending or potential arbitration involving a foreign investor and a state.’

²²¹ Colombian BITs Model (2017), Composition of the Arbitral Tribunal,¶3.d, available on, <https://edit.wti.org/document/show/cdde4cbc-6572-4cad-8c39-8c3413009e52> It reads, ‘upon appointment, arbitrators should refrain from acting as counsel or as party-appointed experts in any pending or new investment disputes under any international agreement throughout the duration of the arbitration.

the lawyer or law firm of one of the parties in another dispute, and the arbitrator has publicly advocated a fixed position regarding an issue in the case that is being arbitrated²²².

Moreover, CETA also prohibits wearing double hat under Art. 30²²³. Some countries with no BITs model banned double-hatting with bilateral investment treaties and free trade agreements. The recent decision of tribunals also shows how double hatting generates conflict of interest, specifically its negative impact on independence and impartiality. In short, the experiences taken by countries, decisions by arbitration tribunals, UNCITRAL code of conduct arbitrators, and measures taken by some international investment agreements such as TTP and BITS, which we discussed in the previous section, imply that it is time to regulate double hatting and no more freedom to practice. That is, it is also time for Ethiopia to regulate double hatting, as she is one of the top African countries in attracting international investment arbitration.

3.7.1 Status of Double Hatting Under Ethiopian Laws

i) Status of Double Hatting under Ethiopian BITs

Ethiopia signed various international bilateral investment treaties. Common clauses are included in each bilateral investment treaty. Except for the Ethiopia-Brazil Bilateral Investment Treaty, all Ethiopian Bilateral Investment Treaties contain investor-state arbitration²²⁴. Brazil follows the strategy of a bilateral investment treaty that does not contain investor-state arbitration. However, if we closely examine, the investor-state dispute settlement clause and procedure are inserted in every BIT signed by Ethiopia²²⁵. Let us discuss some of BITs signed by Ethiopia one by one whether the issue of double hatting is regulated or not.

A) Bilateral Investment Treaty between Ethiopia and United Kingdom

The BITs between Ethiopia and United Kingdom is signed in 2009. A bilateral investment treaty signed between the governments of the United Kingdom of Great Britain and Northern Ireland

²²² India Model BIT (2015), art. 19 (1,10), available on <https://edit.wti.org/document/show/d0eac9a8-2de6-44a8-9e9f-2986b8817aa9>

²²³ CETA, art.8 (30)

²²⁴ GIDEY BALAY, INVESTOR-STATE ARBITRATION UNDER ETHIOPIAN BILATERAL INVESTMENT TREATIES, at 74, (2018) (ebook)

²²⁵ United Nations Commission on Trade and Development International [UNCITRAL] International *Investment Agreement Navigator*, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> last accessed on June 3, 2023 at 04:00 AM

and the Federal Republic of Ethiopia covered the issue of investor-state dispute settlement under Article 9 and whether an arbitrator will be double hatter or not, it is not regulated²²⁶.

B) Bilateral Investment Treaty between Ethiopia and Algeria

Signed in 2002, BIT between Ethiopia and Algeria regulates the dispute settlement mechanism under its articles 9 and 10²²⁷. A party can appoint an arbitrator whenever dispute fails to be ended under article 10. Like any other agreement; this agreement does not regulate double hatting.

C) Bilateral Investment Agreement between China and Ethiopia

The bilateral investment agreement between the government of the people's Republic of China and Ethiopia signed in May 11, 1998 and entered into force in May 1, 2000²²⁸. The issue of dispute settlement is covered under article 8, which enables parties to appoint the an arbitrator of their choice²²⁹. The agreement mentioned nothing about the code of conduct which the selected arbitrator should fulfill, especially whether they will be double hatter or not. This means, according to the agreement, whether the selected arbitrator is double hatter or not it doesn't matter.

Netherlands include the ISDS, which states that disputes between investors and the country (the host state) can be settled at ICSID²³⁰. ICSID was not entered into force in Ethiopia when those bilateral investment treaties were made. However, it is evident that the ICSID is applicable with the consent of the states through a bilateral or multilateral treaty. That is why those BITs are referred to ICSID in case disputes arise in Ethiopian BITs.

D) Bilateral Investment Treaty between Government of Republic of France and Ethiopia

The BIT between Federal Democratic Republic of Ethiopia and the government of the Republic of France signed in 2003 governs the way investor-state dispute settlement shall be amicably ended, referring to the International Center for Settlement of Investment Disputes²³¹. The agree-

²²⁶ Agreement for the Promotion and Protection of Investments, Brit.-Eth., Nov. 19, 2009, art., 9, [https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download .pdf](https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1180/download.pdf)

²²⁷ Agreement for the Promotion and Protection of Investments, Alg.-Eth., Nov. 1, 2005, art. 9-10 , <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>

²²⁸ Available on, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia>

²²⁹ Agreement for the Promotion and Protection of Investments, China-Eth., May 1, 2000, art. 8

²³⁰ Tekalegn, *supra* note 212, at 119

²³¹ Agreements for Reciprocal Promotion and Protection of Investments, Arg.-Eth., June 25, 2003, art., 9, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1163/download .pdf>

ment says nothing about double hatting. These show that this issue will be governed by the ICSID rules as the parties referred to the center.

E) Bilateral Investment Treaty between Government of the State of Qatar and Ethiopia

A bilateral investment treaty signed between the government of the of the Federal Republic of Ethiopia and the government of the State of Qatar, which is yet to enter into force, provides the way the investor-state dispute settlement may be ended through arbitration. Accordingly, the dispute will be ended through ICSID rules and an *ad hoc* tribunal. According to the agreement, the *ad hoc* tribunal should follow United Nations Commission on Trade and Law (UNCITRAL) rules²³². We discussed that UNCITRAL rules do not govern the issue of double hatting in its current state.

In general, BITs between Denmark, Iran, Israel, Austria, Belgian-Luxemburg Economic Union, Finland, France, Germany, Kuwait, Spain, Sudan, Sweden, Tunisia, Turkey, Yemen and Ethiopia do not regulate the issue of double hatting.

F) Bilateral Investment Treaty between Government of the State of United Arab Emirates and Ethiopia

Moreover, the bilateral investment agreement between Ethiopia and the government of the United Arab Emirates, which entered into force in 2021, directs that the dispute shall be ended through arbitration by referring to the International Center for Settlement of Investment Disputes, the International Chamber of Commerce, or an *ad hoc* tribunal²³³.

G) Bilateral Investment Treaty between Government of Finland and Ethiopia

A bilateral investment treaty between the government of the Federal Democratic Republic of Ethiopia and the Government of Finland, which was signed in 2006 in Addis Ababa and has been in effect for twenty years, regulates investor-state dispute settlement under Art. 9 and that the conflict be submitted to the ICSID or arbitration with the consent of the investor by Addi-

²³² Agreements for Promotion and Reciprocal Protection of Investments, Eth.-Qatar, Nov. 14, 2017, art., 16, [https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5982/download .pdf](https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5982/download.pdf)

²³³ Agreement for the Promotion and Reciprocal Protection of Investment, Eth.-UAE, Dec. 3, 2016, art.,15(4), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5947/download .pdf>

tional Facility Rules or an *ad hoc* tribunal established by UNCITRAL Rules²³⁴. This agreement also says nothing about the code of conduct of arbitrators except referring to the center.

In general, almost all bilateral investment treaties signed between Ethiopia and other states contain investor-state dispute settlement (ISDS), despite some state-terminated,²³⁵ reformed²³⁶ renegotiated²³⁷ and excluded ISDS²³⁸. Under none of these bilateral investment treaties signed by Ethiopia, the practice of double hatting is governed. Almost all bilateral investment agreements signed are alike, except for some articles governing corporate social responsibility and environmental issues, which are, to some extent, included in some bilateral investment treaties.

Ethiopia is signatory to ICSID but she did not ratify it to enforce²³⁹. Therefore, she cannot claim any rights based on the convention regarding the code of conduct for adjudicators unless the BIT refers to it or the parties agree otherwise. The convention is applicable through a bilateral investment treaty as the parties have the freedom to choose any applicable law during investment negotiation, and most investment treaties signed refer dispute settlement to the International Center for Settlement of Investment Disputes through ICSID additional facility rules.

²³⁴ An agreement for Promotion and Protection of Investments, Eth.-Fin., Feb. 23, 2006, art.9 (2 b-d), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1162/download.pdf>

²³⁵ Mbenge & Schacherer, *supra* note 43, 263-264. South Africa terminated most of the agreement, which contained investor-state ISDS. The law that will be applicable to foreign investors in South Africa is the Promotion and Protection of Investment Bill, which does not contain ISDS.

²³⁶ Australian Government; Department of Foreign Affairs and Trade, *Investor-State Dispute Settlement*, <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement> As UNCITRAL and ICSID made states modernize their investment treaties, the Australian government reformed existing investment protection agreements and bilateral investment treaties. For example, the Australian government terminated investment promotion and protection agreements (IPPA) with Mexico, Vietnam, and Peru; unilaterally terminated with India; and agreed to terminate with Indonesia and Hong Kong.

²³⁷ Alexander Thompson et al., *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73 IO, 859,860 (2019), <https://www.jstor.org/stable/26831391> The states have basically two options for having space for domestic regulations. The first is unilateral termination, which may have political and economic consequences, while the second is renegotiation of investment agreements. This option produces immediate effects and permits a more tailored recalibration of IIAs. Recently, about 200 investment agreements were renegotiated. The policy reason behind renegotiation of investment agreements is the fear that international obligations excessively restrict the flexibility of host states (where investments are located) in important areas of public policy, including environmental regulation, public health, social policy, and national security. Thus, concerns about the IIA regime are a specific instance of the “sovereignty cost” questions that arise with many legalized international institutions.

²³⁸ EU Economic Agreements with the governments of Canada and Vietnam in which the *ad hoc* tribunal that entertains ISDS is replaced by an investment court. See also, <https://www.loc.gov/item/global-legal-monitor/2018-03-26/new-zealand-agreements-with-five-countries-exclude-compulsory-investor-state-dispute-settlement-processes/>, last visited on March 24, 2024 at 10:34 AM. New Zealand excluded compulsory ISDS from the investment agreement concluded with Australia, Brunei Darussalam, Malaysia, Peru, and Vietnam.

²³⁹ International Center for Settlement of Investment Disputes, *Database of ICSID Member States*, <https://icsid.worldbank.org/about/member-states/database-of-member-states> Jan. 23, 2023, at 11:00 AM

ii) Status of Double Hatting under International Convention Ratified by Ethiopia

The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is signed by Ethiopia²⁴⁰ and ratified on February 13, 2020²⁴¹. Accordingly, it is declared that the New York Convention becomes part and parcel of the law of the land in accordance with Article 9 of the FDRE Constitution²⁴². Ethiopia made reservations about the applicability of the convention on awards before the ratification of the convention²⁴³. Consequently, arbitration agreements signed, ongoing executions, and proceedings started before the proclamation could be governed by the old laws unless parties agreed otherwise²⁴⁴. Ratification of this convention is useful for Ethiopia to attract foreign direct investment as the foreign investors will have confidence to set up new investments, ensuring the awards will be easily executed. The convention does not regulate double-hatting. It covers how the arbitral award is recognized and enforced.

iii) Status of Double Hatting under Ethiopian Domestic Laws

As we have discussed, it is difficult to give a universal definition of double hatting. However, it is commonly understood that it is when an arbitrator acts as legal counsel, expert witness, and tribunal secretary concurrently or simultaneously. The problem of double hatting is exacerbated when the rules authorize other co-arbitrators to decide on challenges made on conflict of interest, impartiality, and independence²⁴⁵. Double-hatting may give rise to concerns over issue conflict, where the arbitrator might arguably fail to keep a neutral mind in drafting arbitral awards when

²⁴⁰ Proclamation to Ratify Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Proc. No. 1184/2020, Federal Negarit Gazette, 26th Year No. 21, Addis Ababa, 13th March 2020, Art. 4, <https://chilot.wordpress.com/wp-content/uploads/2023/02/49da1-a-proclamation-to-ratify-the-convention-on-recognition-and-enforcement-of-foreign-arbitral-awards-1.pdf>

²⁴¹ Available at https://ddfzdmww8urne.cloudfront.net/wp-content/uploads/2020/03/09085917/FT-International-Arbitration-_Ethiopia_March-2020.pdf

²⁴² Federal Democratic Republic of Ethiopia Constitution, Art., 9/1, states that “*all international agreements ratified by Ethiopia are an integral part of the land.*” As Ethiopia follows the dualism approach to incorporating laws into the laws of the land, the international agreements should be ratified by the House Peoples Representative to be applicable in her territory.

²⁴³ It reads, “*The Convention only applies in the Federal Democratic Republic of Ethiopia with respect to arbitration agreements concluded and arbitral awards rendered after the date of its accession to the Convention.*”

²⁴⁴ Arbitration and Conciliation Working Procedure Proclamation, art. 77

²⁴⁵ ICSID Convention on the Settlement of Investment Dispute, art., 5

switching from her role as a legal counsel in a case involving similar issues that he can create precedent on his position when he switches to legal counsel²⁴⁶.

Ethiopia is the home of nations, nationalities and people. Alternative Dispute Resolution method is effective to end dispute among citizens in Ethiopia from long history. This is evident from civil code²⁴⁷ and Civil Procedure Code of Ethiopia²⁴⁸. However, some provisions of the civil code and civil procedure code concerned with arbitration are repealed by Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021²⁴⁹ saving parts of civil procedure used to implement the proclamation²⁵⁰.

According to this proclamation, an award given by a tribunal is deemed to be a decision given by court²⁵¹. Unlike previous time, unless the parties agreed otherwise, the award is not subject to appeal to the ordinary court²⁵². Even cassation review can be excluded by the agreement of the parties even in case basic or fundamental error of law exists²⁵³. The proclamation provides the grounds on which it disallows a party to appeal an award even though the parties agreed on it. These are appeals on arbitration on equity, arbitration on agreed terms, and arbitration without reasons²⁵⁴.

Ethiopia updated its investment laws to conform to current world trends regarding investment protection and to attract foreign direct investment. Though we can consider it a good move, she is not considering the features of current investment laws. For instance, the current investment proclamation is criticized as weak on environmental protection. The investment proclamation

²⁴⁶ Yu, *supra* note 26, at 9

²⁴⁷ Civil Code of the Empire of Ethiopia, Proc. No. 165/1960, Negarit Gazette, 19th Year Issue No. 2, Addis Ababa, 5th May, 1960, art. 3325-3346

²⁴⁸ Civil Procedure Code Decree, Dec. No. 52/1965, Negarit Gazette, 25th Year No. 3, Addis Ababa, 8th October 1965, art. 315-324, 350-357

²⁴⁹ Proclamation To Provide For Arbitration and Conciliation Working Procedure, Proc. No. 1237/2021, Federal Negarit Gazette, 27th Year No. 21, Addis Ababa, 2nd April 2021, Art. 78 (hereinafter, Arbitration and Conciliation Working Procedure Proclamation)

²⁵⁰ Arbitration and Conciliation Working Procedure Proclamation, art.79

²⁵¹ Arbitration and Conciliation Working Procedure Proclamation, art.44/6

²⁵² Arbitration and Conciliation Working Procedure Proclamation, art.49/1

²⁵³ Arbitration and Conciliation Working Procedure Proclamation ,art.49/2

²⁵⁴ Arbitration and Conciliation Working Procedure Proclamation, art.49/3

provides that the investor-state dispute will be ended through arbitration, negotiation, and consultation²⁵⁵.

As one of the recent reforms, Ethiopia enacted the Arbitration and Conciliation Working Procedure Proclamation in 2021, which is a law reform. As it is provided in the preamble of the proclamation, it is believed that the system can ensure the right to justice, particularly by contributing to the resolution of investment and commercial-related disputes and to the development of the sector, rendering efficient decisions by reducing the cost of the contracting parties, protecting confidentiality, allowing the participation of experts, and using simple procedures that provide freedom for contracting parties; managing arbitration proceedings; and executing decisions by taking into account the objective conditions prevailing in the country. It is evident from this wording that the lawmaker gave due attention to investment and commercial disputes when they enacted this proclamation.

The proclamation requires the arbitrator to promptly notify the arbitrator the arbitrator if there is a conflict of interest, which casts doubt on his impartiality²⁵⁶. Unlike other model laws, the proclamation cites only conflicts of interest, which the appointed arbitrator is obliged to notify. Article 14/1 of the proclamation provides in general terms that the arbitrator will be objected to only if there are circumstances that create justifiable doubts as to his impartiality and independence, or the fulfillment of the criteria stated in the arbitration agreement. Whether this circumstance includes double hatting is unclear since it is too general. Therefore, it is questionable for the opposite party to object to the appointment, claiming he or she is a double hatter by virtue of this proclamation, unless the parties agree otherwise²⁵⁷. It is possible to establish an ad hoc tribunal by virtue of this proclamation. At any cost, we cannot undermine the measures taken by the Ethiopian government to modernize and regulate alternative dispute resolution, as this is only the beginning. Moreover, Ethiopian Investment Proclamation No. 1180/2020, Article 28 (2-3) allows arbitration, so an investor can resolve a dispute through arbitration²⁵⁸.

²⁵⁵ Investment Proclamation, Proc. No. 1180/2020, Federal Negarit Gazette, 26th Year No. 28, Addis Ababa, 2nd of April 2020, Art., 28/2 (hereinafter Investment Proclamation)

²⁵⁶ Arbitration and Conciliation Working Procedure Proclamation, art.13/1

²⁵⁷ Arbitration and Conciliation Working Procedure Proclamation, art.14/1

²⁵⁸ Investment Proclamation, art.28 (1-2)

3.7.2) Implication of Regulation of Double Hatting for Ethiopian Legal System

The United Nations Commission on International Trade Law is the core legal body of the United Nations system in international trade law. Its main focus is to remove barriers to international trade through the modernization and harmonization of laws by preparing legal texts such as international commercial disputes, electronic commerce, and the sale of goods and insolvency²⁵⁹. Ethiopia is a member of the United Nations. The arbitrator's code of conduct is applicable to member states of the United Nations, as the standard of laws will not be different for all member states. As a result, Ethiopian laws that govern this area must be in line with these codes of conduct.

Investors consider the existing laws in certain countries before they enter that country for investment. If the laws of the host state hinder the productivity of their investment, they simply leave it. Thus, Ethiopia should again reform its laws to attain the aim of UNCITRAL: harmonization and modernization of laws. Furthermore, the investor will also need to comply with existing laws and the enacted UNCITRAL code of conduct. According to the EU, by establishing a multilateral investment court, we can overcome the problems of the current ISDS, including the problems of double hatting. If this court is established, the opportunity to appoint an arbitrator of her choice is impossible, as the arbitrators will be represented by permanent judges. In this scenario, there is the possibility of Ethiopian judges being hired by a multilateral court. This needs well-trained and experienced lawyers in international law.

The decision given by the international tribunal ordering arbitrators to opt for one of the dual jobs, rejection from members of the arbitrators, carries the message that double hatting is nearing an end. Regulation of double hatting by BITs implies that double hatting is harmful and unnecessary due to its negative impact on the independence and impartiality of arbitrators. Preparing an arbitrator code of conduct by UNCITRAL Working Group III also shows that countries are fed up with double hatting. Banning or limiting through the BITs model individually carries the message that it is time to regulate double hatting. In short, action taken by international organiza-

²⁵⁹United Nations, *Ethiopia Accedes to Convention on the Recognition and Enforcement of Foreign Arbitral Award*, [Ethiopia accedes to Convention on the Recognition and Enforcement of Foreign Arbitral Awards \(unvienna.org\)](https://www.unvienna.org/unhcr/refugees-and-asylum/ethiopia-accedes-to-convention-on-the-recognition-and-enforcement-of-foreign-arbitral-awards), (last visited, December 3, 2023, 08:00 PM)

tions, some states, guidelines, and arbitration tribunals carries the message that a country should focus on the regulation of double hatting. That is true for Ethiopia, too. If we closely observe those countries that are striving to regulate double hatting through international instruments, they are capital-exporting countries. One of the circumstances that those capital-exporting countries take into account when investing in certain countries is the law of the host state. If the law of the host state is not favorable to their investors, they prefer not to invest in such a state. The existing law of the host state should not provide more favorable treatment to any of the parties' investors. That is, the law of the host state should be equally applicable to foreign investors in that host state since there is a most-favored nation (MFN) clause in each bilateral investment treaty. In short, action taken by states through the BITs Model, drafting arbitrators' codes of conduct through international instruments, and the and the decision of an international tribunal implies it is time to regulate double hatting.

3.8) Ethiopia's Challenge to Regulate Double Hatting

3.8.1) Absence of Code of Conduct of arbitrators

The arbitrators' code of conduct sets the obligations and rights of arbitrators. Ethiopia has had no separate arbitrators' code of conduct till now. Proclamation to provide for Arbitration and Conciliation Working Procedure No. 1237/2021 provides an obligation to notify any conflict of interest or casts reasonable doubt on the impartiality and independence of arbitrators under Art. 13/1. The proclamation did not include details on the ethical conduct of arbitrators. However, the practice of some countries shows separate regulation of the ethical conduct of arbitrators.

3.8.2) Lack of arbitration Center which Represent Ethiopia

Ethiopia has institute to end dispute amicably. Addis Ababa Chamber of Commerce Arbitration Institute,²⁶⁰ the Ethiopian Chamber of Commerce Arbitration Center²⁶¹ and the Ethiopian Mediation and Arbitration Center²⁶² are there to end private dispute through arbitration and mediation

²⁶⁰ Available on, <https://addischamber.com/arbitration/about-arbitration-institute/>

²⁶¹ Available on, <https://www.ethiopianchamber.com/>

²⁶² Available on, <https://abyssinialaw.com/study-on-line/368-adr/7230-ethiopian-arbitration-and-conciliation-center>

However, there is no single center which represent her if disputes arise²⁶³ unlike China, which has China International Economic and Trade Arbitration Commission²⁶⁴.

The arbitration working procedure proclamation stipulates the establishment of a private or government arbitration center²⁶⁵. Due to a lack of this institution, the case is usually entertained in the US, Europe, or other countries, where huge amounts of money are splashed. The case is also entertained by foreign nationals and foreign languages.

3.8.3) Existing Laws and Bargaining Power

The incompatibility and stringent procedures, such as formality requirements, of the existing laws, such as the civil code and civil procedure code, which with the UNCITRAL Model Law, the New York Convention, and the ICSID Convention, trigger the need for further improvements on existing laws²⁶⁶. The bargaining power of the investment treaty of the least developed countries, including Ethiopia, is very low as it is based on the will of capital-exporting countries. If the least developing countries come up with stringent laws and procedures, those capital-exporting countries abandon the negotiation or come up with their own negotiation. In the same way, having a separate BITs model to regulate various issues, including double hatting, will be challenged by Ethiopia's economic bargaining power at the global level.

To sum up, the practice of double hatting is not regulated under any of the Ethiopian laws, including BITs. She did not enact her own model of bilateral investment treaty as well. However, the existing practices and trend show the need to regulate double hatting.

²⁶³ Ashenafi Endale, *Arbitration: Commercial Dispute Settlement Mechanism*, Arbitration: Commercial Dispute Settlement Mechanism, Ethiopian Business Review (last visited, November 21, 2023, 09:00 PM)

²⁶⁴ Available on , <https://www.acerislaw.com/wp-content/uploads/2021/07/cietac.org-CIETAC-International-Investment-Arbitration-Rules-China-International-Economic-and-Trade-Arbitration.pdf>

²⁶⁵ Horne, *supra* note 136, at 18

²⁶⁶ Wakgari Kabata, *Revisiting Ethiopia's Approach to International Arbitration: Latest Trends and Future Prospects*, 37 *J. Policy and Globalization*, 1, 3 (2023), <https://www.bing.com/ck/a?!&&p=e3c8ff7b50065a4bJmldtHM9MTcwMDYxMTIwMCZpZ3VpZD0wMTlmZDViNi0wYWw5LTZhMjltMTZhNy1jNjA5MGJiZTZiMDYmaW5zaWQ9NTIwMQ&pptn=3&ver=2&hsh=3&fclid=019fd5b6-0ac9-6a22-16a7-c6090bbe6b06&psq=Wakgari+Kabata%2c+Revisiting+Ethiopia%e2%80%99s+Approach+to+International+Arbitration%3a+Latest+Trends+and+Future+Prospects%2c37+Journal+of+Policy+and+Globalization&u=a1aHR0cHM6Ly93d3cuaWlzdGUub3JnL0pvdXJuYWxzL2luZGV4LnBocC9KTFBHL2FydGljbGUvdmlldy82MTcwOA&ntb=1.pdf>

Chapter Four

Conclusion and Recommendation

4.1) Conclusion

Ethiopia is currently attracting foreign direct investment by reforming laws and policies to facilitate the same. Foreign direct investment has many advantages for poor countries like Ethiopia. Due to economic, social, environmental, political, public health, and other related reasons, investment-related disputes may arise between investors and host states, which are usually ended through arbitration. The arbitration system, ISDS, is facing legitimacy problems, lack of transparency, inconsistency of awards, and the practice of double hatting. As a result, Ethiopia should revise its laws concerning investment agreements and investment laws to keep up with the current investment agreement trend through either a revolutionary approach or an evolutionary approach²⁶⁷.

The absence of a clear definition of the practice of double hatting, especially its scope, hinders the regulation of the practice. Different people and organizations define it differently. For example, ICSID defines it as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short period. This means a person wears the hats of the arbitrator today and the hats of defense counsel on another day.

The practice of double hatting was not considered a problem in past decades, but it is now considered prestigious by double haters in investor-state dispute settlement. The practice of double hatting is criticized for its negative impact on the diversity of arbitrators. Since some well-known double haters occupied positions, there is no gender, color, geographical, or age diversity. Geographically, double haters are from North America and Europe. They are older, male, and white. Therefore, the ISDS arbitrators are considered male and stale. This led to the accumulation of powers within a small club with the same background and view.

²⁶⁷ BALAY *supra* note 224, pp. 39, 50 The revolutionary approach is to abolish investor-state arbitration or revoking the rights of investors to sue sovereign states. According to this approach, the option of ISDS resorts to local remedies, diplomatic protection, state-state arbitration, ISDS based on contracts and national laws, or other dispute settlement methods. Evolutionary approach is reforming the existing ISDS permitting the right to appeal, deterring frivolous claims, appointing arbitrators, and so on.

The main criticism against the practice of double hatting is that it goes against the principles of impartiality and independence of arbitrators, which are core ethical duties of arbitrators. It is the primary characteristic of investor-state dispute settlement for the parties to choose an arbitrator of their choice. The parties chose an arbitrator whose position they knew. In the course of their job, arbitrators will be inclined to favor whoever appointed them for further appointments. In this middle, the principles of impartiality and independence shall be violated. Double-hatting also generates conflicts of interest. Issue conflicts concern an “actual or apparent bias on the part of the arbitrator stemming from (their) previously expressed views on a question that goes to the very outcome of the case to be decided, i.e., conflict arises from arbitrators’ relationship to the subject matter of the dispute.

Some countries have started to regulate the practice by enacting model laws. The prominent example is Dutch/Netherlands model law. Canadian Foreign Investment Promotion and Protection Agreement Model, Article 30/6, requires the arbitrators to be governed by the code of conduct annexed to the model, in which this annex on arbitrator code of conduct stipulates that arbitrators should refrain from being a defense counsel or expert witness for the party or other party under the agreement or any other international investment. The ICJ, in its direction VII, states that parties should refrain from nominating persons who are acting as agents, counsel, or advocates in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination.

The Court of Arbitration (CAS) prohibited being a defense counsel for any party, and the failure to do that resulted in the removal of an arbitrator. The *EU-Canada Comprehensive Economic and Trade Agreement* (CETA) prohibit the practice of double hatting under Art. 8.30. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also states that, up to selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel, party-appointed expert, or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. The joint work of the secretariat of ICSID and UNCITRAL is also the current ongoing work to regulate the practice. Many changes were made from version one up to version five of the draft code of conduct for adjudicators.

Ethiopia's challenges in international arbitration include a lack of experienced arbitrators and institutions, which can carry the burden and inconsistency of existing laws with international rules.

4.2) Recommendation

As we have discussed above, the existing Ethiopian laws, including the bilateral investment treaty, do not regulate the practice of double hatting. Therefore,

- Ethiopia should insert a clause that bans or limits the practice of double-hatting in future bilateral investment treaties that does not require making a bilateral investment model or
- Ethiopian legislature should enact a bilateral investment model treaty like the Netherlands or South Africa that regulates double hatting or
- Ethiopia should immediately accept and ratify the enforcement of the upcoming code of conduct prepared by UNCITRAL and ICSID. This helps the country use ready-made laws without any cost.

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