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CODE OF CONDUCT – BACKGROUND PAPERS

DOUBLE-HATTING[1]

I. Introduction - Double-Hatting

1. 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 time 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 proceedings.[2]

2. There is no comprehensive definition of double-hatting and there are differing views concerning whether double-hatting should be regulated and if so, the scope of such regulation.

3. The practice of double-hatting has prompted discussion among commentators and ISDS users regarding the effects of double-hatting on ISDS. Such discussion raises the following points:

    - Does double-hatting create situations where an adjudicator lacks sufficient independence and impartiality because the arbitrator may consciously or unconsciously decide in a way that is advantageous to his or her interest, or the interests of his or her client?
    - Does double-hatting adversely affect the reputation of the ISDS system due to an appearance of impropriety created by an arbitrator acting simultaneously as arbitrator and as counsel or in other roles?[3]

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[1] This background document is intended to assist the discussions of delegates concerning the Code of Conduct and should not be taken as a legal opinion on the matters addressed. The cases included in this background paper are for illustrative purposes and do not constitute an exhaustive list of the decisions addressing the matter discussed.

[2] Double-hatting has been described as the practice of "individuals switching roles as arbitrator, counsel and expert in different ISDS proceedings" (A/CN.9/1004/Add.12020) and as the practice, "common in international arbitration", whereby "experienced practitioners who actively represent parties before arbitral tribunals [also] serve as arbitrators in other cases." (Dennis H. Hranitzky and Eduardo Silva Romero, 'The 'Double Hat' Debate in International Arbitration' (2010) New York LJ).

[3] See e.g., A/CN.9/WG.III/WP.151 ("At the 35th session of the Working Group, there was general agreement that this practice, often termed 'double-hatting' or 'role confusion', raised a concern to the extent that it created a potential or actual conflict of interest. The Working Group heard at that session that such conflicts, or even the suspicion that cases are decided as a result of these influences, have a negative impact on the perception of the legitimacy of ISDS"). See also, John R. Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension', AJIL Unbound (2019) pp. 284. ("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

- Is the ability to accept arbitral appointments while maintaining work in other capacities – whether as counsel, expert or otherwise – helpful to replenish and increase the pool of available arbitrators with practical expertise in the field? [4]

- Is it practically and economically feasible for a practitioner to cease accepting work in other capacities once he or she has accepted their first appointment(s)?

- Would a transition period for new arbitrators allowing them to double hat for a limited time be useful or would it be inconsistent with the need to avoid conflict?

- Does double-hatting increase the diversity of arbitration by enabling more candidates to participate, including candidates from diverse regions and both male and female candidates?

- Does double-hatting contribute to party autonomy with regard to the selection of adjudicators?

- Do confidentiality obligations impact an adjudicator's ability to disclose his or her role in separate proceedings?

- How would a prohibition on double-hatting affect the ICSID Panel of Arbitrators and Conciliators,[5] a panel appointed by States and including many experienced ISDS practitioners?

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interests of their clients or their own interests in attracting or retaining clients. Those with a less harsh view nevertheless see the situation as creating an appearance of impropriety that adds to IIDS's ill odor among its many critics.").

[4] Some commentators have suggested that restrictions could negatively impact the expansion of the pool of arbitrators: "[i]f we adopt too stringent an approach against double hatting in the periphery, we are going to make it harder to develop the next generation of arbitrators (generational renewal) and increase the diversity of the existing pool (diversity)." (Anthea Roberts, 'A Possible Approach to Transitional Double Hatting in Investor-State Arbitration' (EJIL, 31 July 2017) available at <https://www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration>). It has conversely been suggested that the practice of double hatting may hinder efforts towards diversity: "[i]ndividuals from backgrounds that are historically overrepresented in ISDS […] benefit disproportionately from the ability to assume multiple roles at once, and a restriction on double hatting may diminish the ease with which a small and homogenous group of individuals can dominate the arena." (Clarissa Coleman and Louise Bond, 'Two Heads Are Better Than One: Double Hatting And Its Impact on Diversity In International Arbitration' (Nat'l L. Rev., 30 July 2020) available at <https://www.natlawreview.com/article/two-heads-are-better-one-double-hatting-and-its-impact-diversity-international>.

[5] Articles 12-16 of the ICSID Convention give each Contracting State the right to appoint four arbitrators and four conciliators to the Panels of Arbitrators and of Conciliators for renewable terms of 6 years. Appointees to the Panels cannot be removed unless they resign of their own accord, and this security of tenure enhances the independence of such candidates. The Panels play a critical role under the Convention, especially for the selection of presiding arbitrators where the parties have been unable to reach consensus, and the selection of *ad hoc* Committee members for annulment proceedings.

II. Relevant Jurisprudence

4. A number of publicly available ISDS decisions under the UNCITRAL Arbitration Rules and the ICSID Convention have addressed objections related to activity that could be characterized as 'double-hatting'. Most of the challenges relate to an arbitrator's work taking place simultaneously with the relevant arbitration proceedings (i), including participation in ongoing proceedings that involved one of the disputing parties, as well as participation in matters that did not involve either disputing party. Some challenges have also been made based on matters that the arbitrator was involved in prior to the proceeding (ii).

i. Challenges related to the arbitrator's ongoing work

5. Several challenges have been made on the basis of an arbitrator's concurrent work as counsel for or against one of the disputing parties:

   a) In *ICS Inspection and Control Services v Argentina*,[6] the Respondent **challenged the arbitrator appointed by the Claimant, who, with his law firm, was simultaneously representing investors in another ISDS proceeding against the Respondent**. The arbitrator disclosed this information upon acceptance of his appointment, noting that the cases were factually unrelated. The deciding authority stated that the arbitrator's role as counsel placed him "in a situation of adversity" against the Respondent, giving rise to objectively justifiable doubts as to the arbitrator's impartiality and independence.[7]

   b) In *Exeteco International v Peru*,[8] the Respondent successfully challenged the arbitrator appointed by the Claimant **on the basis that the arbitrator had advised and was concurrently advising a number of Respondent's public entities in a number of unrelated matters**. The decision notes that even though the arbitrator had not yet acquired any factual knowledge through his role as counsel that could influence his judgment as an arbitrator, it was impossible to predict all the future ramifications at that stage of the proceeding. The deciding authority concluded that the circumstances did not give rise to justifiable doubts with respect to the arbitrator's independence but did give rise to justifiable doubts regarding his impartiality.

6. Several decisions address situations where an arbitrator was simultaneously providing legal services or acting in connection with a dispute that did not involve either of the disputing parties, but where the objecting party argued that the services provided by the arbitrator still gave rise to a conflict.

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[6] *ICS Inspection and Control Services Limited v Argentine Republic (I)*, PCA Case No. 2010-09, Decision on Challenge to Arbitrator (17 December 2009).
[7] Ibid para 1.
[8] *Exeteco International Company S.L. v Republic of Peru*, PCA Case No. AA535, Decision on Peru's Request for Disqualification of the Claimant-Appointed Arbitrator (28 October 2014)

a) In *SGS v Pakistan*,[9] the Claimant **challenged the arbitrator appointed by the Respondent after his disclosures concerning his work as counsel for a separate State**, including a disclosure that one of the lawyers representing the Respondent had been appointed as President of the Tribunal in a case involving that State.[10] In seeking disqualification of the arbitrator, the Claimant identified a prior case involving the arbitrator's client in which the Respondent's counsel had acted as President of the Tribunal, and which had been decided favorably to the arbitrator's client. The Claimant argued that these circumstances combined gave rise to reasonable doubt as to the arbitrator's impartiality given the connections with counsel for the Respondent. The co-arbitrators rejected the challenge, stating:

> "…in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. It is widely accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator. Something more must be shown if a challenge is to succeed."[11]

b) In *Telecom Malaysia v Ghana*,[12] the Respondent **challenged the arbitrator appointed by the Claimant based on his involvement as counsel in another investment arbitration**, *Consortium RFCC v Morocco*,[13] because the Respondent was relying on the *RFCC* Award and, as counsel for RFCC, the challenged arbitrator was seeking to annul the Award on which the Respondent was relying. The challenge was brought before the District Court of The Hague, which required the arbitrator to resign either as counsel in *RFCC* or as arbitrator in *Telecom Malaysia*, deciding that the arbitrator's roles as adjudicator and counsel were incompatible given his duty to assert all objections as counsel and his duty as an arbitrator to be unbiased in his consideration of the merits of the case.[14]

c) In *Vito Gallo v Canada*,[15] a proceeding under Chapter 11 of the North America Free Trade Agreement (NAFTA), the Claimant **challenged the arbitrator appointed by the Respondent on the basis that the arbitrator was simultaneously advising the government of another (non-disputing) State Party to NAFTA** on matters of international trade and investment law. The Claimant noted that the non-disputing State advised by the arbitrator would have the right to make a submission in the

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[9] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (19 December 2002).
[10] The arbitrator indicated that he was prepared to agree to not appear before the Tribunal in that case. Ibid para 9.
[11] Ibid para 25.
[12] *Telekom Malaysia Berhad v The Republic of Ghana*, District Court, The Hague, Challenge No. 17/2004, Petition No. HA/RK 2004.778 (5 November 2004).
[13] *Consortium RFCC v Kingdom of Morocco*, ICSID Case No. ARB/00/6.
[14] *Telekom Malaysia Berhad v The Republic of Ghana*, supra n 12, para 1.
[15] *Vito G. Gallo v The Government of Canada*, UNCITRAL, PCA Case No. 55798, Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009).

proceeding as a non-disputing State Party.[16] The decision on the challenge directed the arbitrator to elect to either advise the State Party or continue to serve as an arbitrator in the case, noting that the arbitrator's "judgment may appear to be impaired by the potential interest of the advised State Party in the proceedings" and that if the State Party were to make a submission "this would necessarily lead to the reconstitution of the tribunal."[17]

d) In *Canepa v Spain*,[18] the Respondent **challenged the arbitrator appointed by the Claimant based, *inter alia*, on the arbitrator involvement with a third-party litigation funder**. The Respondent argued that the arbitrator's role with the funder was not disclosed, that the funder had funded a party represented by the same law firm that was representing the party that appointed him, and that a member of that law firm had been hired by the funder. Noting that the third party litigation fund's apparent involvement in funding investor-State disputes is a circumstance that might cause a party to question the arbitrator's reliability for independent judgment or impartiality, the decisions states that "failure to disclose a relevant fact, however, does not by itself demonstrate a manifest lack of impartiality or independence."[19] The decision concluded that neither the arbitrator's involvement with the fund, nor the connections between the fund and the law firm at issue gave rise to a manifest lack of independence or impartiality and the challenge was rejected.

e) In *KS Invest v Spain*,[20] the Respondent **challenged the arbitrator appointed by the Claimant arguing *inter alia* that the arbitrator was acting as counsel in another case which gave rise to a conflict because of substantial similarities between the two cases**. In particular, the Respondent argued that EU law was central to both disputes and that both cases addressed claims under Articles 10(1) and 13 of the Energy Charter Treaty (ECT), and the Respondent noted that the arbitrator's involvement in the case at issue had not been disclosed. The deciding authority found that given a number of significant differences between the two cases, a third party undertaking an evaluation of the facts would not conclude that there is evidence that the arbitrator manifestly lacks the requisite independence and impartiality, or that the arbitrator breached his duty to disclose a circumstance that might call into question his ability to exercise independent and impartial judgement.

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[16] Ibid para 12. The Claimant stated that, while it was not alleging actual bias on the part of the arbitrator, the circumstances gave rise to justifiable doubts regarding the arbitrator's impartiality and independence.
[17] Ibid para 33.
[18] *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v Kingdom of Spain*, ICSID Case No. ARB/19/4, Decision on the Proposal for the Disqualification of Arbitrator Peter Rees (19 November 2019).
[19] Ibid para 74.
[20] *KS Invest GmbH and TLS Invest GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/25, Decision on the Proposal to Disqualify Prof Kaj Hobér (15 May 2020).

ii. Challenges relating to the arbitrator's prior work

7. The following two cases provide examples of an arbitrator being challenged primarily on the basis of work that was done previously by the arbitrator in connection with separate proceedings which did not involve either of the disputing parties:

    a) In *Telecom Malaysia v Ghana*, a second challenge was raised following the challenge noted above, and the Respondent argued that the **previously-challenged arbitrator should be disqualified on the basis of his prior role as counsel** in the *RFCC v. Morocco* case (after he had resigned from representing the Claimant in that case). The second challenge was rejected, and the decision states:

        "…it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. […]."[21]

    b) In *Saint-Gobain v Venezuela*,[22] the Claimant **sought the disqualification of the arbitrator appointed by the Respondent, based on his work as counsel for another State, which terminated shortly after his appointment as arbitrator**. The challenge was rejected and the decision states:

        "Absent any specific facts which indicate that [the arbitrator] is not able to distance himself in a professional manner from the cases in which he was acting as counsel, [the arbitrator] has the assumption in his favor that he is a legal professional with the ability to keep a professional distance. The same assumption is granted in favor of many arbitrators who today sit as arbitrators in ICSID but who started their career as counsel or who still act as counsel in such cases."[23]

iii. Observations

8. These decisions, which range from the early 2000s to 2020, are illustrative of the range of scenarios in which an arbitrator's work as counsel or expert is alleged to have led to a perceived conflict. Some points can be noted:

    - Most of the challenges brought to date related to an arbitrator's role as counsel as opposed to work undertaken as a party-appointed expert, witness etc.

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[21] *Telekom Malaysia Berhad v The Republic of Ghana*, supra n 12, para 11.
[22] *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (27 February 2013).
[23] Ibid para 81.

- The activity which gave rise to a challenge was affirmatively disclosed by the arbitrator in a number of cases.

- In some cases the possibility of a conflict arising from the arbitrator's other role(s) could have been ascertained at the outset of the proceeding (e.g. where the arbitrator was participating in a pending case that involved one of the disputing parties), however in other instances the potential conflict could not have ascertained until a later time (e.g. where a party's submissions relied upon a case which the arbitrator was involved as counsel).

9. Although these cases were decided on the basis of both the ICSID Convention and Rules and the UNCITRAL arbitration rules, the focus of the analysis is similar: whether the circumstances sufficiently demonstrate that the arbitrator at issue lacks the requisite independence and impartiality.

III. Statistics on Double-Hatting

10. Given the lack of a comprehensive definition for double-hatting, it is difficult to measure the prevalence of double-hatting in ISDS, but there is some available data.

11. A 2017 article by Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, provides an empirical analysis based on a database of 1077 known cases that were either concluded or pending as of January 1, 2017 to ascertain how widespread the practice of double-hatting is in ISDS.[24] For purposes of the study, double-hatting was defined as the arbitrator's simultaneous involvement in another ISDS proceeding, regardless of the treaty or parties involved (i.e. previous engagements were not included, nor were appointments as expert witness, nor was work outside the ISDS context).[25]

12. The article states that in 509 of the examined cases (47%) at least one of the appointed arbitrators was simultaneously acting as legal counsel in at least one other ISDS proceeding and in 118 of the examined cases (11%), while there was no double hatting by the relevant arbitrators(s), at least one of the legal counsel involved in the case was simultaneously acting as an arbitrator in at least one other ISDS proceedings.[26] Therefore, by the calculations included in the analysis, approximately 58% of the examined cases involved double-hatting (as defined by the authors) by either an arbitrator or by one of the party representatives.[27]

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[24] Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting', 6:7 ESIL REFLECTION (2017) available at <https://esil-sedi.eu/post_name-118/>. The dataset included "all known treaty-based arbitrations, ICSID contract and foreign direct investment law-based arbitrations, and ICSID annulment committee proceedings." See also Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration', J Intl Econ L, 2017.

[25] Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting', supra n 24.

[26] Of those cases where at least one arbitrator was acting as counsel, the study identified 190 cases where the legal counsel was simultaneously acting as arbitrators in other proceedings. Ibid.

[27] The research did not assess whether arbitrators had acted in roles other than legal counsel, for example as an expert witness.

IV. Approaches to Double-Hatting in International Investment Agreements and other Rules

13. Double-hatting has been addressed in some International Investment Agreements (IIAs), model treaties, dispute-settlement rules and soft law instruments.

i. International Investment Agreements and Model Treaties

14. A number of recent IIAs prohibit adjudicators from acting as counsel, party-appointed expert or witness in any pending or new ISDS proceeding, including for example the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP);[28] the Canada-European Union Comprehensive Economic and Trade Agreement (CETA);[29] the EU-Viet Nam Investment Protection Agreement[30] and the Iran-Slovak Republic Bilateral Investment Treaty.[31]

15. In addition to the above, the US-Mexico-Canada Agreement (USMCA) prohibits an arbitrator appointed under Chapter 14 (investment) from acting as counsel or as party-appointed expert or witness in any proceeding under the USMCA.[32]

16. Several States have published model Bilateral Investment Treaties (BIT) which include provisions prohibiting arbitrators from acting as counsel, expert or witness in any other ISDS dispute. This includes the 2019 Netherlands Model BIT,[33] the 2019 Slovak Republic Model

[28] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018; entered into force 30 December 2018), ch 9, s B, Code of Conduct for ISDS, r (3)(d): "Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement."

[29] Comprehensive Economic and Trade Agreement (signed 30 October 2016). Ch 8, art 8.30 states that members of the permanent investment Tribunal established pursuant to CETA "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement."

[30] EU-Viet Nam Investment Protection Agreement (signed 30 June 2019). Art 3.40 states: "[the Members of the Tribunal and of the Appeal Tribunal] shall refrain from acting as counsel or as party-appointed experts or witnesses in any pending or new investment protection dispute under this or any other agreement or under domestic laws and regulations."

[31] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (signed 19 January 2016, entered into force 30 August 2017). Art 18.5 states: "[i]n addition, [arbitrators] shall refrain from acting as counsel or party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law."

[32] Agreement between the United States of America, the United Mexican States, and Canada (signed 30 November 2019, entered into force 1 July 2020), ch 14. The successor to NAFTA, USMCA addresses double-hatting in art 14.D.6(5)(c), which prohibits an arbitrator during any proceedings from "act[ing] as counsel or party appointed expert or witness in any pending arbitration under the annexes" of ch 14, the USMCA investment chapter.

[33] Netherlands Model Investment Agreement (2019). Art 20.5 states that "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."

BIT,[34] the 2019 Morocco Model BIT,[35] and the 2012 Model BIT of the South African Development Community.[36]

17. In contrast, India's Model BIT identifies circumstances which gives rise to a justifiable doubt concerning the arbitrator's independence or impartiality or freedom from conflicts of interest, including where "[t]he arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute".[37] The draft agreement does not provide that a conflict exists if the arbitrator is acting as counsel in another dispute, nor does it otherwise prohibit arbitrators from acting as counsel.

ii. Institutional Rules

18. Outside the context of ISDS, some international adjudicative bodies have rules indirectly limiting the roles adjudicators may undertake, although few standards on ethics directly discuss the permissibility or otherwise of multiple roles.[38]

19. Since 2009, the Court of Arbitration for Sport (CAS) has prohibited arbitrators and mediators from acting as counsel for a party before the CAS, in order to avoid conflicts of interest and, in doing so, reduce the number of challenges to arbitrators.[39]

20. Article 16 of the Statute of the International Court of Justice (ICJ) provides that "No member of the Court may exercise any political or administrative function or engage in any other occupation of a professional nature."[40]

21. The International Criminal Court Statute states that "[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their

[34] Slovak Republic Model Investment Agreement (2019). Art 18.4 states that upon appointment arbitrators shall "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement."
[35] Morocco Model Investment Agreement (2019). Art 35.4 states "Pour plus de certitude, aucun membre du Tribunal arbitral ne peut exercer en même temps la fonction d'arbitre, au titre d'un différend soulevé dans le cadre du présent Accord, et d'avocat dans un autre arbitrage en cours ou potentiel impliquant un investisseur étranger et un État."
[36] South African Development Community, Model Bilateral Investment Treaty Template with Commentary (2012). Art 29.14 concerning "Avoidance of Conflict of Interest of Arbitrators" includes a "requirement not to act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State." The commentary on this provision notes that whether arbitrators should serve as counsel in other arbitrations at the same time is an issue is of debate, and that "[a] growing number of arbitrators have said they will no longer do so due to the conflicts of interest it creates. Others have refused to recognize this as a problem. The text suggested resolves this issue in favour of ensuring no conflict can arise in this regard by disallowing arbitrators from concurrently acting as counsel in other treaty based investment arbitrations."
[37] Model Text for the Indian Bilateral Investment Treaty (2015) art 19.10.
[38] See also, A/CN.9/WG.III/WP.151 paras 29-32.
[39] Court of Arbitration for Sport, Code of Sports-related Arbitration (in force as from 1 January 2019), s 18. S 18 of the CAS Code states in relevant part: "Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code. CAS arbitrators and mediators may not act as counsel or expert for a party before the CAS."
[40] Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1055, art 16.1.

independence," and that "[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature." [41]

22. The European Court of Human Rights prohibits judges from "engag[ing] in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office".[42]

23. Article 8 of the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Dispute, in contrast, indicates a preference for a potential panelist who has experience acting as counsel before a WTO Panel, although the provision does not indicate whether a panelist may subsequently practice as counsel before WTO Panels.[43]

iii. Soft law instruments

24. While the IBA Guidelines on Conflict of Interest in International Arbitration do not include any direct provisions concerning double-hatting, a number of scenarios that could constitute double hatting are included in the Guidelines. For example, there are circumstances that appear on the "Orange List" (a non-exhaustive list of situations that may give rise to doubts as to the arbitrator's impartiality or independence, depending on the facts) which could constitute 'double-hatting'. These include, for example, where "[t]he arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel" and where "[t]he 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."[44] The IBA Guidelines have been cited extensively in the cases where double-hatting gave rise to a disqualification proposal.[45]

25. Finally, some law firms do not permit lawyers at their firm to accept appointments in investment treaty cases while also acting as counsel in other ISDS proceedings.[46]

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[41] Rome Statute of the International Criminal Court, 17 July 1998, art 40.
[42] Rules of Court of the European Court of Human Rights, (2018) r 4.
[43] World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994. Art 8.1 provides that "Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1847 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement…". Art 8.8 states that "Members shall undertake, as a general rule, to permit their officials to serve as panelists".
[44] IBA Guidelines on Conflict of Interest in International Arbitration (23 October 2014).
[45] See e.g. *ICS Inspection and Control Services v Argentina*, supra n 6, para 2: "Although the IBA Guidelines have no binding status in the present proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality and independence."
[46] ICCA, "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings" (2000) <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf> p 41.

V. Relevant Provision of the Code of Conduct

26. The provisions of the code relevant to double hatting include Article 3 ("Duties and Responsibilities"), Article 4 ("Independence and Impartiality"), Article 5 ("Conflicts of Interest: Disclosure Obligations") and Article 6. Article 6 of the draft Code of Conduct states:

> *Article 6: Limit on Multiple Roles*
>
> Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].

27. Paragraphs 65 to 75 of the commentary to the draft Code of Conduct identify a number of practical considerations concerning double hatting.

28. The comments on Article 6 of the Draft Code are found at pp. 114 -132 of the *Draft Code of Conduct: Compilation of Comments by Article & Topic as of January 14, 2021* (available here).