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DOUBLE-HATTING IN THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: MULTIFUNCTIONALITY VS. STRICT SPECIALIZATION

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The subject. In modern conditions, the problem of independence and impartiality of arbitrators within the decentralized, fragmented and largely ad hoc Investor-State Dispute Settlement (ISDS) system manifests itself in three main forms: issue conflict, repeat appointments, and double hatting. This article focuses on the latter phenomenon.
Methods. The research is based on traditional methods of system analysis, deduction and induction, as well as the study of international legal instruments, arbitral decisions and national court practice.
Main results. Investment arbitration, having inherited key features from international commercial arbitration – particularly the parties' right to appoint arbitrators – reveals specific complexities. Arbitrators are typically not full-time adjudicators and often combine this role with other professional activities. On the one hand, such duality ensures the availability of highly specialized expertise. On the other hand, it creates risks, as the only formal requirement for appointment is the parties' choice. The widespread practice of double hatting – simultaneously or sequentially acting as arbitrator, counsel, or expert – may undermine the principles of independence and impartiality, and ultimately the rule of law. Against this background, current ISDS reform discussions, including proposals for a permanent investment court, aim to reduce or eliminate role combination. However, the justification and usefulness of such reforms remain debatable.
Conclusions. States are increasingly focused on strengthening safeguards of arbitrators' independence and impartiality. This includes limiting double hatting, tightening eligibility criteria, refining appointment and challenge procedures, and enshrinement in international law the duty of arbitrators to disclose relevant circumstances or decline appointments. At the same time, a new form of "moral capital" is emerging, reflected in the fact that arbitrators voluntarily renounce performing multiple roles.

Introduction. The issue of ensuring the independence and impartiality of arbitrators in the international mechanism for the settlement of investment disputes between investors and States (ISDS) is of vital importance both for the parties to the dispute and for the legitimacy of investment arbitration in general[1, p.99]. It arises from a fundamental feature of any arbitration proceeding: the right of a party to a dispute to appoint its own arbitrator once the dispute has already arisen. However, it is precisely due to the specific nature of modern investment law and the arbitration of investment disputes that this problem has acquired new dimensions and a salience uncharacteristic of commercial arbitration (which resolves disputes between companies).

In today's decentralized, fragmented, and ad hoc ISDS system, the issue of arbitrator independence and impartiality has three main manifestations: issue conflicts, repeat appointments, and double-hatting. The phenomenon of double-hatting is one of the most discussed topics in ISDS reform and pertains to ethical issues[2, p. 104], subject to regulation by law.

The essence of this phenomenon can be briefly described as the possibility for an individual to act simultaneously or successively as an arbitrator, representative of the parties, expert witness and court secretary in several arbitration proceedings[3, p.322], a third-party counsel providing funding for the arbitration, a government official, a corporate board member, or a lobbyist within the existing ISDS system. Closely related to this phenomenon is the problem of revolving doors, in which a party's representative selects an arbitrator, who, the next time that arbitrator serves as the party's representative in another dispute, will select the previous representative as arbitrator[3, p.322], which allows both representatives of the arbitration community to ensure a constant demand for their services.

UNCITRAL Working Group III (WG III) considers this issue to be one of the key challenges in ensuring the principle of independence and impartiality in the ISDS system.

In the domestic literature, there are virtually no publications on the topic of combining roles, which stands in stark contrast to the body of foreign research, where it is almost unanimously recognized as the most controversial and contradictory. [4, p.49,] and is actively analyzed[3, 5, 6, 7, 8, 9].

Reasons for the emergence of the phenomenon. Combining roles is a common practice in international commercial arbitration dealing with disputes between companies, and may even be seen as bringing certain benefits to the parties who, while quite consciously refusing to have the dispute heard in national courts, focus primarily on the qualifications and specialization of the lawyers they choose[10, p. 605].

In the context of investment arbitration, which borrowed from international commercial arbitration, inter alia, the right of the parties to appoint their own arbitrators, this issue is less straightforward due to its undeniable specificity. This is manifested in the absence of a single universal international treaty regulating foreign investment, and the resulting high fragmentation of international investment law, represented by more than 3,000 bilateral and regional treaties on the protection of foreign capital. All of these treaties provide for dispute resolution by ad hoc arbitral tribunals, rather than a single permanent international investment court. This represents a highly decentralized and ad hoc approach to international justice, where the ad hoc nature of arbitration implies that those involved in the arbitration proceedings have other, permanent employment.

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In practice, this has led to the fact that, unlike international and national courts, where disputes are heard by professional judges, parties in investment disputes select arbitrators from among individuals who possess not only the necessary qualifications but also other permanent employment. These are most often lawyers working in private practice, specialists with experience in government agencies, former national or international judges, or legal scholars. [11].

On the one hand, for example, Article 14 of the ICSID Convention, almost identical to the International Court of Justice, imposes requirements for professional knowledge and moral character for candidates for the role of arbitrator, with reference to independence and competence in the field of law. On the other hand, in the existing ISDS system, it can be stated that to become an arbitrator in a dispute, one must simply be appointed by a party, whose choice of this particular specialist is determined by its own considerations and is usually not subject to question. In essence, an arbitrator requires nothing more than to be appointed by a party. Parties can screen arbitrators based on any criteria that are valuable to them from the standpoint of effective litigation, which confirms the thesis of freedom to choose an arbitrator in private interests. Historically, judicial oversight or formal prohibitions that would allow for the delineation of roles and prevent their combination in arbitration proceedings have been virtually absent in this area[10, p. 608].

To make matters worse, the roles of arbitrator and arbitrator are interchangeable in terms of required skills and scope of competence.

Therefore, for a long time, combining different roles in resolving various investment disputes was considered in the arbitration community as a sign of the highest prestige and expertise (“virtuosity”), which increased the demand for such specialists[12, p. 1345]. Legal knowledge and networks are effectively used in both capacities[10, p. 602-603], as in any other roles potentially performed during the investment dispute process. However, neither various arbitration rules (e.g., ICSID, ICC, SCC, and UNCITRAL) nor the IBA Guidelines on International Arbitration expressly prohibit this practice.

All this together forms a closed club with a kind of almost corporate arbitration culture (arbitration culture)[12, p.1344] with cross-recommendations and appointments. In this regard, the wording about the privatization of international investment law by an elite arbitration community seems eloquent[13, p.102].

As a result, the international arbitration community has to rely to a certain extent on “self-regulation” or “self-monitoring” to minimize the practice of combining roles in the short term[3, p. 324].

Dichotomy of the consequences of practice. Concerns expressed in the doctrine [14, p.187; 15, p.31] on the prevalence of the practice of combining roles in the ISDS system, ultimately comes down to emphasizing the presence of serious risks associated with the strategic use of combining roles, when a fairly consistent legal position of a specialist, expressed as an expert or representative of a party in one case or in his scientific research, influences the content of the arbitral award in another case, where this specialist is already an arbitrator.

There is a risk that an arbitrator acting as an arbitrator in one case may attempt to incorporate into an arbitration award a result or wording that he or she may also use as counsel in another dispute[3, p.322].

This is no longer a matter of a specific arbitrator's subjective bias toward a specific party, but of objective partiality, which

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precludes not only the arbitrator's participation in a specific dispute, but also the parties' confidence that their fundamental procedural rights have not been violated. This was also noted during the discussion of investment arbitration reform in WG III[16, p. 66][1].

This method fosters strategic behavior aimed not at achieving truth in a dispute or the correct interpretation of international and national law, but at maximizing profits from the quasi-commercial activities of members of the arbitration community. The practice created under such conditions is perceived as biased, undermining states' trust in the ISDS system[10, p. 605] and raises doubts about its legitimacy as a whole.

However, given the nature of investment disputes, which balance the private commercial interests of investors with the public interests of states, the qualifications for arbitrators in this area cannot be reduced to superficial knowledge. Serious professional commitment and knowledge of not only and not primarily bilateral investment treaties, but also general international public law are required. In this regard, concerns expressed in the literature that prohibiting the practice of combining roles will limit the appointment of arbitrators to only the most naive or incompetent specialists[17, p.25], these are the most compelling arguments in favor of the inadmissibility of a complete ban on this practice, and the focus on a solution in the form of establishing a specific period during which an individual should not be eligible for appointment as an arbitrator if they have performed representative or other functions in the arbitration. This is already partially reflected in the 2023 Code of Conduct for Arbitrators[2]. Furthermore, since the 1990s, the pool of potential investment arbitrators has expanded significantly (due to prestige), although in other areas, such as international commercial arbitration, there may be a shortage of qualified arbitrators[3, p.323].

Another argument against a blanket ban on combining roles is economic: many lawyers aspiring to become arbitrators cannot justify abandoning their legal practice when there is no guarantee of future appointments to arbitration positions.

It should be noted that the practice of combining roles may seem like a relatively harmless professional advancement, in particular from an arbitration tribunal secretary to a party representative or even an arbitrator, but research indicates evidence of a significant impact of such combination on the conclusions of arbitration tribunal decisions in investment disputes[3]. The example of the prohibition mechanism of the 2002 UN ICJ Practice Direction (VIII) demonstrates the understanding that such a combination of roles by these individuals could create a perception of bias.

The ICJ prohibits the combination of roles: Article 17 of the Statute stipulates that no member of the Court may act as agent, counsel, or advocate in any case, nor may he or she participate in the determination of any case in which he or she previously participated as agent, counsel, or advocate of a party, or as a member of a national or international court, a commission of inquiry, or in any other capacity. Thus, Romanian Judge Bogdan-Lucian Aurescu, who became a member of the Court on 6 February 2024, abstained from participating in the proceedings regarding the admissibility of Russia's counterclaims against Ukraine in the

[1] Possible Reform of ISDS (UNCITRAL, 30.08.2018). URL: https://uncitral.un.org/en/working_groups/3/investor-state (accessed 07.03.2026).

[2] URL: https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/coc_arb_r_1.pdf (accessed 01.03.2026).

genocide case[3]. The fact is that before his appointment to this position, he had already acted in this case as an agent of Romania, as one of the intervening states in the process[4]. This is consistent with the position of the President of the UN ICJ A. Yusuf, expressed in 2018 and 2020 in his speeches at the UN General Assembly[18]. However, having been a judge of the ICJ since 2003, in 2020, Judge P. Tomka was appointed by China as a judge of the ICSID arbitration tribunal hearing the claim filed against China by the Japanese investor Macro Trading Co., Ltd., although in 2025 Judge Tomka resigned from this tribunal[18]. This practice of combining roles is called “moonlighting” and is a source of much debate[19, 20].

Thus, despite all the positive aspects of combining roles in the ISDS system, there is a more serious risk of ethical conflicts of interest and a loss of legitimacy for the entire investment dispute arbitration process. Essentially, legal certainty as a whole is at stake, in the form of the risk of annulment of an arbitral award or refusal to enforce it.

The strategy of voluntary self-restraint with respect to their own professional career development, chosen in this case by some arbitrators, appears to be a logical alternative and could well form the basis for legal restrictions within both the permanent and ad hoc ISDS systems.

A distinctive trend in the arbitration world is for experienced professionals to leave their large law firms and work exclusively as independent arbitrators, seeking to minimize conflicts of interest[17, p.25]. While some arbitrators apparently believe that the problem of combining roles is absent and continue to practice it (e.g., R. Valterra), others obviously perceive the threat to the legitimacy of arbitration as a blow to their own reputation and maintain exclusively the position of arbitrators, minimizing the practice of representing interests (K. Greenwood, Z. Douglas, S. Alexandrov and E. Schwartz)[10, p. 619].

There are several examples where the issue of combining roles has become the subject of official proceedings. One of these involved the French arbitrator E. Gaillard in the Telkom Malaysia vs. Ghana case, where he acted as the claimant's appointed arbitrator, and another in the RFCC vs. Morocco case, where he acted as the claimant's counsel in annulment proceedings at ICSID. The District Court of The Hague ordered Gaillard to choose, finding such a combination inadmissible. Gaillard chose the role of arbitrator.

In another case, arbitrator K. Thomas, appointed by Canada in the case brought by the American investor V. Gallo, continued to provide legal services to the Mexican government as an independent consultant on investment treaty matters in parallel with his participation in the tribunal[5]. Although the dispute was between an American investor and Canada, Mexico was a party to NAFTA, under Article 1128 of the NAFTA treaty, which gave Mexico the right to submit its interpretation of the treaty to the tribunal, creating a potential conflict of interest. The investor filed a challenge to the arbitrator in 2009. The decision was made by ICSID Deputy Secretary General Narendra Ziade, who found that, from the perspective of a "reasonable and informed third party" (the IBA Guidelines standard), justifiable doubts arose about the arbitrator's impartiality. Even if Mexico did not

[3] Определение МС от 05.12.2025. URL: https://icj-web.leman.un-icc.cloud/sites/default/files/case-related/182/182-20251205-ord-01-00-en.pdf (accessed 07.03.2026).

[4] URL: https://www.icj-cij.org/case/182 accessed 07.03.2026).

[5] URL: https://www.iisd.org/itn/2009/12/04/arbitrator-forced-to-choose-in-nafta-dispute-over-thwarted-canadian-garbage-site/ (accessed 10.03.2026).

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actually intervene in the proceedings, the mere possibility of such participation, combined with the arbitrator's advisory role, cast a "shadow" on the proceedings [6]. The challenge was not immediately granted, but the arbitrator was asked to choose one of the roles. K. Thomas has decided to resign as an arbitrator in order to continue his professional activities as a consultant.

Prospects. As a result of the increased use of international investment agreements by Latin American countries and the introduction of the investment arbitration mechanism within the framework of NAFTA and the Energy Charter Treaty, the portrait of a potential defendant in investment disputes has radically changed: investors have the opportunity to turn to quite wealthy states[21], in particular to EU Member States [22, p.233].

Having become defendants in investment disputes, EU states have approached the reform of the ISDS system with a flagship attitude, arousing perhaps the greatest interest [23]. The EU is one of the most vocal advocates for a radical solution to the double hatting problem, considering it one of the main causes of the ISDS system's legitimacy crisis. Overall, the EU's position has evolved from proposals for strict ethical prohibitions within existing rules to the idea of completely dismantling the ad hoc arbitration system. Specifically, within the framework of WG III, the EU proposes the creation of a permanent international investment court[13], That is, with regard to the issue of combining roles, replacing temporary arbitrators with permanent, full-time judges appointed by states for long terms. Since the judges will work full-time and receive high salaries, they will be prohibited from engaging in any other professional activities (including consulting or representing parties in other disputes). Such institutional solutions completely eliminate the problem of double hatting.

While the establishment of an international investment court is being discussed within WG III, the EU is actively implementing the investment court mechanism (ICS) system in its new trade agreements, for example with Canada, Vietnam [1, p. 99]. CETA and EVIPA are the most progressive in the fight against double hatting, the first treaties to define new rules governing the identity, required qualifications and terms of office of arbitral tribunal members, and even a two-tier system of investment tribunals, these treaties signal a shift towards a more open and judicial system, similar to those of many national legal systems and the WTO [24, p. 625].

Under EVIPA, the appointment of arbitrators by the parties is eliminated from the legal equation, as tribunal members are appointed not by the parties to the dispute, but by the EU-Vietnam Committee for a fixed term. This in itself reduces the risk of double hatting, as judges become part of a permanent structure with a predetermined status. To prevent judges from becoming financially dependent on caseload (which often leads to double hatting in the ISDS system), judges in the EU-Vietnam system receive a monthly retainer fee, paid by the parties to the agreement, regardless of the number of cases they hear.

EU treaty texts stipulate that arbitrators must be available at all times and as quickly as possible. Furthermore, various clauses in these texts specify a prohibition on holding multiple positions. For example, Article 8.30 of CETA states that, once appointed, they must refrain from acting as counsel or party-appointed experts or witnesses in any ongoing or new investment dispute. Article 20.5 of the new Dutch Model Bilateral Investment Treaty (2019)

[6] URL: https://www.italaw.com/sites/default/files/case-documents/ita0352.pdf (accessed 10.03.2026).

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strictly prohibits holding multiple positions; specifically, members of the Tribunal must not currently act as legal counsel or have acted as legal counsel within the past five years in investment disputes under this or any other international treaty.

This is how strict contractual standards for the ethical conduct of arbitrators are being developed at the level of international investment treaties and soft law acts, such as the two documents adopted in 2023: the Code of Conduct for Arbitrators and the Code of Conduct for Judges in the Settlement of International Investment Disputes[7], Article 4 of which contains provisions restricting the simultaneous performance of several functions. For objective reasons, Article 4 of the Arbitrators' Code of Conduct is broader, as the range of possible combinations must be defined more specifically. However, the general idea of these provisions is that an arbitrator/judge is prohibited from simultaneously performing this function from devoting themselves to another professional activity, and also establishes a period during which this restriction on combination remains in effect—one year and three years, respectively. Moreover, in the case of a permanent court, an exception to the rule on combination may be made in accordance with the rules of this mechanism. The rule regarding arbitrators contains reasonable limits of restriction, according to which it is prohibited to combine roles in cases involving the same measure; the same or a related party; or the same provisions of the same consent document (Article 4(1)). How this provision will be interpreted in practice can be monitored, but it is obvious that the approach to the issue of combining roles will not become more lenient.

However, potentially problematic aspects of multiple appointments are not sufficiently covered by current EU initiatives and deserve special attention: the issue of cooling-off periods and the more subtle issue of how to qualify a combination. In particular, in the case of appointment to the permanent investment court, can a specialist retain the status of an employee (founder) of a firm representing interests in investment arbitrations, since a potential conflict of interest still remains if the status is retained.

In relation to the length of prescribed cooling-off periods, both before and after the exercise of dispute resolution duties, extremely varied and important interests are at stake, including: confidentiality; independence and impartiality; reputation; the right of the parties to be assessed by highly qualified specialists; the right of arbitrators to advance in their careers and to prevent undue restrictions that could affect the financial position of arbitrators or their pensions [17, p.32].

The French government document, titled "Towards a new way to settle disputes between states and investors," contains a five-year ex ante and ex post period ("quarantine periods") [17, c.32], which is much more than is stipulated in any modern treaties.

It is logical that restrictive regulation of the legal activities available to arbitrators both before and after, as well as during their mandate, will lead to the gradual emergence of arbitrators specializing exclusively in one area of professional activity. This could offset the rather lengthy cooling-off period and would represent a move closer to the EU perspective, which views the permanent investment court as an international civil service, where judges cannot simultaneously act as representatives of parties and vice versa. This separation of professional trajectories will affect the nature of the disclosure obligation, which will become less onerous; that is, the more professional

[7] URL: https://uncitral.un.org/sites/default/files/media-documents/uncitral/ru/2318944_coc_judges_e-book_r.pdf (accessed 08.01.2026).

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incompatibilities membership of a permanent court creates, the fewer circumstances will need to be disclosed by anyone who chooses this professional path exclusively. This correlation will become more apparent when the prohibited professional activities are defined in detail, along with the cooling-off periods. [17, p.35].

Final provisions. As with the entire international justice system, states have shifted their focus toward tightening requirements for arbitrators to ensure their independence and impartiality in the broadest sense of the principle. A significant role in this is played by limiting the existing and increasingly troubling practice of combining roles in modern investment arbitration. To this end, states are making efforts not only to tighten regulatory requirements for arbitrator candidates and the appointment/recusal procedure, but also to enshrine in international law the obligations of arbitrators themselves to disclose information or even decline appointment.

All recent agreements with EU participation in the field of investment dispute resolution address to one degree or another the issue of the inadmissibility of combining roles, which is undoubtedly a positive development compared to earlier investment agreements, in which the issue of the possibility of changing roles is not directly addressed [17, p.35]. For the EU, the fight against double hatting represents a way to transform the “commercial” arbitration model into a “public” judicial model, where the arbitrator ceases to be a participant in the legal services market and becomes an independent international official.

Currently, the system is moving toward stricter regulations, but states have not yet reached a final compromise between a complete ban on combining roles and regulating this phenomenon through information disclosure. At the same time, a new category of moral capital is emerging[3, p.331] current arbitrators, which is expressed in the arbitrators' refusal to combine roles, which becomes an important signal of their impartiality for potential participants in the arbitration of investment disputes.

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