CHAPTER 34

The Changing Sociology of the Investment Arbitration Market: The Case of Double Hatting

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I INTRODUCTION

In April 2018, in a keynote address at the New York Investment Arbitration Centre, United Nations Commission on International Trade Law (UNCITRAL)[1] Secretary Anna Joubin-Brett spoke of the 'misery of being a double hatter'.[2] Reflecting on the enhanced scrutiny the investment arbitration community was facing over the long-standing practice of arbitrators acting simultaneously as legal counsel, Joubin-Brett's timing was

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1. United Nations Commission on International Trade Law.
2. Anna Joubin-Bret, *Judith S. Kaye Arbitration Lecture*, New York International Arbitration Center, New York, 25 April 2018.

notable. Earlier that day, the Austrian state representative in the UNCITRAL Working Group (WG) III negotiations on investment arbitration reform had cited statistics on the extent of double hatting.[3] Long-standing murmurings of dissent over the practice,[4] strengthened by empirical research, were now finding a formal and official voice. It was also a voice that grew quickly in strength. In subsequent sessions within UNCITRAL WG III, critiques of the practice were echoed by numerous states in their written and oral submissions and significant time was devoted to the discussion of potential regulation and prohibition.[5]

This backlash against double hatting provides a useful opportunity to ask whether there is a changing sociology in the international investment arbitration market. Double hatting is one of many concerns with arbitral practice that is grounded in growing public law expectations of adjudicative behaviour.[6] Other concerns include multiple appointments by the same party,[7] lack of procedural transparency,[8] proximity of law firms to arbitrators,[9] conflicts of interests,[10] excessive collegiality,[11] lack of diversity,[12] high fees,[13] and excessive numbers of appointments,[14] which have all raised pressure on the current modus of appointment. This is further exacerbated by

3. The paper cited was Malcolm Langford, Daniel Behn, and Runar Hilleren Lie, 'The Ethics and Empirics of Double Hatting' 6:7 ESIL Reflection (2017) p. 1.
4. Phillipe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel' in Arthur Rovine ed., *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill, 2012), p. 28; Phillipe Sands, 'Developments in Geopolitics: The End(s) of Judicialization?' *2015 ESIL Conference Closing Speech*, 12 September 2015.
5. *See* sections III/IV below.
6. *See*, *e.g.*, the analysis of growing judicialization and constitutionalization in Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017).
7. *See* Luke Eric Petersen, 'Spain Succeeds in Disqualifying Arbitrator Kaj Hober in Energy Charter Arbitration', *Investment Arbitration Reporter,* 14 January 2020; UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) UN doc. A/CN.9/1004. *See also*: *Halliburton Co. v. Chubb Bermuda Insurance Ltd & Others* (Court of Appeal (England and Wales), 19 April 2018). On appeal to UK Supreme Court.
8. *See*, *e.g.*, Chiara Giorgetti, 'Who Decides Who in International Investment Arbitration', 35(2) University of Pennsylvania Journal of International Law (2014) p. 431; Sergio Puig, 'Blinding International Justice', 56(3) Virginia Journal of International Law (2016) p. 647.
9. Runar Lie, 'The Influence of Law Firms in Investment Arbitration', in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2022), p. 100.
10. *See* Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration', 61 Dispute Resolution Journal (2006) p. 60; Ruth Mackenzie and Phillipe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 Harvard International Law Journal 271 (2003); Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication', 26(1) Berkeley Journal of International Law (2008), p. 111.
11. Sergio Puig, 'Social Capital in the Arbitration Market', 25 European Journal of International Law (2014) pp. 387, 400.
12. Andre Bjorklund et al., 'The Diversity Deficit in International Investment Arbitration', 21(2-3) Journal of World Investment and Trade (2020) p. 410.
13. Focusing at least on transparency of costs awards, *see* Susan Franck, 'Rationalizing Costs in Investment Treaty Arbitration', 88 Wash. U. L. Rev. (2011) p. 769.
14. UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) UN doc. A/CN.9/1004.

broader critiques that Investor-State Dispute Settlement (ISDS) is pro-investor,[15] pro-investment,[16] anti-developing state,[17] and fails to provide legal certainty.[18]

To be sure, the system (including the practice of double hatting) has its defenders. They assert that the critique is exaggerated, overblown, or simply incorrect, and that the regime evolves to address concerns and attracts more support than is acknowledged.[19] Yet, the mounting critique has fuelled a call for a greater democratization of the regime, which has already partly materialized. As shall be argued, in the case of double hatting, we can observe new and emerging rules, self-regulation in the face of reputational pressure, and threats of greater judicial scrutiny.

The result is that two predominant explanatory theories of arbitral appointment – symbolic capital and insider behaviour – require revisiting, especially due to the emerging public law nature of appointment. Public law norms *transform* the type of capital that is demanded by prospective clients and their lawyers and *disrupt* existing forms of insider behaviour – especially double hatting. However, the paper points also to some paradoxical and dynamic effects. On one hand, the rise of what might be called 'moral capital' may be creating new forms of competition, as pragmatic gatekeepers of old may give way to new moral gatekeepers. On the other hand, the last two years have also witnessed the rise of a counter-movement, seeking to legitimate traditional arbitral private law norms within ISDS.

The paper proceeds by presenting the arbitration market (section 2), introducing and expanding competing theories of arbitral appointment (section 3), and then

15. That is, tribunals exhibit a bias that disproportionately favours the interests and rights of individual foreign investors when pitted against the duty of a state to regulate and legislate in the broader public interest. *See, e.g.*, Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', 50 Osgoode Hall Law Journal (2012), p. 211 at p. 251.
16. That is, tribunals exhibit a bias that disproportionately favours liberal economic rights and values over other equally important public welfare objectives such as public health, environmental protection or fundamental human rights. *See*, e.g., Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).
17. That is, tribunals are disproportionately more likely to rule against less developed respondent states. *See, e.g.*, Thomas Schultz and Cedric Dupot, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', 25 European Journal of International Law 1147 (2014); Daniel Behn, Tarald Berge and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', 38(3) *Northwestern Journal of International Law & Business* (2018), p. 333.
18. *See, e.g.*, Michael Waibel et al. eds, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010); Julian Arato, Chester Brown and Federico Ortino, 'Parsing and Managing Inconsistency in ISDS', 21 *Journal of World Investment and Trade* (2020), p. 336; Florian Grisel, 'Fair and Equitable Treatment: Ordering Chaos Through Precedent?', in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2021) p. 258.
19. For example, the European Federation for Investment Law and Arbitration (EFILA) concludes that, 'The bottom line of this analysis is that most of the criticisms are neither supported by the facts nor by the treaty practice and case law. The fact is that the system has been functioning satisfactorily and that it generally provides for adequate resolution of investment disputes.' European Federation for Investment Law and Arbitration (EFILA), *A Response to the Criticism Against ISDS,* 17 May 2015, 42. *See also* J. Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' 18 Duke Journal of International and Comparative Law (2007) p. 77.

charting the trajectory of critique (section 4) and its effects on the arbitration market (section 5). It concludes cautiously by presenting a revised theory of today's arbitration market while noting the emergence of a concerted pushback against reform (section 6).

II PRESENTING THE ARBITRATION MARKET

The development of ISDS represents a remarkable extension of both international law and commercial arbitration. While the development of this regime is largely attributable to the rise of the sprawling network of investment treaties, arbitration can arise also through various forms of investment contracts and national foreign direct investment (FDI) laws.[20] Commonly, arbitration panels are filled by (wing) arbitrators appointed respectively by the investor and state with a president (chair) appointed by either the two-wing arbitrators or the host institution. While the field of ISDS was a small niche market for arbitrators in the 1990s, there are now over one thousand known investment treaty arbitrations initiated to date (almost all coming in the last 15-20 years)[21] – 1177 as of October 2020.[22] Highly prestigious, it is a coveted market for many working in the field of international law and/or commercial arbitration.

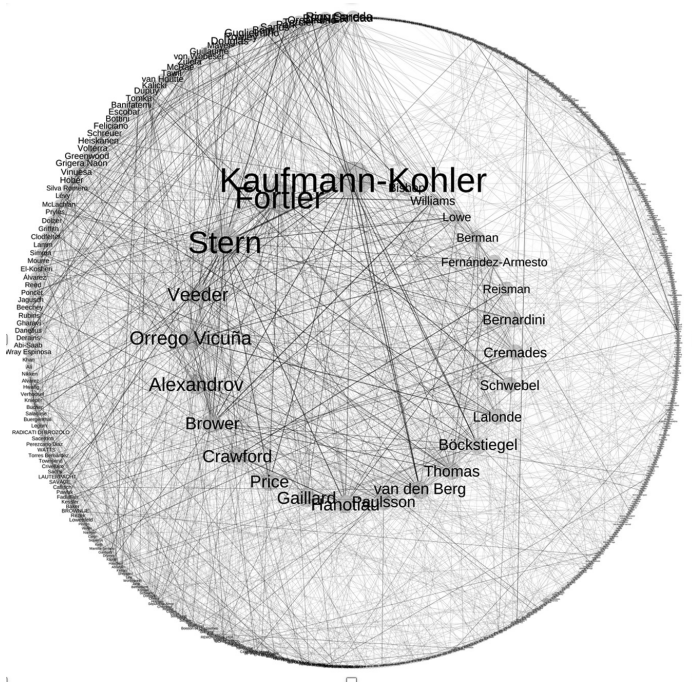
The actors that inhabit the mysterious and closeted world of international arbitration have long been of academic interest. In 1996, after extensive interviews, Dezalay and Grant observed that a coterie of 'grand old men' dominated the broader field of international commercial arbitration.[23] Small in number, linked closely, and mostly European, they even referred to themselves as a 'club' or a 'mafia'.[24] After a period of 'generational warfare', these figures were joined and complemented by Anglo-American arbitration technocrats and law firms.[25]

Often drawing on Dezalay and Garth, more recent studies confirm the asymmetric nature of the arbitration market within ISDS, whether in terms of gender, nationality, education, employment background and the core-periphery.[26] Puig's social

20. This particular form of arbitration is often administered under ICSID, but can also arise under ad hoc procedures or the rules of international commercial arbitration centres.
21. PluriCourts Investment Treaty Arbitration Database (PITAD): pitad.org. Daniel Behn et al., *PITAD Investment Law and Arbitration Database: Version 1.0*, Pluricourts Centre of Excellence, University of Oslo (31 January 2019).
22. Daniel Behn et al., 'Evidence-Guided Reform: Surveying the Empirical Research on Arbitrator Bias and Diversity in Investor–State Arbitration', in Manfred Elsig, Rodrigo Polanco, Peter van de Bossche, *International Economic Dispute Settlement: Demise or Transformation?* (Cambridge University Press 2021), p. 264 at p. 267.
23. Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press, 1996).
24. *Ibid*., at 10.
25. *Ibid*. Although this generational depiction is contested: see discussion in response by Grisel to this chapter.
26. *See*, *e.g.*, Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process', 8 Const. L. Int'l (2013), p. 39; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political?' Working Paper (December 2011); Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration,' 86 N.C. L. Rev. (2007), p. 1; Lauge N. Skovgaard Poulsen, 'Politics of Investment Treaty Arbitration', in Thomas Schultz and Federico Ortino, eds, *Oxford Handbook of International Arbitration* (Oxford University Press 2018); Susan Franck et al., 'International Arbitration: Demographics, Precision

network analysis of arbitral appointments at the International Centre for Settlement of Investment Disputes (ICSID) between 1972 and 2014 found that with the exception of a few 'formidable women', grand old men from Europe and North America, continue to 'dominate the arbitration profession'.[27] Later medium-N surveys of commercial arbitration have confirmed not only the elite educational backgrounds and male and Western identities[28] but also the possible rise of a third generation of managerial arbitrators within commercial, but not investment treaty, arbitration.[29]

Figure 34.1 The Arbitral Powerbrokers



Large-N empirical studies by members of the PluriCourts consortium on all 1000-plus known investment arbitration cases, 600-plus arbitrators and almost 4000

and Justice', *ICCA Congress Series No. 18: Legitimacy: Myths, Realities, Challenges* 33 (2015); Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth', 28(2) Arbitration International (2012), p. 161; Lucy Greenwood and C. Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals', 28 Arb. Int'l (2012), p. 653; Susan Franck et al., 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration', Columbia J. Transnat'l L. (2015), p. 429; Gus van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration', Columbia FDI Perspectives, No. 59 (6 February 2012).

27. S. Puig, 'Social Capital in the Arbitration Market', *supra* n. 11.
28. Franck et al., 'International Arbitration: Demographics, Precision and Justice', *supra* n. 26.
29. Schultz and Kovacs, 'The Rise of a Third Generation of Arbitrators?, *supra* n. 26; Puig, 'Social Capital in the Arbitration Market', *supra* n. 11.

legal counsel, expert witnesses and secretaries, reveal the full breadth of the asymmetry, including its gender and geographic divide. As of January 2017, a small group of 25 'powerbrokers' dominated arbitral appointments (*see* Figure 34.1)[30] and only 11% were women. Moreover, only 26% of arbitrators came from the Global South despite the majority of cases being taken against Global South countries[31] The research also reveals the stickiness of the club: only 5% of arbitrators each year constituted new appointees.[32]

III THEORIZING THE ARBITRATION MARKET

1 Symbolic Capital

Why is the market for international investment arbitration so asymmetric and elite in nature? Dezalay and Garth's explanation, which focused on commercial arbitration, was Bourdieusian. Largely a *demand-side* theory, the argument runs that given conditions of uncertainty concerning the commensurability of transnational qualifications, there was a prescient need to construct a market for arbitration:

> International lawyers in the field of international commercial arbitration must constantly evaluate the stature and authority of potential arbitrators who come from different legal traditions and backgrounds. They must see who will have clout with other arbitrators and with the parties who must obey the decision, Lawyers trying to select arbitrators must therefore determine who from France is equivalent to a retired justice from the House of Lords or who in Sweden is equivalent to an elite professor of contracts and commercial law from the United States. What this means is that arbitration must create a market in symbolic capital – the social class, education, career, and expertise that is contained within a person.[33]

Appointment is thus based on the accumulation of desired *symbolic capital*. Lawyers and their clients look for potential arbitrators that exhibit the optimal combination of social, legal and economic characteristics. Together these attributes will project neutrality, competence, and authority. The ideal arbitrator will thus exhibit and use such authority within an arbitral panel and amongst the parties, for the benefit of one party and eventual enforcement.

What is pertinent and inherent in Dezalay and Garth's description of symbolic capital is the importance of multiple roles. They seek to show the peculiar symbolic capital of those actors that cross institutional lines. One vignette is telling. An

30. Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration', 20(2) *Journal of International Economic Law* (2017) p. 301.
31. Taylor St John et al., *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration* (2018) PluriCourts Working Paper; Malcolm Langford, Daniel Behn and Maksim Usynin, 'Does Nationality Matter? Arbitrator Background and Arbitral Outcomes' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2021), p. 285.
32. St John et al., *ibid*.
33. Dezalay and Garth, *Dealing in Virtue*, *supra* n. 23, p. 23.

Anglo-American litigator, with his first case in international commercial arbitration, learnt the importance of appointing distinguished arbitrators as counsel, commenting that he was a 'conductor of virtuosos and prima donnas'.[34]

This observation deserves greater attention. ISDS has long been characterized by the concept of revolving door, in which individuals within the international investment arbitration community move back and forth between different roles in different arbitrations – concurrently and sequentially. This may be as legal counsel, arbitrator, expert witness, or tribunal secretary.[35] Notably, when Daniel Behn, Runar Lie and myself at PluriCourts took this into account in our computational network analysis in 2017, the picture of powerbrokers changed. There was a jump in network power scores for a group of arbitrators who performed regularly in other roles.:[36] If one compares the ranking in Figure 34.1 with Table 34.1, it is clear that some arbitrators who appeared regularly as counsel – e.g., Alexandrov, Crawford, Price, Gaillard, Paulsson – move up the list; and they are all 'household' names in the field.

Table 34.1 All Actors: Network Power Rankings (Top 25) – as of 1 January 2017

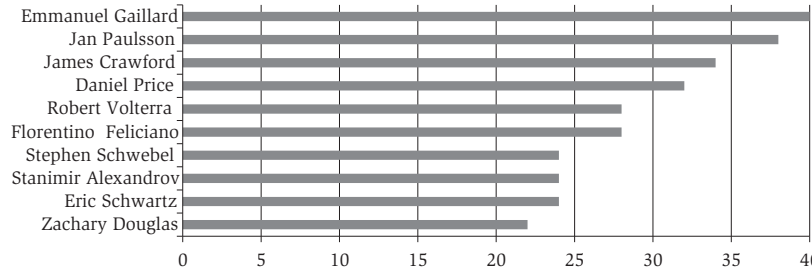
Rank	*Name*	*Nationality*	*Arb.*	*Counsel*	*Exp.*	*Sec.*	*HITS hub*
1	Gabrielle Kaufmann-Kohler	Switzerland	56	0	0	0	1.00000
2	L. Yves Fortier	Canada	53	0	0	0	0.87664
3	Brigitte Stern	France	88	0	0	0	0.87278
4	V.V. Veeder	UK	37	2	0	0	0.55004
5	Francisco Orrego Vicuña	Chile	49	0	0	0	0.54280
6	Stanimir Alexandrov	Bulgaria	32	31	0	0	0.52113
7	Charles Brower	US	52	0	0	0	0.48111
8	James Crawford	Australia	27	14	5	0	0.48067
9	Daniel Price	US	18	13	0	0	0.48031
10	Emmanuel Gaillard	France	23	21	0	0	0.47015
11	Bernard Hanotiau	Belgium	40	3	0	0	0.44905
12	Jan Paulsson	France	28	18	4	0	0.4454
13	Albert Jan van den Berg	Netherlands	44	0	0	0	0.44069
14	J. Christopher Thomas	Canada	43	3	0	0	0.42114
15	Karl-Heinz Böckstiegel	Germany	40	0	0	0	0.41590
16	Marc Lalonde	Canada	35	0	0	0	0.39232

34. *Ibid.*, p. 109.
35. Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', *supra* n. 30.
36. *Ibid.*

Rank	*Name*	*Nationality*	*Arb.*	*Counsel*	*Exp.*	*Sec.*	*HITS hub*
17	Stephen Schwebel	US	18	9	0	0	0.38389
18	Bernardo Cremades	Spain	37	2	0	0	0.37650
19	Piero Bernardini	Italy	36	1	0	0	0.37495
20	Gonzalo Flores	Chile	0	0	0	38	0.34236
21	W. Michael Reisman	US	19	1	16	0	0.33781
22	Juan Fernández-Armesto	Spain	29	0	0	0	0.32955
23	Franklin Berman	UK	24	0	0	0	0.32912
24	Vaughan Lowe	UK	24	1	1	0	0.32573
25	Gabriela Álvarez-Avila	Mexico	0	18	0	19	0.32565

This revolving door occurs also in real-time, through so-called double hatting. Our analysis also measured the extent to which arbitrators simultaneously acted as legal counsel.[37] It was measured formally in two principal ways, using again data up to 1 January 2017. First, an 'arbitrator-focused' approach counted all individual cases in which at least one arbitrator on the panel is simultaneously acting as legal counsel in at least one other ISDS case. Second, a 'counsel-focused' approach counted individual cases where at least one legal counsel is simultaneously acting as an arbitrator in at least one other ISDS case (the inverse of the first measure). We found that a total of 47% of cases (509 in total) involve at least one arbitrator simultaneously acting as legal counsel – much higher than expected.[38] Turning to the counsel-focused category, it accounted for a further 11% of cases (118 in total).

Figure 34.2 The Double Hatting Index (Top 10)

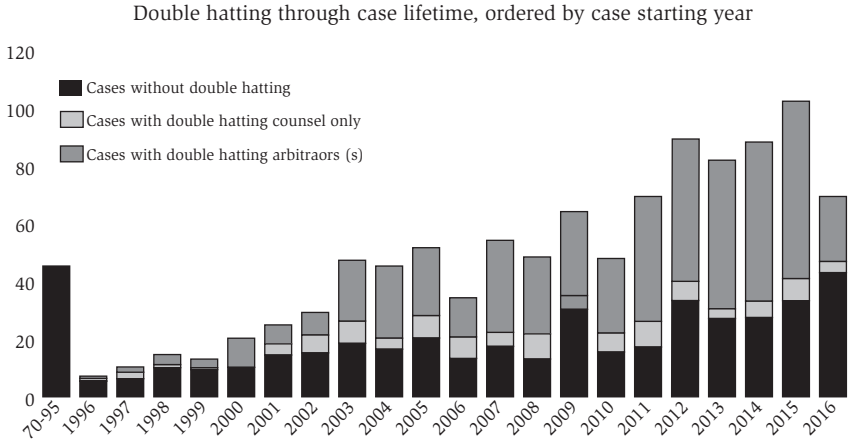


37. Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting', *supra* n. 3; Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', *supra* n. 30.
38. Moreover, in 190 of the cases in this arbitrator-focused category, there are also legal counsel double hatting elsewhere as arbitrators – deepening the extent of the revolving door.

We also scrutinized the *identity* of this group. In doing so, we developed a double hatting index. If an individual was involved in a minimum of two international investment arbitration cases in the roles of arbitrator and counsel, then a yearly score of (2) was assigned to that individual for a given year.[39] The score is conservative and does not attempt to describe the *intensity* of double hatting within a calendar year. Hence the maximum score an individual can receive for a year is (2). Figure 34.2 shows the top 10 list that we published.[40] It shows that the practice is dominated by many of the most powerful and influential arbitrators.[41] However, there are many powerful arbitrators who *do not* feature at all on this list or even amongst the top 100 on our double hatting index. This includes a number that have spoken out against the practice.[42]

Finally, we asked if the degree of double hatting has *changed* over time. Figure 34.3 shows the proportion of cases affected each year for both arbitrator-focused (medium grey) and counsel-focused (light grey). Interestingly, double hatting is a relatively late phenomenon that primarily begins in the early 2000s. The share of double hatting cases was lower in 2016 but it was not yet clear whether this represented a new trend – a similar one-off reduction occurred in 2006.

Figure 34.3 Double Hatting over Time



39. Cases were included in the evaluation from their constitution date and until they are either discontinued, settled or finally resolved through a decision in the form of an award. Cases that were pending as of 1 January 2017 have a concluding date as of 1 January 2017 for the purposes of the analysis.
40. One arbitrator has been excluded from the originally reported version in *JIEL* as the inclusion of the annulment proceeding was deemed to overstate the degree of double hatting.
41. Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', *supra* n. 30, section IV.
42. For example, Philippe Sands, W. Michael Reisman, Sir Franklin Berman, and Judge Thomas Buergenthal.

Returning to the theory of symbolic capital, it is not notable that double hatting is a characteristic feature of many of the most powerful and renowned arbitrators. It suggests that the ability to carry both roles was viewed as a form of prestige, or at the very least did not harm symbolic capital.

2 Insider Behaviour

However, symbolic capital is more than the mere possession of a diverse background. Symbolic capital is itself a social construction that emerges from a specific context. In this respect, it is important to ask whether its development was influenced as much by the supply-side (arbitrators) as much as the demand side (clients and their lawyers). Dezalay and Garth themselves point partly in this supply-side direction. They note the 'networks and relationships organized' around arbitration and the 'space for positions and struggles'.[43]

This observation underscores that the arbitral community may have possessed significant agency in shaping the demand for certain forms of symbolic capital. Notably, the structural potential for this constructive power lies in the revolving door, and particularly double hatting. When actors could simultaneously occupy multiple spaces, it not only constituted a natural form of symbolic capital: As legal counsel, arbitrators had the direct possibility to generate general demand for specific forms of symbolic capital, which would be to their advantage.

In 2004, Ginsburg foregrounded more clearly – at a general level – such *supply-side* behaviour of arbitrators in an alternative *rational choice* model that focused on strategic action.[44] He claimed that the rapid global spread of arbitration incentivizes insiders to raise the barriers to keep out new entrants:

> Here competition to establish the network standard could be associated with monopolistic behavior and may be undesirable. [The scholar] Ogus expects that in national jurisdictions lawyers will control the content of legal culture and will use the notion defensively against outside competition. In this view, culture can be an anti-competitive product. Those inside the relatively closed world of international arbitration can use claims of an 'arbitration culture' to highlight their own expertise. Those who are 'outside the culture' are less desirable participants.[45]

The story told by Ginsburg is the classic realist story of collective action in the legal profession.[46] Lawyers work to keep out external and internal competitors, emphasizing or making necessary the possession of necessary knowledge in the

43. *Ibid.*
44. Tom Ginsburg, 'The Culture of Arbitration', 36 Vanderbilt Journal of Transnational Law (2003), p. 1335.
45. *Ibid.*, p. 1344.
46. *See* discussion in; W. Wesley Pue and David Sugarman (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Hart Publishing 2003); Harald Espeli, Hans Eyvind Næess, and Harald Rinde, *Våpendrager og Veiviser: Advokatenes Historie i Norge* (Universitetsforlag 2008); Malcolm Langford, 'Revisiting the Theory of the Legal Complex Outcomes' in Malcolm Feeley and Malcolm Langford eds, *The Limits of the Legal Complex: Nordic Lawyers and Political Liberalism* (Oxford University Press 2021), p. 262.

demarcating of professional boundaries. Indeed, one arbitration lawyer recently boasted that their competitive advantage lies in what is 'not written down'.[47]

However, the tools deployed are not just constructivist. In 2005, Rogers highlighted the potential role of structural factors that enhance the imperfect competitive nature of the market and benefit insiders, one of them being the revolving door.[48] First, insiders have the power to make arbitration appointments (as counsel or tribunal secretariats). She noted explicitly that, 'Arbitrator selection is often in the hands of members of the same "club", who are either operating in the institutions or already appointed as party-appointed arbitrators.'[49] Second, she also pointed out that arbitrators enjoy an absence of regulation. There is little to no legal/judicial oversight and room for reputational sanction.[50]

As Rogers suggests briefly, double hatting reinforces these asymmetries and can facilitate insider behaviour. Borrowing from the economics of multimarket diversification, we can explicate this insight more fully in formal economic terms. Moreover, we can take the argument one step further. One reason for the emergence of multiple markets, such as the practice of double hatting, is that it can assist insider behaviour.

In economics, the reasons for the multimarket diversification by economic actors are classified as efficiency and strategy, with the result being so-called conglomerates (not unlike arbitral powerbrokers).[51] If a firm diversifies and sells its products in multiple markets, it gains enhanced market power under two alternative scenarios. First, if there are economies of scale in diversification, and second if they can induce anti-competitive effects, particularly collusion and calculated exit.[52] Let us take each in turn.

In the case of markets for arbitrators and counsel, the *economies of scale* generally favour diversification. The roles are largely substitutable.[53] The same 'expertise', primarily legal knowledge, symbolic capital, and relevant networks, can be deployed in both arenas. Moreover, contracting costs are constant in each market for all competitors.[54] Each arbitration is an ad hoc process and there are no long-term arrangements

47. GAR, *Global Arbitration Review 100: The Guide to Specialist Arbitration Firms 2012* (Geneva: GAR, 2012), at 3, cited in Eberhardt and Olivet, below n. 22.
48. Catherine Rogers, 'The Vocation of the International Arbitrator', 20 American University International Law Review (2004), p. 957 at pp. 968-969.
49. 'Arbitrator selection is often in the hands of members of the same "club", who are either operating in the institutions or already appointed as party-appointed arbitrators.' Rogers, *supra* n. 48, at 12.
50. *Ibid.*, at 970-975.
51. *See, e.g.*, Arnold Heggestad and Stephen Rhoades, 'Multi-market Interdependence and Local Market Competition in Banking', 60(4) The Review of Economics and Statistics (1978), 523-532 particularly, *see also* Michael Porter, *Interbrand Choice, Strategy, and Bilateral Market Power* (Harvard Economic Studies, 1996).
52. Kirsty Hughes and Christine Oughton, 'Diversification, Multi-market Contact and Profitability', 60 Economica (1993), pp. 203-224.
53. David Encaua, Alexis Jacquemin and Michel Moreaux, 'Global Market Power and Diversification', 96(382) The Economic Journal (1986), pp. 525-533.
54. This is strongly emphasized in the complementary literature on vertical integration in markets. *See*: Ronald Coase, 'The Nature of the Firm', 4(16) Economica (1937), 386; and Benjamin Klein, Robert G. Crawford and Armen A. Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process', 21(2) The Journal of Law and Economics (1978), p. 297.

(except for employees in a law firm or some tribunal secretaries). While some individuals may struggle with the managerial aspect of the counsel role (e.g., academics with a high teaching load), lawyers employed by law firms or more flexible academics or in retirement may be able to combine multiple roles easily. The result is that arbitrators have the potential to exercise significant power in two markets simultaneously.

What is of particular interest is the second explanation. Concentration of power may emerge because it enhances strategic and collective *anti-competitive behaviour*. Economists have theorized and demonstrated that multimarket firms can engage in a form of cooperation or collusion. Action initiated in one market may result in retaliation in the other market.[55] This danger of reciprocal tit-for-tat can incentivize mutual forbearance or strategic exit.[56] Thus, a predominance of conglomerate firms can mean a 'reduction in rivalry' even when markets possess a relatively competitive structure'.[57] As Edwards famously noted, there is an 'incentive to live and let live, to cultivate a cooperative spirit, and to recognize priorities of interest in the hope of reciprocal recognition'.[58] Writing in the same period, the sociologist Simmel emphasized that the multiple contact points, and the resulting mutual knowledge amongst firms, facilitates also tacit cooperation.[59] Thus, Axelrod concluded that reducing monopolistic tendencies would involve keeping the 'same individuals from interacting too regularly with each other'.[60]

Whether central actors in investment arbitration engage in such strategic monopolistic behaviour is a difficult question to answer. Ginsburg pointed to the remarkable convergence in particular forms of arbitral practice, which he argued could only be accounted for by insider behaviour. Our quantitative research in mapping the 'revolving door' provided no direct evidence to prove or disprove such a claim.[61] While other sociological literature – based on survey evidence and interviews – reveals the presence of many strategic arbitrators,[62] and the claim has been raised in several arbitrator challenges,[63] such data gathering does not indicate directly yet whether they engage in *reciprocal* strategic behaviour.

However, vertical integration is not the best characterization of the monopolistic nature of the market as there are different arbitrators and counsel for case (i.e., product). Vertical integration is commonly defined as 'two single-output production processes': Martin Perry, 'Vertical Integration: Determinants and Effects', 1 Handbook of Industrial Organization (1989), p. 183.

55. Corwin Edwards, 'Conglomerate Bigness as a Source of Power', in National Bureau of Economic Research, *Business Concentration and Price Policy* (Princeton University Press, 1955), 331.
56. Note the conditional argument in Joel Baum and Helaine Korn, 'Dynamics of Dyadic Competitive Interaction', 20(3) Strategic Management Journal (1999), p. 251.
57. Heggestad and Rhoades, 'Multi-market Interdependence and Local Market Competition in Banking', *supra* n. 51, 523.
58. Edwards, 'Conglomerate Bigness as a Source of Power', *supra* n. 55, 335.
59. George Simmel, *The Sociology of George Simmel* (trans) (Free Press 1950).
60. Robert Axelrod, 'The Emergence of Cooperation among Egoists', 75 American Review of Political Science (1981), p. 306, at p. 312.
61. Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', *supra* n. 30.
62. *See especially* Franck, 'International Arbitration', *supra* n. 26 above and Dezalay and Garth, *supra* n. 29.
63. *See Raiffeisen Bank International v. Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018.

However, one can think of two situations in which monopolistic behaviour could emerge due to strong incentives. The first is when central players recommend each other as counsel or arbitrators in the expectation that they would engage in similar nominations.[64] This creates a mutually beneficial snowballing effect as an increase in the number of appointments raises an actor's social and symbolic capital in the market. The second may be more subtle but powerful in the long run. It would constitute the cultivation of a 'patronage' network in which a central actor recommends emerging colleagues or former students. This creates a 'sphere of influence',[65] in which there are internal incentives in this micro-network for reciprocal nomination and external incentives for central players to respect each other's sphere of influence. Further research is required on whether the concentration of power we have observed is driven by strategic factors in addition to economies of scale.

Summing up, existing literature contends that appointment in arbitration markets is determined strongly by the accumulation of symbolic capital to meet demand and insider behaviour to limit supply or shape demand. Which of these two different approaches best explains the economic sociology of appointment is not, however, the focus of this paper. Indeed, the fact that the theories are focused largely on the respective demand and supply sides of the market suggests that both sets of factors may play a role. What is crucial for present purposes, is that both theories provide a space for certain structural dynamics, especially the phenomenon of the revolving door. This allows us in the remainder of the paper to investigate whether the broader structural transformation of ISDS might be affecting the specific market for arbitral appointment. By bringing public law values to the fore, the demand and supply side of the market may be undergoing recalibration. Indeed, already in 1996, Dezalay and Garth pointed to the potentially disruptive effects of the rise of public international economic law in the form of GATT[66] and NAFTA:[67]

> The specific features that have allowed international commercial arbitration to develop and thrive by avoiding the state, we suggest may also render it incapable of adapting effectively to a new and very different regime in business disputes.[68]

We turn now to this transformation by charting critiques and their impact over the last twenty-five years, before returning to its implications for the arbitration market.

IV THE LEGITIMACY CRISIS AND DOUBLE HATTING CRITIQUE

As foreshadowed, in the past decade, ISDS has been engulfed by a dual legitimacy crisis. As states hosting foreign investors found themselves increasingly having to defend their laws and policies before and in the shadow of international arbitral

64. *Ibid*.
65. Simmel, *The Sociology of George Simmel*, *supra* n. 59, noted the incentive to respect spheres of influence in different markets.
66. General Agreement on Tariffs and Trade.
67. North American Free Trade Agreement.
68. Dezalay and Garth, *Dealing in Virtue*, *supra* n. 23, p. 14.

tribunals, concerns arose with *outcome* legitimacy. It is claimed that ISDS in particular is pro-investor, pro-investment, and anti-developing state; and fails to provide legal certainty.[69] Equally, there was a concern with *process* legitimacy, in which the community of arbitrators figure prominently. Process critiques commonly revolve around the apparent lack of transparency, conflict of interests, litigation funding, and quality of reasoning.[70]

Unsurprisingly, these substantive and procedural concerns have resulted in demands for reform from various states, international organizations, and civil society groups – resulting in different forms of unilateral and multilateral action.[71] This has included withdrawal from the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[72] and certain investment treaties, development of new model treaties, replacement of arbitration with a court-like system,[73] substantive reform of existing treaties,[74] and revision of procedural rules.[75] However, many considered the result a patchwork. The reforms lacked depth (only selected issues were tackled) and breadth (only a few states were involved and many solutions require broad consensus).

In July 2017, the first major comprehensive attempt at ISDS reform was announced.[76] At its 50th session, member states of the UNCITRAL entrusted WG III with

69. *See*, *e.g.*, Gus van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', 50 Osgoode Hall Law Journal (2012), p. 211 at p. 251; Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012); Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study', 25 European Journal of International Law (2014), p. 1147; Behn, Berge and Langford, 'Poor States or Poor Governance' *supra* n. 17; Waibel et al., *The Backlash Against Investment Arbitration*, *supra* n. 18; Arato, Brown and Ortino, 'Parsing and Managing Inconsistency in ISDS', *supra* n. 18.
70. *See* Giorgetti, 'Who Decides Who in International Investment Arbitration', *supra* n. 8; Sands, 'Developments in Geopolitics: The End(s) of Judicialization?', *supra* n. 4; Puig, 'Social Capital in the Arbitration Market', *supra* n. 11, p. 416.
71. Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018), Ch. 8; Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, 'Backlash and State Strategies in International Investment Law', in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (CUP 2018) 70-102.
72. 575 UNTS 159, Articles 14 and 40.
73. For example, EU-Canada Trade Agreement (signed 30 October 2016, entered into force 21 September 2017 (CETA).
74. For example, US Mexico Canada Agreement (USMCA) ('NAFTA 2.0') (signed 29 January 2020). States have recently initiated a new process to modify the Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) according to the mandate of its state contracting parties.
75. It is important to note that UNCITRAL is not the only multilateral or plurilateral effort to reform the manner in which disputes are resolved under investment treaties. ICSID for example has initiated several processes over the past decade to reform rules applying in ICSID disputes; arbitral institutions (principally the ICC and SCC) have modified or added rules to allow for better administration of ISDS disputes.
76. Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' 112(3) American Journal of International Law (2018), p. 410. The process emerged gradually in 2015, when the UNCITRAL Secretariat commissioned a study to the Geneva Center for International Dispute Settlement (CIDS) to review whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State arbitration. *See* United Nations, Report of the United Nations Commission on International Trade Law Forty-eighth session (29 June-16 July 2015), Official Records of the General Assembly,

a broad, open-ended, and problem-driven mandate to address the real and perceived legitimacy of the current regime.[77] The body would: identify concerns regarding ISDS; consider whether reform was desirable in the light of those concerns; and, if so, develop solutions.[78] During their November 2018 meeting in Vienna, WG III identified six concerns to be addressed by the reform process: (1) excessive legal costs; (2) duration of proceedings; (3) legal consistency; (4) decisional correctness; (5) arbitral diversity; and (6) arbitral independence and impartiality.[79]

What is notable is that double hatting has been the most-discussed issue under the sixth concern. The reasons for this are diverse and deserve a brief history and overview – which will traverse the backlash to double hatting and the counter-backlash

1 Early Critique

The concern with double hatting is not new. Already in 2003, Sands and Mackenzie raised such concerns;[80] and warnings came from other senior figures[81] and civil society organizations.[82] These voices were, nonetheless, isolated. Double hatting is a common practice in everyday commercial arbitration and is often viewed as beneficial.[83] As Stone Sweet has argued, when two parties in a conflict first turn to third-party resolution, trust in the dispute resolver's neutrality and expertise, their 'impartiality and wisdom', is paramount.[84] Parties to such private disputes typically seek to draw arbitrators from a legal community where their expertise, reputation (and arguably

Seventieth Session, Supplement No. 17, UN Doc. A/70/17, para. 268. In 2017, the UNCITRAL Secretariat commissioned a further study from CIDS and the process then formally commenced with a new mandate for WG III. See generally: Malcolm Langford et al., 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction', 21 Journal of World Investment and Trade (2020), p. 167.

77. United Nations Commission on International Trade Law (UNCITRAL), 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)', UN doc No A/CN.9/930/Rev.1 (19 December 2017).
78. *See* United Nations, Report of the United Nations Commission on International Trade Law Fiftieth session (3 July-21 July 2015), Official Records of the General Assembly, Seventy Second Session, Supplement No. 17, UN Doc. A/72/17, paras 263-264.
79. UNCITRAL, 'Possible reform of investor-state dispute settlement (ISDS)', UN Doc No A/CN.9/WG.III/ WP.149 (5 September 2018). Moreover, several other issues have emerged in the process, such as third-party funding, prevention of investment disputes and calculation of damages. Malcolm Langford, 'UNCITRAL and Investment Arbitration Reform: A Little More Action', *Kluwer Arbitration Blog,* 21 October 2019.
80. Ruth Mackenzie and Phillipe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 Harvard Int'l Law J. (2003), p. 271. *See also* Sands, 'Conflict and Conflicts in Investment Treaty Arbitration, *supra* n. 4.
81. *See, e.g.*, Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', 3(5) Transnational Dispute Management (2006).
82. Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel* (IISD 2010) 17, https://www.iisd.org/sites/default/files/publications/dci_2010_arbitrator_independence.pdf.
83. Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting' *supra* n. 3.
84. Alec Stone Sweet, 'Judicialization and the Construction of Governance', 32 Comp. Polit. Studies (1999), p. 147. *See also* Martin Shapiro, *Courts: A Comparative and Political Analysis* (Univ. Chicago Press 1981).

preferences) are well-established. As ISDS arbitrations were one-off ad hoc disputes, and few in number, it is perhaps surprising that only a few objected at the time.

However, the public law nature of ISDS has become increasingly apparent. It involves international treaties; states as respondents (often in their role as sovereign); issues of domestic public policy; the interests of multiple stakeholders; and, in the case of ICSID and the Permanent Court of Arbitration (PCA), public institutions appointing arbitrators. Moreover, international investment arbitration since the early 2000s has taken on a more juridical form as precedent has formed an important part of arbitral reasoning.[85] Such a context fits well with what Stone Sweet and Shapiro label as socially complex forms of adjudication, which place higher demands on dispute resolvers.[86] The outcomes of any case are less likely to fall within the range of accepted outcomes for both disputing parties (and directly interested third parties), and so an adjudicator must work much harder to demonstrate neutrality.

Thus, Sands asked, in a more direct and stronger tone, in 2012, whether a lawyer that 'spends a morning drafting an arbitral award that addresses a contentious legal issue' can divorce themselves from their role in addressing the same or similar legal issue in the 'afternoon' as counsel in a different case.[87] And, even if they can, would they be able to convince a reasonable observer that such role bifurcation was maintained?[88] An additional concern is the inverse of the first: an arbitrator acting as legal counsel may be coloured by their arbitral role or use their pleadings in one case for the purpose of being picked up and used by the same individual in their work as an arbitrator in another case.

While double hatting is not formally prohibited, an increasing number believed that it fell afoul of *IBA Guidelines on Conflicts of Interest in International Arbitration,* in at least certain cases. The guidelines provide that conflicts of interest arise if behaviour 'would give rise to justifiable doubts as to the arbitrator's impartiality or independence.[89] For example, in *Telkom Malaysia v. Ghana,*[90] Emmanuel Gaillard disclosed that he was acting as counsel in *RFCC v. Morocco* and the respondent state lodged multiple challenges against his appointment in the Hague District Court.[91] Ghana claimed that both cases involved similar legal issues and noted that it was relying on *RFCC v. Morocco* in its submissions. The Hague District Court ordered Gaillard to choose whether to continue as arbitrator or legal counsel, but not both. This case was the exception not the rule, and there have been no other successful challenges.

85. *See also* A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration*, on the broader judicialization of the field.
86. *See* Sweet, 'Judicialization and the Construction of Governance', *supra* n. 84; Shapiro, *Courts: A Comparative and Political Analysis*, *supra* n. 84.
87. *See* Sands, 'Conflict and Conflicts in Investment Treaty Arbitration', *supra* n. 4.
88. *Ibid.*, 31-32.
89. *Ibid.*, Part I, Article 2.
90. *Telekom Malaysia Berhad v. The Republic of Ghana*, PCA Case No. 2003-03, UNCITRAL, Settled.
91. *Republic of Ghana v. Telekom Malaysia Berhad*, Hague District Court, Challenge No. 13/2004, Petition No. HA/RK 2004.667, 18 October 2004; Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004.

2 Maturing Critique

In 2015, in his closing speech at the European Society of International Law conference, Sands launched arguably his strongest attack, which was published shortly thereafter in *EJIL: Talk!* He took direct aim at some of the association's members – some present in the plenary hall.[92] The international legal profession, he maintained, bore some responsibility for the legitimacy crisis in international law and adjudication. The crux of his concern was the ethics of appointments and the appearance that international lawyers were prioritizing their material and political interests over independence and impartiality.

Sands named four specific practices, whereby all concerned the absence of transparency and public law norms and two of them double hatting: Lawyers and law firms were 'capturing' international investment arbitration and charging excessive fees; International Court of Justice (ICJ) judges were acting as arbitrators – seemingly the 'only' international court to allow this practice; some judges and arbitrators were too close to states, participating in the appointment processes of state counsel or leaking confidential information to governments; and individuals were acting simultaneously as arbitrators and legal counsel in international investment arbitration – i.e., double hatting. Sands conceded that such critique is 'delicate and embarrassing' but unavoidable as it goes to the 'heart of the system.'[93]

Yet, Sands noted that despite a decade-long expression of concern with double hatting in ISDS and beyond, it had never been measured.[94] He acknowledged that he was himself unsure as to how far he could draw on 'isolated' incidents to undergird his general critique.[95] This speech inspired though our measurement of the extent and nature of double hatting in ISDS, presented above in section 3 – namely that 58% of cases were affected by double hatting.[96] The research generated significant attention in social media,[97] a threatened lawsuit against the authors, and reports of discussions amongst arbitrators.[98]

This research was followed in November 2017 by an empirical analysis of ICJ judges double hatting or 'moonlighting' as arbitrators – Sands' second critique above. Bernasconi-Osterwalder and Dietrich Brauch found that (as of July 2017), a sitting ICJ judge had sat as an arbitrator in 10 per cent of all ISDS cases.[99] They discussed the fees involved and noted the potential for conflicts of interest given ISDS involved party

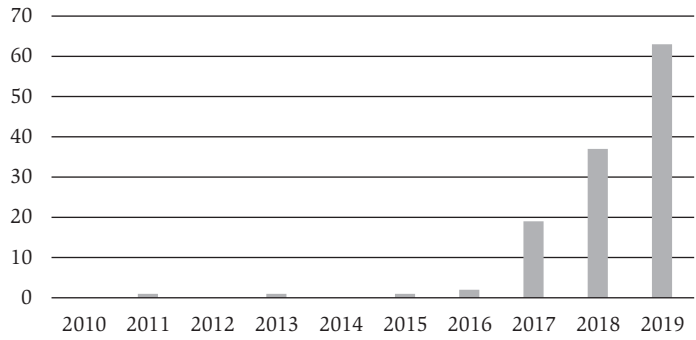
92. Sands, 'Developments in Geopolitics: The End(s) of Judicialization?', *supra* n. 4.
93. *Ibid.*
94. For other critics, *see* references at *supra* n. 9. Double hatting as an expert witness at the same time as acting as arbitrator or legal counsel may also be problematic but requires a more nuanced ethical discussion.
95. Sands, 'Developments in Geopolitics: The End(s) of Judicialization?', *supra* n. 4.
96. Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting', *supra* n. 3; Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', *supra* n. 30.
97. For an overview, *see* https://www.jus.uio.no/pluricourts/english/news-and-events/news/2020/prize-revolving-door.html.
98. Private correspondence from an arbitrator, September 2018.
99. Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, Is 'Moonlighting' a Problem? The Role of ICJ Judges in ISDS, IISD Commentary, November 2017.

appointment. While not focused on double hatting within ISDS, this analysis heightened considerably the discussion of multiple adjudicative roles. It also had a dramatic impact on the ISDS arbitration market – on 25 October 2018 the President of the ICJ President announced an effective ban on judges moonlighting as arbitrators.[100]

3 Diffusion of Critique

The year 2017 arguably marked a turning point for the public discussion and critique of double hatting. In Figure 34.4, I have plotted the references to double hatting and investment arbitration in academic articles registered in Google Scholar. Until June 2017, only three articles can be found. Yet, in the two and half years from that date, 119 academic publications have addressed the topic. The topic has also featured significantly on social media – especially Twitter –[101] and has been the subject of podcasts[102] and addressed in keynote lectures by figures such as the ICSID Secretary-General.

Figure 34.4 Double Hatting and Investment Arbitration: Google Scholar



To be sure, the issue of double hatting in practice has been addressed by other literature with different terminology – e.g., 'dual roles'. However, articles addressing the issue are often cited only after 2016.[103] The exception is Judith Levine's, 'Dealing with Arbitrator 'Issue Conflicts' in International Arbitration' from 2008 which was cited academically ten times before 2017;[104] and Ruth Mackenzie and Phillipe Sands'

100. Marie Davoise, 'Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes', *EJIL:Talk!* 5 November 2018.
101. https://twitter.com/search?q=double-hatting&src=typed_query – scroll down to see posts over a five-year period.
102. Charles N. Brower Lecture on International Dispute Resolution was given at 3:00 p.m., 5 April 2018.
103. *See* Google Scholar citations for Joseph Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication', 26(1) Berkeley Journal of International Law (2008), p. 111; Bernasconi-Osterwalder, Johnson and Marshall, *Arbitrator Independence and Impartiality*, *supra* n. 82.
104. Judith Levine, 'Dealing with Arbitrator "Issue Conflicts" in International Arbitration' 61 Dispute Resolution Journal (2006), p. 60.

'International Courts and Tribunals and the Independence of the International Judge', from 2003 which was cited fifteen times before 2017 in an international investment arbitration context.[105]

As foreshadowed, the issue of double hatting subsequently seeped into the two major multilateral reform processes: the development of new ICSID rules and the UNCITRAL WG III investment arbitration reform process. In August 2018, the issue of double hatting was addressed in the first iteration of the Working Paper on Proposals for Amendment of the ICSID Rules. The paper called for an increase in disclosure and transparency so that conflicts of interest could be dealt with on a case-by-case basis, but the issue was partly deferred due to the emerging UNCITRAL discussions.[106]

In the UNCITRAL WG III process, double hatting was not identified in the opening session in October 2017. However, in the following session in April 2018, double hatting was explicitly mentioned by the Government of Thailand in its written submission: It noted specifically the possibility of conflict of interests and a weakening of sociological legitimacy in ISDS.[107] The matter was discussed by states and the sessional report of the working group read similarly to the initial conclusions in the ICSID process.[108] Delegates debated the potential for 'actual and perceived conflicts of interests' although some noted counterarguments for double hatting such as allowing

105. Ruth Mackenzie and Phillipe Sands, 'International Courts and Tribunals and the Independence of the International Judge', 44 Harvard International Law Journal (2003), p. 271.

106. ICSID, *Volume 3: Proposals for Amendment of the ICSID Rules – Working Paper*, August 2018, paras 302-305. ['The WP therefore does not take a position on double-hatting, and leaves this for the joint ICSID–UNCITRAL discussions. However, the proposed rules do require greater disclosure and provide a better basis to assess whether a conflict exists in fact. The disclosure of additional information regarding an arbitrator's other roles proposed in the declaration would enhance transparency and enable the parties to consider potential conflicts of interest deriving from double-hatting on a case-by-case basis, and to pursue the available remedies should they choose to do so.']

107. *Possible reform of Investor-State dispute settlement (ISDS), Comments by the Government of Thailand*, UN doc. A/CN.9/WG.III/WP.147. ['Another concern in ISDS is related to arbitrators' possible pre-existing bias due to their repeated appointments on one side of the dispute, and situations of "double-hatting" where the same persons are appointed as counsel and arbitrators in similar disputes. Such situations can bring about conflicts of interests in positions, and undermine the impartiality of arbitrators.']

108. *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session* (New York, 23-27 April 2018), paras 78-81:

> 78. A number of concerns were raised with regard to this topic, often referred to as 'double-hatting'. Statistics provided to the Working Group indicated that the practice was prevalent in ISDS. It was generally noted that the practice posed a number of issues including potential and actual conflict of interest. It was stated that even the appearance of impropriety (for example, suspicion that arbitrators would decide in a manner so as to benefit a party it represented in another dispute) had a negative impact on the perception of legitimacy of ISDS. Some States shared their experience in this regard.
>
> 79. Other observations included that domestic legislation in general did not prohibit double-hatting. It was also noted that 'triple' or even 'quadruple' hatting had been observed in practice, where certain individuals acted as party-appointed experts in certain ISDS cases or advisers to third-party funders. It was consequently suggested that the scope of the issue should be clearly delineated, and that the focus should not be on the practice of double-hatting itself, but rather on the problems that the practice posed (particularly where there was an actual conflict of interest). It was noted that States had attempted to address the question of double-hatting in more recent investment treaties.

'potential arbitrators (entrants) to gain experience of ISDS by acting first as counsel in a number of cases'.[109] In subsequent sessions, the topic gained more attention in the documentary submissions, Secretariat papers, sessional reports, and interventions and discussions by states and observers. As Table 34.2 shows, in 2018 and 2019 up to 50% of the formal documents submitted by the UNCITRAL secretariat or states in the process registered this concern.

Table 34.2 Double Hatting in the UNCITRAL WG III Process: A Document Content Analysis

	No. of Documents	*Documents with 'Double Hatting'*	*Proportion of Documents with Double Hatting (%)*	*No. of Mentions of Double Hatting*
34th Session (2017)	5	0	0	0
35th Session (2018)	5	2	40	8
36th Session (2018)	8	4	50	25
37th Session (2019)	12	6	50	16
38th Session (2019)	11	2	18	19
38th Session – Ext (2020)	4	1	25	1

In the October 2019 session, significant time was devoted to discussing how double hatting could be regulated. A majority of state interventions proposed prohibition, while a minority suggested regulation. The report of the discussion captures this shift from a focus on actual conflict of interests to perceived conflict of interests. At the same time, counterarguments were made by some states and observers – for example, that double hatting may contribute to 'diversity in gender, geography, age group and ethnicity' by 'ensuring an adequate pool of qualified arbitrators'.[110]

> 80. It was noted that, while some data was available, there was also a need to compile additional data and information about the practice for the Working Group to better understand the nature of double-hatting and to consider possible solutions.
>
> 81.There was general agreement that double-hatting to the extent that it created potential or actual conflict of interest was the main issue of concern. The need to balance a number of interests was highlighted, in that possible solutions might involve an element of tension with other issues, such as efforts to expand and diversify the pool of arbitrators. For example, allowing double-hatting might allow potential arbitrators (entrants) to gain experience of ISDS by acting first as counsel in a number of cases. The need for training of potential arbitrators in developing States was again suggested in that regard. From that perspective of inter-connection among different issues, it was said that solutions would require a holistic approach and might need to be of a systemic nature. Another view was that tools such as a code of conduct could address the matter, and that it should not be limited to the functions of arbitrator and counsel but should cover other actors in the field of ISDS, such as experts.

109. *Ibid.*, para. 81.

110. Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019), UN doc. A/CN.9/1004, paras 57-58, as follows:

4 Counter-Backlash

Nonetheless, the critique has not been met with silence. Over the last four years, an increasing mobilization of counterarguments has occurred, which is already clear from the analysis of UNCITRAL WG III discussions above.[111]

First, there is the claim that practically speaking, there is a small pool of investment arbitrators that can sit in these types of arbitrations.[112] This argument was entrenched already in arbitral jurisprudence in 2002 when a tribunal declared the following in an arbitrator challenge:

> It is commonplace knowledge that 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 overlap is not, by itself, sufficient ground for disqualifying an arbitrator.[113]

The statement has seemingly continuing force and was invoked by counsel in 2018 to defend an arbitrator under challenge,[114] and the concern was presented by some states in the October 2019 session of the WG III. Empirically speaking, this argument could only hold for the 1990s. Since then, the potential pool of experienced investment arbitrators has expanded significantly – more than 600 have served in at least one case. While there may be a shortage of qualified adjudicators in other

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> 57. With regard to independence and impartiality, the need to address double-hatting was generally emphasized and statistics were provided. The experience of States in recently concluded investment treaties on how they addressed that matter was shared. It was said that arbitrators, upon appointment, should generally refrain, and be prevented, from acting as counsel or party-appointed expert or witness in any pending or new ISDS cases. Differing views were expressed on the extent to which double-hatting should be regulated and a number of solutions were presented (complete ban, introducing a transitional period after which the arbitrator would be prevented from acting as counsel or expert, limiting the number or type of cases that an arbitrator could take, and requiring declarations). The need to develop a definition and scope of double-hatting was mentioned.
>
> 58.While the necessity of regulating double-hatting was shared, it was also noted that a balance should be sought between restricting double-hatting and ensuring an adequate pool of qualified arbitrators which would also contribute to addressing the lack of diversity in gender, geography, age group and ethnicity. It was also stated that any regulation on double-hatting should not unduly limit parties' autonomy to make appointments.

111. *See* section IV below.
112. On this point, Barton Legum, a prominent counsel and arbitrator based in Paris, has noted that: 'the pool of qualified arbitrators is already "vanishingly small" and that it would be problematic for the users of the arbitration system if efforts were made to exclude all practicing BIT counsel from this pool'. Luke Eric Peterson, 'Arbitrator Decries "Revolving Door" Roles of Lawyers in Investment Treaty Arbitration', *Investment Arbitration Reporter* (25 February 2010).
113. *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) para. 26 (emphasis added).
114. *Raiffeisen Bank International v. Croatia*, ICSID Case No. ARB/17/34, Decision on the Proposal to Disqualify Stanimir Alexandrov, 17 May 2018, para. 59.

fields,[115] investment arbitration is a buyer's market, not a seller's market – appointments are viewed as highly prestigious.[116] Nonetheless, it is interesting that this 'small pool' argument is repeated and restated without reference to the nature of the market.

Second, some leading arbitrators have argued that double hatting is important in developing arbitral expertise. Gary Born has been particularly prominent and controversial in protesting various ISDS reform efforts.[117] As to double hatting, in 2018, he stated, 'I view double hatting – sometimes acting as counsel, other times serving as an arbitrator – as an important strength of the international arbitration system. It makes you better in each of those roles.'[118] Here, Born makes the case that symbolic capital reflects actual capital, although it is not entirely clear why serving simultaneously rather than sequentially is necessarily preferable – besides the question of organization.

Third, some point to the need for transitional arrangements as lawyers move from the legal counsel role to the full-time arbitrator role.[119] Both inside and outside reform processes, arbitral community voices have expressed concern that prohibitions on double hatting might affect the entry of women, younger arbitrators, and arbitrators from developing countries, into arbitral roles.[120] From an economic perspective, it may be fair to permit legal counsel seeking to become full-time arbitrators time and space to carry on their legal counsel practice until there is some guarantee that arbitral appointments will come.[121] This argument, however, probably only holds for a short period of time: once a counsel obtained their first or even second arbitrator appointment, they could desist from accepting future counsel appointments as they ease into a new role. In any case, double hatting has been practised foremost by experienced arbitrators rather than younger counsel in transition.[122] Moreover, the gender gap is mostly driven by the focus on appointing parties on prior experience.[123] From an

115. *Ibid.*, 2.
116. Franck et al., 'International Arbitration: Demographics, Precision and Justice', *supra* n. 26.
117. He recently likened the EU's proposal for a multilateral investment court to the Nazi court-stacking in the 1930s: see https://www.youtube.com/watch?v = VkmMQh4F0PM&t = 8409s.
118. Jenna Greene, 'An International Arbitration Star with NY Roots', New York Law Journal, 14 May 2018 https://www.law.com/newyorklawjournal/2018/05/14/from-hitchhiking-across-africa-to-international-arbitration-star-a-qa-with-wilmers-gary-born-389-30964/?slreturn = 20200125131325.
119. Anthea Roberts, 'A Possible Approach to Transitional Double Hatting in Investor-State Arbitration' *EJIL:Talk!* 31 July 2017, https://www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration/.
120. *See*, *e.g.*, Laura Pereira and Zara Desai, 'A Binding Code of Conduct for Adjudicators in Investor-State Disputes: A Step Forward?', Thomson Reuters Arbitration Blog, 26 May 2020.
121. Legum states: 'I have a lot of sympathy for those who say you need arbitrators with skill and experience. How on earth does somebody get established as an arbitrator if he or she never gets a chance to start? So I think inevitably there has to be some overlap. But there may be a stage in one's career when it becomes sensible to do one thing or the other.' Peterson, *supra* n. 112, 2.
122. If we examine the top twenty-five double hatters according to our index, we do find a group of prominent legal counsel that appear to be merely transitioning from the legal counsel role to the arbitral role – but they are only in a minority.
123. *See* St John et al., *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration*, *supra* n. 31.

empirical perspective, it is possible to equally argue that a reduction in double hatting could increase the participation of female arbitrators, i.e., if it increases the chances for new appointments. In any case, what is important for present purposes is that the argument that double hatting has diversity benefits is increasingly made and appears to have significant resonance in some quarters.

Finally, arbitrators have resisted the automatic conflation of double hatting with conflicts of interest. In practice, there is clearly a wide spectrum of potential conflicts of interest, from clear and substantive conflicts of interest to mere perceptions of conflicts. As Richard Kreindler of Cleary Gottlieb Steen and Hamilton stated during Paris Arbitration Week in 2019: 'There is good double hatting, bad double hatting and innocuous double hatting.'[124] Actual conflicts are present most likely only in a minority of double hatting cases – and so this claim also resonates for many. While critics of double hatting maintain that double hatting still raises issues of perceived legitimacy – which is covered by the International Bar Association (IBA) rules – defenders are anxious to keep the focus on actual conflicts of interest.

V THE EFFECT OF CRITIQUES ON THE INVESTMENT ARBITRATION MARKET

We now turn to the impact of this critique (and counter-critique) on the investment arbitration market, directly and indirectly. As the investment arbitration regime and its reform processes are fragmented, we need to look in different places for the critiques' effects. There is currently no overarching coordinating institution that could facilitate and enforce particular conflict of interest rules. However, in different spheres, it is possible to observe not only the potential impact of diffusion and debate but also the traces of the counter-backlash.

1 Changes in Treaties

First, we see some action from the principals – states – in the investment treaty regime. A new series of treaties and model treaties have included bans on double hatting. Up until 2017, the only treaty to regulate the practice was the newly signed Canada-EU Comprehensive Economic and Trade Agreement (CETA).[125] Article 8.30(1) of CETA stipulates that members of the Tribunal 'shall be independent' and 'upon appointment, they 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.' Moreover, the push by the European Union for a Multilateral Investment Court, also as part of the UNCITRAL WG III process, would definitively rule out double hatting.

Since 2017, there have been several treaty developments. Three can be named. First, in the Chile-Argentina Free Trade Agreement (FTA), double hatting in all its

124. Reported by ICCA, 1 April 2019.
125. EU-Canada Trade Agreement (signed 30 October 2016, entered into force 21 September 2017.

varieties is banned for ISDS;[126] second, the inter-state Commission established under the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) adopted a Code of Conduct for ISDS that expressly bans an arbitrator – once appointed, during the proceedings – from serving as counsel or party-appointed expert or witness in any pending or new investment dispute under the CPTPP or any other international agreement.[127] Finally, in the new Dutch model Bilateral Investment Treaty (2019), there is a new provision on requirements for arbitrators which possesses strong public law overtones and constitutes a strong ban on double hatting. An arbitrator cannot have occupied a counsel position in the five years *before* the dispute:

> The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. The appointing authority shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, which includes environmental and human rights law, international investment law as well as in the resolution of disputes arising under international agreements. *In addition, 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.*[128]

The most significant 'legislative' development though is the new code of conduct that has emerged from the UNCITRAL/ICSID process. In May 2020, the two international organizations distributed the first draft for public comment.[129] Article 6, entitled 'Limit on Multiple Roles', provided as follows:

> 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].

The intent to include a provision of double hatting is clear, but the plethora of double brackets reflected the lack of a concrete consensus amongst states on the degree of regulation. The commentary to the draft provision notes the advantages and disadvantages of the practice.[130] On one hand, 'An outright ban is easier to implement, by simply prohibiting any participation by an individual falling within the scope of the prohibition.'[131] On the other hand, an outright ban 'may exclude a greater number of persons than necessary to avoid conflicts of interest', 'would interfere with the freedom

126. http://www.sice.oas.org/TPD/ARG_CHL/ARG_CHL_e.ASP.
127. Chiara Giorgetti et al., 'Lack of Independence and Impartiality of Arbitrators', 21(1) Journal of World Investment and Trade (2020), pp. 441-474.
128. Article 20.5. Emphasis added. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwiCyqvIqO3nAhUSFpoKHfGlCX8QFjADegQIBhAB&url=https%3A%2F%2Fwww.internetconsultatie.nl%2Finvesteringsakkoorden%2Fdocument%2F3586&usg=AOvVaw0WGUekzZgmfE-febJKw_BM.
129. *Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, ICSID and UNCITRAL May 2020.
130. *Code of Conduct for Adjudicators in Investor-State Dispute Settlement – Annotated*, ICSID and UNCITRAL May 2020.
131. *Ibid.*, para. 67.

of choice of adjudicators and counsel by States and investors',[132] restrict the amount of 'available' expertise,[133] and constrain 'new entrants to the field'.[134] The UNCITRAL and ICSID secretariats note that the latter concern could be addressed by introducing 'a phased approach so that an adjudicator may overlap in a small number of cases at the start of their adjudicator career' but they point out that even this 'is hard to justify if the mere fact of double-hatting is considered as creating a conflict of interest'.[135] They also note that trying to limit the prohibition to cases concerning the actual conflict of interests is extremely difficult in practice.[136]

The range of possible options for regulating double hatting was narrowed though in the second version of the code of conduct, which was launched on 19 April 2021. For international investment disputes (IID), Article 4 provides:

> 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].

This version defers partly to concerns about limiting party autonomy by allowing investors and states in a case to consent to double hatting. However, it otherwise presented states in WG III with a stark choice: prohibition in a very narrow set of situations (actual conflict in cases concerning the same facts or parties) or a simple outright prohibition (if the text in the square brackets is deleted).

Following in-depth and sustained discussions at subsequent WG III sessions in November 2021,[137] a further revised version was produced in March 2022 for public discussion. The substantially revised Article 4 applies firstly to arbitrators, as follows:

> 1. Unless the disputing parties agree otherwise, an Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:
>
> (a) The same measures;
> (b) The same or related parties; or
> (c) The same provisions of the same treaty.
>
> 2. An Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are substantially so similar that accepting such a role would create the appearance of a lack of independence or impartiality.

132. *Ibid.*, para. 68.
133. *Ibid.*, para. 69.
134. *Ibid.*, para. 68.
135. *Ibid.*
136. *Ibid.*, para. 72. ['Should it only apply when the same parties are present; when the same facts are addressed; when the same legal issues arise; or when a combination of these factors are present? In terms of legal instruments, should it include all international disputes, or only those pursuant to the same treaties?']
137. *See*: *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session* (Vienna, 15-19 November 2021), UN doc. A/CN.9/1086, paras 86-107.

The text is essentially a compromise between states who wished for an outright ban, an outright ban in a wide range of situations, and mere disclosure. Article 4(1) now contains an automatic ban (for contemporaneous and potentially historical double hatting) for cases in which there is a clear overlap: the same measures, parties, and treaty provisions. Moreover, as per Article 4(2), the presence of similar legal issues can attract the prohibition but the provision is nuanced when compared to the original proposal, by placing emphasis on the need for 'substantial' similarity and a clear perceived conflict of interest. Article 4 then goes on to provide a clear ban on judges in an eventual permanent ISDS mechanism.[138] However, dissensus remains, as states in September 2022 diverged on the need for a cooling off period and whether Article 4(2) should be retained – with some states arguing it was covered by Article 3 on independence and impartiality.[139]

Examining these treaty and reform developments so far, it is clear that regulation is on its way, but the extent of imposition of actual restrictions, or their direct effect, will only be clear at some point in the future when the code of conduct is adopted and mainstreamed. So far what the above developments contribute most to is arguably a strengthening of the critical discourse – and thus pressure on arbitrators. It is this effect to which we now turn.

2 Self-Regulation

The second impact of the critique is the reaction from the agents – arbitrators – in the form of self-regulation. There may be strong motives for arbitrators to evolve their behaviour in response to external signals.

The principal prism through which to understand and model such behaviour is within *rational choice* theory, whereby adjudicators seek to optimize their goals within a constrained context.[140] For investment treaty arbitrators, a strategic account would

138. '3. Judges shall not exercise any political or administrative function. They shall not engage in any other occupation of a professional nature which is incompatible with their obligation of independence or impartiality or with the demands of a full-time office. In particular, they shall not act as a legal representative or expert witness in another IID proceeding.

4. Judges shall declare any other function or occupation to the [President] of the standing mechanism and any question on the application of paragraph 1 shall be settled by the decision of the standing mechanism.

5. Former Judges shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which they had dealt with, before the end of their term of office.

6. As regards an IID proceeding initiated after their term of office, former judges shall not act as a legal representative of a disputing party or third party in any capacity in proceedings before the standing mechanism within a period of three years following the end of their term of office.'

139. *See Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session* (Vienna, 5-16 September 2022), UN doc. A/CN.9/1124, paras 232-246. *See also* discussion in Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reform: What to Expect When You're Expecting', *EJIL:Talk!*, 5 October 2022, available at https://www.ejiltalk.org/uncitral-and-isds-reform-what-to-expect-when-youre-expecting/.

140. Adjudicators: (1) may hold diverse preferences that extend beyond political ideology or good lawyering; (2) 'take into account the preferences and likely actions of other relevant actors,

imply that a behavioural correction in response to legitimacy critiques could forestall certain material and reputational 'costs', such as greater non-compliance by respondent states and exits from the regime or damage to *individual* reputation and chances of future appointment.[141] A sizeable sample of arbitrators themselves have acknowledged that they engage in strategic behaviour when writing decisions.[142] The concern of some in the arbitral community with the critique of double hatting is apparent, if not palpable.[143]

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including their colleagues, elected officials, and the public;' and (3) operate in a 'complex institutional environment' that structures this interaction. *See* Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences' 16 Annual Review of Political Science (2013), p. 11, at p. 11. On diverse goals, *see* in particular Laurence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (2008). Evidence from various domestic jurisdictions suggests that judges are strategically sensitive to signals from the executive and legislature: *See*, *e.g.*, Juan Carlos Rodriguez-Rada, 'Strategic Deference in the Colombian Constitutional Court, 1992-2006' in Gretchen Helmke and Julio Rios-Figueroa (eds) *Courts in Latin America* (2011) 81-98; Diana Kapiszewski, 'Tactical Balancing: High Court Decision Making on Politically Crucial Cases' 45 Law and Society Review (2011), p. 471; Epstein and Knight, *ibid*. although the scholarship is divided on the extent of this shift. Compare, e.g., M. Bergara, B. Richman and P. Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint', 28(2) Legislative Studies Quarterly (2003), p. 247 with Segal, *ibid*. As to public opinion, there is consensus that it has an *indirect* influence on judgments though judicial appointments but is divided over whether it exerts a *direct* influence on judges. Roy Flemming and Dan Wood, 'The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods', 41 American Journal of Political Science (1997), pp. 468, 480. *See also* Barry Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); Lee Epstein and A. Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)', 13 University of Pennsylvania Journal of Constitutional Law (2010) pp. 263, 270; Isaac Unah, Kristin Rosano and K. Milam, 'U.S. Supreme Court Justices and Public Mood', 30 Journal of Law and Politics (2015), p. 293. At the international level, empirical and doctrinal scholarship suggests that the Court of Justice of the EU (CJEU) and the WTO dispute settlement body are sensitive to the balance and composition of member state opinion within institutional constraints: Olof Larsson and Daniel Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU', 70(2) *International Organisation* (2016), pp. 377-408; M. Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (2003); Cosette Creamer, 'Between the Letter of the Law and the Demands of Politics: The Judicial Balancing of Trade Authority within the WTO' *Working Paper* (2015).

141. Studies of domestic judges that are subject to reappointment processes reveal higher levels of strategic behaviour amongst this group. *See* Ilana Lifshitz and Stefanie Lindquist, 'The Judicial Behavior of State Supreme Court Judges', *APSA 2011 Annual Meeting Paper* (2011). For a study of investment arbitrators' strategic considerations, *see* Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?', 29(2) European Journal of International Law (2018), p. 551.
142. In a recent survey, 262 international arbitrators, which included a subset of 67 with experience in ITA, S. Franck et al., 'International Arbitration: Demographics, Precision and Justice' *ICCA Congress Series No 18, Legitimacy: Myths, Realilities, Challenges* (2015), p. 33. They were asked whether they considered future reappointment when deciding cases. A remarkable 42% agreed or were ambivalent. Given the sensitive nature of the question, it is arguable that this figure is understated.
143. We received a threat of legal action from one arbitrator, describing our index as a form of defamation with commercial and reputational consequences. The arbitrator challenged the methodology and data selection, demanded a retraction of the articles, and a formal written apology.

These strategic predictions may be also enhanced by a logic of appropriateness: sociological forces.[144] The theory of *discursive institutionalism* proposes that discourse (such as the legitimacy crisis) may shape the preferences of judicial agents[145] and the space in which they communicate and justify their actions.[146] Arbitrators may thus simply adapt to a new culture of appointments – a new social norm – and view double hatting in morally pejorative terms.

The reasons for such self-regulation, however, are not the central point here. They merely provide some background justification for why we might expect a change in the arbitration market. The key question here is descriptive: Do we see such a shift?

Table 34.3 New and Arbitral and Counsel Activities of Selected ISDS Arbitrators

	Double-Hatting Index 2012-2016					*New Cases as Arbitrator*			*New Cases as Counsel*		
	2012	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*	*2019*	*2017*	*2018*	*2019*
Gaillard	X	X	X	X	X	1	0	0	1	1	
Paulsson	X	X	X	X	X	1	2	1	0	0	0
Crawford	X	X	X	X		0	1	0	0	0	0
Price	X	X	X	X	X	0	1	0	0	0	0
Volterra	X	X	X	X	X	1	1	0	3	2	*[147]
Feliciano	X	X	X	X	Passed away	n.a	n.a	n.a	n.a.	n.a.	n.a.
Schwebel	X	X				0	0	0	0	0	0
Alexandrov	X	X	X	X	X	13	7	2	0	0	0
Schwartz	X	X		X	X	0	0	0	0	0	0
Douglas	X	X	X	X	X	4	6	1	0	0	0
Greenwood	X	X				4	2	0	0	0	0

In an attempt to provide a first look at the possible change, I have tracked the activities of those in our prior top 10 double hatting list plus one arbitrator/counsel (Christopher Greenwood) who has become active again in the arbitration market after a period on the ICJ. Table 34.3 presents whether they received a yearly score in the five years before 2017 and then new appointments as arbitrators and counsel. The data is based on publicly available ISDS documents now incorporated in PITAD as well as searches of the online websites of the arbitrators to locate missing cases. This is complemented in Table 34.4 by a closer look at the types of arbitral and counsel work in the period 2017-2019, and the extent to which cases concern finalization.

144. On this empirical conundrum, *see* A. Gilles, 'Reputational Concerns and the Emergence of Oil Sector Transparency as an International Norm', 54 *International Studies Quarterly* (2010), p. 103.
145. V. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse', 11 *Annual Review of Political Science* (2008), pp. 303, 304.
146. Schmidt, *supra* n. 85, 304.
147. Note that there is some uncertainty over the new counsel cases by Volterra.

Table 34.4 Finished Versus Pending Cases for Selected Arbitrators 2017-2019

	Finished Cases as Arbitrator			*Pending Cases as Arbitrator*	*Finished Cases as Counsel*			*Pending Cases as Counsel*
	2017	*2018*	*2019*	*As at 2019*	*2017*	*2018*	*2019*	*As at 2019*
Gaillard	1	0	0	2	3	0	0	3
Paulsson	1	0	0	5	0	1	1	1
Crawford	2	0	0	5	0	1	1	0
Price	1	1	0	1	0	0	0	0
Volterra	2	0	1	3	1	0	0	5*
Feliciano	1	n.a.	n.a.	0	1	0	0	0
Schwebel	2	0	0	0	0	0	0	0
Alexandrov	2	5	3	31	3	0	0	0
Schwartz	0	0	0	6	0	0	0	0
Douglas	1	4	1	21	0	0	0	1
Greenwood	0	1	5	10	0	0	0	0

The above data allows us to initially sketch four groups or 'types' amongst this previously rather homogenous group. First, some arbitrators have ceased arbitral practice due to retirement, illness or death (Price, Feliciano, Schwebel) making it difficult to judge the effect of the new critique on them. Second, some arbitrators were forced to give up both arbitral and counsel work as ICJ judges (Crawford), mostly because of double hatting critique against ICJ judges acting as arbitrators and the new prohibition imposed in 2018. Third, and directly on point, some arbitrators have maintained or dramatically increased arbitral work but have not taken up new counsel work (Greenwood, Douglas, Alexandrov, and Schwartz). Examining the websites of Greenwood, Douglas, and Schwartz there appears to be an attempt to signal that they only act as arbitrators. Greenwood joined an arbitrator's practice in 2018 and Douglas's only current case as counsel is not especially visible. Schwartz left, however, King and Spaulding for an arbitral-centric practice earlier than Alexandrov – the former in 2016, the latter in August 2017. Fourth, some arbitrators seem to care little about the critique. Gaillard and Volterra also took up new cases as counsel.

This preliminary overview of changes in double hatting practice suggests that the critique is potentially having an influence. We see a clear change for four of the six arbitrators who could make a clear choice. However, how far this extends to the remainder of the arbitral field is the subject of an ongoing research project. On one hand, the arbitrator who has spoken in favour of double hatting, Gary Born, continues to take some cases as counsel. On the other hand, given the decrease in double hatting by some very active arbitrators, the overall level of the phenomenon has significantly decreased.

3 State Challenges

Finally, it is important to examine whether states – as litigants rather than principals – have begun to more regularly ***challenge*** double hatting in arbitral proceedings.[148] An initial review indicates that there has not been an increase, but this may be also because the practice is declining or arbitrators are avoiding the possibility of a challenge by declining a counsel role. Instead, we have seen accompanying or related challenges on appointment by the same party and connections through law firms. Moreover, it is not clear how much can be taken from the existence or not of arbitrator challenges. Some authors have argued that because the rules are so vague and the jurisprudence on double hatting unsettled that it is difficult for parties to challenge the practice.[149]

VI CONCLUSIONS: A CHANGING MARKET

The above discussion indicates that recent critiques of double hatting have diffused broadly and, as this preliminary analysis shows,[150] it appears to have had some impact on treaty and arbitral practice. The extent and speed of the impact can be clearly debated, especially as previous studies reveal that the decentralized system of ISDS adjusts more slowly to backlash than the centralized trade adjudication system of the WTO.[151] Although the ongoing reform discussions and new treaty negotiations are likely to facilitate further adaptation, this reform process will not be complete until 2026, or later.[152]

The main point of this paper, however, is to highlight the potentially changing sociology of appointment – whatever its speed and scale – through the impact of public law critiques of international investment arbitration. The case of double hatting is just one example amongst others but it usefully points to the need to revisit the two dominant sociological theories of appointment.

On the demand side of the investment arbitration market, it is arguable that the form or content of symbolic capital is potentially undergoing a change. Double hatting may no longer be viewed as a form of prestige and element for those seeing new appointments. Indeed, it is possible that the absence of double hatting – a classical public law norm – may now better signal the 'impartiality' desired by clients and their lawyers. Such a change is potentially representative of a broader change in, at least,

148. Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, 'Backlash and State Strategies in International Investment Law', in Thoma Gammeltoft-Hansen and Tanja Aalberts (eds), *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (2018), Ch. 4.
149. Bernasconi-Osterwalder, Johnson and Marshall, *Arbitrator Independence and Impartiality*, *supra* n. 82.
150. A comprehensive analysis of the trends in double hatting across all arbitrators is currently underway at PluriCourts.
151. Malcolm Langford, Cosette Creamer and Daniel Behn, 'Regime Responsiveness in International Economic Disputes', in Szilárd Gáspár-Szilágyi, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (CUP 2020), p. 244.
152. Roberts and St John, *supra* n. 139.

state preferences for arbitral capital. For example, in the UNCITRAL WG III, there is a strong push for ensuring that adjudicators have sufficient competence in 'public' international law, with no strong focus on relevant commercial experience.

On the supply side, it has been argued that the decline of double hatting reduces insider advantages. This provides more power to the 'non-double-hatters' to shape the culture of appointments and flows of information. To be sure, this does not reduce necessarily the power of the broader club of lawyers who are instrumental in appointments: Lie has charted the close links between some law firms and certain arbitrators in appointment processes.[153] However, a reduction in double hatting reduces the direct opportunities for arbitrators to engage in anti-competitive behaviour. Moreover, combined with the emergence of other public law norms – including greater scrutiny of repeat appointments by law firms – means that the investment arbitration market may be less affected by insider behaviour.

In this respect, we see potentially a new 'moral economy' in the investment arbitration market emerging. The concept has been defined as follows:

> The moral economy embodies norms and sentiments regarding the responsibilities and rights of individuals and institutions with respect to others. These norms and sentiments go beyond matters of justice and equality to conceptions of the good; for example, regarding needs and the ends of economic activity.[154]

In our case, we can identify the gradual infusion of moral capital on the demand side and the space for moral guardians on the supply side. Actors can now use new forms of capital, in this case, moral capital, to signal authority and cast doubt on others. A potentially paradoxical result is that the changing market creates new strategic incentives to 'act moral' or 'appear moral' in order to obtain appointments. If one is concerned with moral norms, this is a very good result. Although given the counter-backlash, this new symbolic capital may be in the eye of the beholder. In any case, the emergence of a new moral economy sharpens our attention on the way in which the arbitration market may be changing.

153. Lie, 'The Influence of Law Firms in Investment Arbitration', *supra* n. 9.
154. Andrew Sayer, 'Moral Economy and Political Economy', 61(1) *Studies in Political Economy* (2000), pp. 79-103, at p. 79.