Canada's Pro-Ban Stance on Double-Hatting: Playing the Long Game in ISDS Reform?

La position du Canada en faveur d'une interdiction de la "double casquette" reflète-t-elle une vision à long terme de la réforme du RDIE?

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Abstract

The practice of arbitrators and counsel in investor-state dispute settlement (ISDS) cases simultaneously playing both roles — known as "double-hatting" — has been the subject of much controversy in recent debates on ISDS reform, notably, at the United Nations Commission on International Trade Law's (UNCITRAL) Working Group III where a *Draft Code of Conduct for Adjudicators in International Investment Disputes* is under discussion. While Canada has been less than consistent in its approaches to ISDS in recent international investment agreements (IIAs), its position against double-hatting has been rather constant. This article explores whether this stance reveals a commitment on the part of Canada towards increased judicialization of ISDS or reflects a "flavour of the month" reform likely to change with differing IIAs and negotiating partners. Analysis of Canada's recent IIA practices, including its model *Foreign Investment Promotion and Protection Agreement*, released in May 2021, and the positions it has taken at UNCITRAL's Working Group III, lead the author to conclude that Canada appears

Résumé

La pratique souvent qualifiée de "double casquette," soit lorsque des arbitres et des avocats/plaideurs agissent simultanément à ces deux titres dans le cadre de procédures de règlement des différends entre investisseurs et États (RDIE), a fait l'objet de controverses multiples au cours des débats portant sur la réforme du RDIE, notamment durant les discussions sur un *Projet de Code de conduite pour les personnes appelées à trancher des différends internationaux d'investisssement* se tenant actuellement au sein du Groupe de travail III de la Commission des Nations Unies pour le droit commercial international (CNUDCI). Bien que l'approche du Canada concernant le RDIE dans ses récents traités d'investissement international ne fasse preuve que de peu de cohérence, sa position en faveur d'une interdiction de la double casquette est plutôt constante. Cet article explore la question suivante: cette position révèle-t-elle un engagement de la part du Canada envers une judiciarisation accrue du RDIE ou reflète-t-elle plutôt une réforme "au goût du jour," susceptible de varier selon les traités ou les partenaires de négociations?

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committed to increased judicialization of ISDS in the long run.

L'analyse des pratiques récentes du Canada dans ses traités d'investissement international, y compris le *Modèle d'Accord sur la promotion et la protection des investissements étrangers* datant de mai 2021, et les positions prises par le Canada au Groupe de travail III de la CNUDCI, mènent l'auteure à la conclusion que le Canada semble engagé à long terme envers une judiciarisation accrue du RDIE.

Keywords: Code of Conduct for Adjudicators in International Investment Disputes; double-hatting; foreign investment promotion and protection agreements; international investment agreements; investor-state dispute settlement; ISDS reform.

Mots-clés: Accords sur la promotion et la protection des investissements étrangers; *Code de conduite pour les personnes appelées à trancher des différends entre investisseurs et États*; double casquette; réforme du RDIE; règlement des différends entre investisseurs et États; traités d'investissement.

Introduction

The reform of the arbitration-based investor-state dispute settlement (ISDS) system has been a topic of discussions and heated debates for many years. In 2017, the United Nations Commission on International Trade Law's (UNCITRAL) Working Group III was given a broad mandate to work on the possible reform of ISDS.[1] Canada has been an active participant in these discussions and a consistent proponent (along with the European Union (EU)) of the creation of a multilateral investment court (MIC).[2]

Yet, in its international investment agreements (IIA) practice, Canada has adopted or signed on to a variety of models in the last five years ranging from a judicialized system in the *Canada-European Union Comprehensive Economic and Trade Agreement* (*CETA*),[3] to an improved arbitration-based ISDS system in

[1] The United Nations Commission on International Trade Law's (UNCITRAL) Working Group III webpage includes all available documents from 2017 to the present. See UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform," online: <uncitral.un.org/en/working_groups/3/investor-state>.

[2] See e.g. Damien Charlotin & Lisa Bohmer, "UNCITRAL Working Papers on Appeal Mechanism and Selection and Appointment of ISDS Adjudicators Reveal Rift between Parties as to Desirability of Standing Investor-State Dispute Settlement Body," *Investment Arbitration Reporter* (14 January 2021).

[3] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, ch 8, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng> (provisionally applied 21 September 2017) [*CETA*].

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the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (*CPTPP*),[4] to an absence of ISDS, as exists between Canada and the United States in the *Canada-United States-Mexico Agreement* (*CUSMA*).[5] In its recently released *Foreign Investment Promotion and Protection Agreement (FIPA) Model* (*2021 FIPA Model*),[6] Canada offers confirmation that it is not moving away from traditional or arbitration-based ISDS — in the short term at least.

While the circumstances of each negotiation and the identity of negotiating partners can explain to a degree the varied outcomes in recent Canadian IIAs,[7] the long-term objective of a MIC implies a paradigm shift away from traditional arbitration towards the judicialization of dispute resolution. For international courts, judicialization is often reflected in state-driven appointments of judges, fixed tenures, and full-time positions, which all seek to promote the independence of the court and of its judges.[8] One corollary is the prohibition on judges from playing other roles concurrently, such as counsel or witness.[9] In the debates over ISDS reform, this practice is most often referred to as "double-hatting," "role confusion," or an instance of "revolving doors."[10] It has come to the fore in the workings of UNCITRAL's Working Group III on a *Draft Code of Conduct for Adjudicators*, which would in

[4] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, ch 9, consolidated text online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/09.aspx?lang=eng> (entered into force 30 December 2018) [*CPTPP*].

[5] *Canada-United States-Mexico Agreement*, 30 November 2018, ch 14, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/14.aspx?lang=eng> (entered into force 1 July 2020) [*CUSMA*]. Under Annex 14-C, legacy investment claims are still possible for a period of three years after the entry into force of *CUSMA* (see art 3).

[6] *Foreign Investment Promotion and Protection Agreement (FIPA) Model*, 2021, released 13 May 2021, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng> [*2021 FIPA Model*].

[7] See David A Gantz, "Canada's Approaches to Investor State Dispute Settlement: Addressing Divergencies among CETA, USMCA, CPTPP and the Canada-China FIPA" (2020) 17:3 Transnational Dispute Management 1.

[8] See e.g. Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge" (2003) 44:1 Harv Intl LJ 271; Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, *Selecting International Judges: Principle, Process and Politics* (Oxford: Oxford University Press, 2010).

[9] See Mackenzie & Sands, *supra* note 8 at 280–83.

[10] See e.g. International Centre for Settlement of Investment Disputes (ICSID), *Code of Conduct: Background Papers, Double-Hatting* (undated) at 1, online: <icsid.worldbank.org/sites/default/files/Background_Papers_Double-Hatting_(final)_2021.02.25.pdf> [ICSID, *Double-Hatting Background Paper*]; Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) J Intl Economic L 1 [Langford, Behn & Lie, "Revolving Door"].

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principle apply to both arbitrators and judges called upon to rule on treaty-based investment disputes.[11]

This article focuses on "double-hatting," which is defined here as the practice of one individual acting simultaneously as an international arbitrator and as counsel in separate ISDS proceedings.[12] While other overlaps exist (such as between arbitrator and expert or witness), most controversies have centred on the roles of counsel and arbitrator. In the discussions on the *Draft Code of Conduct for Adjudicators*, Canada is on record as being in favour of a prohibition (or ban) on double-hatting for both judges and arbitrators.[13] Regarding the latter, Canada has stated: "The practice of adjudicators acting in multiple often incompatible roles creates an appearance of bias that undermines the legitimacy of ISDS arbitration."[14] Not surprisingly, other states and observers (especially those representing lawyers groups) at Working Group III are opposed to a ban because it may undermine party autonomy in arbitral appointments and limit the pool of arbitrators.[15] It is noteworthy that Canada's pro-ban stance on double-hatting is a position on which it has been largely consistent in its recent IIAs. *CETA* was the first IIA Canada signed, in October 2016, that included a prohibition on double-hatting.[16] In 2019, the *CPTPP* Commission adopted a *Code of Conduct for Investor-State Dispute Settlement* that also includes a ban on double-hatting.[17] The *2021 FIPA Model* also includes such a prohibition.[18]

[11] See UNCITRAL/ICSID Secretariats, *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement* (with commentary), version 1 (May 2020), online: <uncitral.un.org/en/codeofconduct> [*Draft Code of Conduct for Adjudicators*].

[12] See e.g. ICSID, *Double-Hatting Background Paper*, *supra* note 10 at 1.

[13] UNCITRAL/ICSID Secretariats, *Draft Code of Conduct, Comments by Article and Topic* (14 January 2021) at 114, para 22 (comments by Canada), online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_-_comments_by_article_-_update_01.14.21.pdf> [UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*]. For all comments made by Canada on version 1 of the *Draft Code of Conduct for Adjudicators*, see UNCITRAL/ICSID Secretariats, *Draft Code of Conduct, Comments by State/Commenter* (14 January 2021) at 12-19, online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/code_of_conduct_-_comments_by_state-commenter_-_updated_01.14.21.pdf>.

[14] UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13.

[15] Discussed further below.

[16] *CETA*, *supra* note 3, art 8.30(1). It should be noted that *CETA*'s Investment Court System (ICS) is not in force yet.

[17] *CPTTP* Commission, *Code of Conduct for Investor-State Dispute Settlement under Chapter 9 Section B (Investor-State Dispute Settlement) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (19 January 2019), online <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/isds_code_conduct-rdei_code_conduite.aspx?lang=eng> [*CPTPP Code of Conduct*].

[18] *2021 FIPA Model*, *supra* note 6, art 30(6), *Arbitrator Code of Conduct for Dispute Settlement*, art 3(4).

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The goal of this article is to analyze whether Canada's pro-ban stance on double-hatting reflects its commitment to a long view of ISDS reform that will lead inevitably towards judicialization or whether it is a "flavour of the month" ISDS reform that will likely change with differing IIAs and negotiating partners. In other words, is Canada playing the long game or playing the field in ISDS reform? The first part of this article will explore concerns with double-hatting in ISDS and its prevalence. The second part will analyze the pros and cons of a prohibition on double-hatting, highlighting what the arguments reveal about the different paradigms related to arbitral and judicial decision-making. A ban's impact on the diversity of adjudicators will also be discussed in this respect. The third part will analyze Canada's recent treaty practice, focusing on the language used to ascertain its long-term commitment to a judicial model of investment dispute resolution. Canada's position *vis-à-vis* the *Draft Code of Conduct for Adjudicators* will be surveyed with respect to double-hatting to validate (or not) that commitment.

Double-Hatting: Concerns and Prevalence in ISDS

The practice of double-hatting has come under heavy criticism in Europe, especially in the lead up to the negotiations of the *Transatlantic Trade and Investment Partnership* (*TTIP*) between the EU and the United States.[19] However, double-hatting had already been a target of criticism, including from academics and judges. Philippe Sands, a professor who also acts as an ISDS arbitrator, is often cited for his long-standing opposition to double-hatting. One of his illustrations of the ills of the practice strikes at one key concern, which is the appearance of bias:

> [I]t is possible to recognise the difficulty that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel? The issue is not whether she thinks it can be done, but whether a reasonable observer would so conclude. Speaking for myself, I find it difficult to imagine

[19] See e.g. Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom*, Corporate Europe Observatory and the Transnational Institute, Brussels/Amsterdam (November 2012), online: <www.tni.org/files/download/profitingfrominjustice.pdf>. Under the heading "The Hidden Agenda behind the Multiple Roles of Arbitrators," the report states that "[i]t has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as a government representative or expert witness" (at 43). For a reference to the halted *Transatlantic Trade and Investment Partnership* (*TTIP*) negotiations and double-hatting, see *infra* note 85.

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> that I could do so without, in some way, potentially being seen to run the risk of allowing myself to be influenced, however subconsciously.[20]

Rusty Park, also a professor who acts as an arbitrator in both commercial and investment arbitrations, similarly voiced early on the concern that such situations might compromise the integrity of the arbitral process (including instances where an arbitrator could be influenced by his or her position while acting as counsel in another case). As such, he identified both "issue conflict" and "role confusion" (its sibling) as representing special forms of pre-judgment.[21] Suffice to say for our purposes that, while they are different concepts, they overlap in some situations.[22]

After the first challenge decisions regarding double-hatting in ISDS began to come out in the mid-2000s, Thomas Buergenthal, then a judge at the International Court of Justice, criticized the fact that some conflict-of-interest issues were paid insufficient attention and opined that the practice of double-hatting raised rule-of-law issues.[23] In his view, arbitrators and counsel should have to make a choice as to which role they play (at least for a specified period of time): "That is necessary, in my opinion, in order to ensure that an arbitrator will not be tempted, consciously or unconsciously,

[20] Philippe Sands, "Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel" in A Rovine, ed, *Contemporary Issues in International Arbitration and Mediation* (Boston: Martinus Nijhoff, 2013) at 31–32 [Sands, "Conflict and Conflicts"]. See also Philippe Sands, "Reflections on International Judicialization" (2017) 27 EJIL 885. For earlier concerns expressed by Sands regarding international adjudicators playing multiples roles and issue conflict, see e.g. Mackenzie & Sands, *supra* note 8 at 280–83.

[21] WR Park, "Arbitrator Integrity: The Transient and the Permanent" (2009) 46 San Diego L Rev 629 at 648. See also Nassib G Ziadé, "How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?" (2009) ICSID Rev – Foreign Investment LJ 49 at 49–50, who treats instances of arbitrator counsel double-hatting under the concept of issue conflicts.

[22] In the initial *Draft Code of Conduct for Adjudicators*, *supra* note 11, some of the questions related to issue conflict are addressed under Article 5: Conflicts of Interest: Disclosure Obligations. The May 2020 commentary to the draft code states that "[i]ssue conflict may exist when an adjudicator has taken a position on a legal matter relevant to the case or has prior factual knowledge relevant to the dispute at hand" (at 15, para 59). In this context, it refers primarily to prior publications and speeches. See also International Council for Commercial Arbitration, *Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration*, ICCA Reports No 3 (17 March 2016). While the task force did not come up with a unique definition of issue conflict (namely, for lack of consensus in and outside the task force), the introduction to the report does refer to the fact that "[a]rbitral institutions face a growing number of challenges to disqualify arbitrators on the ground of 'issue conflict,' an allegation that an arbitrator is biased towards a particular view of certain issues or has already prejudged them" (at 1) [internal note omitted].

[23] Thomas Buergenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22:4 Arbitration International 495.

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to seek to obtain a result in an arbitral decision that might advance the interests of a client in a case he or she is handling as counsel."[24]

It should be noted that neither the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*ICSID Convention*),[25] the International Centre for Settlement of Investment Disputes' (ICSID) *Rules of Procedure for Arbitration Proceedings* (*ICSID Arbitration Rules*),[26] nor the *UNCITRAL Arbitration Rules*[27] directly address double-hatting. Both sets of rules, however, require an arbitrator's independence and impartiality.[28] In each case, not only are actual conflicts covered but also the appearance of dependence or bias.[29] Thus, under the arbitration rules most often used in ISDS cases, concerns with double-hatting are addressed primarily via their challenge system. Soft law instruments such as the International Bar Association's *Guidelines on Conflict of Interest in International Arbitration* also play a role.[30] Indeed, some of the situations listed in the Orange List in these guidelines (that is, situations to be disclosed, waivable) could constitute "double-hatting."[31]

[24] *Ibid* at 498.

[25] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*].

[26] ICSID, *Rules of Procedure for Arbitration Proceedings* (2006), online: <icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> at 99 [*ICSID Arbitration Rules*].

[27] UNCITRAL, *UNCITRAL Arbitration Rules* (2010), online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> [*UNCITRAL Arbitration Rules*].

[28] See *ibid*, art 11; *ICSID Convention*, *supra* note 25, art 14(1); *ICSID Arbitration Rules*, *supra* note 26, rule 6(2). While the standards are worded differently, there is general agreement that they encompass both independence and impartiality requirements. See e.g. UNCITRAL, Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS*, Note by the Secretariat, Doc A/CN.9/WG.III/WP.151 (30 August 2018) at 5, n 5, online <undocs.org/en/A/CN.9/WG.III/WP.151> [UNCITRAL, *Independence and Impartiality*].

[29] UNCITRAL, *Independence and Impartiality*, *supra* note 28 at 14.

[30] International Bar Association (IBA), *Guidelines on Conflict of Interest in International Arbitration* (23 October 2014). On conflicts of interest, the guidelines at Part I(2)(c) provide for an objective test of justifiable doubts: "Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision." ICSID, *Double-Hatting Background Paper*, *supra* note 10 at 10, notes that the IBA guidelines are cited extensively in cases involving double-hatting. See also John R Crook, "Dual Hats and Arbitrator Diversity: Goals in Tension" in *Symposium: A Focus on Ethics in International Courts and Tribunals, AJIL Unbound* (2019) at 286.

[31] IBA, *supra* note 30, Part II, Practical Application of the General Standards, provides that "[t]he Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's

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Challenge decisions from the early 2000s illustrate some of the concerns with the practice as well as some of the limitations of the current challenge system. In *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, the claimant challenged the arbitrator appointed by the respondent on the ground that "there is a clear relationship of dependency" between the arbitrator appointed by Pakistan and the counsel for Pakistan.[32] The challenge came after the said arbitrator disclosed to the parties that his law firm (and he himself) were acting as counsel for another state (Mexico) under a continuing retainer and, later, that Mexico had agreed to the appointment of counsel for Pakistan as president of the tribunal in an arbitration under the *North American Free Trade Agreement* (*NAFTA*).[33] Further, the claimant noted that the arbitrator was also representing Mexico in another *NAFTA* arbitration where Pakistan's counsel was the presiding arbitrator and the case was resolved in favour of Mexico. The arbitrator firmly rejected the suggestion that he may feel indebted to counsel for Pakistan in the present case.

As provided under the *ICSID Convention*, the two remaining arbitrators rendered the decision on the challenge[34] and decided not to disqualify the arbitrator. In a nutshell, the arbitrators believed the challenge was founded on suppositions and not on facts.[35] Of particular interest is their statement regarding the normalcy of double-hatting in international commercial arbitration:

> 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 an overlap is not, by itself, sufficient ground for disqualifying an arbitrator. Something more must be shown if a challenge is to succeed. In the instant case, that "something more" has not been shown by the Claimant.[36]

In 2004, the District Court of The Hague (the seat of the arbitration) ruled on a challenge to an arbitrator under the *UNCITRAL Arbitration Rules*. These

impartiality or independence" (at para 3). See also ICSID, *Double-Hatting Background Paper*, *supra* note 10 at 10.

[32] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator J Christopher Thomas (19 December 2002) at para 26 [*SGS v Pakistan*].

[33] *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2, (1933) 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*].

[34] *ICSID Convention*, *supra* note 25, art 57.

[35] *SGS v Pakistan*, *supra* note 32 at paras 25–26.

[36] *Ibid* at para 25.

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rules provide that the appointing authority is to decide on the challenge. In the case, the secretary general of the Permanent Court of Arbitration rejected the challenge, following which Ghana (the petitioner) filed a challenge with the provisional measure judge in The Hague.[37] During the course of the ten-day arbitral hearing, Ghana relied on the award in *Consortium RFCC v Kingdom of Morocco*, following which the arbitrator appointed by the claimant made a disclosure to the effect that he had been instructed to act as one of RFCC's counsel in an action the purpose of which was to annul the award in the case.[38]

In analyzing the arguments made, the judge considered the duties of counsel, including that of putting forward "all possibly conceivable objections against the RFCC/Moroccan award."[39] The judge held:

> This attitude is incompatible with the attitude Prof Gaillard has to adopt as an arbitrator in the present case, i.e. to be unbiased and open to all the merits of the RFCC/Moroccan award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the reversal proceedings against the RFCC/Moroccan award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid the appearance of not being able to keep these two parts strictly separated.[40]

The judge concluded that if the arbitrator did not resign from his role as attorney in the RFCC/Morocco case, there would be justified doubts about his impartiality. In that case, the motion would be upheld. The judge gave the arbitrator ten days to notify the parties whether he would resign as counsel (which the arbitrator did).[41] Shortly after the first decision, Ghana tried to challenge the arbitrator again, including on the ground that he had up until recently represented RFCC in the annulment proceedings of the relevant award. In rejecting the challenge this time, the judge noted (as in *SGS v Pakistan* cited earlier) the commonplace occurrence of arbitrator-counsel double-hatting and that the act of having previously defended a certain point of view as counsel does

[37] *Republic of Ghana v Telekom Malaysia Berhad*, Case No 13/2004, Decision, District Court of the Hague, Civil Law Section (18 October 2004). Note that the provisional measure judge applied Dutch law to the challenge (see para 4 of the decision) [*Ghana v Telekom Malaysia Berhad*, October 2004].

[38] *Ibid* at para. 1.

[39] *Ibid* at para 4.

[40] *Ibid.*

[41] *Ibid.*

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not constitute an automatic appearance of partiality *vis-à-vis* the party who argues the opposite in an arbitration.[42]

Since the early 2000s, other challenges have been brought forward on the basis of double-hatting, but it was only in 2017 that a team of researchers published the results of their empirical analyses into the prevalence of double-hatting, adding a new dimension to discussions on reform.[43] The researchers analyzed 1,077 cases (including all known treaty-based arbitrations, ICSID contract arbitrations, foreign direct investment law-based arbitrations, as well as ICSID annulment proceedings up until 1 January 2017) and found that a total of 47 percent of cases (509) involved at least one arbitrator acting simultaneously as counsel. When looking at the specifics of the actors involved, they found that "[d]ouble hatting is a practice that is dominated by a small group of arbitrators with numerous arbitral appointments, but a comparatively smaller amount of simultaneous legal counsel work."[44]

While critics of the practice tend to see these numbers as evidencing a prevalent problem, others look at the same numbers to reach a different conclusion. For instance, during the discussion on the *Draft Code of Conduct for Adjudicators*, the Corporate Counsel International Arbitration Group noted that "[m]any of the best arbitrators today also serve as counsel in international arbitration. Indeed, double-hatting is prevalent, notwithstanding the current taboo in some quarters, because parties (both states and investors) consider many double-hatters to be excellent arbitrators — not in spite of, but because of, their experience as counsel."[45]

Nowadays, a distinction between international commercial arbitration and treaty-based investment arbitration is often made as it relates to concerns regarding double-hatting. It has been argued that the practice is not problematic (or as problematic) in commercial arbitration, where disputes are contract based, highly fact specific, and often kept confidential. Conversely, treaty-based ISDS centres on the interpretation of a limited number of state obligations, often available in public awards, which get heavily relied on in other cases.[46] As commentators have noted, investment arbitration is a "different kettle of fish. It is arguably more

[42] *Republic of Ghana v Telekom Malaysia Berhad*, Case No 17/2004, Decision, District Court of the Hague, Civil Law Section (5 November 2004) at para 11.

[43] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Ethics and Empirics of Double Hatting" (2017) 6:7 ESIL Reflections 1 [Langford, Behn & Lie, "Ethics and Empirics"]; Langford, Behn & Lie, "Revolving Door," *supra* note 10. For more empirical research on the central players involved in investor-state dispute settlement (ISDS), see Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25:2 EJIL 387.

[44] Langford, Behn & Lie, "Ethics and Empirics," *supra* note 43 at 4.

[45] UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 123–24.

[46] See e.g. GJ Horvath & R Berzero, "Arbitrator and Counsel: The Double-Hat Dilemma" (2013) 10:4 Transnational Dispute Management 1 at 5–6.

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public than private," and, as such, it raises broader concerns in terms of legitimacy.[47]

Another way to evaluate the extent of the concerns with double-hatting would be to consider the number of challenges made on that basis and whether they have been successful or not. Yet this is not a straightforward exercise. First, an arbitrator may resign rather than go through the disqualification process once challenged. Second, for a long time, disqualification decisions were not made public, so it is difficult to fully ascertain grounds for challenge. Even putting these difficulties aside, the challenges and decisions related to them do not account for instances where one party thought there was a problem with double-hatting and chose not to challenge it. It may be that the disputing party had concerns regarding the repercussions of a potentially unsuccessful challenge.[48] It would not be unusual for a party to consider the odds since challenges — in general — are rarely successful. For instance, ICSID provides on its website a list of decisions on disqualifications. From 2000 to 2020, more than eighty decisions have been rendered (sometimes more than one per case), and only five challenges have been upheld.[49]

Interestingly, for the subset of challenges based on double-hatting for which a decision is publicly available or of public record, the success rate appears to be higher. In the *Draft Code of Conduct for Adjudicators*'s background paper on double-hatting, there is a list of nine challenge decisions decided on that basis.[50] Another relevant decision has been publicly reported.[51] In half of those ten decisions, the challenges were upheld.[52]

In sum, concerns with double-hatting have been growing since the early 2000s, and cases (while limited) provide a window into the issues raised by the practice. On the issue of prevalence and its impact, no hard and fast conclusion can be reached. It is thus worthwhile now to turn to the arguments in

[47] Langford, Behn & Lie, "Ethics and Empirics," *supra* note 43 at 7. See also Sands, "Conflict and Conflicts," *supra* note 20 at 32–33.

[48] See e.g. UNCITRAL, *Independence and Impartiality*, *supra* note 28 at 14, 19.

[49] See ICSID, *Decisions on Disqualification*, online <icsid.worldbank.org/cases/content/tables-of-decisions/disqualification>. See also Crook, *supra* note 30 at 286–87. After noting few challenges are upheld, Crook concludes: "In the end, the small number of successful challenges leaves uncertain the effectiveness of arbitration's principal mechanism for ensuring independence and impartiality" (at 287).

[50] This list is said to be non-exhaustive. See ICSID, *Double-Hatting Background Paper*, *supra* note 10 at 1, n 1.

[51] Luke Eric Peterson, "In an Apparent First, an Arbitrator Is Disqualified from Tribunal after State Objects to His Serving as Counsel to Investor on Parallel Case Where Jurisdiction over Intra-EU Claims Was at Issue," *Investment Arbitration Reporter* (13 December 2018). Cited in Crook, *supra* note 30 at 286.

[52] For our purposes, cases where the adjudicator asked the arbitrator to pick one of the two roles (that is, arbitrator or counsel) were included. See e.g. *Ghana v Telekom Malaysia Berhad*, October 2004, *supra* note 37 at 6; *Vito G Gallo v Government of Canada*, NAFTA/UNCITRAL Decision on the Challenge to Mr J Christopher Thomas, QC (14 October 2009) at 11–12.

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favour of and against a prohibition on double-hatting in ISDS so as to illustrate briefly the context in which Canadian policy on ISDS reform develops.

The Pros and Cons of a Double-Hatting Ban in ISDS

Recent discussions on the *Draft Code of Conduct for Adjudicators* have put in contrast the pros and cons of a prohibition on double-hatting. The arguments for and against also highlight the different underlying paradigms related to arbitral and judicial decision-making. Further, a ban's potential impact on the diversity of adjudicators has become a central topic of debate,[53] each "camp" claiming that a ban would have negative or positive consequences on diversity.

States and commentators in favour of a ban argue that it would promote the legitimacy of the ISDS system.[54] Since a lot a public opposition to ISDS has centred on the issue of double-hatting, they argue that it is the only way to garner confidence in the ISDS system. Limitations on or regulation of the practice would not solve the perception problem attached to double-hatting. They also argue a ban would be simplest to implement, avoiding the need for detailed and complex regulations (including on disclosure). A ban, they argue, would also reduce conflicts and challenges, which in turn would avoid delays and costs. They also argue that banning double-hatting would promote diversity in the adjudicators pool — not only diversity of experiences but also of gender, geography, and other factors. It has been suggested that, if investment arbitration counsel prioritize their counsel work (by reason of a ban), it will leave room for more diverse new entrants. Others have opined that those counsel could continue doing their work in international commercial arbitration (but not in international investment disputes) and avoid most conflicts with their arbitrator duties in this manner.[55]

States and commentators against a ban emphasize that it would interfere with party autonomy in the selection of adjudicators,[56] which some argue is a

[53] See e.g. Crook, *supra* note 30; ICSID, *Double-Hatting Background Paper*, *supra* note 10 at 2.

[54] See UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 114–15, Comments by Canada. As of this date, other countries have shared their pro-ban positions or inclinations, but, as the process is ongoing, many have voiced their openness to compromises, such as through waivers (more on this in the last part of this article). See e.g. the positions of Armenia, Australia, Bahrain, Chile, China, Colombia, the European Union (EU) and its member states, Mexico, the United Kingdom, and Western Balkans countries (at 114–21).

[55] For a discussion of "pro-ban" arguments, see *Draft Code of Conduct for Adjudicators*, *supra* note 11 at para 67; Langford, Behn & Lie, "Ethics and Empirics," *supra* note 43 at 7–10; Sands, "Conflict and Conflicts," *supra* note 20 at 47–48.

[56] See UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 120–21 (comments by the United States), 116–17, 119 (comments by Costa Rica, Israel, Switzerland, and Turkey).

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fundamental tenet of arbitration. Opponents put emphasis on actual conflict as opposed to perceptions of conflict. They argue that a ban is too drastic a solution when there is no evidence of bias from double-hatting. For them, regulation via disclosure is a preferable solution. Opponents to a ban argue that it would unduly limit access to relevant expertise and the pool of available arbitrators. Specifically, some argue that this would limit the pool to full-time arbitrators (who are typically older, such as retired lawyers), retired judges, and senior academics. Since the majority of ISDS arbitrators only act in that capacity in one or two cases in their careers, most counsel could not afford to leave their practice behind in the hope of getting more appointments in the future. As such, a prohibition to also act as counsel would hinder new entrants and, as a result, the diversity of arbitrators (in terms of gender, geography, and so on).[57]

While the *Draft Code of Conduct for Adjudicators* is meant to apply to both arbitrators (in ad hoc proceedings) and judges (appointed to a standing mechanism), a distinction is most often drawn in relation to a MIC and double-hatting. Indeed, the states and commentators who advocate for the creation of a MIC are in favour of a ban on double-hatting, a practice that they see as fundamentally at odds with the independence of a standing court.[58] As with most international courts, judges appointed in state-driven processes for fixed tenures and acting full-time are not permitted to simultaneously act as counsel.[59] Part of the discussions about the *Draft Code of Conduct for Adjudicators* (as described more fully below) is therefore whether the provision concerning the "Limit on Multiple Roles" should only apply to arbitrators or to both arbitrators and judges (knowing that, in the case of a MIC, the court's statute would most likely prohibit such a practice for its judges).

What the pro-and-con arguments and scope-of-application questions reveal is the tension between arbitral and judicial decision-making for treaty-based international investment disputes. Those who believe in the need for judicialization of ISDS more generally, due to its public nature, tend to favour limits on double-hatting, while those who are firmly grounded in the logic of international (commercial) arbitration tend to

[57] For a discussion of "anti-ban" arguments, see *Draft Code of Conduct for Adjudicators*, *supra* note 11 at para 68; Crook, *supra* note 30 at 285, 288; Horvath & Berzero, *supra* note 46 at 12–13. In the comments received on the first version of the *Draft Code of Conduct for Adjudicators*, the most vociferous opponents to a ban on double-hatting were the representatives of lawyers' associations. See e.g. UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 123–27 (on behalf of Corporate Counsel International Arbitration Group (CCIAG)), 127–31 (Inter-Pacific Bar Association).

[58] See e.g. UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 116–17 (comments by EU and its member states), 114–15 (Canada).

[59] See e.g. Mackenzie & Sands, *supra* note 8 at 280–83.

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be against limits. The latter put prime value on party autonomy in arbitral appointments and would rather maintain the status quo of having recourse to disclosures to allow disputing parties to make informed decisions.

Interestingly, both the proponents and opponents of a ban on double-hatting use arguments related to diversity to make their case. For those against a prohibition, and even those that favour some limits on the practice, diversity is a key concern. Indeed, ISDS is dominated by male and Western arbitrators, and progress towards diversity in terms of gender and geography has been slow. The risk then is that preventing female or non-Western counsel from accessing the rank of arbitrators via a prohibition on double-hatting will delay even further the progress made thus far.[60] A few countries, including Canada and Chile, have questioned whether a ban would have such effects.[61] Further, the results of the empirical study referred to above undermine somewhat this premise, as the authors note that the practice of double-hatting is dominated by a small group of arbitrators (all men) with numerous arbitral appointments.[62] Except for a few individuals in the top twenty-five of their "double hatting index," these are not counsel who could be transitioning to a full-time arbitration practice but, rather, experienced arbitrators who continue their simultaneous legal counsel work.[63] Nonetheless, proposals to allow a transition period for counsel to move into full-time arbitration work[64] have not been especially well received as a matter of principle as well as of practicality.[65]

Again, the difference between a MIC and ad hoc ISDS arbitration resurfaces. If the parties to a MIC value diversity, they could ensure that the criteria for judges' nomination, selection, and appointment reflect that goal.[66] As such, for those in favour of a MIC, a prohibition on double-hatting does not necessarily have a negative impact on diversity, to the contrary.

[60] See e.g. Crook, *supra* note 30 at 287–88.

[61] See e.g. UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 114 (comments by Canada).

[62] See Langford, Behn & Lie, "Ethics and Empirics," *supra* note 43 at 5, 10; Langford, Behn & Lie, "Revolving Door," *supra* note 10 at 25–26.

[63] Langford, Behn & Lie, "Ethics and Empirics," *supra* note 43.

[64] See e.g. Langford, Behn & Lie, "Revolving Door," *supra* note 10 at 23; Anthea Roberts, "A Possible Approach to Transitional Double Hatting in Investor-State Arbitration," *EJIL Talk!* (31 July 2017).

[65] See e.g. Crook, *supra* note 30 at 288; UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 124–25 (comments by CCIAG).

[66] See Mackenzie et al, *supra* note 8 at 161–65.

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This discussion of some of the pros and cons of a prohibition on double-hatting, including what they reveal about the paradigms at play (arbitration versus judicialization of investment dispute resolution) sets the stage for an analysis of Canada's relevant treaty practice and its future direction.

Canada's Treaty Practice and What It Reveals of Canada's Views on ISDS Reform

The last part of this article analyzes Canada's recent treaty practice on double-hatting and on a possible transition towards the judicialization of investment dispute resolution. It will also consider whether Canada's positions on double-hatting during the discussions on the *Draft Code of Conduct for Adjudicators* are consistent with its treaty practice.

treaty practice on double-hatting

Starting with *CETA*, it should be recalled that, when Canada and its European counterparts concluded the negotiations in 2014, the text showed they had agreed to arbitration-based ISDS to resolve investment disputes.[67] It was only during the legal review (or "scrubbing") of the treaty text that a new method of resolving such disputes came to light: the Investment Court System (ICS). The model, which involved the creation of a first instance tribunal and an appellate tribunal, had been proposed by the European Commission to the United States during the *TTIP* negotiations in the fall of 2015 (these negotiations later came to a halt).[68]

The *CETA*'s ICS represents a hybrid model between arbitration and judicial adjudication.[69] Indeed, *CETA* provides that tribunal members are to be appointed by the treaty parties for fixed terms.[70] The first instance and

[67] Text on file with author.

[68] European Commission, *TTIP Proposal: Investment, Resolution of Investment Disputes and Investment Court System* (12 November 2015), online: <trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>.

[69] See e.g. August Reinisch, "The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court," CIGI Investor-State Arbitration Series Paper No 2 (March 2016), online: <www.cigionline.org/sites/default/files/isa_paper_series_no.2.pdf>; Céline Lévesque, "The European Commission Proposal for an Investment Court System: Out with the Old, in with the New?" Investor-State Arbitration Series Paper No 10 (September 2016), online: <www.cigionline.org/static/documents/isa_paper_series_no.10_0.pdf>.

[70] In the case of the first instance tribunal, the terms are of five years and renewable once: see *CETA*, *supra* note 3, art 8.27(5). As for the appellate tribunal members, the terms are of nine years and non-renewable. See CETA Joint Committee, *Decision No 001/2021 of the CETA Joint Committee of January 29, 2021 Setting Out the Administrative and Organisational Matters Regarding the Functioning of the Appellate Tribunal*, art 2(3), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/appellate-tribunal-dappel.aspx?lang=eng> [*CETA 2021 Decision*].

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appellate tribunals are therefore standing, but their members are not appointed on a full-time basis — that is, unless the *CETA* parties decide that they should be.[71] In other respects, the tribunals would operate much like ad hoc arbitration tribunals do: the proceedings rely on the same arbitration rules (for example, those from ICSID and UNCITRAL), and the parties provide that awards would be enforced under those regimes as well.[72]

On double-hatting, however, the parties fall squarely on the judicial model. *CETA*'s Article 8.30 entitled "Ethics" provides that, "[i]n addition, upon appointment, [tribunal members] 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."[73] The prohibition appears strict and broad, as it covers pending and new investment disputes not only under *CETA* but also under "any other international agreement," which, at a minimum, would cover other IIAs. Further, in January 2021, *CETA*'s Committee on Services and Investment adopted decisions providing additional rules on the ICS pending its implementation,[74] including a *Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators*.[75] This code of conduct provides additional disciplines applicable to former tribunal members, including time limitations on their ability to act as representatives of disputing parties before the *CETA* tribunals.[76] This provision would act as a sort of extension of the double-hatting ban post-term.

Turning to the *CPTPP*, it was signed by its eleven parties in March 2018 and came into force for Canada and five other countries in December 2018.[77] The agreement was years in the making, starting out as the *Trans-Pacific Partnership* (*TPP*) with the United States as one of its key signatories

[71] For the first instance tribunal, see *CETA*, *supra* note 3, art 8.27(15); for the appellate tribunal, see *CETA 2021 Decision*, *supra* note 70, art 2(10)–(13).

[72] See Lévesque, *supra* note 69.

[73] *CETA*, *supra* note 3, art 8.30(1).

[74] The ICS will only come into force once all relevant jurisdictions have ratified *CETA* (other parts of the treaty have been provisionally applied since 21 September 2017). To date, many members of the EU have not ratified *CETA*, and more delay can be expected. See Council of the European Union, online: <www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017>.

[75] See CETA Committee on Services and Investment, *Decision No 001/2021 of the Committee on Services and Investment of January 29, 2021 Adopting a Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators*, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/code-conduct-conduite.aspx?lang=eng>.

[76] See *ibid*, art 5(2): limit of three years.

[77] See Government of Canada, *View the [CPTPP] Timeline*, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/view_timeline-consultez_chronologie.aspx?lang=eng>.

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(before it withdrew).[78] The text of the *TPP* that was released in November 2015 provided for arbitration-based ISDS and included some improvements on issues such as transparency.[79] The text did foresee the application of a code of conduct to such disputes,[80] but it took years — and the entry into force of the *CPTPP* — before it saw the light of day. Specifically, it was at the first meeting of the *CPTPP* Commission on 19 January 2019 that the *Code of Conduct for Investor-State Dispute Settlement* was adopted.[81]

Of most interest for our purposes is that the *CPTPP*'s *Code of Conduct for Investor-State Dispute Settlement* includes a prohibition on double-hatting. Article 3, entitled "Governing Principles" at paragraph (d) provides: "Upon selection, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or any other international agreement."[82] The ban is broadly similar to the one in *CETA*, except for differences related to the mode and nature of appointment of adjudicators (for example, specifics regarding application in time — that is, for the duration of the proceeding — for ad hoc arbitration). Remarkably, both prohibitions apply to the role of counsel (amongst others) under "any other international agreement," giving it a wide scope of application. In sum, even though the model adopted is arbitration-based ISDS, the parties to the *CPTPP* still judged it fit to include a prohibition on double-hatting. It is unclear whether Canada played a leadership role in that regard, but the similarity of the language could lead one to assume so.

A word should be said about the *CUSMA*, which came into force on 1 July 2020, even though, after a transition period of three years (for "legacy claims"), ISDS proceedings will no longer be possible under it between Canada and the United States (and their investors).[83] Such proceedings will still be possible between the United States and Mexico (and their investors) but on a smaller scale than that provided for in *NAFTA*.[84] Of note is the fact that *CUSMA* includes a prohibition on

[78] See US Trade Representative, *The United States Officially Withdraws from the Trans-Pacific Partnership* (30 January 2017), online: <ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP>.

[79] *Trans-Pacific Partnership*, text released subject to legal review on 5 November 2015, Ch 9 Investment, art 9.18–9.23 [*TPP*].

[80] *Ibid*, art 9.21(6).

[81] *CPTPP Code of Conduct*, *supra* note 17.

[82] *Ibid*, art 3(d).

[83] *CUSMA*, *supra* note 5.

[84] As between Canada and Mexico, ISDS claims can be submitted under the investment chapter of the *CPTPP*, *supra* note 4.

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double-hatting, but it is limited to arbitration-based ISDS taking place under *CUSMA*. Yet the reference to other sources of conflicts could potentially encompass other such circumstances. Article 14.D.6, entitled "Selection of Arbitrators," provides:

> 5. Arbitrators appointed to a tribunal for claims submitted under Article 14. D.3.1 shall:
>
> (a) comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, including guidelines regarding direct or indirect conflicts of interest, or any supplemental guidelines or rules adopted by the Annex Parties;
> (b) not take instructions from any organization or government regarding the dispute; and
> (c) not, for the duration of the proceedings, act as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter.
>
> 6. Challenges to arbitrators shall be governed by the procedures in the UNCITRAL Arbitration Rules.[85]

Moving on to the Canadian FIPA practice, it should be noted that the *2021 FIPA Model*'s update process was undertaken some years back with public consultations taking place in 2018.[86] Contemporaneously, Canada was still negotiating FIPAs, including those with Kosovo and Moldova, which were both signed in 2018 and include arbitration-based ISDS.[87]

[85] *Ibid*, art 14.D.6(5) – (6). Regarding US practice, it has been said that Canada had proposed early on the inclusion of an ICS in *CUSMA*, a model that the United States would have been familiar with after the EU proposed its adoption (inclusive of a ban on double-hatting) in the context of the *TTIP* negotiations. See European Commission, *supra* note 68, art 11 (ethics). On another front, back in the winter of 2015, the *TPP* was being attacked in the US political arena in part on the basis of the risk of double-hatting in ISDS proceedings. See Crook, *supra* note 30 at 284, referring to Senator Elizabeth Warren's opposition. Nevertheless, in the context of the *Draft Code of Conduct for Adjudicators*, *supra* note 11, the United States voiced concerns about an outright ban. See UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 121 (comments by the United States).

[86] See the Government of Canada, *Executive Summary of the Consultation Results*, online: <www.international.gc.ca/trade-commerce/consultations/fipa-apie/report-rapport.aspx?lang=eng>.

[87] See *Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments*, 12 June 2018 (entered into force 23 August 2019), online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/Canada-Moldova-FIPA_EN.pdf>; *Agreement between the Government of Canada and the Government of the Republic of Kosovo for the Promotion and Protection of Investments*, 6 March

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Interestingly, while neither agreement includes a ban on double-hatting, they are both accompanied by joint declarations that "[*r*]*ecognize* the need to ensure that conflicts of interest do not arise in dispute settlement proceedings."[88] As mentioned in the introduction, the *2021 FIPA Model* (released on 13 May 2021) includes an *Arbitrator Code of Conduct for Dispute Settlement* that prohibits double-hatting. The *Arbitrator Code of Conduct*'s Article 3(4) provides: "Upon appointment, an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under this Agreement or any other international *investment* treaty."[89] The language retained is almost identical to that included in the *CPTPP*, save for the precision as to the scope of the ban, which is now specific to investment treaties (as opposed to "any other international agreement"). In practice, this may not make much of a difference.

Overall, one can conclude that Canada's treaty practice has been widely consistent in the last five years regarding its approach to double-hatting. We now turn to the question of whether this pro-ban stance is rooted in an inexorable move towards the judicialization of investment dispute settlement or a "flavour of the month" phenomenon, likely to change in future negotiations. In order to assess Canada's commitment, it is useful to survey the provisions included in recent IIAs and the *2021 FIPA Model* concerning a possible transition to more judicialized forms of investment dispute settlement.

TREATY PRACTICE TOWARDS JUDICIALIZATION

The strongest affirmation of the goal to move towards a MIC is found in *CETA*. The text provides as follows:

> Article 8.29 — Establishment of a multilateral investment tribunal and appellate mechanism

2018 (entered into force 19 December 2018), online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/fipa-kosovo-eng.PDF>.

[88] See *Joint Declaration by the Government of Canada and the Government of the Republic of Moldova Regarding Progressive and Inclusive Trade and Investment*, 12 June 2018, online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/Canada-Moldova-FIPA-Declaration_EN.pdf> [emphasis in original]; *Joint Declaration by the Government of Canada and the Government of the Republic of Kosovo Regarding Progressive and Inclusive Trade and Investment*, 6 March 2018, online: <www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/fipa-kosovo-declaration-eng.pdf>.

[89] *2021 FIPA Model*, *supra* note 6, *Arbitrator Code of Conduct for Dispute Settlement*, art 3.4 [emphasis added].

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> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.[90]

The use of mandatory terms such as "shall" is not surprising since the EU and Canada have been at the forefront of discussions on the possibility of creating a MIC since 2016, even before UNCITRAL's Working Group III undertook its work program on possible ISDS reforms.[91] Of note is also the use of the conjunction "and" between a multilateral investment tribunal and an appellate mechanism, implying that both are to be pursued and not only one or the other.

The *CPTPP*'s language would come second, with a focus on an appellate mechanism only and a less stringent commitment to "consider" whether awards should be subject to it (as opposed to pursuing the establishment of such a mechanism in *CETA*). The *CPTPP*'s Article 9.22(11) provides:

> In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings).[92]

In this case, the commitment to a more judicialized multilateral system must be assessed in the evolving context of the *CPTPP*'s negotiations. First, it should be noted that this provision already appeared in the text of the *TPP*

[90] *CETA*, *supra* note 3, art 8.29.

[91] See e.g. European Commission and Canada, "Non-Paper: Reforming Investment Dispute Settlement: Considerations on the Way towards a Multilateral Investment Dispute Settlement Mechanism" (Paper presented at the OECD-hosted Investment Treaty Dialogue, Paris, 2016), online: <trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf>; European Commission and Canada, "Discussion Paper: Establishment of a Multilateral Investment Dispute Settlement System" (Paper presented at the Expert Meeting, Geneva, 2016), online: <trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20p>; European Commission and Canada, "The Case for Creating a Multilateral Investment Dispute Settlement Mechanism" (Paper presented at the Informal Ministerial Meeting, World Economic Forum, Davos, 2017), online: <trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf>.

[92] *CPTTP*, *supra* note 4, art 9.22(11).

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(subject to legal review), which was released publicly in November 2015 and, as such, was likely included in the text for some time before that. Second, at the time, the United States was still involved in the negotiations. While the United States has never followed through on the implementation of an appellate mechanism, it was its policy to negotiate towards that goal as early as 2002, following the mandate included in the Trade Promotion Authority legislation.[93] Third, the way to move forward with the *CPTPP* (after the United States' withdrawal) was to suspend the application of certain *TPP* provisions, of which Article 9.22(11) was not one.[94] Thus, while other parties to the *CPTPP* (such as Japan) are not known to support the establishment of an appellate mechanism,[95] this language appears to represent a compromise reached at an earlier time — before most of the current discussions on multilateral ISDS reform.

The relevant provision of the *2021 FIPA Model* comes last, in part due to its lack of clarity. The text provides as follows:

> Article 46: Establishment of a First Instance Investment Tribunal or an Appellate Mechanism for Investor-State Dispute Settlement
>
> If an investor-State dispute settlement mechanism, consisting of a first instance investment tribunal or an appellate mechanism, is developed under other institutional arrangements and is open to the Parties for acceptance, the Parties shall consider whether, and to what extent, a dispute under this Section should be decided pursuant to that investor-State dispute settlement mechanism.[96]

First, the options included in the provision are connected by the word "or." Yet it would not seem consistent with recent positions adopted by Canada to agree to a first instance investment tribunal only. The option to agree only to a multilateral appellate tribunal would be more so and has been included in the *CPTPP*, as just discussed. Further, it is an option promoted by a number of countries at UNCITRAL's Working Group III (including China) and may

[93] See David A Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand J Transnatl L 39 at 56–57.

[94] See *CPTPP* (non-consolidated text), art 1–2, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng>.

[95] See e.g. Luke Eric Peterson, "Analysis: What Did Governments Agree (And Disagree) on at Recent UNCITRAL Meetings on Investor-State Dispute Settlement Reform?" *Investment Arbitration Reporter* (4 January 2018).

[96] *2021 FIPA Model*, *supra* note 6, art 46.

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hold realistic prospects of success.[97] Second, the segment providing "whether, *and to what extent, a dispute* under this Section should be decided pursuant" (emphasis added) to the mechanism is ambiguous. It would have been customary to refer to disputes in the plural (as in *CETA*) in this context, as the decision would have to be made not for each individual dispute but, rather, for all disputes under a specific FIPA. Indeed, because arbitration-based ISDS is provided for in the *2021 FIPA Model*, the proceedings would be instigated by investors making claims under applicable rules (which could not be modified on a case-by-case basis after the fact by treaty parties). The use of the expression "to what extent" compounds the ambiguity. The intention could be that under each FIPA, parties could decide that disputes get submitted to a MIC (including both a first instance and appellate instance) or only to the appellate mechanism, but the text leaves much to be desired. That being said, the provision still displays a commitment by Canada to the consideration of a more judicialized form of investment dispute settlement in the context of its FIPA program.

The last step in the analysis consists of assessing whether the positions taken by Canada regarding double-hatting in the discussions on the *Draft Code of Conduct for Adjudicators* thus far are consistent with a long view of ISDS reform — that is, a position that is headed towards more judicialization.

Canada's Positions on Double-Hatting in the *Draft Code of Conduct for Adjudicators*

Before considering Canada's positions, it is useful to situate the debates on the *Draft Code of Conduct for Adjudicators* in their context. UNCITRAL's Working Group III gave the mandate to the UNCITRAL and ICSID Secretariats to work together on a draft code of conduct in 2019.[98] Since ethical concerns related to adjudicators are cross-cutting, the code would apply in principle to both arbitrators and judges in international investment disputes and, therefore, the term "adjudicators" is used. However, as mentioned above, not all provisions would be applicable to a (possible) permanent MIC.

The first version of the *Draft Code of Conduct for Adjudicators* dates from 1 May 2020 and provides the following text on double-hatting at Article 6 (entitled more diplomatically "Limit on Multiple Roles"): "Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same

[97] UNCITRAL, Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China* (19 July 2019) at 4, online: <undocs.org/en/A/CN.9/WG.III/WP.177>.

[98] See *Draft Code of Conduct for Adjudicators*, *supra* note 11 at 2–3.

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facts] [and/or] [the same treaty]."[99] The bracketed text reveals where the tensions lie in the current debate, starting with the key opposition between a ban and regulation of the conduct via disclosures. Other elements define the roles played (counsel, witness, and so on) and the timing and duration of the overlap in roles (within X years). The last critical element relates to scope: if an arbitrator should clearly not be permitted to act as counsel in another dispute involving the same parties, should a prohibition apply when the same facts or treaties are involved?

Canada's comments on this draft highlight that it is in favour of a prohibition on double-hatting for both judges and arbitrators; however, it is more "strict and broad" for the former.[100] Canada argues that the same rationale applies to both roles, and, in referring to ad hoc arbitration, it states: "The practice of adjudicators acting in multiple often incompatible roles creates an appearance of bias that undermines the legitimacy of ISDS arbitration."[101] Yet, while it is not convinced that a ban would necessarily have a negative impact on diversity in the ISDS arbitrator pool, Canada states that it is open to considering whether some flexibility is required — for example, via the possibility of waivers. To that effect, Canada has offered the following language for consideration: "Upon selection, [except where otherwise agreed by the parties] an arbitrator shall refrain, for the duration of the proceeding, from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under an international agreement."[102] As described above, the language of the provision tracks closely the double-hatting bans included in the *CPTPP* and the *2021 FIPA Model* but with the bracketed possibility of parties agreeing to some cases of double-hatting but not others.

More broadly, the comments and suggested language reflect Canada's position that the prohibition should have a wide scope, which is not limited to the same parties, facts, or treaty but, rather, to all investment disputes under an international agreement since "[m]any treaties contain similarly worded provisions and the interpretation of one treaty can influence the interpretation of another."[103]

Many states and observers have provided comments on the draft "Limit on Multiple Roles" article, and the provision was discussed during webinars. Taking these discussions into account, the UNCITRAL and ICSID Secretariats circulated a second version of the *Draft Code of Conduct for Adjudicators* on 19 April 2021. The provision has notably been simplified and now includes

[99] *Ibid*, art 6.

[100] UNCITRAL/ICSID Secretariats, *Comments by Article and Topic*, *supra* note 13 at 114, para 22.

[101] *Ibid* at 114, para 22.

[102] *Ibid* at 115, para 24.

[103] *Ibid* at 115, para 23.

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the possibility of a waiver, but it still presents the fundamental opposition between a broad and narrow prohibition. The newly renumbered Article 4 thus 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]."[104] More virtual discussions took place in early June 2021, with the goal of submitting the *Draft Code of Conduct for Adjudicators* to the November 2021 session of UNCITRAL's Working Group III.[105]

In sum, as things stand in June 2021, except for Canada's openness to considering the possibility of individual waivers in the context of treaty-based ISDS, it still appears committed to a broad prohibition on double-hatting for international investment disputes. On the question of diversity, it seems that Canada believes it can partly remedy the situation through selection criteria for adjudicators. For instance, the *CETA* parties recently have agreed that the ICS's appellate tribunal would be composed of six members who would be "appointed by the CETA Joint Committee with a view to the principles of diversity and gender equality."[106] Further, in its *2021 FIPA Model*, Canada provides that "[t]he disputing parties are encouraged to consider greater diversity in arbitrator appointments, including through the appointment of women."[107]

Conclusion

One could be forgiven for thinking that Canada's recent practice regarding ISDS has been inconsistent. Especially after much noise was made over the fact that arbitration-based ISDS would no longer apply as between Canada and the United States (and their investors) under *CUSMA*, one might have expected that this "achievement" would be repeated elsewhere, including in

[104] ICSID/UNICTRAL, *Draft Code of Conduct for Adjudicators in International Investment Disputes*, version 2 (19 April 2021), online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf>. For a description of the changes between version 1 and version 2 of the *Draft Code of Conduct*, see Chiara Giorgetti, "The Second Draft of the Code of Conduct for Adjudicators in International Investment Disputes: Towards a Likely Agreement?" *Kluwer Arbitration Blog* (29 May 2021), online: <arbitrationblog.kluwerarbitration.com/2021/05/29/the-second-draft-of-the-code-of-conduct-for-adjudicators-in-international-investment-disputes-towards-a-likely-agreement/>.

[105] See UNCITRAL, Working Group III (ISDS Reform), "Status of Work," online: <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/210603_uncitral_wgiii_status_of_work.pdf>.

[106] *CETA 2021 Decision*, *supra* note 70, art 2(1).

[107] *2021 FIPA Model*, *supra* note 6, art 30(1) (arbitrators).

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FIPAs.[108] Yet such a reading would be missing a significant part of the picture. Aside from the obvious role played by the identity of the negotiating parties (including who has most bargaining power and who is a rule setter versus a rule taker), Canada's approach to retaining arbitration-based ISDS in its relations with its FIPA partners may be the most practical if its ultimate goal is the creation of and participation in a MIC. Paradoxically, pursuing arbitration-based ISDS in the short term, while shoring up guarantees of independence and impartiality for adjudicators, including through the adoption of prohibitions on double-hatting, could best serve a long-term goal of judicialization of international investment dispute settlement.

As the analysis of recent treaty practice demonstrates, the strongest commitment to a transition towards a MIC is found in *CETA*. However, the establishment of a semi-permanent ICS as a stepping stone to more judicialization is unsuited to most potential FIPA relationships. Instead, as we have seen, the *2021 FIPA Model* provides that the parties "shall consider" whether to have dispute(s) under a FIPA decided under a first instance or appellate mechanism still to be created. Realistically, if a multilateral permanent court of sorts is the goal, it could at least be a decade before such a mechanism sees the light of day. For one, UNCITRAL's current Working Group III work program is not expected to conclude before 2026.[109]

In the meantime, however, Canada's consistent position against double-hatting in recent treaties allows it to move the needle in discussions on the *Draft Code of Conduct for Adjudicators*. In all likelihood, any statute for a MIC (staffed with permanent judges) would include a broad prohibition on double-hatting. As such, when Canada argues for a ban, the target can be assumed to be arbitration-based ISDS. Whether it is done to show the need to move away from arbitration-based ISDS in the long term or to make ISDS more palatable, the result is the same. The suggestion to consider attaching the possibility of a "waiver" to a ban fits this narrative, as states parties could always decline to approve a "double-hatter" if they chose to.[110] Furthermore,

[108] See Statement by the Honourable Chrystia Freeland, *Debate on the Bill for the Implementation of CUSMA* (11 June 2019): "Perhaps one of the achievements I am most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, will be gone. This means that Canada can make its own rules about public health and safety, for example, without the risk of being sued. Known as ISDS, this provision has cost Canadian taxpayers more than $300 million in penalties and legal fees."

[109] See UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Resumed Fortieth Session (Vienna, 4 and 5 May 2021)* (27 May 2021), online: <uncitral.un.org/sites/uncitral.un.org/files/wg_iii_resumed_40th_session_final_003.pdf>.

[110] This possibility might lead one to question the utility of such waivers: in what circumstances would a party be inclined to approve of the other side's "double-hatter" nominee? Further, some would argue that allowing for waivers undermines a fundamental premise of a ban: the appearance of bias created by the practice. These questions will have to be left for another day.

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with time and experience under the *CPTPP* or with FIPAs following the *2021 FIPA Model*, Canada will (potentially) also be able to argue that the ban on double-hatting has not hurt diversity in the appointment of adjudicators (as many observers currently fear).

At the end of the day, in the context of FIPAs, two scenarios present themselves: first, if the counterparty also joins a newly established MIC, then disputes under the FIPA get resolved by permanent judges, who are prohibited from double-hatting, and, second, even if the counterparty does not join a MIC, the FIPA still includes the ban on double-hatting, which at least would counter some of the (negative) perception issues related to ISDS. By also including more "progressive" provisions related to the right to regulate, the promotion of diversity, and so on, they could combine to reduce the legitimacy criticism concerning Canadian FIPAs.

As stated in the introduction, the goal of this article has been to analyze whether Canada's pro-ban stance on double-hatting reflects its commitment to a long view of ISDS reform leading inevitably towards judicialization, or a "flavour of the month" ISDS reform likely to change with differing IIAs and negotiating partners. Based on the analysis presented, Canada's recent treaty practice and its positions on the *Draft Code of Conduct for Adjudicators* at UNCITRAL's Working Group III are rather consistent with it playing the long game in ISDS reform. It is too early to determine how much "judicialization" will take place following the recent multilateral reform efforts, but Canada's days of playing the field may be over when it comes to double-hatting.

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