Kluwer Arbitration Blog

The Double Hatting Paradox in Investment Arbitration: Justification For Abolition?

Khan Khalid Adnan (Khan Saifur Rahman & Associates) · Friday, December 29th, 2023

Double hatting and insufficient disclosure by the arbitrators have been problematic features of investment arbitration. Double hatting is generally regarded as an individual simultaneously playing the role of counsel and arbitrator in similar matters. The real issue is whether these concerns have the potential to affect the arbitrator's ability to form "independent judgment," as described in the ICSID Convention. The UNCITRAL Draft Codes of Conduct and Commentary (2022) recommended abolition of double hatting while introducing an extensive disclosure regime. The Draft covered codes of conduct for both arbitrators and judges in investment arbitration. It has been prepared to address the major concerns in investment disputes and ensure reform of the ISDS system. The Draft Code of Conduct for Arbitrators in International Investment Disputes was adopted by UNCITRAL in July 2023. The advance copy of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution has recently been released. In the final version, the recommendations for abolishing the practice of double hatting substantively remain the same. This post claims that these proposals are practically unnecessary because double hatting should be held permissible to preserve party autonomy by eliminating the risk of conflict of interest through imposing substantial disclosure requirements. Furthermore, such disclosure obligations have already been satisfactorily addressed by the new ICSID Arbitration Rules 2022 following the annulment decision in *Eiser v Spain* (2020). After discussing the existing arbitral practice along with the implemented and proposed reforms, this post will suggest some solutions as alternatives to abolishing the practice of double hatting.

Concerns Regarding Double Hatting

An arbitrator may become unable to approach a particular issue impartially with an independent mind due to his/her prior views conceived as a counsel in another case. One such example may be cited with reference to Emmanuel Gaillard. He identically argued as a counsel for the same claimant in *SGS v Pakistan* (*SGS I*) (2003) and *SGS v Philippines* (*SGS II*) (2004) that the effect of umbrella clause was to convert a contractual claim into a treaty claim. This argument was rejected in both cases. Wearing a second hat as an author of an article, Gaillard strongly criticised the *SGS II* approach. Subsequently, the *Consorzio v Algeria* (2005) tribunal (Gaillard being a member) adopted Gaillard's view on umbrella clause. Therefore, Gaillard's same conviction regarding umbrella clause travelled from his written memorial as a "counsel" to an article as a "scholar" further to an award as an "arbitrator" within a span of two years. This illustrates the possibility of

an arbitrator getting influenced by his counsel role in other cases. Conversely, absent any specific facts which indicate that the arbitrator is not able to professionally distance himself from the cases in which he was acting as counsel, he/she has the assumption in his/her favour that he/she is a legal professional with the ability to keep a professional distance. Thus, the act of double hatting does not automatically give rise to conflict of interest. Judge Crawford also recognised that these conflicts are not 'insuperable' considering the practical reality of investment arbitrators coming from private law firms. This latter view offers more meaningful perspective while also acknowledging the troublesome feature of multiple roles being played by investment arbitrators.

Arbitral Practice and Disclosure Obligations

Saint-Gobain v Venezuela (2013) and *Ghana v Telekom Malaysia* (2004), when analysed together, demonstrate the impermissibility of double hatting only when the dual role is played simultaneously involving the same party. This is likely to raise potential doubts as to the arbitrator's independence indicating his inability to "freely form a view on the merits." In *RSE Holdings v Latvia* (2022), the arbitrator was disqualified due to her engagement as counsel in "sheer number of cases" involving overlapping questions of interpretation of the Energy Charter Treaty (ECT) notwithstanding the fact that she was not representing the same parties as counsel in other cases. Her role as counsel in other arbitrations under the ECT, "primarily" representing the investors, required "fulsome disclosure and consideration of detailed information" regarding all the other ECT arbitrations in which she was involved as a counsel. In *Eiser v Spain* (2020), the Annulment Committee found manifest appearance of bias on the part of the arbitrator due to his failure to disclose all "past and present professional connections and interactions" with the valuation expert. Hence, the common trend emerging from the recent decisions is the imposition of ongoing obligation on the arbitrators to disclose comprehensively any potential conflict of interest.

Reforms: Implemented and Proposed

Following the earlier ICSID Arbitration Rules 2006, there was no stipulation on the part of the arbitrators to sign the declaration disclosing matters with regard to their independence when accepting their appointment prior to the constitution of the tribunal. However, under the new ICSID Arbitration Rules 2022, simultaneous requirement regarding acceptance of the appointment and signing the declaration before the formation of the tribunal has been placed on them. Thus, the new procedural Rules have made extensive disclosure obligation a prerequisite for both acceptance of appointment and formation of the tribunal which may have been the direct influence of *Eiser* adequately addressing the concern with lack of disclosure.

The proposed UNCITRAL Code of Conduct (2023) contains Article 3 under the broader rubric of independence and impartiality with specific provisions in Articles 4 and 11 respectively dealing with multiple roles and disclosure obligations. With the qualifier of parties' agreement, Article 4 prohibits the arbitrators from concurrently acting as a legal representative or an expert witness in another arbitration proceedings for a period of three years after serving as an arbitrator. Thus, the practical effect of Article 4 is complete abolition of double hatting and multiple roles. This proposed reform has the potential to infringe with the parties' rights to choose their arbitrators having extensive experience and practical expertise.

Even though Article 11 provides for substantial disclosure obligations, most of these features have already been introduced in the ISDS mechanism deriving its root from *Eiser*. Under Article 11, the disclosure shall include any financial, business, personal and other relationships existing for five years with the relevant personnel. In *Eiser*, Dr Alexandrov's partnership in the chamber from 2002 to 2017 was considered. Moreover, Article 11 imposes the duty to disclose in case of doubt while also making the disclosure obligation ongoing. However, *Eiser* already made these requirements obligatory. Interestingly, Article 11 has introduced "justifiable doubts" as the standard of disclosure which has its original basis in the UNCITRAL Arbitration Rules 2021. Explicit recognition of this lower threshold in investment arbitration may prima facie appear to have resolved the complication arising out of the interpretation of the term "manifest" in Article 57 of the ICSID Convention. However, the recent ICSID arbitral practice since 2013 demonstrates the adoption of the lower UNCITRAL standard through the acknowledgement of the *Blue Bank* test. The threshold of "appearance of dependence or bias" as laid down in *Blue Bank* is similar to the "justifiable doubts" standard under the UNCITRAL Arbitration Rules. This has ensured uniformity in the test for disqualification both in ICSID and non-ICSID cases (e.g. under the UNCITRAL Rules). Therefore, the provisions of the UNCITRAL Code of Conduct (2023) which deal with the disclosure obligations add nothing substantially new to the existing framework.

Alternative Solutions

Multiple roles are being played only by a very small exclusive group of influential practitioners with outstanding expertise in investment disputes. Also double hatting scenario is rare in investor-State arbitration. This highly exceptional practice does not justify the drastic measure of abolishing it. Rather some alternative solutions are worth considering to sufficiently address the issue. Firstly, the treaties can expressly deal with the concern. For example, the Comprehensive and Economic Trade Agreement (CETA) prohibits arbitrators "from acting as counsel… in any pending or new investment dispute…." Investors usually appoint experienced arbitration practitioners as their arbitrators. Thus, this recent treaty response against the practice of double hatting validates the concern of the states about the practitioners acting as counsel. Notably, these treaties are not prohibiting academics and/or former public servants acting as arbitrators, the group of people who states prefer to choose their arbitrators from. Therefore, a general ban on double hatting by the UNCITRAL Code of Conduct (2023) may substantially restrict options for the investors affecting equality of arms. Secondly, following *Eiser*, the ICSID Arbitration Rules 2022 requiring the signing of a declaration as a prerequisite of accepting appointment is a positive shift towards guaranteeing fairness. Finally, some commentators have suggested that if only 10 to 15 individuals agreed to stop double hatting, the criticisms regarding the practice will disappear. This demonstrates that double hatting might not be as big as a practical problem as being perceived by some literature. Hence, there is no valid argument to substantially justify a complete ban affecting party autonomy with regard to the selection of adjudicators as it remains at the heart of the ISDS system.

Concluding Remarks

The longstanding practice of double hatting should be viewed in the light of party autonomy. The present arbitral practice has cautiously responded to the issue of independence through imposing

comprehensive disclosure obligations to prevent situations giving rise to conflict of interest. The ICSID Arbitration Rules 2022 have also satisfactorily dealt with the same, enhancing the legitimacy of the process. As already explained, the remaining issues with double hatting can be addressed in various ways rather than adopting an absolute ban. From these perspectives, the drastic measure of complete ban of double hatting as contained in the UNCITRAL Code of Conduct (2023) is unnecessary and uncalled for.
