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Debate topic:
Double Hatting:
Hazardous to International Arbitration?

Transcription of Proceedings

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Dilber Devitre: So good afternoon everybody. I can see the participants are all online. My name is Dilber Devitre. I am an associate at Homburger in Zurich. It's my pleasure today to introduce this last panel, unfortunate last panel of the India ADR Week. We are going to end this panel this week today with a very very interesting session on a very interesting topic, very interesting debate. We are going to be debating today about double-hatting and is it hazardous to international arbitration or not and we have a very illustrious panel before us today who is going to be talking about this. Several of them are arbitrators and counsels which would be very interesting to hear their positions. It's my pleasure to introduce this counsel to all of you today. I will start with our moderator who is Mr. Promit Chatterjee who is joining us from Delhi, he is a principal associate at P&A Law offices which is also the law firm that is sponsoring this session. So thank you very much for that. His practice focuses on international commercial arbitration and investor state disputes and he is dual qualified as a lawyer in India and also as a solicitor advocate in England and Wales. Thank you so much Promit for moderating the session today. We then also have Amit Kumar Mishra with us who leads the dispute resolution practice at P&A Law offices. His practice also focuses on international arbitration. He regularly advises the Government of India and various public sector undertakings in India on their

dispute strategies and he is also a visiting faculty member at the National Law University Delhi and the Jindal Global Law School. So thank you Amit for joining us today. Also joining us is Dipen Sabharwal QC, who is a partner at White & Case and who serves as the head of the EMEA arbitration practice at White & Case. Dipen also advices on complex cross border disputes and he also is a lecturer at King's college and teaches advocacy skills for the foundation for international arbitration advocacy. He is also a QC and the youngest QC, youngest solicitor advocates to take Silk. So we are very privileged to have him with us today as well. Thank you for joining us Dipen. Finally, well, not finally, sorry. Our fourth speaker is Epaminontas Triantafilou who is also a partner of Quinn Emanuel Urquhart & Sullivan specializes in international arbitration. Also based in London, we have a quite a prominent London presence on this panel today. He has also been involved in a lot of arbitrations as counsel and also as arbitrator, sole and presiding arbitrator in several high value disputes. It would be very interesting to hear his perception also on this issue that we are going to be debating actively today. And finally we have Mr. Steven Finizio who is a partner at Wilmer Hale. He is in the international arbitration and dispute resolution group of Wilmer Hale. He is also a very active counsel and a very active arbitrator. So also somebody who can give this interesting perspective on the

issue we are going to be discussing today. He is also a teacher and an adjunct professor at SOS University of London and teaches international arbitration in London. As you can see, we have a very very distinguished panel before us today. I look forward to very interesting debate on this topic. I will hand over to you Promit from it. Thank you so much.

Promit Chatterjee: Thanks Dilber for the kind introduction. Ladies and Gentleman, we at P&A Law Offices are delighted to welcome you to this exciting debate on the motion is double hatting hazardous to international arbitration. After a week full of riveting analysis of complex issues affecting arbitration and ADR law, we felt the only way to top it all would be to pit arbitration heavyweights against each other on an issue which surely ricks of controversy. The panelists have promised to do the very best to defend their turf so long as they issue a necessary disclaimer. Whatever they say at this debate should not be later held against them or be construed as their personal opinion on the matter. Now to put the motion of this debate to context, double hatting refers to the practice of the same person acting as counsel and arbitrator simultaneously in different arbitrations. This draws criticisms from some quarters on the basis that performing such overlapping rules can affect an arbitrator's ability to act impartially. This criticism probably becomes

more acute in investor state disputes where similar questions of law are more likely to arise across arbitrations. This can lead to a situation where arbitrator is tasked with adjudicating a legal issue which has also previously dealt with as a counsel. Apart from issue bias, there are also inherent questions of apparent bias arising out of such conflicting roles. These are even lead to instances of annulment of arbitral award, such as in the case of ——- vs Spain. On the other hand, an outright ban on double-hatting would also make it all the way difficult for new entrants from diverse backgrounds to get their first break as arbitrators, who may not yet have the financial resource to altogether give up on their existing counsel practice. Therefore, the jury is still out as to how to draw a balance between these competing concerns which is why all the more this debate promises to be exciting and engaging. Amit and Steve will speak for the motion while Dipen and Epaminontas would speak against. Before I mute my mic and handover the stage to the stellar panelists, we would like to take a poll to gauge which way the audience tilts at the start of the debate and before hearing the panelists. We will try to take another poll at the end. The side which is able to swing the audience votes would be the winner. To clarify, let's say if 60% of the audience polls in favor of the motion now and this percentage changes to 55 at the end of the debate, then Dipen and ——- will be the winner. Can I

request MCIA to start the poll please? Can we put up the results? Okay. So 72% of the audience think that double-hatting is indeed hazardous to international arbitration. I leave the floor open to the panelists now. Just two housekeeping points. I would request it speaker to try to limit their speech to around 10 minutes each and I would also request the audience to post their questions using the Q&A and chat functions. We will try to take a couple of questions towards the very end depending on how time permits. Thank you. Over to Amit.

Amit Mishra: Thank you Promit. I didn't encourage this. I didn't feel that this polling would be 72% for the motion. Although I thought that this is something when I go in for speaking that double-hatting is hazardous, we didn't think that is something against the norm in India at least. Anyway, what I proposed to speak for the motion today is on a very specific area which Promit has already highlighted and which is something of a concern which is the issue conflict. Now, as Promit has already explained, the concept of double-hatting basically means whether arbitrator and counsel can simultaneously act on a particular issue in the context of what I am going to speak and whether that is something we should encourage or that is something we should completely be prohibiting. As I endeavour to present in course of my speech for next 10 minutes, how this has on

several occasions led to even a challenge to arbitrators and on certain occasions even challenge to an award. What is also encouraging to note is that in several new ISDS <Induadible >.

Promit Chatterjee: I think Amit there is a sound issue. Could you just re-login.

Neeti Sachdeva: Amit could you try speaking now. Amit we are still having difficulty hearing you.

Amit Mishra: Can you hear me now? Sorry Promit.

Neeti Sachdeva: Yes.

Promit Chatterjee: It's fine.

Amit Mishra: Sorry. My apologies. There is some network issue. Sorry. I just, I don't know where did I miss it. Basically I was addressing the area of issue conflict and what I was presenting is an example whereby say in the morning today I as a counsel in a case have presented my views on a particular issue and say in the coming week or in

the coming month, I happen to be an arbitrator on the same issue. There is a scope and there are issues which arises whether on the same issue which is a issue conflict which I will I have my independence challenged or can there be a challenge on impartiality. As you will see in some of the cases that I plan to deal with, this issue has been taken up as an issue conflict and courts have and the deciding authorities have on those cases accepted the challenge or the problem of the issue conflict and on certain occasions have upheld the challenge to the arbitrators. Now let me deal with few of these cases which are noteworthy ,like in the case of Bank of Montreal vs Brown which is a case of 2006, the court actually disqualified the arbitrator for simultaneously acting as a counsel against one of the parties concerning an unrelated dispute in a different field of law but on the same issue. The court noted a reasonable apprehension of bias must not be confused with the actual bias and therefore there was the apprehension of a bias on the particular issue since the arbitrator is already acting as a counsel. There is a scope that his views are already prejudice because he would not want to have a decision as an arbitrator which can be used against him in the case where he is acting as a counsel. In similar another case which is ICS Inspection and Control Services vs Argentia. This is relatively newer case of 2009. The respondent challenged the arbitrator appointed by the claimant who with his law firm

in that case was simultaneously representing investors as the counsels in another ICS proceedings, then deciding authority interestingly use the phrase that the arbitrators role as a counsel places him in a situation of adversity which against the respondent in that case and it says that it give rises to a justifiable doubt as to the arbitrators impartiality. Now, another case if I may deal with which is a case of —— vs international vs Peru, this is a recent case of 2014. The respondent in this case successfully challenged the arbitrator appointed by the claimant on the basis that the arbitrator had advised and was concurrently/ simultaneously advising a number of respondents, public entities in a number of unrelated matter but on the same issue. Similarly, in this case, the deciding authority concluded that the circumstances does exist which do not go to the arbitrators independence but definitely give rise to a justifiable doubts about the arbitrators impartiality on this issue. Basically the point to be noted is that the area of issue conflict is a serious one which has on various occasions led to a justifiable doubt as to the arbitrators impartiality and has been successful ground of challenge in the arbitrators appointment. Now this has actually traveled beyond the judicial challenge. When I say it has traveled beyond the judicial challenge, I mean that the various governments or the executives have picked this up and have sought to incorporate it as a bar or a ban on certain

occasions in their agreements. Now, this conflict is very acute in a case of Investor State arbitrations. Why so is because in more than often, the arbitrators are called upon to interpret similar, if not identical provisions in the BIT. As you know this is a very small world, almost all BITs are similar worded. If a particular person has already acted as a counsel and given a view or has presented his case as a counsel on a particular interpretation of the BIT clause. If it is same almost similar clause in another BIT where he acts now as an arbitrator, there is very very much genuine apprehension of his impartiality on that particular issue. To give you few examples where this has now been sought to be incorporated in the agreement as a ban is a very recent agreement of comprehensive and progressive agreement for Trans Pacific Partnership CPTPBB as we call it which was brought into force in 2018 has a clause which clearly says that upon selection an arbitrator shall refrain for the duration of the entire arbitration proceeding from acting as a counsel or party appointed expert or even a witness in any pending or new investment dispute under the CPTPBB or any of the international agreement. So it's almost amounting a good bar. Similarly, the Canada European Union Comprehensive Economic and Trade Agreement or the CETA as they call it has a clause which say that the members of the permanent investment tribunal under CETA shall refrain from acting as a counsel or a party appointed expert or witness in any

pending or new investment is put under the CETA or in any other international agreement. The last of the examples being the US, Mexico, Canada agreement or USMCA which is as early as last year 2020 which was brought into force clearly says that it basically prohibits an arbitrator appointed under Chapter 14 which is the investment related chapter from acting as a counsel or party appointed expert or even a witness in any proceeding under the USMCA. Now these are examples of the multilateral organizations treaties which as I have sought to lay down, they are prohibiting the concept of double-hatting. Interestingly states are picking up and the Model BITs and some of them that I shall now elaborate are also going ahead and are encouraging a ban on the double-hatting. The most novel example, in the 2019 Netherland Model BITs which is specifying clearly that the members of the tribunals shall not act as a legal counsel or in fact in past should not have acted as a legal counsel for the last five years in any investment dispute under that agreement or any other international agreement. So basically it is not only a prospective bar, it says for any appointment in your last five years if you are acting as a counsel on this particular issue who may not be appointed as the member of the tribunal. Now similar clauses exists in 2019 Slovak Republic Model BIT, the Morocco Model BIT 2019 and also the Model BIT of the South African Development Community which is a 2012 Model. In nutshell in conclusion,

if I can say India Model BIT does not have this clause but that's because it's a very common practice where a counsels in the morning are acting as the arbitrators in the afternoon or post lunch session and it is a concept not at all frowned upon. That's why I was very surprised with the poll and that is something I thought many counsels in India will not be happy with the, for the motion speakers but it's an increasing trend internationally where people are discourages which has led to a severe and a successful challenge. States are picking it up as a ban, complete prohibition in their Model BITs and multilateral treaties that are coming forward. I end this debate on my part by saying that is something which should be encouraged. It definitely leads to a conflict on the issue or the same question which the counsel may have dealt with and has to deal with again as an arbitrator. Thank you very much.

Promit Chatterjee: Thanks Amit for capturing the legal developments around this issue so nicely and basically rallying support from all states except India for your position. I would now request Epaminontas to present his points against Amit.

Epaminontas Triantafilou: Thank you very much and of course thank you Amit. I noticed that the presentation just made by Amit, so heavily was focused on investor state arbitration

and I will address that of course but I want to start by saying that the topic here is double-hatting in international arbitration writ large and there are some very significant differences between the more specialized field of treaty arbitration and the broader field. The key difference which Amit of course identified is that treaty arbitration is based on the adjudication of relatively similar instruments across the world of investment treaties. For those who have not seen them are both surprisingly short and surprisingly similar, that is changing, of course with new generations of treaties becoming a lot more elaborate in their provisions but the treaty protections that arbitrators deal with in the investor state cases tend to be worded in a similar fashion or tend to have similar legal effects. So there is actually a pronounced issue with taking counsel positions on one type of protection in the morning and then adjudicating the very same provision in the afternoon. Now, I do want to say, however, even within this very limited field that the motion or at least the concept behind the motion is focusing a little bit too much on the difference in mindset between advocacy and adjudication. There seems to be some sort of instinctive reaction that once one is counsel for something, they cannot think fairly about the issue when they have to resolve and I question that premise on a number of grounds which of course time prohibits me from going into great detail. First of all, it's not true

that counsel are expressing personal opinions when they are arguing for a case. This is actually, exemplified by this panel today. It's about arguing a particular case. It's about putting forward the client's case. It's not about expressing a personal opinion. So why necessarily advocating for a position in the morning would reflect all that particular person's own adjudication of a particular issue as arbitrator in the afternoon is not quite an automatic inference. It's not immediately clear. The second point is that while we are on issue conflict in particular, why are we giving a free pass to other types of personal bias, if you will or types of things that could influence one's judgment beyond counsel roles. What about academic roles? There are people out there who are writing books left and right about the legal effects of treaties then get appointed and are presumed in most instances to be able to resolve the same legal issues impartially and there is nothing saying that those books are not their positions, they actually are presented as their personal positions. I am just trying to say that it's not quite that clear that the counsel role is what disqualify one or should disqualify one who is serving as arbitrator. There are all sorts of other functions that one could be performing in the legal field which could raise questions about independence and impartiality. So, there is I guess not just two hats but multiple hats that one needs to be aware of when deciding to wear the arbitrator hat or

not. Stepping back a bit from this, Oh and I am sorry but I should also mention then there is the financial conflict issue. I differentiate that from the issue conflict because Amit also mentioned cases where for example there is a partner in a law firm, the law firm is acting in another case then and you can say that partner then is benefiting financially from the conflict. That is not an issue of, it's not an issue of conflict, it's a financial conflict and that is an entirely separate major of problem which of course is typically dealt with very swiftly when disqualifying arbitrators but I will step back a little bit from the treaty field and talk about international arbitration generally. Promit opened this session by saying, how then it will give new arbitrators opportunities to appear. Perhaps here it's worth highlighting. There are some natural barriers into an arbitrator career. One is experience and what kind of experience one would say, I would argue it needs to be practice experience, market experience, practical experience with the legal issues that you are going to be called upon to resolve. I mean, we should be paying homage here to the roots of international arbitration in the commercial sense. Going back to the medieval guilds in England where merchants wanted other merchants to solve their problems because they understood trade practices best. We don't want people who are completely divorced from the issue they are adjudicating to just come in and try to learn

everything anew. That defeats the whole purpose, we may as well just go up to generalist judges and have decisions rendered there. I think there is an issue here about entry and giving young lawyers who most of the times begin their professional lives by practicing and opportunity them to see the other side of the table or to go up on that bench in a virtual sense is an extremely valuable thing for the field and for their careers. The other barriers if you can see is remuneration. Oftentimes arbitrations, you don't have enough to make a living for yourself even if you decide to be a career arbitrator. It takes a long time to become known in the market to become selected. It is a market. Again, it's not something that you can end up, you can start doing from the outset and it is necessary for a stage in your life to be able to do both, if you are going to transition even to a full-time arbitrator role. So it's almost like a necessary bridge. If one factors in conflicts, you start seeing that it's actually not quite that easy to double-hat in the first place and a motion completely trying to ban the practice exaggerates the problem, creates barriers and then naturally favors certain types of people. For example, ones that are in academic positions and therefore don't have any income insecurity in most instances who can then have the luxury perhaps of dabbling into arbitrations as and when not coincidentally those tend to be the most vocal advocates against double-hatting. Again, in the broader field, not

just in treaty arbitration where there are some specific concerns. Again, in terms of the overall problem of double-hatting and there are actually studies out there about the extent to which it actually happens. It doesn't happen that much in the first place. It is safeguarded against by all sorts of provisions in arbitral rules and ethical rules as well as guidelines such as the international bar associations famous guidelines which are out now being applied pretty much in all arbitrations either by express adoption or implicit consultation by tribunals and appointing authorities. The practical considerations that underlie assuming in arbitrator appointments and this is what I will close with. The practical considerations here quite apart from all the other points are how are you going to present yourself in the market? Arbitration and the strength of arbitration is that it's a market. Arbitrators don't just get appointed randomly. They get selected because of the certain reputation they have built. Everybody knows that reputation is like a crystal glass. It takes a long time to build but it can be very easy to break and if you are the sort of person who will get caught in the serious conflict in a serious ethically compromised situation, chances are that you are endangering your career as an arbitrator just from the outset. Most people refrain, that people who get caught and never get appointed again. So the market self-corrects anyway. Sure there are costs associated

with having done something bad in a particular case but the market as a whole tens of thousands of commercial and treaty arbitration is taking place every day. Don't give any reason either in terms of how they function or the enforcement of the underlying awards to believe that there is some widespread problem of arbitrators who have other roles either as academics or counsel corrupting the process or adversely impacting the process. So I just don't think that by banning the practice we are solving the big enough of a problem. This is the proverbial launching a missile to kill a mouse type of things and with that I will close. Thank you.

Promit Chatterjee: Thanks Epaminontas for giving an interesting free-market spin to this question of ban. I will move on to Steven please.

Steven Finizio: Thank you Promit and thank you Amit and not just for starting us off. I think I want to start by saying, I agree with Epaminontas that investment treaty arbitration and commercial arbitration are different and double-hatting concerns arise in particular in investment treaty arbitration because of the development of publicly available case law that can be applied to broader issues in a way that awards in commercial cases can't. However, it is really important to focus on the fact that double-hatting is not

just a concern in investment treaty arbitration rather there is a real reason to believe and to worry that allowing double-hatting in investment treaty arbitration will more broadly damage international arbitration generally. In particular, I think we should be concerned that one of the fundamental strengths of international arbitration is party autonomy, the right to choose your arbitrator. In fact, allowing double-hatting in this smaller field of investment treaty arbitration is creating a fundamental threat to party autonomy more generally in particular allowing double-hatting encourages threats like shifting to investment courts. It also though encourages criticisms that we have heard from very prominent arbitrators and commentators like Jan Paulson and Albert Jan Vandenberg questioning whether party appointment itself should be allowed at all. Jan Paulson has called it a more hazard and they have raised concerns about bias where parties are allowed to choose their own arbitrators. I think if we care about party autonomy and I think we should care about party autonomy. We need to push back on those sorts of proposals to shift to courts, to shift to a no party autonomy to choose arbitrators and one simple way to do that is to draw a black line against double-hatting in investment treaty cases. I don't think that Amit and I have to prove to the audience, the double-hatting is a threat. Well, I think we need to tell you and you need to listen to its concern that it has a

potential to cause serious damage while fixing it has very little cost. So we have a situation where a little cost, if we regulate double-hatting and very significant benefits. We should also ask ourselves whether we should be concerned about the interests of the repeat players as Epaminontas just suggested in the development of arbitrators careers or whether we should be concerned about faith and the legitimacy of the overall system of international arbitration. Should we simply hold on to a certain status quo as the other side I think is suggesting while ignoring that one of arbitrations greatest virtues is that it adapts, it evolves and in particular investment treaty disputes are a recent phenomenon. If we go back 20 or 30 years. We didn't have these. I think what we need to do is rethink the needs and approach in those cases because of the differences that exist in those cases and not simply apply a method that we might be comfortable within commercial arbitration to investment treaty arbitration. I want to briefly and quickly talk about some of the particular points that Epaminontas made. I think we should start with the idea that we are not really hurting parties or hurting arbitrators. There are many disputes, many qualified arbitrators and if we think we are going to regulate double-hatting just in the investment treaty sphere which I think is the right approach. We are not really preventing arbitrators from gaining experience and we are not really preventing people from choosing

qualified arbitrators. There is always more than one qualified arbitrator and if we avoid the problems that come with double-hatting, we don't tie parties hands in a way that means they can't get qualified arbitrators. We don't impede people's ability to learn to be better arbitrators. What we in fact do is we expand the pool of experienced arbitrators. We expand the pool of available arbitrators. We automatically increase diversity and representativeness. If you take a step back and look at the statistics around doubling-hatting and you think about the pool of arbitrators who do investment treaty cases, the fact that there is currently a club is pretty stark when you look at those numbers and by regulating double-hatting we help break that club and expand the pool of experienced arbitrators and we do that recognizing that parties are not free to appoint anyone already. As Amit explained, this is just one form of conflict. We regularly tell parties they can't appoint certain arbitrators because of conflicts. That's what this is, a form of conflict. I think we all should ask ourselves, should we be concerned that pro double-hatting arguments are mainly coming from those lawyers who are in a position to most benefit from double-hatting? And even if you don't think that people who double-hat or law firms who use lawyers who are double-hatting are misbehaving, the fundamental question is why allow the perception that there is a risk of bias or the criticisms and then the response

including the greater regulation that this can lead to, if we can fix the problem with such a small cost. I am also concerned that we hear and we have heard this with Epaminontas that we should trust the integrity of the people involved. I think this is similar to the discredited arguments we solve for example in the English courts in the Chubb versus Halliburton case where the basic approach of the lower courts was we know the arbitrator and we trust him. So therefore that's enough despite the fact that might be an appearance of bias. Just trust us is not a basis for developing confidence and the acceptance of the legitimacy of arbitration. More broadly and particularly is not a basis for getting people to trust a system where consent to arbitration is not contractual but a standing offer to arbitrate through broad treaty language as in investment treaty arbitrations. I think we need to move away from the just trust us system. The self-correction, self correction might be fine in the long term but also self-correction doesn't help us in the particular cases where something has gone wrong and if we can avoid those risks and both the risks and the perception of risk, we have done the whole world of international arbitration a benefit. We also have to recognize that this is not about necessarily people consciously misbehaving but it's about the idea that people can compartmentalize and most of us get uncomfortable if an arbitrator is appointed in a case where that arbitrator has

also been involved in a related or similar case because we know despite the logic of a lot of decisions on challenges that people can't compartmentalize what is in one part of brain is not kept out of what is in the other side of the brain. When we are talking about double-hatting that concerned about compartmentalization is even worse because the arbitrator is not only having to compartmentalize what he or she knows from one case from another case but an interest that person has in a particular outcome which may benefit him or her or their client in another case. It is asking people to unconsciously avoid that sort of influence. It is asking the impossible. We already know it is difficult to address those sorts of issues to challenge procedures because challenge procedures are pretty sympathetic to arbitrators and the standard of bias to disqualify an arbitrator is typically very high. Why create this risk at all? If we have a bright line rule regulating double-hatting. We have a simple approach that avoids all the negative impact that comes with issues of double-hatting and finally it avoids the potential tension between the party that appoints an arbitrator without knowing whether that arbitrator might be carrying the baggage of another case that they would know about because of the confidential nature of procedures. If I appoint an arbitrator, I don't know whether she has issues in a case where she is counsel that may make her want a different outcome consciously or

unconsciously. I don't know that during the course of the case where she is my arbitrator, she doesn't get engaged in another case to act as counsel, so all of these things can be easily avoided at low costs. There is really no reason to accept it. Avoiding double-hatting in the investment treaty system, disarms those who will do greater harm to a party autonomy in international arbitration more generally which is why people should stick with where they started which is to recognize double-hatting as it's allowed now in investment treaty arbitration is a threat to the overall system of international arbitration and should be regulated.

Promit Chatterjee: Thanks Steven. That was very insightful. I now request Dipen to have the last word.

Dipen Sabharwal: Thank you everyone. I think it falls upon me to be the last speaker of the last event of this week where we spend discussing arbitration topics. I will try to keep my points very pithy because the speakers before me have done an excellent job of setting out the various aspects of the debate. At the very outset, I must declare an interest, if double- hatting is a sin, then I must confess my guilt. I am an arbitration practitioner who primarily acts as counsel in arbitrations but I do from time to time sit as an arbitrator. So I have to make that disclosure first. Now we have heard about the pros and cons of double-

hatting to some degree today. I think it is very important for us to remember that this is not a new debate, it has been going on for about 12 to 13 years now. The Court of Arbitration for Sports which sits in Switzerland introduced rules in 2009 it is 12 years ago prohibiting double-hatting as far as CAS proceedings were concerned and evocatively use the phrase you cannot be a referee and a football player at the same time, very appropriate for the Court of Arbitration for Sport. Again in 2009 Philip Sands QC gave a speech at the annual IBA Conference where he said double-hatting is very bad for investment arbitrations. He said it is deplorable and awful and it should stop. We have been talking about this for dozens of years. Nothing unusual in the field of arbitration. We like talking about things. We like debating things and if nothing else, it allows us to have fun conversations on a Saturday evening on these topics which is all well and good. The key question and for me that is always the most important question when you are discussing changes and arbitration is what do users want. Ultimately, arbitration exists not for lawyers. It doesn't exist for arbitrators. It exists for the users, the business people, the clients, the parties, the States who use arbitration and I think the best available empirical data as to what users want are the surveys that the Queen Mary University do from time to time. They did one with my firm White & Case about a couple of years ago in 2018 where we

asked respondents what are the most valuable characteristics in arbitration that you actually like? And 40% of the respondents said they prefer flexibility and the fact that they can appoint arbitrators of their own volition. They don't get a judge imposed upon them. That is something that they really value. It's among the top three things about arbitration that they like and when they were asking me the three worst characteristics of arbitration, things they hate about arbitration. They say, they don't like how long arbitrations take, how much they cost. Very few, if at all say they don't like double-hatting or conflicts of interest. So if you look at the users, this is not something that is keeping them awake at night as something that is fundamentally wrong with arbitration. Now, this Queen Mary survey that I am talking about dealt with arbitration as a whole, it was asking respondents about arbitration generally, not limiting itself to investor state arbitration. I think as Steven has mentioned, there are some separate concerns that apply when it comes to investor state arbitration which are different from commercial arbitration but there is a subsequent survey that Queen Mary did in 2020 specifically in the field of investor state dispute settlement and in that survey they asked users specifically in the context of investor state arbitration, they asked them a bunch of questions about double-hatting and what do you users really feel about it? And 65% of the respondents,

two out of three said that restrictions in double-hatting will reduce the availability of arbitrators and the parties can choose from. So that was a concern that is expressed by the users and 61% of the respondents said that arbitrators should be allowed to act as counsel in other cases and vice versa. So again, I mean based on the empirical data and I think this is the best empirical data that is available before us as to what users actually want. Double hatting seems to be more of a big deal to academic practitioners of arbitration and commentators who are concerned about the purity of arbitration. Jan Paulson talking about the moral hazard of arbitration. Professor Vandenberg talking about the ethics of arbitration. I think all of that is well and good but fundamentally at least what the data is telling us is that users are more concerned about flexibility of the process and less concerned about the problem of double-hatting. The second point which came up and I think all the speakers raised it in one form or the other is this whole idea of what impact this would have in the real life when it comes to diversity in arbitration. We all know that arbitration especially international arbitration for the longest time has suffered a criticism of being pale, male and stale. It's largely Western European white men with grey hair deciding things in the world of international arbitration and there has been a significant desire to change things. It is from the context of gender of having

more women and making it more international and having more ethnic minorities involved. The question you would ask yourself is what impact of creating the segregation between an exclusive cadre of arbitrators who sit as arbitrators and arbitrators alone, what impact that would have in the field of arbitration. And again, I think there you can look at what people are saying, Arbitral women which is an NGO that has been set up in the last five years whose purpose is to advance the interest of women and to increase diversity in dispute resolution. They published a report that was last year and I am quoting from that where they said that a ban on multiple roles in arbitration would have a severe impact on gender diversity and imposing a ban duel hatting would be tantamount to reversing progress made on gender diversity by the international arbitration community over the past years. So Arbitral Women which is advocating diversity for women doesn't like it. We are today speaking in the context of the India ADR Week and we have to ask ourselves what would a ban or a prohibition on double-hatting mean for people practicing arbitration in India or in Indian arbitrations. Now we all know that historically arbitrators in India have principally been drawn from retired judges. Now retired judges bring a lot to the table when it comes to adjudication skills but there has been a recognition that those retired judges tend to run arbitration proceedings much as they do a court proceedings and that is not what

parties intended or sought when they chose to go for arbitration and the question that listeners on this session have to ask themselves is that if there were to be a prohibition on double- hatting in India, are there enough arbitral appointments going around that there will be practitioners today who will forsake their practice before courts and tribunals and say they are willing to sit exclusively as arbitrators. And if they would not, effectively what practitioners in India are saying is retired judges would have the field to be sitting as arbitrators, that pretty much is the only game in town and there is a big question to be asked whether that is desirable for the continuous progress of arbitration in India and I think that in my view at least that would seriously undermine a lot of the progress and change that has happened in Indian arbitration in the last decade. The third point which I think came right at the outset which was the issue about issue conflict and the fact that it is a particular problem in investor state arbitration and if for nothing else, at least in the context of investor state arbitration, double-hatting should be prohibited because it causes issue conflict. I think there are a couple of things I want to say to that. I think the first is international arbitration has done pretty well in coming up with a set of rules and guidelines when it comes to dealing with conflicts of arbitration. The IBA rules and the conflicts of interest

of arbitration have been around for the better part of two decades. They have achieved universal acceptance. Indeed the recent amendments to the Indian Arbitration Act have actually incorporated them into the main body of the legislation. So the different lists, the orange list, the green list, the red list, all of that is well accepted mechanism. People understand the traffic light system and it works and I think at the outset, there was a reference to the ICSID case involving Argentina but I take the case which was mentioned by Amit at the outset as supporting my position which is in that case where there was an issue of conflict, the parties relied on the IBA guidelines and conflicts of interest. They said that it was caught by the orange list. They said the arbitrators served as a counsel and that issue was dealt with. Given that you already have safeguards in the form of the IBA guidelines and conflicts of interest available, I do agree with Epaminontas where he said that you using a missile to kill a mouse or you throwing the baby out with the bath water depending upon your preference of analogies. I think it is an overreaction when you already have mechanisms in place. I think dealing with Steven's point where he mentioned the fact that in an investor state arbitration you have people whose positions as counsel would somehow impede their objectivity as an arbitrator. I think we all know very well that in investor state arbitration, there are many investors, many

arbitrators, I beg your pardon, who exclusively sit as an arbitrators whose position on issues are extremely well-known and therefore they inevitably get appointed either by the state exclusively or by investors exclusively and that is a position that international arbitration community is perfectly happy to live with. It's a practice, I must confess with some degree of guilt. We all practice it when nominating arbitrators. I think if that is acceptable for arbitrators whose public positions on issues are certainly known, I find it difficult why we should be imposing a most stringent burden on counsel for whom issue conflicts is held up as a higher bar or a bigger challenge which they have to surmount which arbitrators who sit exclusively as arbitrators don't have to deal with. I just want to end up with a final point which is because I started with the confession of guilt, so I might as well end with elaborating on that confession. Shortly before I joined the session, I was filling in an acceptance form for sitting as an arbitrator and in that I was making very detailed disclosures because I work in an international law firm. We have 41 offices in 30 countries and we have 3700 lawyers and I was making very extensive disclosures which I spent the better part of three hours this morning sort of setting out in some detail for precisely the reason that Epaminontas mentioned that I do value my independence, impartiality and reputation. The last thing I want is to be challenged on

grounds of not making sufficient disclosures. I think the system works because ultimately if disclosures are made and parties know where the candidate for arbitrators stands and if the arbitrator is appointed, well that goes down to party autonomy and obviously if people have objections to it, the mechanisms exist for challenges and I don't think that it is the interest of international arbitration to be coming up with blanket prohibitions which undermine that principle of party autonomy. With that I hand over to, back to Promit.

Promit Chatterjee: Thank you so much Dipen for such a resounding comeback to Steven. Before we move on to a few question answer from the audience, I would just like to take a poll back to see if Amit and Steven were managing to get a swing. I can request MCIA to run the poll, please. Can we share the results? I think the house clearly belongs to Dipen and Epaminontas, congratulations.

Steven Finizio: Promit, can I make a point? And I congratulate Epaminontas and Dipen. I do think that it's important to recognize that you have got a panelist made up of law firm lawyers here who all sit as arbitrators and as act as counsel. I therefore think I tried to throw myself into the role of supporting the resolution that it was hazardous and I worry that some people might think that we have compromised in defending that position because of where

we come at things. At the same time, I think it is really important for people to recognize two things. One is, this is an issue that is not going to go away. We have got draft conduct rules for investment arbitration that propose possibilities of either regulating this and banning this idea of multiple roles or to increase disclosures. As soon as you increase disclosures, you create complexities in some of the questions that people have been asking. These become real issues both more challenges to arbitrators, more challenges to awards particularly because the idea of multiple roles will change over the lifetime of a case. In the investment treaty world, these cases may last for many years and the lawyers and arbitrators involved will have their roles change in other cases during that time. So we cannot ignore this issue. Even if the general reaction is the way we have approached, it tends to work. We cannot ignore it. We also generally cannot ignore, we talk about the international arbitration community as it is one thing. We cannot ignore the threat to a greater regulation that goes beyond things like disclosure that will change things that are very important to both the legitimacy and the success of international arbitration. I passionately believe, Dipen was talking about the Queen Mary surveys, if we start to limit party's ability to choose their own arbitrators, I don't mean pick individual X but to appoint their own arbitrators, we are fundamentally moving away from

what makes international arbitration work. So I don't think even if the vote is not hazardous, I think it is a mistake to think this is going away. It is a mistake to think that we can just say, huh we all agree. Therefore, it's not a problem.

Epaminontas Triantafilou: I was going to say, I fully agree that this issue is only beginning. I mean Amit was talking about the big changes now underway in the investment treaty system with the will of States. So, we all can question it, it is what it is and the treaty system is moving towards a kind of international judiciary mechanism. It seems to me we are moving away from the ad-hoc constitution of investment treaty tribunals at least under those multilateral treaties, it looks like we are moving to a more bureaucratized type standing tribunal situation. At least that's the active proposal of several States. So, at the same time, if we are going to preserve the nature of arbitration which is to have a system for the private resolution of disputes using people specialized or knowledgeable about the dispute with particular industry experience, knowledge of commercial practices and things of that nature, then we must, it seems to me keep ways of injecting that expertise into whatever tribunal we put in place. One of my hobby horse ideas actually is to start thinking about mixed tribunals between standing adjudicators and people from the markets,

practitioners, whoever subject to appropriate vetting so that this type of knowledge and experience can always be up there on the bench. We don't get into an ivory tower type of situation and complete separation between the commercial reality and the educational method.

Promit Chatterjee: Okay. There is one question for you Dipen. I think this rephrasing question for the audience. I know you have referred to a White & Case survey a few times but now that we have to remove the debaters hat. Who do you think benefits the most of double-hatting and how do the other participants in arbitration who are non-lawyers actually stand to gain if we do not ban double-hatting?

Dipen Sabharwal: I think it's kind of hard, right because as Steven said all of us are sort of primarily practitioners who sit as arbitrators on side but I genuinely think that its a chicken and egg problem right that if effectively if you have a blanket double-hatting prohibition that kicks in, I think absent what Epaminontas has which I think is quite a good idea that you have, it's a bit like how the London High Court works, right. So for example, in the London High Court, you have let's say 25 permanent judges but you have at least 40 deputy High Court Judges who are appointed for a term of four years, they are practitioners in London tend to be largely barristers but for at least one month of the

year, they promise that they will say 30 days as a judge. The idea is that way you are getting practitioners, some judicial experience and you also helping them figure out that whether a career as a judge is right for them. Now, I don't know whether that is the future for creating some sort of super judiciary for investment arbitration where people have those kind of roles. But it's those kinds of top-down changes are easy to make in domestic judiciaries, they are very hard to do in this chaotic world of investment arbitration. We have spoken a lot about investor state arbitration but investor state arbitration, if you were just to look at the number of arbitrations is a tiny fraction of the number of arbitrations taking place in the world. You have got maritime arbitrations, you have got trade arbitrations, you have got construction, commercial, blah blah blah. I think part of the advantage of arbitration is chaos the fact that you want a particular sectors, particular businesses, particular trades to be able to make choices for themselves and it may well be that investor state arbitration will have to be treated as a sui-generis kind of a situation with a particular bespoke solution and the rest carry on in the usual way.

Promit Chatterjee: Thank you so much Dipen. I think we are running out of time, so you still get to say the last word. Thanks to all the panelists for having such an engaging

session with us. I will now handover to MCIA for the conclusion.

Dilber Devitre: Thank you so much Promit. I think that was a fantastic debate and a fantastic way to end this India ADR Week that we have had. We have seen some really interesting arguments from both sides, even though one side seemed clearly, the audience seemed to be with one side. But we have seen, we have heard about issue conflict, we have spoken about the differences between investment arbitration and commercial arbitration. Do we have to take that into account? Whether we can compartmentalize as a lawyer, as counsel and as arbitrator? We have spoken about the diversity issues that this could raise and each of these arguments had, we have spoken about both sides to each of these arguments. We have seen that it's not a clear cut answer. Anyway and I think as Steven said, if I may use his concluding remarks, this is an issue that's not going away. It's good that we are talking about it. It's good that we are aware about it and it's an issue that, we are going to be speaking about again. With that, I am going to close this session and close this fantastic week that we have had, we have participated in. Thank you to the MCIA. Thank you to all our speakers, all our sponsors. It was an absolute pleasure to have all of you with us during this week. Thank you so much.