Problematic Aspects of the Appointment of Arbitrators in Investor-State Arbitration Proceedings: Causes, Challenges and Prospects

Povilas Plikūnas

Assistant lawyer at Sorainen, fifth-year student at Vilnius University Faculty of Law

This article analyses the issue of appointing arbitrators in investment arbitration proceedings, revealing the significance of this procedure and the risks it poses. An examination of the rules presented by ICSID and UNCITRAL reveals that the widely applied autonomy of the parties in forming the arbitral tribunal does not ensure a sufficient standard of independence and transparency. The empirical data examined confirm a marked lack of diversity among arbitrators, the prevalence of dual roles, and the risk of failing to ensure their independence and impartiality. These problems may undermine the legitimacy of investment arbitration and erode states' and investors' confidence in the mechanism. The paper presents possible solutions to these problems and evaluates ongoing reforms, such as the UNCITRAL Working Group III Code of Conduct for Arbitrators. After analysing the current situation, future prospects and ways to ensure positive results are discussed.

INTRODUCTION

The appointment of arbitrators is one of the most critical stages in investment arbitration proceedings, as it directly shapes the tribunal's composition and, consequently, the legitimacy and outcome of the dispute resolution process. While the principle of party autonomy remains a cornerstone of international arbitration and is widely used in frameworks such as the International Centre for Settlement of Investment Disputes (ICSID) Convention and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, it also gives rise to systematic challenges.

This article examines the key problematic aspects of arbitrator appointment in investment arbitration, focusing on three interconnected issues: the lack of diversity among arbitrators, the prevalence of double-hatting, and concerns regarding arbitrator independence and impartiality. By analysing both the regulatory framework and empirical data, the paper evaluates how these factors affect the system's credibility and effectiveness. It further explores ongoing reform efforts, including initiatives within UNCITRAL Working Group III, and assesses potential solutions to strengthen transparency, legitimacy, and trust in investment arbitration.

I. CHARACTERISTICS OF ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

I.1. PROCEDURES FOR APPOINTMENT OF ARBITRATORS IN INVESTMENT ARBITRATION

The ability to appoint arbitrators individually for each dispute has historically been a defining feature of international arbitration. The existence of this possibility is undoubtedly one of the reasons why both states and private parties choose arbitration as the preferred method for

resolving international disputes.[1] The stage of arbitrator selection is the first procedural stage in both commercial and investment arbitration. The parties to a dispute devote considerable effort to anticipating whether the individual they appoint as their arbitrator may be favourable to their position. Decisions taken at this stage of the dispute play a significant role in the outcome of the proceedings and the rendering of the final arbitral award.[2]

Investment arbitration proceedings are commonly conducted in accordance with the arbitration rules established by ICSID or UNCITRAL. In this context, it is important to briefly examine how arbitrator appointments are organised under the most widely used procedural frameworks.

Under the ICSID Convention (Articles 37-40), the constitution of the arbitral tribunal is grounded in the principle of party autonomy, requiring that the process be initiated as soon as possible following the submission of the request for arbitration. Tribunals may consist of a sole arbitrator or any uneven number agreed by the parties. In the absence of such an agreement, the default structure is a three-member tribunal, where each party appoints one arbitrator and the presiding arbitrator is jointly appointed. Arbitrators may, but are not required to, be selected from the ICSID panel, and all appointees must meet high standards of competence, integrity, and independence in fields such as law, commerce, industry, or finance.

The ICSID Convention also establishes safeguards to prevent delays or deadlock in the formation of arbitral tribunals. If the tribunal is not constituted within 90 days, either party may request the Chairman of ICSID to complete the appointments after consultation with both parties. In such cases, strict nationality restrictions apply, meaning that Chairman-appointed arbitrators may not share the nationality of either disputing party, ensuring a minimum standard of neutrality. More broadly, ICSID requires that the majority of arbitrators not be nationals of the disputing parties, with very limited exceptions. Additionally, arbitrators appointed by the Chairman must be selected from the ICSID panel, further reinforcing procedural consistency and legitimacy.[3]

The UNCITRAL Arbitration Rules (Articles 7-10) regulate the constitution of the arbitral tribunal in a manner broadly similar to the ICSID framework, emphasising party autonomy while also introducing the role of an appointing authority in cases where the parties fail to agree on arbitrator appointments. As the core principles largely mirror those established under the ICSID Convention, attention is primarily directed to the key distinctions rather than repeating overlapping provisions.

UNCITRAL rules provide more detailed guidance on the appointment of arbitrators nominated directly by the parties. In such cases, the appointing authority may apply the list procedure, submitting an identical list of at least three candidates to both parties, who then indicate their preferences and objections within 15 days and these responses are taken into account when making the final appointment. Additionally, the appointing authority is vested with broader powers than under the ICSID Convention, as it may, upon a party's request, constitute the entire tribunal if necessary, even where this requires revoking previously made appointments.[4] One of the key differences from the ICSID Convention is that the UNCITRAL Rules do not expressly set out requirements

[1] Gary Born, International Commercial Arbitration (3rd edn, Wolters Kluwer 2021) 1765.

[2] Rebeca Mosquera, 'Constitution of the Tribunal: Key Factors and Strategic Considerations for Selecting and Appointing Arbitrators' in *The Guide to Investment Treaty Protection and Enforcement* (3rd edn, Global Arbitration Review 2025) 86.

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

[4] UNCITRAL Arbitration Rules (as revised in 2021), United Nations General Assembly (UNGA) Res 76/108 (9 December 2021).

regarding arbitrators' qualifications or nationality to ensure transparency and impartiality in arbitral proceedings.

A quick analysis of the two principal international procedural frameworks for investment arbitration proceedings indicates that the primary objective of these rules is to ensure party autonomy in selecting arbitrators. Both procedural frameworks consistently grant disputing parties the right to determine the number of arbitrators and freely appoint individuals of their choice.

Only the ICSID Convention establishes minimum requirements regarding nationality and qualifications, whereas the UNCITRAL Rules rely on mechanisms such as the list procedure to safeguard the proper conduct of the arbitrator appointment process. However, it is precisely the gaps in this international regulatory framework that, over time, have contributed to criticism of the current investment arbitration system, particularly regarding arbitrator appointments.

I.2. SIGNIFICANCE OF ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

It is self-evident that the primary purpose, or significance, of arbitrator appointment is the constitution of the arbitral tribunal. At first glance, the procedural aspects of arbitrator appointment might therefore appear to be of only secondary importance, given the existence of mechanisms designed to ensure that a tribunal is ultimately constituted and that the investment dispute proceeds. In reality, however, this stage is far more significant.

Returning to the ICSID Convention, Article 54(1) provides that each Contracting State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territory as if it were a final judgment of its national courts. The exclusive grounds for setting aside an award rendered under the ICSID Rules are set forth in Article 52 of the ICSID Convention. One such ground is that the tribunal was not properly constituted.

Conversely, non-ICSID awards are recognised under a more general procedure. In Lithuania, for instance, Article 809(1) of the Code of Civil Procedure[5] requires the Court of Appeal to recognise foreign arbitral awards prior to enforcement. Article 810(6) provides that the conditions for such recognition are governed by the 1958 New York Convention[6], which lists the improper constitution of the arbitral tribunal as a ground for refusing recognition or enforcement. Consequently, non-compliance with the applicable appointment rules may ultimately render an award unenforceable.

Additionally, the arbitrator's appointment is crucial to ensuring a fair and well-reasoned final decision. Investment arbitration typically involves complex, high-value disputes that are often highly specialised, requiring arbitrators with the ability to navigate both public and private international law. The appointment of suitably qualified and experienced individuals is therefore essential to ensuring a properly conducted process. This further highlights the importance for disputing parties to carefully select arbitrators who are not only independent and impartial but also possess the appropriate expertise.

It can be concluded that the procedure for appointing arbitrators constitutes a central element of the investment arbitration process, effectively setting the tone for the entire proceedings. Only properly appointed arbitrators can ensure a high-quality, transparent, and impartial adjudication. Nevertheless, the prevailing mechanisms and practices for arbitrator appointment in investment arbitration have attracted significant criticism from scholars and practitioners worldwide.

[5] Lietuvos Respublikos civilinio proceso kodeksas (Lithuanian Code of Civil Procedure) 2002 m. vasario 28 d. Nr IX-743, Valstybės žinios, 2002, Nr 36-1340.

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.

II. PROBLEMATIC ASPECTS OF ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

Having examined the most widely applied procedures for the appointment of arbitrators in investment arbitration and established the significance of this process, this paper will analyse probably the main problematic aspects of arbitrator's appointments: (i) the lack of diversity among investment arbitration arbitrators; (ii) the issue of double-hatting; (iii) concerns regarding impartiality and independence of arbitrators in investment arbitration proceedings.

II.1. THE LACK OF DIVERSITY AMONG INVESTMENT ARBITRATION ARBITRATORS

The prevailing mechanism for the appointment of arbitrators in investment arbitration has long been based on the ideal of a free market (*laissez-faire*[7] and on unrestricted party autonomy in selecting arbitrators). The most commonly applied procedural rules grant parties almost unlimited discretion in appointing arbitrators, provided that they are, at least formally, impartial and independent. It is precisely this underlying philosophy that has led many international law scholars to question whether such a meritocratic model truly functions effectively in practice and ensures the proper operation of investment arbitration. On the contrary, it may incentivise disputing parties to rely on a well-established pool of arbitrators repeatedly.[8] Unfavourable empirical data have increasingly prompted concern among experts regarding the lack of diversity among arbitrators deciding investment disputes, particularly in respect of gender and nationality.

Let's start with a frequently cited example in legal doctrine that helps to paint the picture: an arbitrator from Nigeria may differ considerably in legal outlook from the one from South Africa, despite both being African. These differences stem not only from nationality but also from colonial history – some African states follow civil law, such as the former French colonies Senegal and Côte d'Ivoire, while others follow common law, such as the former British colonies Ghana and Tanzania. The same logic applies in Europe: the gap between a French and an English arbitrator can be equally substantial.[9] In light of this, limited diversity among arbitrators may create conditions for the dominance of a single mode of thinking and a uniform understanding of law and investment protection across investment arbitration proceedings, thereby undermining the independence and impartiality of this international legal instrument.

At a general level, the issue of arbitrator diversity is reflected in ICSID statistics concerning investment arbitration cases administered by it throughout its entire period of activity, from 1966 to the present. ICSID data clearly indicates that over 70% of all appointed arbitrators originate from the Northern Hemisphere, with as many as 65% coming from Western Europe (45%) and North America (20%). South America ranks third in the number of appointed arbitrators, accounting for 13%. It should be noted that even these figures may not fully reflect the true geographical imbalance, as many arbitrators from the Global South are educated and practice in the Northern Hemisphere countries, and are therefore often influenced by the legal traditions, academic schools, and broader intellectual frameworks prevailing in those regions.[10]

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[7] *Laissez-faire* – a certain philosophy or approach characterized by a generally deliberate restraint from giving directions or any interference, especially in relation to an individual's freedom of choice and actions.

[8] Konstantin Ksenofontov and Elena Murashko, '*Rebalancing the Scales: Diversity and Reform of Investor-State Dispute Settlement*' (*Kluwer Arbitration Blog*, 26 July 2025) <https://legalblogs.wolterskluwer.com/arbitration-blog/rebalancing-the-scales-diversity-and-reform-of-investor-state-dispute-settlement/> accessed 16 June 2026.

[9] Andrea Kay Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (Academic Forum on ISDS Concept Paper No 21, 2020) <https://brill.com/view/journals/jwit/21/2-3/article-p410_7.xml> accessed 16 June 2026.

[10] Ksenofontov and Murashko (n 8).

The disparity is even more pronounced when considering gender. Of all arbitrator appointments in ICSID proceedings, 84% have been men, compared to only 16% women.[11] Furthermore, a 2017 study examining the 'inner circle' of the most influential arbitrators in investment arbitration revealed that, despite the already low proportion of female appointments, two arbitrators – Brigitte Stern and Gabrielle Kaufmann-Kohler – accounted for as much as 57% of all female arbitrator appointments made up to 2018.[12]

Gender and geographical background of arbitrators are currently the two most frequently discussed factors that illustrate the lack of diversity in investment arbitration, not only because of their relevance in arbitral proceedings but also because of their objective and easily measurable nature, which allows for a clear empirical assessment of the existing situation. However, legal scholars increasingly emphasise that future research should encompass a broader range of factors, including arbitrators' language skills, educational backgrounds, and participation in both commercial and investment arbitration. For example, a large-scale study conducted in 2015, based on survey data, analysed six variables (gender, nationality, age, language proficiency, legal education, and professional experience) across 262 international arbitrators, of whom 67 specialised exclusively in investment arbitration. The study concluded that the 'average international arbitrator' is a 53-year-old man from a developed country who has served as an arbitrator in ten separate cases.[13]

One of the primary causes of the lack of diversity in investment arbitration appointments is arguably an unwritten expectation to appoint individuals with prior experience, as the prevailing practice of repeatedly selecting well-established arbitrators effectively creates barriers for new entrants seeking to join the field. Empirical data support this observation. According to the PluriCourts Investment Treaty Arbitration Database (PITAD), 377 of 716 arbitrators who have participated in at least one investment arbitration case were appointed only once. Furthermore, as of 2019, the 50 most frequently appointed and influential arbitrators received 1,710 appointments, representing nearly 50% of all appointments made to that point. This demonstrates a significant concentration of appointments within a relatively small and established group of practitioners.[14]

It can be argued that the very mechanism of arbitrator appointment in investment arbitration itself contributes to the persistence of limited diversity. Typically, the claimant appoints the first arbitrator, often opting for a well-known individual with an established reputation and, in some cases, a track record of decisions perceived as favourable to private investors. In response, the respondent is likely to mirror this strategy by appointing a similarly prominent arbitrator. Conversely, if the claimant selects a less well-known arbitrator, the respondent may strategically appoint a highly recognised figure, anticipating that such an arbitrator will have greater influence on other arbitrators within the tribunal. The situation is no more conducive to diversity in the appointment of the presiding arbitrator, as party-appointed arbitrators tend to jointly select a third arbitrator who is more experienced or at least of comparable standing. Within the current investment arbitration framework, such behaviour is entirely rational. Given that these disputes are often highly complex and

[11] ICSID, 'The ICSID Caseload Statistics' (Issue 2026-1, ICSID 2026) <https://icsid.worldbank.org/sites/default/files/publications/2026-1_ENG_TheICSIDCaseloadStatistics.pdf> accessed 16 June 2026.

[12] Malcolm Langford, Daniel Behn and Runar Hillerer Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *Journal of International Economic Law* 301.

[13] Bjorklund and others (n 9).

[14] Andrea Kay Bjorklund, 'The Diversity Deficit in Investment Arbitration' (*EJIL: Talk!*, 1 April 2019) <https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/> accessed 16 June 2026.

involve significant financial stakes, parties naturally prefer to rely on experienced arbitrators with specialised expertise in relevant fields of law and economics.[15]

To understand why the lack of diversity among investment arbitrators is such a pressing issue, it is important to revisit the very essence of investment arbitration. This mechanism of international law allows private investors, mostly businesses from developed countries, to protect their investments, typically made in developing states, and to seek compensation for damage caused by unlawful acts of sovereign states. As noted, arbitrators are predominantly drawn from Western Europe and North America, whereas states from these regions account for less than 10% of respondent parties in ICSID-administered cases. This imbalance suggests that disputes are often decided by arbitrators who may lack a thorough understanding of the respondent state's geopolitical, economic, or legal context. In the author's view, this may subconsciously lead arbitrators to favour private investors, who frequently represent the 'Western world', thereby affecting both their objectivity and the quality of decisions. Such dynamics have contributed to growing concerns within the international investment law community regarding the legitimacy of the current system.

In summary, the lack of diversity stems in part from the arbitrator appointment mechanism itself, which, despite promoting party autonomy, effectively reinforces a closed system that is difficult for new entrants to access. As a result, the majority of appointments remain concentrated among experienced male arbitrators from Western countries, raising concerns about the representation of diverse perspectives and the impartiality of outcomes. Ensuring greater diversity among arbitrators is increasingly viewed as essential for maintaining the legitimacy and credibility of the system.

II.2. PROBLEMATIC ASPECTS OF DOUBLE-HATTING IN INVESTMENT ARBITRATIONS

The phenomenon of double-hatting in international legal scholarship is described as a practice whereby the same individuals alternate between the roles of arbitrator, counsel, and expert (mostly legal expert) in different investment arbitration proceedings, or as a pattern in which experienced legal practitioners actively representing parties before arbitral tribunals simultaneously serve as arbitrators in other cases.[16]

One of the most significant studies on the prevalence of this phenomenon was concluded in 2017. It found that, up to that point, as many as 58% of investment arbitration cases were affected by double-hatting. This figure was derived from examining situations where at least one arbitrator, serving on an arbitral tribunal, was simultaneously acting as counsel in at least one parallel investment arbitration proceeding (47% of cases), as well as situations where at least one party representative concurrently served as an arbitrator in another ongoing investment arbitration case (11% of cases). The study further revealed that dual roles were most frequently assumed by some of the most well-known and influential figures in investment arbitration, such as Emmanuel Gaillard, Jan Paulsson, and James Crawford.[17] This evidence alone demonstrates the scale of the double-hatting issue and helps explain why the investment arbitration community has devoted considerable efforts to addressing and limiting this practice.

As concerns surrounding double-hatting in investment arbitration continue to intensify, international legal doctrine has identified several

[15] Bjorklund and others (n 9).

[16] Dennis H Hranitzky and Eduardo Silva Romero, 'The "Double Hat" Debate in International Arbitration' (*New York Law Journal*, 2010).

[17] Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6(2) *ESIL Reflection* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008643> accessed 16 June 2026.

underlying factors that explain its persistence.[18] First, the concept of *symbolic capital* plays a significant role. Parties tend to select arbitrators not only for their formal qualifications but also for their reputation, social standing, and professional recognition within the arbitration community.[19] Over time, the ability to act both as arbitrator and counsel has itself become a mark of prestige and expertise. Second, strategic behaviour by established practitioners has contributed to maintaining this practice, as leading arbitrators may have an incentive to limit competition and preserve a professional environment that allows them to operate with relatively high autonomy and limited external scrutiny.[20] Third, financial incentives further reinforce double-hatting, as acting as counsel can often be more lucrative than serving as an arbitrator, encouraging practitioners to retain both roles.[21] Fourth, the limited pool of sufficiently qualified arbitrators is frequently cited as a practical justification, though this argument is contested, as experience can only be gained through participation.[22] Finally, double-hatting may also serve as a transitional mechanism, allowing legal professionals to gradually shift from roles such as counsel into full-time arbitrator positions. Together, these factors demonstrate that double-hatting is not merely incidental but structurally embedded within the current investment arbitration system.

At first glance, the phenomenon of double-hatting may appear to pose no direct issues of illegality or to render appointed arbitrators automatically not impartial or independent. However, it is important to recall the previously examined problem of the lack of diversity among arbitrators and to emphasise that, in practice, the international investment arbitration system has evolved into a *de facto* judiciary. A relatively small group of 'full-time' arbitrators dominates the field and effectively shapes the overall practice of investment arbitration.[23]

In legal doctrine, the British-French scholar Philippe Sands is widely regarded as one of the first to highlight the concerns associated with double-hatting. As early as 2012, he questioned whether a lawyer involved in shaping an arbitral award on a particular legal issue could later, in a different proceedings, genuinely detach from that role when acting as counsel on the same or a similar issue, and whether such separation would be convincing to a reasonable observer.[24] The core concern thus lies in the arbitrator's ability to remain fully impartial and independent when legal reasoning or factual assessments developed in one case may later influence their conduct as counsel, or *vice versa*. This dynamic can create a 'vicious circle', in which individuals contribute to the development of quasi-precedents as arbitrators and subsequently rely on them to support arguments in other cases, thereby raising doubts about objectivity and the integrity of the deliberations and decision-making process as a whole.[25]

It is clear that this dynamic limits opportunities for new arbitrators to enter the field and

[18] Malcolm Langford, 'Political Success, Legal Failure? Double Hatting in Investment Arbitration Reform' in Chiara Giorgetti and Catharine Titi (eds), *Ethics and Investor-State Dispute Settlement* (Brill, forthcoming 2025) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5136121> accessed 16 June 2026.

[19] Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

[20] Catherine Rogers, 'The Vocation of the International Arbitrator' (2004) 20 *American University International Law Review* 957.

[21] Arman Sarvarian, 'The Impact on "Diversity" of the Modified Prohibition on Multiple Roles in the UNCITRAL-ICSID Code of Conduct' in Chiara Giorgetti and Catharine Titi (eds), *Ethics in ISDS* (Brill 2025).

[22] 'An International Arbitration Star With NY Roots: A Q&A with Wilmer's Gary Born' (*Law.com*, 14 May 2018) <https://finance.yahoo.com/news/international-arbitration-star-ny-roots-154847198.html> accessed 16 June 2026.

[23] Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting' (n 17).

[24] Philippe Sands, 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel' in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* (Brill Nijhoff 2013) 28.

[25] Gaurav Naik, 'Peculiarities of Investment Arbitration and Differences from Commercial Arbitration: Independence and Impartiality Perspective' (Master's thesis, Vilnius University 2022).

perpetuates structural imbalances within the system. Also, under this model, there is a risk that the public perception will develop to view investment arbitration proceedings as potentially illegitimate due to the phenomenon of double-hatting, thereby undermining trust in this important mechanism for resolving complex, high-value disputes involving state interests.

Double-hatting extends beyond diversity concerns by undermining the perceived legitimacy of investment arbitration. The coexistence of dual roles might foster perceptions of opacity and potential bias, thereby raising justified concerns about the system's transparency and objectivity in resolving complex disputes.

II.3. PROBLEMATIC ASPECTS OF THE INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS IN INVESTMENT ARBITRATION

In many national jurisdictions and procedural rules governing investment arbitration proceedings, arbitrators are required to act impartially and independently, and to disclose any facts or circumstances that may give rise to doubts about their impartiality or independence. As these obligations are closely linked to the ethical standards imposed on arbitrators, it is the arbitrator's own responsibility to ensure that their role as a decision-maker is exercised in accordance with the highest standards of impartiality and independence. The disclosure requirements contained in various investment arbitration rules, therefore, function as a primary safeguard of the parties' right to an independent and fair tribunal.[26]

The primary rationale for the requirement of arbitrator independence and impartiality is to ensure the legality and fairness of the final award in investment arbitration. It is natural that, within the investment arbitration system, where institutional checks and balances are largely absent, safeguarding arbitrator independence and impartiality is a fundamental precondition for the adoption of legitimate decisions.[27]

In legal doctrine, there can be identified several key factors that raise concerns regarding arbitrator independence and impartiality in investment arbitration. First, the very practice of party appointment, while central to arbitration, is seen by some scholars as creating a 'moral hazard', as party-appointed arbitrators may consciously or unconsciously feel inclined to favour the appointing party. Second, the lack of clear boundaries governing interactions between arbitrators and disputing parties creates additional risks, as certain forms of contact may compromise, or appear to compromise, the arbitrator's neutrality. Third, the practice of repeat appointments intensifies these concerns, as arbitrators frequently appointed by the same party or law firms may be incentivised to adopt positions favourable to those actors to secure future appointments, a dynamic further reinforced by the phenomenon of double-hatting.

Additionally, systemic features of investment arbitration may contribute to perceived bias, as claimants are most often private investors, potentially incentivising arbitrators to develop jurisprudence favourable to investors to sustain demand for arbitration.[28] It should be noted that this argument is not universally accepted, and some scholars take the opposite view, arguing that empirical evidence does not demonstrate any clear bias in favour of investors. According to this perspective, ICSID data indicate that investors succeed in only 49% of cases, suggesting that claims of pro-investor bias are not empiri-

[26] Csilla Andrea Mate, 'Independence and Impartiality in International Arbitration – Perspectives from French and Investor-State Case Law' (2025) 7(1) *ITA in Review* <https://itainreview.org/articles/2025/Vol7/Issue1/independence-and-impartiality-in-international-arbitration-perspectives-from-french-and-investor-state-case-law.html> accessed 16 June 2026.

[27] Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill 2017) 253.

[28] Chiara Giorgetti, 'Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions' (*EJIL: Talk!*, 4 April 2019) <https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/> accessed 16 June 2026.

cally substantiated. Similarly, more recent data published by the United Nations Conference on Trade and Development (UNCTAD) shows that states prevailed in 38% of cases, compared to 28% for investors, while the remaining cases were either settled (18%), discontinued (13%), or resulted in a finding of breach without any compensation awarded to the investor (3%).[29]

In conclusion, it can be argued that the very structure of international arbitration, in which disputing parties appoint arbitrators, is inherently incompatible with the full realisation of absolute impartiality and independence. By choosing this method of dispute resolution, parties effectively accept a certain limitation of their right to a fully independent and impartial tribunal. Accordingly, arbitrator independence and impartiality can be safeguarded only through a transparent and clearly regulated system.[30]

III. FUTURE DEVELOPMENTS AND REFORMS IN ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

III.1. ADDRESSING THE CHALLENGES OF ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

III.1.1. DOCTRINAL APPROACHES TO RESOLVING CHALLENGES OF ARBITRATORS IN INVESTMENT ARBITRATION

Regarding the lack of diversity among investment arbitration arbitrators, one of the most frequently proposed solutions is the establishment of a multilateral investment court with an appellate mechanism. As such an institution would be created from the ground up, it would allow for the introduction of structured appointment models, including a centralised roster of candidates, making it easier to ensure diversity in terms of gender, nationality, experience, race, and legal background. For instance, a first-instance tribunal could consist of 15 arbitrators, while an appellate body might be composed of 6 members, with the same individuals serving across these formations. Such a system would enable participating states to design balanced compositions of adjudicators more systematically. However, the effectiveness of this approach would ultimately depend on the choices made by those states, and there remains a significant risk that preference would still be given to the most well-known and experienced arbitrators, meaning that diversity imbalances could persist, particularly during the early stages of the institution's operation.[31]

Also, legal scholarship proposes several ways to increase arbitrator diversity, including more comprehensive candidate rosters with clearly defined qualifications, the establishment of regional arbitration centres to train new arbitrators, and a stronger role for appointing authorities such as ICSID or the Permanent Court of Arbitration (PCA), which could publish mandatory public lists and thereby facilitate the appointment of new and more diverse candidates.[32]

Regarding the double-hatting phenomenon, one of the most effective measures would be self-regulation by arbitrators themselves. A commitment by a relatively small group of leading figures to avoid holding multiple roles simultaneously could significantly reduce the prevalence of the practice and set a new professional standard. This should be complemented by increased transparency and public awareness, which may discourage reputationally conscious practitioners from engaging in dual roles, as well as more proactive litigation strategies by disputing parties, who can raise challenges against such arbitrators, thereby increasing the risks associated with double-hatting and indirectly contributing to its decline.[33]

Concerning the independence and impartiality of arbitrators, a higher standard could,

[29] Oguzhan Samanci and Shay Lakhter, 'The Unilateral Appointment of Adjudicators to a Multilateral Investment Court: A Failed Attempt to Enhance the Legitimacy of the System?' (24 February 2025).
[30] Cleis (n 27) 25.
[31] Bjorklund, 'Diversity Deficit' (n 14).
[32] Bjorklund and others (n 9).
[33] Langford, Behn and Lie, 'The Ethics and Empirics of Double Hatting' (n 17).

in the author's view, be achieved most effectively only through a fundamental reform of the current system, such as the establishment of a permanent adjudicative body for investment disputes or the introduction of effective appellate mechanisms to ensure consistency and legality of decisions. However, within the existing framework, several preventive measures may be implemented, including stricter limitations on contacts between parties and arbitrators, restrictions on repeat appointments by the same actors, *ex ante* and *ex post* controls over double-hatting, clearer and more accessible procedures for arbitrator challenges, and the introduction of mechanisms allowing states to bring counterclaims.[34]

III.1.2. ONGOING REFORM OF INVESTMENT ARBITRATION

Arbitrator appointment procedures are far from the only shortcoming of the current investment arbitration system, and discussions on reforming the system as it is understood today remain ongoing at the international level. Broadly speaking, three main reform approaches can be distinguished. First, *incrementalists* argue that the existing systems function adequately and require only limited, targeted adjustments. Second, *systematic reformers*, who view the current model as outdated and advocate for more substantial changes, such as the creation of a centralised international investment dispute resolution body. Third, *paradigm shifters*, who reject the existing framework altogether as irreparably flawed and call for a complete overhaul of the system.[35]

It is important to recognise that differing philosophies and interests in investment arbitration lead to varied reform proposals, and that no single, universally accepted solution can be found. Nevertheless, one of the most active and influential actors in shaping the future of investment arbitration is UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, the leading international forum driving reform discussions.[36]

One of the most significant outcomes of UNCITRAL Working Group III is the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution[37] (hereinafter – Code of Conduct), which directly addresses the issues examined in this paper. The preamble highlights its core purpose: to address concerns about the perceived lack of independence and impartiality of certain arbitrators by establishing clear ethical standards. The Code of Conduct introduces key obligations, including duties of independence and impartiality, restrictions and improper communications between parties and arbitrators, and strengthens disclosure requirements, thereby aiming to increase transparency and reinforce the integrity of the arbitration process.

However, the central objective of the Code of Conduct is to address the phenomenon of double-hatting. It restricts arbitrators from simultaneously acting as counsel or experts in related proceedings, subject to certain conditions and cooling-off periods. Despite this, the effectiveness of these rules remains contested, as they apply only in narrowly defined circumstances and fail to fully address broader structural concerns, particularly the ability of arbitrators to influence legal practice across cases in which they participate in different roles. As a result, some scholars argue that the Code of Conduct falls short as a comprehensive

[34] Giorgetti, 'Independence and Impartiality' (n 28).

[35] Anthea Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 *American Journal of International Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189984> accessed 16 June 2026.

[36] United Nations Commission on International Trade Law, 'Working Group III: Investor-State Dispute Settlement Reform' <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 16 June 2026.

[37] *UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes* (approved by UNGA Res 78/105, 7 December 2024) <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf> accessed 16 June 2026.

legal solution to the double-hatting problem. Still, it was confirmed to present it as a political achievement.[38]

It should be noted that best practices for increasing diversity among investment arbitration arbitrators can also be observed through private initiatives within the arbitration community, such as the Equal Representation in Arbitration Pledge. This initiative aims to gather and promote commitments from members of the international arbitration community, including law firms, investors, and arbitral institutions, to encourage greater participation of women in arbitration and to ensure equal opportunities for both men and women to hold positions, regardless of gender.[39]

III.2. TRENDS IN ARBITRATOR APPOINTMENT IN INVESTMENT ARBITRATION

Having conducted an in-depth analysis of the issues surrounding arbitrator appointment in investment arbitration, the measures taken to mitigate existing shortcomings, and their impact, it is relevant to examine recent trends in arbitrator appointments. To maintain the coherence of this paper, the analysis will focus on data from ICSID regarding investment arbitration cases administered by the institution.

First, it is important to consider regional trends in arbitrator appointments. An analysis of data from the past decade (2015-2025) on the distribution of arbitrators in ICSID-administered investment arbitration cases shows that no significant structural changes have yet occurred, but positive trends are evident. When Western Europe and North America are considered together, the data clearly shows that appointments remain overwhelmingly concentrated in the Northern hemisphere, even though this dominance has gradually weakened over time. The combined total begins at a very high level of 76% in 2015 and, despite fluctuations, remains consistently above all other regions throughout the period. However, a noticeable downward trend emerges: the combined figure falls to 61% in 2020, briefly recovers to 67% in 2023, and then declines again to 55% by 2025. This trajectory indicates that, while the Northern hemisphere continues to act as the primary source of appointments, its relative share is steadily eroding.

At the same time, this gradual decline reflects a wider process of small yet positive geographic diversification. The reduced combined share of Europe and North America coincides with the growth of other regions, most notably South America, and more modest increases elsewhere. Nevertheless, even by the end of the period, no other region or combination of regions comes close to matching the scale of the Northern Hemisphere core. The data, therefore, suggests a system that remains structurally centred in Europe and North America, but is slowly becoming more globally distributed as other regions begin to play a more prominent role.

Trends in arbitrator appointments by gender show more positive developments. ICSID has provided data on arbitrator appointments in its annual reports since 2019, and these figures clearly indicate a steady decline in the proportion of male arbitrators, accompanied by a corresponding increase in female appointments. Notably, over the past five years, the percentage of female arbitrator appointments has reached approximately 30% in three separate years. In the author's view, this represents a significant achievement for the investment arbitration system, as it promotes greater rotation and inclusion of arbitrators and thereby strengthens transparency and public confidence in the system.

In summary, the developments outlined in this section demonstrate that the evolution of investment arbitration is closely driven by efforts to address well-recognised shortcomings in the appointment of arbitrators. Legal scholarship offers a range of reform proposals, including the establishment of a multilateral investment court, strengthening arbitrator ethics standards, and developing institutionalised appointment lists.

[38] Langford, 'Political Success, Legal Failure?' (n 18).
[39] 'Equal Representation in Arbitration Pledge' <https://www.arbitrationpledge.com> accessed 16 June 2026.

Although reform is currently incremental, clear positive trends are emerging, particularly in the growing awareness of these issues and the gradual increase in arbitrator diversity, especially in gender diversity.

Accordingly, the appointment of arbitrators remains at the centre of ongoing international debate, and meaningful reform in this area is essential to safeguard the long-term legitimacy and credibility of the investment arbitration system.

CONCLUSIONS

Arbitrator appointment procedures in investment arbitration constitute a foundational element of the system, shaping both the composition of arbitral tribunals and the quality, legitimacy, and enforceability of final awards. Although the ICSID Convention and the UNCITRAL Arbitration Rules grant a high degree of party autonomy, this flexibility does not in itself guarantee sufficient standards of independence, impartiality, or transparency. On the contrary, it facilitates the emergence of structural shortcomings, reflected in persistent patterns such as the lack of diversity among arbitrators, the prevalence of double-hatting, and continued concerns regarding neutrality. The concentration of appointments within a limited and repeatedly selected group

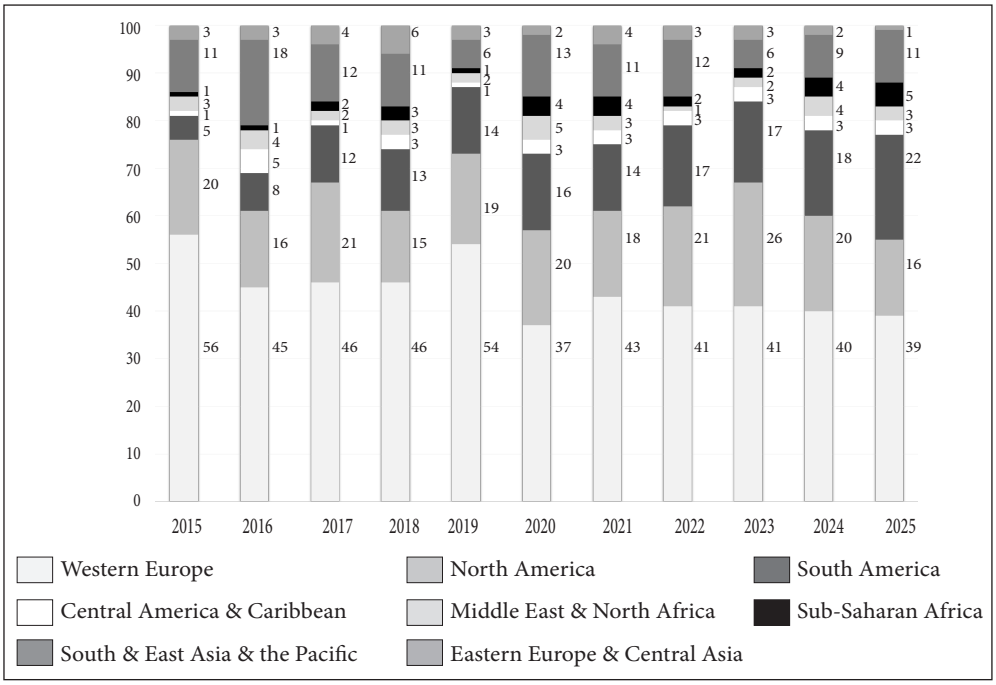


Figure 1. Distribution of Arbitrators by Region in ICSID Administered Cases yearly[40]

of practitioners contributes to the formation of a 'closed circle', reinforcing systemic imbalances and raising legitimate doubts about the objectivity and representativeness of decision-making in investment arbitration.

These interconnected challenges undermine confidence in the legitimacy and credibility of the system, not only within the international legal community but also from the perspective of states and the broader public. While ongoing reform initiatives, such as the UNCITRAL Code of Conduct, represent important steps toward improving ethical standards and transparency, they remain largely incremental and insufficient

[40] ICSID, 'The ICSID Caseload Statistics' (n 11).

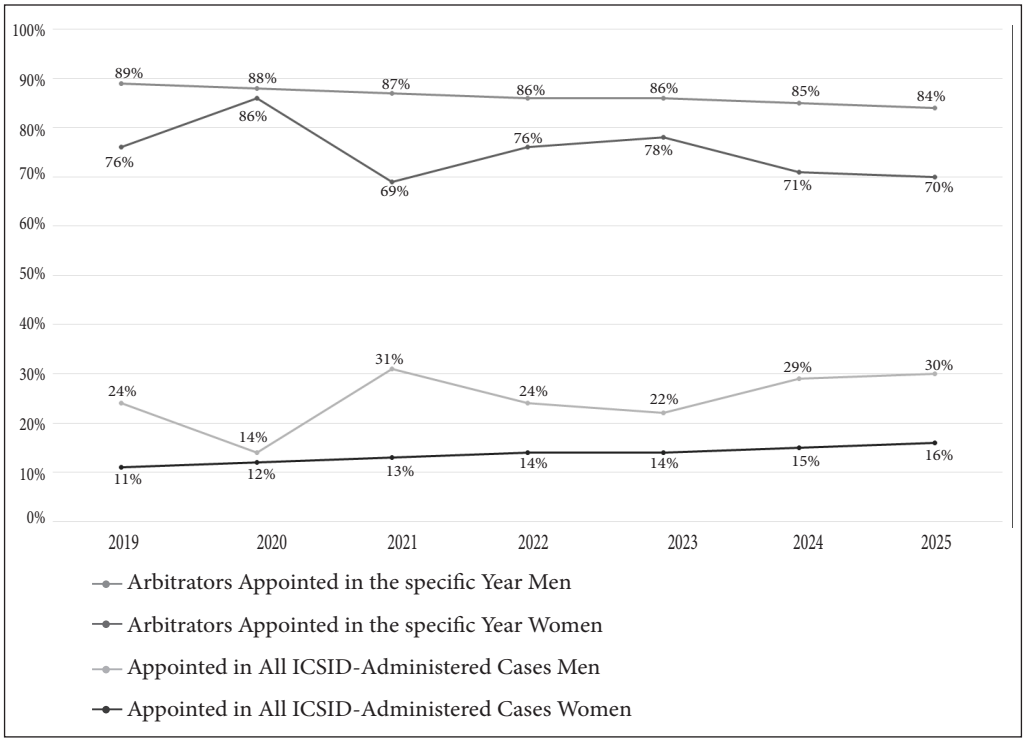


Figure 2. Distribution of Arbitrator Appointments by Gender in ICSID Administered Cases[41]

to address deeper structural issues. Ensuring the long-term sustainability of investment arbitration will therefore require a more balanced approach that preserves the benefits of party autonomy while introducing stronger safeguards for diversity, accountability, and independence. This may include stricter regulation of dual roles, enhanced oversight of appointments, and potentially more fundamental institutional reforms, such as the establishment of a permanent adjudicative body or appellate mechanism. Ultimately, the evolution of arbitrator appointment procedures will be decisive in determining the future legitimacy and effectiveness of the investment arbitration system.

[41] ibid.