

## Comparing Arbitrator Standards of Conduct in International Commercial, Trade and Investment Disputes

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**Since the success of international arbitration (commercial, investment and trade disputes), depends in large part on the quality and conduct of the arbitrators who hear the disputes, there is a great need for arbitrators to avoid ethical conflicts and disclose actual and potential conflicts of interest. In this article, the author examines the disclosure and qualification requirements for international arbitrators in the rules of the major international arbitration institutions, ethical codes, NAFTA, the WTO and rules promulgated by the International Bar Association.**

Parties to international disputes use arbitration because they see it as an alternative to an unreliable judicial system, or because they think it is faster than litigation or affords privacy, or for a combination of these reasons. The role of arbitrators in resolving disputes is quasi-judicial. Accordingly, arbitrators should be subject to stringent standards of conduct to guarantee their integrity and impartiality, and the transparency of the arbitral proceedings. It is due to these standards that arbitrators are required to disclose actual and potential conflicts of interest that could indicate that their decision might not be made impartially and independently of the influence of any party. This article discusses the qualifications and conflict-of-interest disclosure standards for arbitrators in three broad categories of international arbitration:

- (1) international commercial arbitration between private parties or a private party and a quasi-governmental entity;
- (2) international investment arbitration between a foreign investor and the sovereign State where the investment is made or between the State parties to the treaty; and
- (3) international trade arbitration between States arising from violations of international trade agreements prohibiting restraint of trade.

The documents on which this discussion of international commercial arbitration are based are the following:

- (1) the United Nations Commission on International Trade Law (UNCITRAL) Rules of International Commercial Arbitration (the UNCITRAL Rules),<sup>1</sup>

- (2) the International Arbitration Rules of the International Center for Dispute Resolution (ICDR Rules), a division of the American Arbitration Association (AAA),<sup>2</sup>
- (3) the AAA-American Bar Association (ABA) Code of Ethics for Arbitrators in Commercial Disputes (AAA-ABA Code),<sup>3</sup>
- (4) the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),<sup>4</sup>
- (5) the International Chamber of Commerce (ICC) Rules of Arbitration (ICC Rules),<sup>5</sup> and
- (6) the Internal Rules of the ICC International Court of Arbitration.<sup>6</sup>

The documents on which this discussion of international investment arbitration are based are the following:

- (1) Chapters 11, 19 and 20 of the North American Free Trade Agreement (NAFTA),<sup>7</sup>
- (2) the Code of Conduct for Dispute Settlement Procedures under NAFTA Chapters 19 and 20 (NAFTA Code of Conduct),<sup>8</sup>
- (3) the ICSID Convention,<sup>9</sup>
- (4) the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules),<sup>10</sup>
- (5) the ICSID Additional Facility Rules,<sup>11</sup> and
- (6) the paper entitled “Possible Improvements of the Framework for ICSID Arbitration and Administrative and Financial Regulations.”<sup>12</sup>

The documents on which this discussion of international trade disputes are based are the following:

- (1) the World Trade Organization (WTO) Dispute Settlement Understanding (DSU)<sup>13</sup>; and
- (2) the Rules of Conduct for the understanding on rules and procedures governing the settlement of disputes.<sup>14</sup>

This work was inspired by a comparison chart prepared by the Working Group on Practical Aspects of Transparency and Accountability Issues in Investment Treaty Arbitration of the International Dispute Resolution Committee of the International Section of the Washington, D.C., Bar.<sup>15</sup> It was also inspired by a discussion brought about by the ICSID paper on improving the ICSID framework for investment arbitration.<sup>16</sup>

## **I. Qualifications of Arbitrators**

In general, the most important qualifications demanded of arbitrators are independence and impartiality. These characteristics are even required vis-à-vis an appointing party. The reason is that they enable arbitrators to take decisions free of bias and pressure. However, there are differences among the standards in the documents examined, even within the same category of arbitration. For example, although both impartiality and independence are required in all types of arbitration, they tend to be the only requirements in international commercial arbitration, while professional qualifications

tend to be an additional requirement in international investment and trade arbitration proceedings.

Another significant difference is in the way the nationality of the arbitrator candidate is treated. Nationality can be a critical factor in selecting an arbitrator. Its importance derives from the perception that a national of one of the parties to the dispute could be less than impartial or independent. In general, the nationality of the arbitrator plays a less relevant part of the arbitrator selection process in international commercial arbitration than investor-State and international trade arbitration, but it is not altogether irrelevant. In investor-State and State-to-State cases, it is an unstated presumption that being a national of a party indicates partiality or lack of independence or both, since these characteristics are not stated requirements of arbitral service for these types of arbitration.

#### ***A. International Commercial Arbitration***

1. *The UNCITRAL Rules.* In international arbitration under the UNCITRAL Rules, if the parties do not agree on the selection of a neutral, the “appointing authority,” which is directed to make that appointment, “shall have regard to such considerations that are likely to secure the appointment of an independent and impartial arbitrator.” In carrying out this mandate, the UNCITRAL rules say that the appointing authority shall consider appointing an arbitrator whose nationality is other than that of the parties.<sup>17</sup> The use of the term “consider” indicates that it is not mandatory but instructive. Thus, it is possible, but unlikely, that an arbitrator with the same nationality as a party could be appointed.

2. *The ICDR Rules and AAA/ABA Code of Ethics.* In international arbitration proceedings conducted under the ICDR Rules, arbitrators are expressly required to be impartial and independent.<sup>18</sup> This obligation is reinforced by the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (revised 2004), which states that an arbitrator should accept appointment as an arbitrator only if fully satisfied, inter alia, that “he or she can serve impartially and independently from the parties, potential witnesses, and the other arbitrators; and that he or she is competent to serve.”<sup>19</sup>

Perhaps because the cases the ICDR administers are mainly commercial disputes between private parties, the nationality of the arbitrators seems not relevant. The ICDR Rules provide that when called upon to appoint one or more arbitrators and the presiding arbitrator,<sup>20</sup> the administrator, “after inviting consultation with the parties, shall endeavor to select suitable arbitrators.” (Emphasis added.) There is nothing in the rules precluding the appointment of a national of one of the parties. But Article 6(4) of the ICDR Rules states that “[a]t the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties.” (Emphasis added.) This language is instructive, not mandatory, and provides guidance to administrators in making appointments.

3. *The IBA Guidelines.* The IBA Guidelines, which are also very influential among international commercial practitioners, call for both impartiality and independence at the time of accepting an appointment to serve and during the entire arbitration proceeding.<sup>21</sup> Nationality is not referred to anywhere in the IBA Guidelines in connection with the

qualification or suitability of arbitrators. A possible explanation for this is that the IBA does not have an arbitration body that selects or confirms arbitrators. The UNCITRAL does not have one either, but the purpose of the UNCITRAL Rules differs from that of the IBA Guidelines. The IBA Guidelines are intended to supply arbitrators with hints as to how to behave in any kind of arbitration (whether ad hoc or administered), while the UNCITRAL Rules are intended to provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationships.

4. *The ICC Rules.* By contrast, the ICC Rules provide that every arbitrator must “remain independent of the parties.”<sup>22</sup> It does not use the term “impartial.” To make arbitrators responsible for their independence, before they assume their role as arbitrators, they are required to write a statement indicating their independence without qualification and file it with the Secretary General of the ICC Court. In case the arbitrators fail to act accordingly, this statement could be used to make them liable.

Nationality plays a role in arbitrator selection in ICC cases, but it is not dispositive. Neutral arbitrators are appointed by the ICC Court, as are other members of the panel if the parties fail to nominate them in a timely manner. Furthermore, party-appointed arbitrators are subject to confirmation by that court. In appointing and confirming arbitrators, the ICC Rules say that the ICC Court “shall consider the prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with these rules.”<sup>23</sup> Here too the word “consider” indicates that nationality alone does not disqualify an arbitrator candidate, but it is instructive. The ICC Rules further provide that, except in suitable circumstances and no party objects, a sole arbitrator and the chair of a tribunal shall not be from a country of any of the parties.<sup>24</sup> Thus, it is possible for a party to waive an objection to having a sole arbitrator or chair of the tribunal share the nationality of a party in a proper case.

### ***B. International Investment Arbitration***

The rules applicable to investment arbitration arising under bilateral and multilateral investment treaties often contain professional qualifications, one of which is independent judgment. Whenever arbitration involves a State party, nationality tends to become very important. Indeed, being a national of any party to the dispute is presumed to be indication of partiality and a lack of independence. The same is true when States are at odds with each other, as discussed below in connection with international trade disputes.

1. *ICSID Arbitration.* The ICSID Convention, in Article 14, § 1, requires arbitrators to be “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance,” who may be relied on to exercise “independent judgment.”<sup>25</sup> The Additional Facility Rules contain an identical provision.<sup>26</sup> These rules apply to cases when the State party to the dispute or the State of the investor (but not both) is not a party to the ICSID Convention.

If an arbitrator is considered not independent, he or she may be challenged and disqualified.<sup>27</sup> Recently, some ICSID arbitrators were challenged because there were doubts about their “exercise of independent judgment.” In most cases where those challenges were made, the arbitrators served as legal counsel in other investment treaty cases. Most of these challenges have not been successful.

It seems the ICSID Convention and the ICSID Arbitration Rules presume that having the same nationality as a party is a sign of partiality, but they allow the nationality impediment to be waived because they require the agreement of the other party whenever the selecting party chooses one of its nationals or a national from its own State.<sup>28</sup> Thus, in general, the majority of arbitrators in ICSID investor-State arbitration proceedings do not share the nationality of the parties.

The ICSID Additional Facility Rules provide in Article 7(1) that “the majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.” It also provides that, in the case of a three-person tribunal, a national of either of the parties may not be appointed without the agreement of the other party. Furthermore, Article 7(2) states that arbitrators appointed by the Chairman shall not be a national of either party.

2. *NAFTA Chapter 11*. Chapter 11 of NAFTA contains provisions relating to private dispute proceedings commenced by investors against signatory States for violations of treaty protections. Under NAFTA Chapter 11, arbitration may be administered under the UNCITRAL Rules (which require impartiality and independence) or the ICSID Rules or the Additional Facility Rules (which require independent judgment). The chosen rules would apply only to the extent not in conflict with NAFTA itself.

One NAFTA rule that would apply to Chapter 11 arbitration provides that the presiding arbitrator selected by the Secretary General from the NAFTA roster of presiding arbitrators (or from the ICSID panel if no such presiding arbitrator is available to serve) may not be a national of either party to the dispute.<sup>29</sup>

3. *NAFTA Chapters 19 and 20*. Different rules apply to NAFTA State-to-State disputes under Chapters 19 (i.e., disputes alleging violations of antidumping or countervailing duties) and 20 (disputes involving the interpretation or application of NAFTA). The NAFTA Code of Conduct expressly requires the panel members who serve on these cases (called “binational” panels under NAFTA Article 1904(1)) to be citizens of the States involved in the dispute and also to be independent and impartial.<sup>30</sup> Furthermore, a majority of the members of a binational panel must have a majority of lawyers who are in good standing.<sup>31</sup>

In State-to-State arbitration under Chapter 20, members of binational panels must be independent of, and not affiliated with or take instructions from, any party.<sup>32</sup> They are also instructed by the NAFTA Code of Conduct to “avoid impropriety and the

appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved.”

Except for the chair, two members of the panel in a Chapter 20 dispute have the same national as each party. Despite this shared nationality, the NAFTA Code of Conduct requires all members of the panel to be independent and impartial. Significantly, the chair may not be a national of either party.<sup>33</sup> Article 2011 (1)(a) has the two State parties agreeing on the chair but if they cannot agree, the chair will be selected by a State party chosen by lot.<sup>34</sup>

### ***C. State-to-State WTO Arbitration***

In WTO disputes between States for violation of the multilateral trade framework, arbitrators must be experienced in international trade law and policy.

Article 8 of the DSU provides that arbitration panels shall be composed of “well-qualified governmental and/or non-governmental individuals including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.” However, an arbitrator who is a citizen of a State party to the dispute cannot serve on the panel unless both parties agree otherwise.<sup>35</sup>

The DSU states in Article 8 that panelists in WTO disputes “should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.”

The “governing principle” in WTO arbitration is that each panel member (and other “covered persons”) shall be independent and impartial and avoid direct and indirect conflicts of interest so that the integrity and impartiality of the dispute settlement mechanism are preserved.”<sup>36</sup>

The WTO Rules of Conduct further state that panel members “shall not incur any obligation or accept any benefit that would in anyway interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person’s dispute settlement duties.”<sup>37</sup>

## **II. Disclosure of Conflicts of Interest**

An arbitrator is supposed to render a decision without any influence external to the case, such as relationships or political, economic or hierarchy pressure. However, an arbitrator’s relationships are a continuous source of conflicts of interest. Thus, there is a great need for disclosure of actual and potential conflicts that could affect an arbitrator’s ability to act impartially. This is essential in order to maintain transparency of the process. All of the arbitration rules discussed in this article contain disclosure requirements, but they are differently worded. In all cases, the failure to disclose could give rise to a challenge to the arbitrator, and even to the award.

***A. International Commercial Arbitration***

1. *The UNCITRAL Rules.* Under the UNCITRAL Rules, a prospective arbitrator is required to disclose “to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.”<sup>38</sup> There is also a continuing disclosure obligation: “An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.”<sup>39</sup> It is not clear whether arbitrators in UNCITRAL cases are prohibited from continuing to engage in activities and/or relationships after they have been disclosed. But failure to disclose a potential conflict of interest by an arbitrator could be a ground for challenging an arbitrator’s appointment, or even the award.<sup>40</sup> The UNCITRAL Rules provide that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators’ impartiality or independence. In a recent annulment case dealing with the issue of arbitrator liability, the Finnish Supreme Court held that the chairman of the panel was liable for failing to disclose that he had given an expert legal opinion to one of the parties. The award was set aside on that basis.<sup>41</sup>

2. *The ICDR Rules and the AAA-ABA Code of Ethics.* In international arbitration administered by the ICDR, prior to accepting appointment, a prospective arbitrator is required to disclose to the administrator any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence.<sup>42</sup> Moreover, if at any stage during the arbitration new circumstances arise that may give rise to such doubts, an arbitrator shall promptly disclose such circumstances to the parties and the administrator. Article 8(2) of the ICDR Rules allows a party to challenge an arbitrator whenever there are circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.

There are no provisions in the rules detailing the types of activities and relationships to be disclosed, but the AAA-ABA Code of Ethics sheds light on this.

Canon I(B)(1) and (2) of the AAA-ABA Code advises arbitrators to accept an appointment only if they are fully satisfied that they can serve impartially and independently from the parties, potential witnesses and the other arbitrators.

Canon I(C) provides that arbitrators who accept appointment should, during their service, avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, likely to affect their impartiality or which might reasonably create the appearance of partiality.<sup>43</sup> Canon I(D) calls for arbitrators to conduct themselves in a way that is fair to all parties, and not be swayed by outside pressure, public clamor, fear of criticism or self-interest. Arbitrators are also advised to avoid making statements and engaging in conduct that gives the appearance of partiality toward or against any party.<sup>44</sup> The Code makes these obligations continuing.<sup>45</sup>

Canon II(A) requires arbitrator candidates, before accepting an appointment, to disclose any known direct or indirect financial or personal interest in the outcome of the

arbitration, and any past or present financial, business, professional or personal relationships which might reasonably affect their impartiality or lack of independence in the eyes of the parties. This includes relationships involving families or household members, employers, partners, or professional or business associates that can be ascertained by reasonable efforts. The Code of Ethics also says that potential arbitrators who are asked to serve should make a reasonable effort to inform themselves of these kinds of relationships.<sup>46</sup>

In addition, potential arbitrators also should disclose any prior knowledge they may have of the dispute,<sup>47</sup> and any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.<sup>48</sup>

3. *The IBA Guidelines.* According to Part I of the IBA Guidelines (“General Standards Regarding Independence, Impartiality and Disclosure”), every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceeding.<sup>49</sup> Likewise, an arbitrator who has any doubts as to his or her ability to be impartial or independent shall refuse to continue to act as an arbitrator.<sup>50</sup> Arbitrators are also supposed to decline to serve or refuse to continue service if facts or circumstances exist or have arisen since the appointment, that, from the point of view of a reasonable third person with knowledge of the relevant facts, give rise to justifiable doubts about the arbitrator’s impartiality or independence (unless the parties waived any objections).<sup>51</sup> Under this provision, doubt is justifiable if a reasonable, informed third party would conclude that the arbitrator’s decision making might be influenced by factors other than evidence presented by the parties.

Lawyers at law firms who serve as arbitrators in international cases often have conflict-of-interest issues. This is because other lawyers at the firm might have relationships with one of the parties, the arbitrators, or witnesses. The IBA Guidelines state that the fact that the activities of the arbitrator’s firm involve one of the parties shall not automatically constitute a source of an ethical conflict or a reason for disclosure.<sup>52</sup>

The IBA Guidelines also impose a disclosure obligation on arbitrators if facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to their impartiality or independence.<sup>53</sup> Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure.<sup>54</sup>

To assist the arbitrators in identifying potential conflicts of interest, the IBA Guidelines provide three non-exhaustive lists of practical examples of different types of relationships and interests. One is the Red List, which has examples of unwaivable conflicts of interest. Another is the Orange List, which has examples of waivable potential conflicts. The last is the Green List, which contains examples that do not pose a conflict.

Presumably because of the importance of identifying conflicts of interest, the IBA Guidelines also obligate parties to inform the tribunal, the other parties, and the

arbitration institution or appointing authority (if any) about any direct or indirect relationship between it (or another company in the same group of companies) and the arbitrator.<sup>55</sup>

It is important to note that nondisclosure does not necessarily make an arbitrator less independent—only the facts that he or she did not disclose can do so. However, as the Finnish Supreme Court decision mentioned above illustrates, national courts do not necessarily follow that view.

4. *ICC Arbitration.* As noted above, Article 7(2) of the ICC Rules require a prospective arbitrator, before appointment or confirmation, to sign a statement of independence.<sup>56</sup> Article 7(3) requires an appointed arbitrator to “immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature which may arise during the arbitration.” The Secretariat is then directed to provide this information to the parties. The latter requirement appears to be a continuing one. However, nothing in the ICC Rules or related Appendices provides any guidance as to what kinds of circumstances should be disclosed. The only relationship the rules identified as problematic are individuals associated with the ICC. Thus, Appendix II to the ICC Rules disqualify the chairman of the ICC, vice-chairmen and members of the Secretariat of the Court from serving as arbitrators in ICC cases.<sup>57</sup>

### ***B. International Investment Arbitration***

1. *The ICSID Rules.* In ICSID arbitration, before or at the first session of the tribunal, each arbitrator is required to fill and sign a disclosure declaration.<sup>58</sup> This declaration states, in relevant part:

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by [ICSID] with respect to a dispute between \_\_\_\_\_ and \_\_\_\_\_.

I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto. A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto.

An arbitrator who fails to sign this declaration by the end of the first session will be deemed to have resigned.

ICSID has proposed expanding the declaration to include past or present relationships with the parties, as well as any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment.<sup>59</sup> ICSID has also proposed that this expanded disclosure requirement should apply throughout the proceeding, not just at commencement. It has also suggested formulating a code of conduct for arbitrators.<sup>60</sup>

Article 57 of the ICSID Convention authorizes a party to seek disqualification of an arbitrator on account of any fact indicating a manifest lack of the qualities required by ¶ 1 of Article 14 (i.e., the failure to be a person of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment).

One ground for annulment of an ICSID award is corruption on the part of an arbitrator. Arguably this could include the intentional failure to disclose a significant financial interest in the outcome of the proceeding or a close relationship with a party.<sup>61</sup>

2. *NAFTA Chapter 11*. Since Chapter 11 arbitration involves the ICSID Rules or the UNCITRAL Rules, the disclosure rules discussed above would apply.

3. *NAFTA Chapters 19 and 20*. In State-to-State investment disputes under Chapters 19 and 20 of NAFTA, Part II of the NAFTA Code of Conduct governs disclosure by arbitrator candidates; Part IV governs the activities and relationships of members of a panel.

Part II of the NAFTA Code provides that the following kinds of relationships and interests have to be disclosed by potential arbitrators: any financial interest of the candidate or his or her employer, partner, business associate or family member in the proceeding or its outcome; any past or existing financial, business, professional, family or social relationship with any parties interested in the proceeding or its outcome; and public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same goods.<sup>62</sup> Part II(C) of the Code makes this duty a continuing one once an arbitrator candidate is appointed.

According to the Introductory Note to Part II, the “governing principle” is to disclose the existence of any interest, relationship or matter that is likely to affect the candidate’s or member’s independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. It states that an appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate’s or member’s ability to carry out the duties with integrity, impartiality and competence is impaired. However, there is no obligation to disclose interests, relationships or matters “whose bearing on [the role of arbitrator candidates] would be trivial.” This is intended to avoid making the disclosure process overly burdensome and making it impossible for the parties to select arbitrators of their choosing.<sup>63</sup>

Part IV of the NAFTA Code requires arbitrators in disputes under Chapters 19 and 20 to act in a fair way and avoid creating an appearance of impropriety or a misapprehension of bias.<sup>64</sup> Furthermore, it states that tribunal members shall not be influenced by self-interest, outside pressure, political considerations, public clamor, loyalty to a party, or fear of criticism.<sup>65</sup> There is also a provision stating that arbitrators shall not allow themselves to be bribed. Thus, arbitrators shall not “directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere,

with the proper performance of the member's duties, or use its position on the panel or committee to advance any personal or private interests.”<sup>66</sup>

With respect to arbitrator relationships, Part IV provides that members of tribunals formed under Chapters 19 and 20 shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence their conduct or judgment<sup>67</sup>; they should also avoid giving the impression that others are in a position to influence them and make every effort to discourage others from representing that they are in such a position.<sup>68</sup> They are also supposed to avoid entering into any relationship, or acquiring any financial interest that is likely to affect their impartiality, or reasonably create an appearance of impropriety or an apprehension of bias.<sup>69</sup> An arbitrator who violates any of these obligations could be removed.

In addition, a decision in a State-to-State arbitration by an arbitrator who violated these obligations could be challenged by either State in the Extraordinary Challenge Committee, which is considered to be a safeguard to preserve the integrity of the panel process.

### ***C. International Trade Disputes***

The WTO Rules of Conduct require arbitrators to “disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality.”<sup>70</sup>

Annex 2 to these rules provides an illustrative list of examples for panel members to help them recognize when they need to disclose. Under § VI.1, disclosable matters include all kinds of financial (e.g., investments, loans, debts), business and property interests relevant to the dispute; past and present relationships with clients, or interests in domestic or international proceedings involving issues similar to those addressed in the dispute; participation in organizations or groups with an agenda relevant to the dispute; opinions made public on issues relevant to the dispute; and employment or family interests.

During the performance of their duties, arbitrators are also required to avoid any direct or indirect conflicts of interest in respect of the subject matter of the proceeding.<sup>71</sup> This duty to disclose continues as long as there is arbitration.<sup>72</sup>

Indeed, panelists are required to acknowledge in a disclosure declaration their continuing duty to disclose, inter alia, any information likely to affect their independence or impartiality, or “which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism....”<sup>73</sup>

### **Conclusion**

The success of arbitration in the years to come resides, to some extent, in the conduct of arbitrators. The more independent and impartial arbitrators are, the more trustworthy arbitration will be.

This applies to all forms of arbitration, whether commercial, trade-related or investment arbitration. Given the nature of trade and investment arbitration, the arbitral bodies that administer them are likely to demand strict standards of arbitrator conduct.

Currently independence and impartiality are demanded by all the standards of conduct reviewed in this article. For this reason disclosure of conflicts of interest, even interests that might give rise to an apprehension of bias, is required. Recent cases show that the failure to disclose conflicts can form the basis for a challenge to the appointment and open the door to a motion to set aside the award. However, deciding whether an interest or relationship could give rise to an apprehension of bias is a difficult issue for every arbitrator.

In arbitration involving sovereign States and governmental entities, the need for a clearly unbiased panel is paramount. For this reason, the nationality of the arbitrator, if the same as a party, is enough to disqualify the arbitrator from service because of a presumed lack of independence.

The difficulty is in not removing qualified arbitrators from the pool by overly onerous disclosure requirements. Even so, it seems better to err on the side of over-disclosure to maintain the integrity of these highly effective forms of arbitration.

#### Endnotes

1. UNCITRAL Rules, available at [www.uncitral.org/](http://www.uncitral.org/).
2. ICDR International Arbitration Rules (ICDR Rules), available at [www.adr.org/](http://www.adr.org/).
3. AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (AAA/ ABA Code), available at [www.adr.org/](http://www.adr.org/).
4. IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), pt. I(1), available at [www.ibanet.org/](http://www.ibanet.org/).
5. ICC Rules of Arbitration (ICC Rules), available at [www.iccwbo.org/](http://www.iccwbo.org/).
6. Internal Rules of the ICC Court (ICC Internal Rules).
7. NAFTA, available at [www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=78](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78)
8. NAFTA Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20 (NAFTA Code) , available at [www.worldtradelaw.net/nafta/19-20code.pdf/](http://www.worldtradelaw.net/nafta/19-20code.pdf/).
9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), available at [www.worldbank.org/icsid/](http://www.worldbank.org/icsid/).
10. ICSID Rules of Procedure, available at [www.worldbank.org/icsid/](http://www.worldbank.org/icsid/).
11. Schedule C Arbitration (Additional Facility Rules), available at [www.worldbank.org/icsid/](http://www.worldbank.org/icsid/).
12. Possible Improvements of the Framework for ICSID Arbitration (ICSID Working Paper), suggesting changes to the ICSID Rules and Regulations, see [www.worldbank.org/icsid/052405-sgmanual.pdf/](http://www.worldbank.org/icsid/052405-sgmanual.pdf/).
13. World Trade Organization Dispute Settlement Understanding DSU), available at [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top/](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top/)
14. WTO Rules of Conduct, available at web site in n. 13.
15. [www.dcb.org/for\\_lawyers/sections/international\\_law/conduct.cfm/](http://www.dcb.org/for_lawyers/sections/international_law/conduct.cfm/).
16. See n. 12 supra.
17. UNCITRAL Rules, n. 1 supra, art. 6(4).
18. See n. 2 supra, art. 7.
19. See n. 3 supra, CANON I(B).

20. ICDR art. 6(3). This appointing procedure occurs only if the parties have not designated the arbitrators or the procedure for their appointment.
21. See n. 4 *supra*.
22. See n. 5 *supra*, art. 7(1).
23. *Id.*, art. 9.
24. *Id.*, art. 10(5).
25. See n. 9 *supra*, art. 14(1).
26. See n. 11 *supra*, art. 8.
27. See n. 9 *supra*, ICSID Convention, art. 57.
28. *Id.* art. 39. The ICSID rules also provide for a tribunal of more than three arbitrators. ICSID Rule 1(3) says: “Except if each member of the Tribunal is appointed by agreement of the parties, nationals of the State party to the dispute or of the State whose national is a party to the dispute may be appointed by a party only if appointment by the other party to the dispute of the same number of arbitrators of either of these nationalities would not result in a majority of arbitrators of these nationalities.” If arbitrators are appointed by the chair of the Administrative Council of ICSID, these arbitrators are also not allowed to be nationals of either party to the dispute (i.e., either of the State party or the home jurisdiction of the investor).
29. See *supra*, n. 7, NAFTA art. 1124(3). Members of the NAFTA presiding arbitrator roster must satisfy the requirements of the NAFTA Convention, the rules cited in Article 1120, and be experienced in international law and investment matters. Roster members are required to be appointed by consensus without regard to their nationality. NAFTA art. 1124(4).
30. NAFTA Code, *supra*, n. 8.
31. Annex 1901.2 to Chapter 19 contains the procedure for forming these panels. Each party appoints two panelists in consultation with the other, usually from the NAFTA roster. If a proposed panelist is not on the roster, the panelist must meet the qualifications for membership. If a party fails to appoint its members, the panelists will be selected by lot from that party’s candidates on the roster. The parties then have to agree on the fifth panelist. If they can’t agree, they are to decide by lot which party shall select the fifth panelist from the roster. The panelists themselves select a chairperson by majority vote from the lawyers on the panel. If there is no majority, the chair is appointed by lot from among the lawyers on the panel. Annex 1902.2(11) prohibits a panelist from appearing as counsel before another panel.
32. NAFTA, *supra* n. 7, art. 2009.
33. *Id.* art. 2011(1)(b).
34. After the chair is selected, either by agreement of the parties, or by lot, the respondent selects two panelists who are citizens of the claimant. Then the claimant States select two panelists who share the nationality of the respondent. NAFTA art. 2011 (1)(c). If the respondent does not make its selection within the required time, two panelists shall be selected for it by lot in accordance with the foregoing. NAFTA art. 2011(1)(d).
35. DSU, *supra* n. 13, art. 8.
36. WTO Rules of Conduct, *supra* n. 14, § II.1, available at [www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm#25\\_1/](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#25_1/).
37. *Id.* at § III.2.
38. UNCITRAL Rules, *supra* n. 1, art. 9.
39. *Id.*
40. *Id.* art. 10.
41. [www.internationallawoffice.com/ld.cfm?r=9560&i=1030305&print=1/](http://www.internationallawoffice.com/ld.cfm?r=9560&i=1030305&print=1/).
42. ICDR Rules, *supra* n. 2, art. 7(1).
43. AAA-ABA Code of Ethics, *supra* n. 3, CANON I.
44. *Id.* CANON I(D).
45. *Id.* CANON I(G).

46. Id. CANON II(B).
47. Id. CANON II(A)(3).
48. Id. Canon II.
49. IBA Guidelines, supra n. 4, pt. I(1), (2), (5), (6), (7) and pt. II.
50. Id. pt. 1(2)(a).
51. Id. pt. I(2)(b).
52. Id. pt. IV(6)(a).
53. Id. pt. I(3).
54. Id. pt. I(3)(b).
55. Id. pt. IV(7).
56. ICC Rules, supra n. 5, art. 7.
57. ICC Internal Rules, supra n. 6, app. II, art. 2(1). However, if any of these persons are involved in any capacity whatsoever in proceedings pending before the ICC Court, that has to be disclosed.
58. ICSID Arbitration Rules, supra n. 10, Rule 6(2).
59. ICSID Working Paper, n. 12 supra, ¶ IV. Disclosure Requirements for Arbitrators.  
[www.worldbank.org/icsid/improve-arb.htm](http://www.worldbank.org/icsid/improve-arb.htm).
60. Id.
61. ICSID Convention, supra n. 9, art. 52.
62. NAFTA Code, supra n. 8, art. II.
63. Id. Introductory Note to pt. II.
64. Id. pt. IV(A).
65. Id. pt. IV(B).
66. Id. pt. IV(C).
67. Id. pt. IV E.
68. Id. pt. IV(D).
69. Id. pt. IV(F).
70. WTO Rules of Conduct, supra n. 14, § III.1.2, see also § VI.2.
71. Id. § III.1.3.
72. Id. art. VI-2.2.
73. Id. art. II-1, VI-5 and annex 2.
74. Id. annex III.