

**COMMENTS BY THE REPUBLIC OF CHILE ON THE DRAFT CODE OF CONDUCT FOR  
ADJUDICATORS IN ISDS**

This document includes the comments of the Republic of Chile to the second draft Code of Conduct submitted for comments by the ICSID and UNCITRAL Secretariats on April 19, 2021. This document is not exhaustive, nor does it represent a final position of the Republic of Chile. The numbers of the provisions referred to correspond to the numbering presented in the second draft code.

<b>APPLICABLE PROVISION AND SUGGESTED LINE-EDITS</b>	<b>COMMENTS AND PROPOSALS</b>
<p><b>Article 1 Definitions</b></p> <p>For the purposes of this Code:</p> <ol style="list-style-type: none"> <li>1. “Adjudicator” means Arbitrator and Judge;</li> <li>2. “Arbitrator” means a member of an <i>ad hoc</i> tribunal or panel, or member of an ICSID <i>ad hoc</i> Committee who is appointed to resolve an “International Investment Dispute” (IID);</li> <li>3. “Assistant” means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, including research, review of pleadings and evidence, drafting, case logistics and similar assignments, as agreed with the parties;</li> <li>4. “Candidate” means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for selection as a Judge, but who has not yet been <del>appointed confirmed</del> in such role;</li> </ol>	<ul style="list-style-type: none"> <li>▪ We support referring generically to “Adjudicator” as encompassing both “Arbitrator” and “Judge,” and supports the proposed broad definition of “Arbitrator” and “Judge”.</li> <li>▪ Note that Art. 1(2) and Art. 1 (6), respectively, refer to an Arbitrator and a Judge who is “appointed”, without specifying who made the appointment (if an an institution, party, or other). We understand this to be in line with our comment on Version 1 of the Draft CoC, that the term “Adjudicator” should include individuals “howsoever appointed.”</li> <li>▪ In Art. 1(4), for a consistent use of the language, it may be worth to replace “not yet been confirmed in such role” for “not yet been <i>appointed</i> in such role.”</li> <li>▪ We suggest revising the definition of “International Investment Dispute” (IID) included in Art. 1(5) to encompass disputes arising out of contracts or domestic law. In Version 1 of the Draft CoC those disputes were included. Excluding those disputes may lead to having disputes decided by adjudicators subject to a different and perhaps lesser standard of conduct.</li> </ul>

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ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
<p>5. “International Investment Dispute” (IID) means a dispute arising pursuant to <del>an the investment promotion and protection provisions in an</del> international <u>investment treaty, a national legislation or a contract relating to the governance of international investments.</u>;</p> <p>6. “Judge” means a judge appointed to a standing mechanism for IID settlement.</p>	
<p><b>Article 2 Application of the Code</b></p> <p>1. Articles 3 to 5, 6(1), 7(3) and 8 to 11 of this Code apply to Adjudicators in IID proceedings.</p> <p>2. <del>Adjudicators shall take reasonable steps to ensure that their</del> Assistants <u>shall also be aware of, and comply with, the provisions of this Code, to the extent relevant.</u></p> <p>3. Articles 6(2), 7(1), 7(2), 8(1) and 8(3) of this Code apply to Candidates from the date they are first contacted concerning a possible appointment.</p> <p>4. Articles 7(3) and 8 of this Code continue to apply to Adjudicators after the conclusion of the IID proceeding.</p>	<ul style="list-style-type: none"> <li>▪ Regarding Art. 2(2), we refer to our comments on Version 1 of the Draft CoC in the sense that Assistants should also be subject to the CoC. We propose that when the parties receive a request to approve the appointment of an Assistant, that the Assistant be required to sign a declaration confirming that s/he will comply with the CoC. <ul style="list-style-type: none"> <li>○ We would be open to consider modifications to Art. 2(2) in the sense of limiting the obligations of the Assistants to specific provisions listed in the rule.</li> <li>○ Finally, regarding the sanctions to the assistants -a topic discussed during the informal consultations- we consider that this could be included in the declaration to be signed by the Assistant, in the sense that s/he would need to resign immediately. Additional monetary sanctions (i.e. no-payment of pending fees could be considered).</li> </ul> </li> <li>▪ We suggest amending Art. 2(5), as shown in the left-hand column, in the sense that the provisions of this code shall not apply, only to the extent that there is a contradiction between this code and a treaty-based code. In that case, the treaty-base code shall prevail.</li> </ul>

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ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
<p>5. [<del>Should there be an incompatibility between the provisions of tThis Code, and a code of conduct that is part of shall not apply if</del> the treaty upon which consent to adjudicate is based <u>for the initiation of</u> <del>contains a Code of Conduct for</del> proceedings, <u>the provisions of the treaty-based code shall prevail</u> <del>initiated pursuant to that treaty.</del>]</p>	
<p><b>Article 3 Independence and Impartiality</b></p> <p>1. Adjudicators shall be independent and impartial.; <del>and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias</del></p> <p>2. In particular, Adjudicators <u>shall take reasonable steps to avoid bias, conflict of interest, impropriety, or appearance of bias and</u> shall not:</p> <p>(a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor;</p> <p>(b) be influenced by loyalty to a Treaty Party to the applicable treaty, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the proceeding;</p> <p>(c) take instruction from any organization, government or individual regarding the matters addressed in the IID;</p>	<ul style="list-style-type: none"> <li>▪ We consider that it would be better to separate the obligation to be independent and impartial and move the concepts of “avoid[ing] bias, conflict of interest, impropriety, or appearance of bias to the second paragraph, considering that “bias, conflict of interest, impropriety” are grounds to determine whether there is a lack of independence and impartiality.</li> <li>▪ We support the idea of including in the Commentary a list of examples of conduct falling within Art. 3(1), but suggest that the list also include situations that may be less obvious, so that the exercise can prove more useful.</li> <li>▪ Regarding Art. 3(2)(d), and with reference to our comment on Art. 4(2) of Version 1 of the Draft CoC, we suggest broadening the scope of influence by also including forward-looking situations. We suggest saying: “allow any past, existing or <i>prospective</i> financial, business, professional or personal relationship to influence their conduct or judgment.” <ul style="list-style-type: none"> <li>○ With this addition, we seek to prevent resignation of arbitrators during the course of the proceeding due to a conflict of interest created by a superseding circumstance that was avoidable.</li> </ul> </li> </ul>

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ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
<p>(d) allow any past, <del>or</del> existing or prospective financial, business, professional or personal relationship to influence their conduct or judgement;</p> <p>(e) use their position to advance any personal or private interest; or</p> <p>(f) assume an obligation or accept a benefit during the proceeding that could interfere with the performance of their duties.</p>	
<p><b>Article 4 Limit on Multiple Roles</b></p> <p>Unless the disputing parties agree otherwise, an Adjudicator in an IID proceeding shall not act concurrently as counsel or expert witness in another IID case <del>[involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity].</del></p>	<ul style="list-style-type: none"> <li>▪ In line with our comments on Version 1 of the Draft CoC, we support a prohibition on multiple roles while a case in which the adjudicators is acting, is pending. We therefore support the adoption of Art. 4 without the bracketed text.</li> <li>▪ We further support limiting the bar on double hatting to counsel or expert witness eliminating the other categories that were mentioned in version 1 of the Draft Code.</li> <li>▪ Regarding experts, we agree that this should apply to both party-appointed and tribunal appointed experts.</li> <li>▪ While we can support the rule as drafted - subject to the elimination of the bracketed text- we would welcome the possibility of deleting the reference to “<i>unless the disputing parties agree otherwise</i>”, to incorporate a clearer and easier to apply rule. We consider that it may be difficult for parties to agree on this issue prior to making their appointments.</li> </ul>
<p><b>Article 5 Duty of Diligence</b></p> <p>1. Adjudicators shall perform their duties diligently throughout the proceeding <del>including by conducting a</del></p>	<ul style="list-style-type: none"> <li>▪ In line with our comment on Art. 8(1) of Version 1 of the Draft CoC regarding the duty of diligence, and in order to address concerns voiced by States during the WG III discussions, we propose to incorporate in Art. 5(1) examples of the types of duties that Adjudicators are expected to perform diligently.</li> </ul>

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ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
<p><a href="#">thorough review of the record and constructive participation in hearings and deliberations.</a></p> <p><u>2. Adjudicators</u><del>and</del> shall refuse competing obligations, <del>and</del> they shall be reasonably available to the parties and the administering institution, shall dedicate the necessary time and effort <u>to</u> the proceeding, and shall render all decisions in a timely manner.</p> <p><u>3. Adjudicators shall perform their duties expeditiously and be punctual in the exercise of their functions.</u></p> <p><u>4.</u> Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.</p>	<ul style="list-style-type: none"> <li>▪ We also propose to address in a separate paragraph (Art. 5(2)) the duties related to the availability required for Adjudicators to perform their duties in a timely manner (duty to refuse competing obligations, maintain reasonable availability, and dedicate time and effort to the proceeding).</li> <li>▪ We suggest reincorporating in Art. 5(3), the obligation to act in a punctual and expeditious manner throughout the proceeding (previously included under Art. 8(3), which is both more precise and has a broader scope than current Art. 5(2).</li> <li>▪ In line with our comment on Art. 8(2) of Version 1 of the Draft CoC, we agree with the removal of the specific limitations on the number of cases that Adjudicators could concurrently handle.</li> <li>▪ As a formal comment, a “to” seems to be missing in Art. 5(1): “...shall dedicate the necessary time and effort <b>to</b> the proceeding...”</li> </ul>
<p><b>Article 6 Other Duties</b></p> <p>1. Adjudicators shall:</p> <p>(a) display high standards of integrity, fairness, and competence;</p> <p>(b) make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties; and</p> <p>(c) treat all participants in the proceeding with civility.</p>	<ul style="list-style-type: none"> <li>▪ In line with our comment on Art. 7(3), second sentence, of Version 1 of the Draft CoC, we propose that Art. 6(2) states that Candidates <b>“shall”</b> decline, instead of “should” decline.</li> <li>▪ We agree with the proposal to include in Art. 5, as part of the “Duty of diligence” the Adjudicators’ duty not to delegate decision-making functions (formerly addressed in Art. 7(4) of Version 1 of the Draft CoC).</li> </ul>

**COMMENTS BY THE REPUBLIC OF CHILE ON THE DRAFT CODE OF CONDUCT FOR  
ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
<p>2. Candidates <del>shall should</del> decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfill their duties.</p>	
<p><b>Article 7 Communications with a Party</b></p> <p>1. Any pre-appointment communication with a Candidate concerning a potential appointment shall be limited to discussion concerning the expertise, experience and availability of the Candidate and the absence of any conflict of interest. Candidates shall not discuss any issues pertaining to <u>the case, including</u> jurisdictional, procedural, or substantive matters that they reasonably can anticipate will arise in the proceeding.</p> <p>2. [The <del>existence</del><u>contents</u> of any pre-appointment communication concerning the proceeding between the Candidate and a party shall be <del>fully</del> disclosed to all parties upon appointment of the Candidate.]</p> <p>3. An Adjudicator shall not have any <i>ex parte</i> contacts with a party <u>or a third-party funder</u> concerning the proceeding other than communications contemplated by the applicable rules or treaty or consented to by the parties <u>in connection with the constitution of the Tribunal</u>.</p>	<ul style="list-style-type: none"> <li>▪ Regarding Art. 7(1), we suggest including a reference to the “case”, as suggested by some delegations during the informal session.</li> <li>▪ In line with our comment on Art. 10(2) of Version 1 of the Draft CoC, we propose removing Art. 7(2). Since Art. 7(1) limits what may and may not be discussed at the pre-appointment interview, it may not be necessary to burden the parties and the Adjudicator with the disclosure of the content of pre-appointment interview.</li> <li>▪ Alternatively, and, as a compromise, we propose that Art. 7(2) be amended to include the obligation to disclose the existence of the pre-appointment interview but eliminating the reference to the “content” of the communication and omitting the word “fully”. Our concern is that a process (i.e. the interview) that to date has not generated much debate, could end up enlarging the list of procedural battles in ISDS cases.</li> <li>▪ Regarding Art. 7(3), if this provision is maintained, we propose that it be expanded to cover also third-party funders and be specified that the communication between the adjudicator and the party is allowed for constitution of the Tribunal and not leave it open for interpretation.</li> </ul>

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ADJUDICATORS IN ISDS**

<b>APPLICABLE PROVISION AND SUGGESTED LINE-EDITS</b>	<b>COMMENTS AND PROPOSALS</b>
<p><b>Article 8 Confidentiality</b></p> <p>1. Candidates and Adjudicators shall not:</p> <p>(a) disclose or use any non-public information concerning, or acquired in connection with, a proceeding except for the purposes of that proceeding;</p> <p>(b) disclose or use any information concerning, or acquired in connection with, a proceeding to gain personal advantage, advantage for others, or to adversely affect the interests of others.</p> <p>2. Adjudicators shall not:</p> <p>(a) disclose the contents of deliberations or any view expressed by an Adjudicator during the deliberation;</p> <p>(b) disclose any decision, ruling or award to the parties prior to delivering it to them, unless the applicable rules or treaty so permits;</p> <p>(c) publicly disclose any decision, ruling or award in which they participated, except in accordance with the applicable rules or treaty.</p> <p><u>(d) comment on any decision, ruling or award in which they participated, unless and until the decision, ruling or award becomes public.</u></p>	<ul style="list-style-type: none"> <li>▪ We consider that the current language of draft Art. 8(2)(c) would not necessarily be interpreted as prohibiting verbal or written comments regarding decisions, rulings and awards in which the Adjudicator has participated. For this reason, we propose reincorporating the last sentence of former Art. 9 (2), pursuant to which Adjudicators shall not “comment on any decision, ruling or award in which they participated, unless and until the decision, ruling or award becomes public”, as a new Art. 8.2(d).</li> </ul>

**COMMENTS BY THE REPUBLIC OF CHILE ON THE DRAFT CODE OF CONDUCT FOR  
ADJUDICATORS IN ISDS**

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<p>3. The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.</p>	
<p><b>Article 9 Fees and Expenses</b> (...)</p>	<p>No comments.</p>
<p><b>Article 10 Disclosure Obligations</b></p> <p>1. Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter.</p> <p>2. Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information:</p> <p>(a) Any financial, business, professional, or personal relationship within [the past five years] with:</p> <p>(i) the parties, and any subsidiary, affiliate or parent entity identified by the parties;</p> <p>(ii) the parties' legal representatives, including all appointments as Arbitrator, [Judge], counsel, or expert witness made by the parties' legal representative in any IID {and non-IID} proceedings;</p>	<ul style="list-style-type: none"> <li>▪ There seem to be three different standards of disclosure in Art. 10(1) (doubts as to independence and impartiality; demonstration of bias; and demonstration of appearance of bias). Having three different standards of disclosure may create confusion and lead to an unharmonized application of the provision and defeat the purpose of this exercise.</li> <li>▪ We agree with the 5-year period for the disclosure of information proposed in Art. 10(2)(a).</li> <li>▪ We agree with the generic reference to “any subsidiary, affiliate or parent entity” in Art. 10(2)(a)(i), as “any” encompasses direct and indirect entities. We also agree with the replacement of “agency” for “affiliate”.</li> <li>▪ With regard to Art. 10.2(a)(ii), we support including non-IID matters, and trust that we can find mechanisms for such disclosures to take place, without breaching confidentiality obligations, as it is done, for example, in proposals by law firms and others.</li> <li>▪ We request removing the brackets in Art. 10(2)(c), in order to include disclosure of non-IID proceedings.</li> <li>▪ We agree with the 5-year limit proposed in Art. 10(2)(c) but are flexible on this question and could agree to a bigger number should this be presented as a proposed option.</li> </ul>



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ADJUDICATORS IN ISDS**

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<p>(iii) the other Arbitrators, Judges or expert witnesses in the proceeding; and</p> <p>(iv) any third-party funder with a financial interest in the outcome of the proceeding and identified by a party;</p> <p>(b) Any financial or personal interest in:</p> <p>(i) the proceeding or its outcome; and</p> <p>(ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and</p> <p>(c) All IID {and non IID} proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator. (...).</p>	<ul style="list-style-type: none"> <li>▪ We agree with the continuing duty of disclosure encompassed in Art. 10(4) and the duty to disclose newly discovered information “as soon as they become aware of such information.”</li> <li>▪ We support the inclusion of Art. 10(5), last sentence, that the disclosure by an adjudicator does not establish a breach of the CoC.</li> <li>▪ We note that the duty to disclose a list of publications proposed in Art. 5(2)(d) of Version 1 of the Draft CoC has been removed. We welcome the removal from the list of mandatory disclosures. Nevertheless, in our past comments, we had suggested to make this a recommended disclosure in lieu of eliminating the obligation all together. Since it would be useful to have access to this information, and it could have some impacts on issue-conflict, we respectfully resubmit our proposal and request that a new article (text below) be added listing the elements that the code recommends being disclosed: <i>Candidates and adjudicators should provide a list of all publications and shall make all reasonable efforts to update such publications on an ongoing basis for the duration of the proceeding.</i></li> </ul>
<p><b>Article 11 Enforcement of the Code of Conduct</b></p> <p>1. Every Adjudicator and Candidate shall comply with the applicable provisions of this Code.</p>	<ul style="list-style-type: none"> <li>▪ We do not agree with the idea of omitting the disclosure requirements in Art. 10 from the disqualification and removal proceedings upfront. While they may not necessarily give rise to a challenge there may be cases in which the lack of disclosure could be sufficient to justify a challenge. The current drafting of Art. 11(2) would not permit this.</li> </ul>

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ADJUDICATORS IN ISDS**

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<p>2. The disqualification, <del>and removal</del> <u>procedures and other sanctioning procedures</u> in the applicable rules shall apply to <del>breaches of this Articles 3-8</del> the Code.</p> <p>3. [Other options based on means of implementation of the Code]</p>	<ul style="list-style-type: none"> <li>▪ In addition, different rules, with different enforcement mechanisms may apply to a dispute in which the Adjudicators are subject to the CoC, for example, under some rules failure to act expeditiously may lead to a reduction of the fees payable to the tribunal. For these reasons we suggest broadening the scope of Art. 11(2) and refer to disqualification and other sanctioning procedures, as suggested in our line-edits to Art. 11.</li> </ul> <p>We further refer to our comments on Art. 12 of Version 1 of the Draft CoC reproduced herein for ease of reference:</p> <p><u>As to the enforcement of the code:</u></p> <ul style="list-style-type: none"> <li>▪ We believe <i>monetary, disciplinary or reputational</i> sanctions could prove useful, but not all types of sanctions may be appropriate for all obligations. In this sense, enforcement of the code may be an issue that we would like to revisit once there is a second or third draft of the code. <ul style="list-style-type: none"> <li>○ In the meantime we consider that added transparency and greater insights into the adjudicators conduct and track record, may not only encourage self-regulation and voluntary compliance with the provisions of the Draft Code, but may also be an adequate enforcement mechanism.</li> <li>○ For example, with regard to reputational sanctions, in the ICSID Rules Amendment process, at some point it was being considered giving some publicity to the compliance or lack thereof with the timeframes for the issuance of awards and decisions provided in the new rules. That mechanism, if finally adopted, could also serve the purpose of ensuring for example compliance with the obligations set forth in Art. 3(c) and Art. 8 relating to the duty to act with diligence, and efficiency.</li> </ul> </li> </ul>

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ADJUDICATORS IN ISDS**

APPLICABLE PROVISION AND SUGGESTED LINE-EDITS	COMMENTS AND PROPOSALS
	<p><u>As to the implementation of the code</u>, we offer the following comments:</p> <ul style="list-style-type: none"> <li>▪ For ICSID cases, we understand that the current proposal is that a finalized agreed code could be appended to the declaration signed by individual arbitrators when they accept the appointment (current Rule 6), and hence incorporated into the process through this mechanism.</li> <li>▪ For non-ICSID cases, the parties could adopt it on a case-by-case basis, by requesting arbitrators to commit to acting consistently with the code when they accept their appointments, and thus the code should be proposed in the seeking acceptance letters to arbitrators.</li> <li>▪ Finally, we believe that incorporating a final and agreed code of conduct in a Multilateral Investment Reform Agreement or Multilateral Treaty on ISDS Reform, could be an excellent implementation option.</li> </ul>

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