

**COMMENTS BY THE REPUBLIC OF CHILE ON THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT SUBMITTED BY UNCITRAL AND ICSID**

This document includes the comments of the Republic of Chile to the draft Code of Conduct submitted for comments by the ICSID and UNCITRAL Secretariats on 1 May 2019. 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 draft code.

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<p><b>Article 1 - Definitions</b></p> <p><u>For the purpose of this Code:</u>            1. “Adjudicators” means <u>individuals appointed to resolve investor-State disputes, including</u> arbitrators <u>howsoever appointed</u>, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes;</p> <p>(...)</p>	<ul style="list-style-type: none"> <li>▪ It may be worth clarifying that the code has been drafted to apply to the ISDS context.</li> <li>▪ To clarify that the term adjudicators includes party appointed adjudicators, the adjudicators appointed by an arbitral institution or through any other mechanism, we propose to include at the end of the sentence the words “<i>howsoever appointed</i>”.</li> </ul>
<p><b>Article 2 - Application of the Code</b></p> <p>1. This Code applies to all persons serving as adjudicators in ISDS proceedings.</p> <p><del>Adjudicators shall take appropriate steps to ensure that their assistants to adjudicators are aware of, and shall also</del> comply with, the <del>relevant</del> provisions of this Code, <u>to the extent relevant</u>.</p>	<ul style="list-style-type: none"> <li>▪ Although we are aware of the importance to have a code of conduct that solely and comprehensively regulates the obligations of adjudicators, we believe that their assistants also ought to be bound by the Code. The language used in this Article makes the adjudicator responsible for the behavior of its assistant instead of making the assistants directly responsible for their conduct.</li> <li>▪ Considering that the Tribunal should only accept an assistant that has been previously consented to by the Parties, we propose that</li> </ul>

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<p>(...)</p>	<p>when the Parties receive a request to approve an assistant, the assistant be asked first to sign an affidavit confirming that he/she will also comply with the Code.</p>
<p><b>Article 3 - Duties and Responsibilities</b></p> <p>At all times, adjudicators shall:</p> <p>(a) Be independent and impartial, and shall avoid any direct or indirect conflicts of interest, impropriety, bias and appearance of bias;</p> <p>(b) Display the highest standards of integrity, fairness and competence;</p> <p>(c) Be available and act with diligence, civility and efficiency;</p> <p>(d) Comply with any confidentiality and non-disclosure obligations.</p>	<ul style="list-style-type: none"> <li>▪ No comments on Article 3.</li> </ul>
<p><b>Article 4 - Independence and Impartiality</b></p> <p>1. Adjudicators shall at all times be independent and impartial.</p> <p>2. In particular, adjudicators shall not:</p> <p>(a) Be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party <u>or non-disputing Treaty Party</u> to the proceedings, or fear of criticism;</p> <p>(b) Allow any past or ongoing financial, business, professional, family or social relationships to influence their conduct or judgement;</p> <p>(c) Take action that creates the impression that others are in a position to influence their conduct or judgement;</p> <p>(d) Use their position to advance any personal or private interests; or</p> <p>(e) Directly or indirectly, incur an obligation or accept a benefit that would interfere, or appear to interfere, with the performance of their duties.</p>	<ul style="list-style-type: none"> <li>▪ We suggest including a reference in paragraph (a) to non-disputing Treaty Party, considering the participation of States as non-disputing parties under the proposed amendments to the ICSID Rules.</li> <li>▪ We suggest incorporating an Article 4(f), according to which, during the proceeding, the adjudicator shall avoid entering into new relationships or acquire financial or business interests that could affect or appear to affect its independence or impartiality. We recognize that this has already been included in paragraph (b) for past or ongoing relationships but suggest the same be included for forward looking situations. <ul style="list-style-type: none"> <li>○ With this addition, we also seek to prevent situations in which arbitrators resign mid-way because of a conflict of interest created by a superseding circumstance that could have been avoided. It was a question that was raised by several delegations during the discussions in working group III. We look forward to discussing this or other ways of addressing this issue.</li> </ul> </li> </ul>

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<p><u>(f) Enter into a relationship or acquire a business or -financial interest that is likely to affect his or her independence and impartiality or that might reasonably create an appearance of impropriety, bias or dependence.</u></p>	
<p><b>Article 5 - Conflicts of Interest: Disclosure Obligations</b></p> <p>1. Candidates and adjudicators shall avoid any direct or indirect conflict of interest. They shall disclose any interest, relationship or matter that could reasonably be considered to affect their independence or impartiality <u>or that might- create an appearance of bias or dependence, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.</u> To this end, candidates and adjudicators shall make all reasonable efforts to become aware of such interests, relationships and matters.</p> <p>2. Disclosures made pursuant to paragraph (1) shall include the following:</p> <p>(a) Any professional, business and other significant relationships, within the past <del>{five}</del> years with:</p> <p>(i) The parties <del>{and any direct or indirect subsidiaries or parent-companies or agencies related of to the parties}</del>;</p> <p>(ii) The parties' counsel;</p> <p>(iii) Any present or past adjudicators or experts in the proceeding;</p> <p>(iv) <del>{Any third party with a direct or indirect financial interest in the outcome of the proceeding}</del>;</p> <p>(b) Any direct or indirect financial interest in:</p> <p>(i) The proceeding or in its outcome; and</p>	<ul style="list-style-type: none"> <li>▪ Considering that the disqualification standard under ICSID Convention Articles 57 and 14(1), do not require proof of actual dependence or bias, but instead “it is sufficient to establish the appearance of dependence or bias” (see, e.g. <i>BlueBank v. Venezuela</i>, Decision on Disqualification, 2013), we believe it is important that these same terms be reflected in Art. 5(1), for the code to be a useful tool in preventing conflicts of interest that could give rise to a challenge after the proceeding has been initiated and thus increasing the duration and cost of proceeding.</li> <li>▪ We propose to include “prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them” in paragraph 1 in order to make clear when the disclosure shall take place.</li> <li>▪ We agree with the proposal to include a 5-year period for the disclosure of information under Art. 5(2).</li> <li>▪ We suggest omitting the term “agencies related to the parties” included under 5.2.(ii), considering that this term may not be sufficiently precise and may impose too big of a burden on adjudicators, and/or would be hard to enforce. Instead we propose to refer to “direct or indirect” subsidiaries of the Parties, which may be a concept more commonly used in different legal systems and easier to identify.</li> </ul>

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<p>(ii) An administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves questions that may be <u>relevant for the underlying dispute to be</u> decided in the ISDS proceeding; <u>and</u></p> <p>(c) All ISDS <del>and other international</del> arbitration cases in which the candidate or adjudicator has been or is currently involved as counsel, arbitrator, annulment committee member, expert, <del>conciliator and mediator.</del>; <u>and</u></p> <p><del>(d) A list of all publications by the adjudicator or candidate and their relevant public speeches.</del></p> <p>3. Adjudicators shall have a continuing duty to promptly make disclosures pursuant to this article.</p> <p>4. Candidates and adjudicators should err in favour of disclosure if they have any doubt as to whether a disclosure should be made. <del>Candidates and adjudicators are not required to disclose interests, relationships or matters whose bearing on their role in the proceedings would be trivial.</del></p> <p><u>5. The disclosure of the information does not, in and of itself, create a presumption for the existence or appearance of a conflict.</u></p>	<ul style="list-style-type: none"> <li>▪ We consider indispensable that the adjudicators disclose any link with third parties with direct or indirect interests, including in particular, third party funders, as set forth under 5(2)(a)(iv).</li> <li>▪ As to Art. 5(2)(b)(ii), we consider that it will be rare for administrative or domestic court proceedings “to <u>involve questions</u> that may be decided in the ISDS proceeding”. In particular, “questions” is a term that may be understood in multiple ways. We therefore suggest an amendment that seeks to provide more clarity, and which attempts to acknowledge that administrative or local proceedings most often include questions of fact relevant to the underlying dispute, but this is not necessarily the same as the legal issue to be decided by the tribunal in an ISDS proceeding.</li> <li>▪ With regard to Art. 5(2)(c), we agree that adjudicators should disclose their participation in all ISDS proceedings, as well as all international arbitration, but not necessarily all domestic cases, EXCEPT, if the domestic cases relate to the Parties to the proceeding. We understand that those situations are covered by Art. 5(2)(a). If this is not the case, then we believe an additional sentence could be added to confirm that the adjudicator should disclose all local or international proceedings in which he or she is involved in any capacity, in which one of the Parties to the proceeding is also involved.</li> <li>▪ With regard to Art. 5(2)(d), we suggest including this disclosure requirement relating to the publications and speeches, in a</li> </ul>

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	<p>different Article, as a way to minimize a potential chilling effect on scholars.</p> <ul style="list-style-type: none"> <li>○ In particular, we consider that by including a duty to make disclosures under Art. 5, with other elements that have in the past served as basis for successful challenges, may not be sending the appropriate message, and could also inadvertently prevent necessary academic discussion from flourishing. Academic Publications, studies and empirical analysis of the issues commonly discussed in ISDS, have been an important engine for the development of international investment law, and even for potential changes in ISDS cases.</li> <li>○ The situation with regard to publication and speeches is complex, and this should be acknowledged by incorporating it in a different article.</li> </ul> <ul style="list-style-type: none"> <li>▪ We suggest deleting the last sentence of Article 5(4), as this appears to be obvious, but at the same time may serve as a mechanism for adjudicators to justify not disclosing information. If a party brings something to the attention of the other party and the tribunal or the members of the tribunal it is because it does not consider it to be trivial. Therefore, we believe this sentence will give rise to many arguments, as to what could or could not be considered “trivial” adding more uncertainty to what needs to be disclosed, instead of assisting in the proper implementation of the code.</li> <li>▪ We suggest including an additional sentence to reinforce what is already in the commentary, which is that by disclosing the</li> </ul>

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	<p>information, the adjudicator is not accepting that there is a potential conflict of interest or other situation, but merely complying with the disclosure obligations set forth in the code.</p>
<p><u>Article X - Additional recommended disclosures</u></p> <p><u>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.</u></p>	<ul style="list-style-type: none"> <li>▪ Consistent with our argument set forth above relating to 5(2)(d), we propose a new article to be incorporated as Article 6 or 5.a, which would incorporate a list of elements that the code recommends being disclosed.</li> </ul>
<p><b>Article 6 - Limit on Multiple Roles</b></p> <p>Adjudicators shall <del>refrain from acting concomitantly</del> <del>and disclose that they act</del> as counsel, expert witness, judge, <del>agent</del> or in any other relevant role <u>on any other pending or new ISDS proceeding</u> <del>the same time as they are</del> <del>[within X years of]</del> <del>acting on matters that involve the same parties, [the same facts], [and/ or] [the same treaty].</del></p>	<ul style="list-style-type: none"> <li>▪ Consistent with the codes of conduct incorporated in its recent treaties, as well as modern international investment law, Chile proposes to ban multiple roles in ISDS proceedings for the duration of the proceeding, for proceedings arising out of the same treaty or any other international agreement.</li> <li>▪ The ban should apply to wearing two or more hats for cases running simultaneously.</li> <li>▪ We also suggest that “agent” may not be understood by all ISDS users in the same way, so we would suggest deleting this term.</li> </ul>
<p><b>Article 7 - Integrity, Fairness and Competence</b></p> <p>1. Adjudicators <u>shall</u> have the highest standards of integrity and fairness. They shall ensure that parties are treated with equality and that each party is given a reasonable opportunity of presenting its case.</p>	<ul style="list-style-type: none"> <li>▪ Consistent with the rest of the provision, we believe that Art. 7(3), second sentence, should also refer to “shall”, instead of “should”.</li> </ul>

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<p>2. An adjudicator shall not engage in ex parte contacts concerning the proceeding.</p> <p>3. Adjudicators shall act with competence and shall take reasonable steps to maintain and enhance the knowledge, skills and qualities necessary to fulfil their duties. Candidates shall <del>only</del> accept appointments for which they are competent.</p> <p>4. Adjudicators shall not delegate their decision-making function to any other person.</p>	
<p><b>Article 8 - Availability, Diligence, Civility and Efficiency</b></p> <p>1. Before accepting any appointment, adjudicators shall ensure their availability to hear the case and render all decisions in a timely manner. Upon selection, adjudicators shall be available to perform and shall perform their duties diligently <del>and expeditiously</del> throughout the proceeding, <u>which includes, without limitation, performing a comprehensive and thorough review of the full record of the case and evidence adduced by the Parties; and to participate constructively in hearings and deliberations.</u></p> <p><u>2.</u> Adjudicators shall ensure that they dedicate the necessary time and effort to the proceeding and refuse competing obligations. They shall conduct the proceedings so as to avoid unnecessary delays.</p>	<ul style="list-style-type: none"> <li>▪ Draft Art. 8.1. refers to the adjudicators’ obligations to perform their duties diligently. We understand that the criteria of diligence, differs from the notions of acting in a punctual or expeditious manner, which refer more to a temporal question. <ul style="list-style-type: none"> <li>○ We understand that the duty to act diligently is broader and incorporates other questions, such as requiring arbitrators to make a comprehensive and thorough review of the full record of the case and of all the evidence presented to the Tribunal. We propose an amendment in this sense, which seeks to reflect a concern that was raised by a number of States during the UNCITRAL Working Group III discussions.</li> <li>○ We understand that the duty to act expeditiously would be better placed in Art. 8(3), in conjunction with the duty to be punctual.</li> </ul> </li> </ul>

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<p><del>32. [Adjudicators shall refrain from <u>presiding</u> serving in more than <del>{8X}</del> pending ISDS proceedings at the same time so as to issue timely decisions.]</del></p> <p>3. Adjudicators shall <u>perform their duties expeditiously and</u> be punctual in the exercise of their functions.</p> <p><u>4. While serving in any pending ISDS proceedings, adjudicators shall not accept subsequent obligations that would prevent them from complying with their duties under this Article-</u></p> <p><u>5.</u> Adjudicators shall act with civility, respect and collegiality towards the parties and one another, and shall consider the best interests of the parties.</p>	<ul style="list-style-type: none"> <li>▪ We also understand that pursuant to Art.8(1), arbitrators shall agree to prioritize their adjudicator work over competing demands when they accept an appointment.</li> <li>▪ With regard to the original Art. 8(2), it may prove extremely difficult to set a number of cases an adjudicator can hear simultaneously, in any capacity as the number of cases an arbitrator can diligently manage, depend on many factors, as set forth in the comments to the draft code. For this reason, and subject to additional information we do not suggest adopting an absolute limitation on the number of cases at this time.</li> </ul>
<p><b>Article 9 – Confidentiality</b></p> <p>1. Adjudicators shall not:</p> <p>(a) Disclose or use any non-public information concerning, or acquired from, a proceeding except for the purposes of that proceeding;</p> <p>(b) Disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interests of others; and</p> <p>(c) Disclose deliberations of an ISDS tribunal, or any view expressed by an adjudicator during the deliberations.</p> <p>2. Adjudicators shall not disclose any decision, ruling or award to the parties prior to delivering it to them. They shall not publicly disclose any decision, ruling or award until it is in the public domain<del>†</del>and they shall not comment on any decision, ruling or award in which they</p>	<ul style="list-style-type: none"> <li>▪ We agree that adjudicators shall not comment on any decision, ruling or award in which they participated, and thus suggest deleting the brackets in Art. 9.2. but we also propose additional language in order to ensure that adjudicators may comment on decisions in which they have participated once they become public.</li> </ul>

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<p>participated, <del>unless and until the decision, ruling or award becomes public</del>.</p>	
<p><b>Article 10 - Pre-appointment Interviews</b></p> <p><del>1-</del>Any pre-appointment interview shall be limited to discussion concerning availability of the adjudicator and absence of conflict. Candidates shall not discuss any issues pertaining to jurisdictional, procedural or substantive matters potentially arising in the proceedings.</p> <p><del>2. [If any pre-appointment interview occurs, it shall be fully disclosed to all parties upon appointment of the candidate.]</del></p>	<ul style="list-style-type: none"> <li>▪ Subject to further information, we suggest omitting Art. 10.2, which requires disclosing the existence of the pre-appointment interview and, based on the draft comments to the code, we understand it would also require disclosing the content of the interview. This could prove burdensome and unnecessary considering that Art. 10.1, already sets forth what can and what cannot be discussed during the pre-appointment interview.</li> </ul>
<p><b>Article 11 - Fees and Expenses</b></p> <p>1. Any discussion pertaining to fees shall be concluded immediately upon constitution of the adjudicatory body and, when possible, shall be communicated to the parties through the entity administering the proceeding.</p> <p>2. Adjudicators shall keep an accurate and documented record of the time devoted to the procedure and of their expenses as well as the time and expenses of their assistant.</p>	<ul style="list-style-type: none"> <li>▪ No comments</li> </ul>
<p><b>Article 12 - Enforcement of the Code of Conduct</b></p> <p>1. Every adjudicator and candidate has an obligation to comply with the applicable provisions of this code.</p> <p>2. The disqualification and removal procedures in the applicable rules shall continue to apply.</p> <p>3. [Other options based on means of implementation of the code]</p>	<p><u>As to the enforcement of the code</u>, we offer the following comments:</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> </ul> </li> </ul>

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	<ul style="list-style-type: none"> <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> <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>

