



CONFLICT PREVENTION AND DISPUTE RESOLUTION: MAIN PROVISIONS AND INSTRUMENTS

ENERGY CHARTER SECRETARIAT

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FOREWORD

The Energy Charter Treaty (ECT), is a multilateral treaty which primarily addresses investment, transit and trade matters – but also competition, environmental issues and other concerns in the energy sector. Moreover there are strong dispute resolution provisions to strengthen implementation of the Treaty. A binding treaty without a credible mechanism for effective implementation would have been of little benefit.

The ECT, in fact, contains several dispute resolution mechanisms, each one of which is designed to address a particular subject matter or aspect of the Treaty. This illustrates the importance and unique role of the dispute settlement provisions of the ECT. These dispute resolution mechanisms may be divided into two main groups:

- (i) Dispute resolution between Contracting Parties (Article 27 of the ECT). The general system has some relevant exceptions so as to facilitate a better approach to competition disputes, environmental disputes, trade disputes and trade-related investment matters. There is an additional conciliation mechanism for transit disputes.
- (ii) Dispute resolution between an investor and a Contracting Party (Article 26 of the ECT).

The starting point for all these mechanisms is the desirability of an amicable early settlement between the parties to any dispute. The potential role of the Secretariat through its good offices, mediation and conciliation facilities was highlighted by the Energy Charter Conference in 2014 as an example of how to achieve amicable dispute settlement. Since 2014, the Secretariat has provided its good offices in advance of the investor resorting to international arbitration, and after the initial stages of arbitration. The Secretariat, can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings; and even help the parties to overcome initial procedural hurdles, for example by providing the premises of the Secretariat for the initial meetings and administrative support for the mediation process.

Over the last three years (2014-2016), with the invaluable help of the delegates and the lead of the General Counsel of the Secretariat, Dr Alejandro Carballo, the Energy Charter Conference has modernised all these dispute resolution mechanisms to make them more effective. In particular, the Conference has (i)

updated its transit conciliation rules (endorsing also a commentary as a helpful, non-binding explanatory tool to facilitate understanding and uniform application of the Conciliation Rules), (ii) welcomed a Model Early Warning Mechanism (to prevent and overcome emergency situations in the energy sector related to the transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines); (iii) endorsed a Guide on Investment Mediation; and (iv) confirmed the new policy on access to the *travaux préparatoires*, including the de-restriction of most of them and allowing the publication online of the different drafts of the Energy Charter Treaty.

This publication compiles the relevant documents related to the dispute resolution mechanisms under the ECT and provides some useful flowcharts to facilitate their understanding. I expect it to be a useful tool for both governments and companies.

Thank you,

Dr Urban Rusnák,
Secretary General,
Energy Charter Secretariat

25TH November 2016

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SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1.1 GENERAL

ENERGY CHARTER TREATY
Article 27
Settlement of Disputes between Contracting Parties

[DECISION. With respect to the Treaty as a whole

In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.¹

[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.]²

- (1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.
- (2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.
- (3) Such an ad hoc arbitral tribunal shall be constituted as follows:
 - (a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;
 - (b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d);

¹ Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

² Final Act of the European Energy Charter Conference, Understanding 17.

- (c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in paragraph (2), the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with subparagraph (d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice;
- (d) Appointments requested to be made in accordance with this paragraph shall be made by the Secretary-General of the Permanent Court of International Arbitration within 30 days of the receipt of a request to do so. If the Secretary-General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy;
- (e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty, of the members to be appointed;
- (f) In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members;
- (g) The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law;
- (h) The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute;
- (i) Where, in making an award, a tribunal finds that a measure of a regional or local government or authority within the Area of a Contracting Party listed in Part I of Annex P is not in conformity with this Treaty, either party to the dispute may invoke the provisions of Part II of Annex P;
- (j) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute;
- (k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in The Hague, and use the premises and facilities of the Permanent Court of Arbitration;
- (l) A copy of the award shall be deposited with the Secretariat which shall make it generally available.

ENERGY CHARTER TREATY
Article 28
Non-Application of Article 27 to Certain Disputes

A dispute between Contracting Parties with respect to the application or interpretation of Article 5 or 29 shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree.

ENERGY CHARTER TREATY
Annex P: Special Sub-National Dispute Procedure
(In accordance with Article 27(3)(i))

PART I

1. Canada
2. Australia

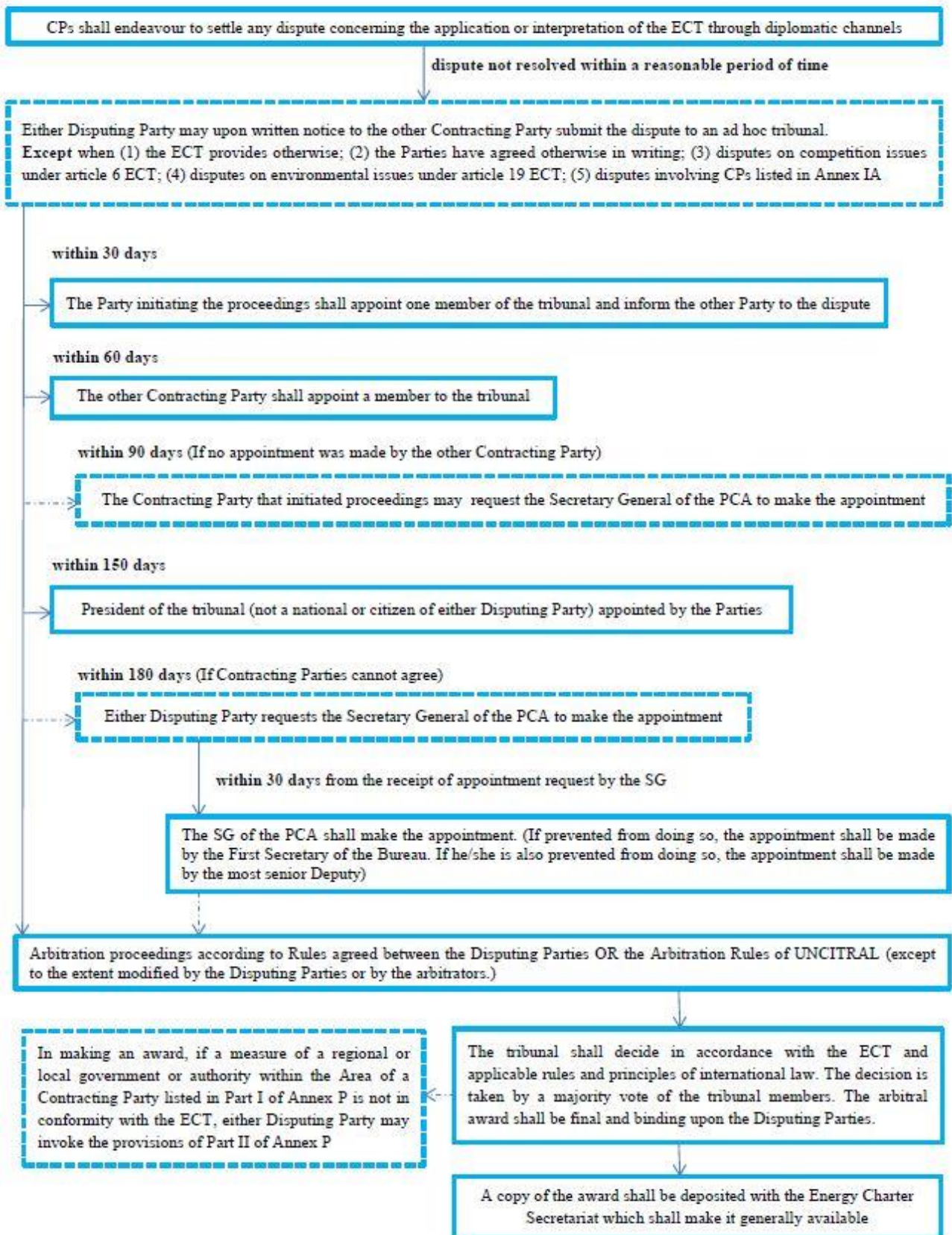
PART II

- (1) Where, in making an award, the tribunal finds that a measure of a regional or local government or authority of a Contracting Party (hereinafter referred to as the "Responsible Party") is not in conformity with a provision of this Treaty, the Responsible Party shall take such reasonable measures as may be available to it to ensure observance of the Treaty in respect of the measure.
- (2) The Responsible Party shall, within 30 days from the date the award is made, provide to the Secretariat written notice of its intentions as to ensuring observance of the Treaty in respect of the measure. The Secretariat shall present the notification to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the notice. If it is impracticable to ensure observance immediately, the Responsible Party shall have a reasonable period of time in which to do so. The reasonable period of time shall be agreed by both parties to the dispute. In the event that such agreement is not reached, the Responsible Party shall propose a reasonable period for approval by the Charter Conference.
- (3) Where the Responsible Party fails, within the reasonable period of time, to ensure observance in respect of the measure, it shall at the request of the other Contracting Party party to the dispute (hereinafter referred to as the "Injured Party") endeavour to agree with the Injured Party on appropriate compensation as a mutually satisfactory resolution of the dispute.
- (4) If no satisfactory compensation has been agreed within 20 days of the request of the Injured Party, the Injured Party may with the authorization of the Charter Conference suspend such of its obligations to the Responsible Party under the Treaty as it considers equivalent to those denied by the measure in question, until such time as

the Contracting Parties have reached agreement on a resolution of their dispute or the non-conforming measure has been brought into conformity with the Treaty.

- (5) In considering what obligations to suspend, the Injured Party shall apply the following principles and procedures:
 - (a) The Injured Party should first seek to suspend obligations with respect to the same Part of the Treaty as that in which the tribunal has found a violation.
 - (b) If the Injured Party considers that it is not practicable or effective to suspend obligations with respect to the same Part of the Treaty, it may seek to suspend obligations in other Parts of the Treaty. If the Injured Party decides to request authorization to suspend obligations under this subparagraph, it shall state the reasons therefor in its request to the Charter Conference for authorization.
- (6) On written request of the Responsible Party, delivered to the Injured Party and to the President of the tribunal that rendered the award, the tribunal shall determine whether the level of obligations suspended by the Injured Party is excessive, and if so, to what extent. If the tribunal cannot be reconstituted, such determination shall be made by one or more arbitrators appointed by the Secretary-General. Determinations pursuant to this paragraph shall be completed within 60 days of the request to the tribunal or the appointment by the Secretary-General. Obligations shall not be suspended pending the determination, which shall be final and binding.
- (7) In suspending any obligations to a Responsible Party, an Injured Party shall make every effort not to affect adversely the rights under the Treaty of any other Contracting Party.

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES (Art. 27 ECT)





SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1.2 COMPETITION AND ENVIRONMENTAL ISSUES

ENERGY CHARTER TREATY
Article 6
Competition

[...]

- (4) Contracting Parties may cooperate in the enforcement of their competition rules by consulting and exchanging information.
- (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and co-operation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development.
- (6) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy.
- (7) The procedures set forth in paragraph (5) and Article 27(1) shall be the exclusive means within this Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article.

ENERGY CHARTER TREATY
Article 19
Environmental Aspects

- (1) [...] The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. [...]
- (2) At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.



SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1.3 TRADE

ENERGY CHARTER TREATY
Article 29³
Interim Provisions on Trade-Related Matters

[...]

- (9) Annex D shall apply:
- (a) to disputes regarding compliance with provisions applicable to trade under this Article;
 - (b) to disputes regarding the application by a Contracting Party of any measure, whether or not it conflicts with the provisions of this Article, which is considered by another Contracting Party to nullify or impair any benefit accruing to it directly or indirectly under this Article; and
 - (c) unless the Contracting Parties parties to the dispute agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a member of the WTO,

Except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:

- (i) has been notified in accordance with and meets the other requirements of sub-paragraph (2)(b) and Annex TFU; or
- (ii) establishes a free-trade area or a customs union as described in article XXIV of the GATT 1994.

ENERGY CHARTER TREATY
Annex D
Interim Provisions for Trade Dispute Settlement
(In accordance with Article 29(9) of the ECT)⁴

[CHAIRMAN'S CONCLUSION ON THE IMPLEMENTATION OF TRADE-RELATED RULES, AT THE ENERGY CHARTER CONFERENCE ON 24 APRIL 1998: There was furthermore a consensus that in developing dispute settlement rules and procedures WTO rules of procedure and practice would be followed and the roster of panellists to be adopted by the

³As amended by Art. 1 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

⁴ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

*Conference would be drawn up in accordance with Article 3 of the Amendment.]*⁵

- (1) (a) In their relations with one another, Contracting Parties shall make every effort through cooperation and consultations to arrive at a mutually satisfactory resolution of any dispute about existing measures that might materially affect compliance with the provisions applicable to trade under Article 5 or 29, or about any measures that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29.⁶
- (b) A Contracting Party may make a written request to any other Contracting Party for consultations regarding any existing measure of the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 5 or 29, or any measure that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29.⁷ A Contracting Party which requests consultations shall to the fullest extent possible indicate the measure complained of and specify the provisions of Article 5 or 29 and of the WTO Agreement⁸ that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretariat, which shall periodically inform the Contracting Parties of pending consultations that have been notified.
- (c) A Contracting Party shall treat any confidential or proprietary information identified as such and contained in or received in response to a written request, or received in the course of consultations, in the same manner in which it is treated by the Contracting Party providing the information.
- (d) In seeking to resolve matters considered by a Contracting Party to affect compliance with provisions applicable to trade under Article 5 or 29 as between itself and another Contracting Party, or to nullify or impair any benefit accruing to it directly or indirectly under the provisions applicable to trade under Article 29,⁹ the Contracting Parties participating in consultations or other dispute settlement shall make every effort to avoid a resolution that adversely affects the trade of any other Contracting Party.
- (2) (a) If, within 60 days from the receipt of the request for consultation referred to in subparagraph (1)(b), the Contracting Parties have not resolved their dispute or agreed to resolve it by conciliation, mediation, arbitration or other method, either Contracting Party may deliver to the Secretariat a written request for the

⁵ Editor's note: Document CS (98) 338 CC 124, point 13, of 24 May 1998 (not published). The Conclusion was drawn by the Chairman to the first Energy Charter Conference on 24 April 1998. The Conference agreed without objection to this conclusion

⁶ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

⁷ Id.

⁸ Id.

⁹ Id.

establishment of a panel in accordance with sub-paragraphs (b) to (f). In its request the requesting Contracting Party shall state the substance of the dispute and indicate which provisions of Article 5 or 29 and of the WTO Agreement¹⁰ are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.

- (b) The interests of other Contracting Parties shall be taken into account during the resolution of a dispute. Any other Contracting Party having a substantial interest in a matter shall have the right to be heard by the panel and to make written submissions to it, provided that both the disputing Contracting Parties and the Secretariat have received written notice of its interest no later than the date of establishment of the panel, as determined in accordance with subparagraph (c).
 - (c) A panel shall be deemed to be established 45 days after the receipt of the written request of a Contracting Party by the Secretariat pursuant to subparagraph (a).
 - (d) A panel shall be composed of three members who shall be chosen by the Secretary-General from the roster described in paragraph (7). Except where the disputing Contracting Parties agree otherwise, the members of a panel shall not be citizens of Contracting Parties which either are party to the dispute or have notified their interest in accordance with sub-paragraph (b), or citizens of states members of a Regional Economic Integration Organization which either is party to the dispute or has notified its interest in accordance with sub-paragraph (b).
 - (e) The disputing Contracting Parties shall respond within ten working days to the nominations of panel members and shall not oppose nominations except for compelling reasons.
 - (f) Panel members shall serve in their individual capacities and shall neither seek nor take instruction from any government or other body. Each Contracting Party undertakes to respect these principles and not to seek to influence panel members in the performance of their tasks. Panel members shall be selected with a view to ensuring their independence, and that a sufficient diversity of backgrounds and breadth of experience are reflected in a panel.
 - (g) The Secretariat shall promptly notify all Contracting Parties that a panel has been constituted.
- (3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Annex. Rules of procedure shall be as close as possible to those of the WTO Agreement¹¹. A panel shall also have the right to adopt additional rules of procedure not inconsistent with the rules of procedure adopted by the Charter Conference or with this Annex. In a proceeding before a panel each disputing Contracting Party and any other Contracting Party which has notified its interest in accordance with sub-paragraph (2)(b), shall have the

¹⁰ Id.

¹¹ Id.

right to at least one hearing before the panel and to provide a written submission. Disputing Contracting Parties shall also have the right to provide a written rebuttal. A panel may grant a request by any other Contracting Party which has notified its interest in accordance with sub-paragraph (2)(b) for access to any written submission made to the panel, with the consent of the Contracting Party which has made it.

The proceedings of a panel shall be confidential. A panel shall make an objective assessment of the matters before it, including the facts of the dispute and the compliance of measures with the provisions applicable to trade under Article 5 or 29. In exercising its functions, a panel shall consult with the disputing Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by the disputing Contracting Parties, a panel shall base its decision on the arguments and submissions of the disputing Contracting Parties. Panels shall be guided by the interpretations given to the WTO Agreement within the framework of the WTO Agreement and shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a member of the WTO to other members of the WTO to which it applies the WTO Agreement and which have not been taken by those other members to dispute resolution under the WTO Agreement.¹²

Unless otherwise agreed by the disputing Contracting Parties, all procedures involving a panel, including the issuance of its final report, should be completed within 180 days of the date of establishment of the panel; however, a failure to complete all procedures within this period shall not affect the validity of a final report.

- (b) A panel shall determine its jurisdiction; such determination shall be final and binding. Any objection by a disputing Contracting Party that a dispute is not within the jurisdiction of the panel shall be considered by the panel, which shall decide whether to deal with the objection as a preliminary question or to join it to the merits of the dispute.
- (c) In the event of two or more requests for establishment of a panel in relation to disputes that are substantively similar, the Secretary-General may with the consent of all the disputing Contracting Parties appoint a single panel.
- (4) (a) After having considered rebuttal arguments, a panel shall submit to the disputing Contracting Parties the descriptive sections of its draft written report, including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties. The disputing Contracting Parties shall be afforded an opportunity to submit written comments on the descriptive sections within a period set by the panel.

¹² Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

Following the date set for receipt of comments from the Contracting Parties, the panel shall issue to the disputing Contracting Parties an interim written report, including both the descriptive sections and the panel's proposed findings and conclusions. Within a period set by the panel a disputing Contracting Party may submit to the panel a written request that the panel review specific aspects of the interim report before issuing a final report. Before issuing a final report the panel may, in its discretion, meet with the disputing Contracting Parties to consider the issues raised in such a request.

The final report shall include descriptive sections (including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties), the panel's findings and conclusions, and a discussion of arguments made on specific aspects of the interim report at the stage of its review. The final report shall deal with every substantial issue raised before the panel and necessary to the resolution of the dispute and shall state the reasons for the panel's conclusions.

A panel shall issue its final report by providing it promptly to the Secretariat and to the disputing Contracting Parties. The Secretariat shall at the earliest practicable opportunity distribute the final report, together with any written views that a disputing Contracting Party desires to have appended, to all Contracting Parties.

- (b) Where a panel concludes that a measure introduced or maintained by a Contracting Party does not comply with a provision of Article 5 or 29 or with a provision of the WTO Agreement¹³ that applies under Article 29, the panel may recommend in its final report that the Contracting Party alter or abandon the measure or conduct so as to be in compliance with that provision.
- (c) Panel reports shall be adopted by the Charter Conference. In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be adopted by the Charter Conference until at least 30 days after it has been provided to all Contracting Parties by the Secretariat. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretariat at least 10 days prior to the date on which the report is to be considered for adoption by the Charter Conference, and the Secretariat shall promptly provide them to all Contracting Parties. The disputing Contracting Parties and Contracting Parties which notified their interest in accordance with sub-paragraph (2)(b) shall have the right to participate fully in the consideration of the panel report on that dispute by the Charter Conference, and their views shall be fully recorded.
- (d) In order to ensure effective resolution of disputes to the benefit of all Contracting Parties, prompt compliance with rulings and recommendations of a final panel report that has been adopted by the Charter Conference is essential. A

¹³ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

Contracting Party which is subject to a ruling or recommendation of a final panel report that has been adopted by the Charter Conference shall inform the Charter Conference of its intentions regarding compliance with such ruling or recommendation. In the event that immediate compliance is impracticable, the Contracting Party concerned shall explain its reasons for non-compliance to the Charter Conference and, in light of this explanation, shall have a reasonable period of time to effect compliance. The aim of dispute resolution is the modification or removal of inconsistent measures.

- (5) (a) Where a Contracting Party has failed within a reasonable period of time to comply with a ruling or recommendation of a final panel report that has been adopted by the Charter Conference, a Contracting Party to the dispute injured by such non-compliance may deliver to the non-complying Contracting Party a written request that the non-complying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the non-complying Contracting Party shall promptly enter into such negotiations.
- (b) If the non-complying Contracting Party refuses to negotiate, or if the Contracting Parties have not reached agreement within 30 days after delivery of the request for negotiations, the injured Contracting Party may make a written request for authorization of the Charter Conference to suspend obligations owed by it to the non-complying Contracting Party under Article 5 or 29.
- (c) The Charter Conference may authorize the injured Contracting Party to suspend such of its obligations to the non-complying Contracting Party, under provisions of Article 5 or 29 or under provisions of the WTO Agreement¹⁴ that apply under Article 29, as the injured Contracting Party considers equivalent in the circumstances.
- (d) The suspension of obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with Article 5 or 29 has been removed, or until a mutually satisfactory solution is reached.
- (6) (a) Before suspending such obligations the injured Contracting Party shall inform the non-complying Contracting Party of the nature and level of its proposed suspension. If the non-complying Contracting Party delivers to the Secretary-General a written objection to the level of suspension of obligations proposed by the injured Contracting Party, the objection shall be referred to arbitration as provided below. The proposed suspension of obligations shall be stayed until the arbitration has been completed and the determination of the arbitral panel has become final and binding in accordance with subparagraph (e).
- (b) The Secretary-General shall establish an arbitral panel in accordance with subparagraphs (2)(d) to (f), which if practicable shall be the same panel which made the ruling or recommendation referred to in sub-paragraph (4)(d), to examine the

¹⁴ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

level of obligations that the injured Contracting Party proposes to suspend. Unless the Charter Conference decides otherwise the rules of procedure for panel proceedings shall be adopted in accordance with sub-paragraph (3)(a).

- (c) The arbitral panel shall determine whether the level of obligations proposed to be suspended by the injured Contracting Party is excessive in relation to the injury it experienced, and if so, to what extent. It shall not review the nature of the obligations suspended, except insofar as this is inseparable from the determination of the level of suspended obligations.
 - (d) The arbitral panel shall deliver its written determination to the injured and the non-complying Contracting Parties and to the Secretariat within 60 days of the establishment of the panel or within such other period as may be agreed by the injured and the non-complying Contracting Parties. The Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the determination.
 - (e) The determination of the arbitral panel shall become final and binding 30 days after the date of its presentation to the Charter Conference, and any level of suspension of benefits allowed thereby may thereupon be put into effect by the injured Contracting Party in such manner as that Contracting Party considers equivalent in the circumstances, unless prior to the expiration of the 30 days period the Charter Conference decides otherwise.
 - (f) In suspending any obligations to a non-complying Contracting Party, an injured Contracting Party shall make every effort not to affect adversely the trade of any other Contracting Party.
- (7) Each Contracting Party may designate two individuals who shall, in the case of Contracting Parties which are also member of the WTO,¹⁵ if they are willing and able to serve as panellists under this Annex, be persons whose names appear on the indicative list of governmental and non-governmental individuals, referred to in article 8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement or who have in the past served as panellists on a GATT or WTO dispute settlement panel.¹⁶ The Secretary-General may also designate, with the approval of the Charter Conference, not more than ten individuals, who are willing and able to serve as panellists for purposes of dispute resolution in accordance with paragraphs (2) to (4). The Charter Conference may in addition decide to designate for the same purposes up to 20 individuals, who serve on dispute settlement rosters of other international bodies, who are willing and able to serve as panellists. The names of all of the individuals so designated shall constitute the dispute settlement roster. Individuals shall be designated strictly on the basis of objectivity, reliability and sound judgement and, to the greatest extent possible, shall

¹⁵ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

¹⁶ Id.

have expertise in international trade and energy matters, in particular as relates to provisions applicable under Article 29. In fulfilling any function under this Annex, designees shall not be affiliated with or take instructions from any Contracting Party. Designees shall serve for renewable terms of five years and until their successors have been designated. A designee whose term expires shall continue to fulfil any function for which that individual has been chosen under this Annex. In the case of death, resignation or incapacity of a designee, the Contracting Party or the Secretary-General, whichever designated said designee, shall have the right to designate another individual to serve for the remainder of that designee's term, the designation by the Secretary-General being subject to approval of the Charter Conference.

- (8) Notwithstanding the provisions contained in this Annex, Contracting Parties are encouraged to consult throughout the dispute resolution proceeding with a view to settling their dispute.
- (9) The Charter Conference may appoint or designate other bodies or fora to perform any of the functions delegated in this Annex to the Secretariat and the Secretary-General.
- (10) Where a Contracting Party invokes Article 29(9)(b), this Annex shall apply, subject to the following modifications:¹⁷
 - (a) the complaining party shall present a detailed justification in support of any request for consultations or for the establishment of a panel regarding a measure which it considers to nullify or impair any benefit accruing to it directly or indirectly under Article 29;
 - (b) where a measure has been found to nullify or impair benefits under Article 29 without violation thereof, there is no obligation to withdraw the measure; however, in such a case the panel shall recommend that the Contracting Party concerned make a mutually satisfactory adjustment;
 - (c) the arbitral panel provided for in paragraph (6)(b), upon the request of either party, may determine the level of benefits that have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute.

¹⁷ Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

RULES OF PROCEDURE FOR PANEL PROCEEDINGS
Related to Article 5 or Article 29 of the Energy Charter Treaty
(Pursuant to Paragraph 3(A) of Annex D to the Energy Charter Treaty)
CCDEC1999 (13) TTG, 7 December 1999

The Conference notes that the Group on Trade discussed the attached draft Rules of Procedure for Panel Proceedings related to Article 5 and 29 of the Energy Charter Treaty (pursuant to paragraph 3(a) of Annex D to the Energy Charter Treaty) at its meeting on October 28-29 1999. It notes further that the Group had at that stage not been ready to recommend the formal adoption of the text of the draft Rules of Procedure for Panel Proceedings.

The Conference recognises the need for the rules of procedure for panel proceedings to be adopted by the Charter Conference, as provided for in paragraph 3 of Annex D to the Energy Charter Treaty, as Annex D provides dispute settlement rules which parties to the ECT could invoke at any time.

The Conference decides that, in the event of a dispute related to Article 5 or 29 of the Energy Charter Treaty, the attached draft set of rules shall serve as a basis for the operation of panel proceedings. Any ad hoc use of the attached set of draft rules, in the event of such a dispute, shall not be construed to set any precedent.

The Conference will continue to consider the draft Rules of Procedure for Panel Proceedings in the light of the relevant developments of the ongoing WTO dispute settlement review with a view to their adoption at the next Conference meeting.

Rule 1
Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions cited by the parties to the dispute, the matter referred to it by (name of the Contracting Party) in document ... (the written request for the establishment of a panel delivered to the Secretariat pursuant to paragraph 2(a) of Annex D) and to make the rulings and recommendations provided for in the relevant provisions and referred to in Annex D.

2. The parties to the dispute may authorize the Secretary-General to draw up the terms of reference of the panel. The terms of reference thus drawn up shall be subject to agreement of the parties to the dispute and circulated to all Contracting Parties. If other than standard terms of reference are agreed upon, any Contracting Party may raise any point relating thereto in the Charter Conference.
3. The dispute settlement system in Annex D is a central element in providing security and predictability in respect of Articles 5 and 29 of the Treaty. Contracting Parties

recognize that it serves to preserve the rights and obligations of Contracting Parties under these provisions, and to clarify those provisions in accordance with customary rules of interpretation of public international law. Recommendations and rulings of panels cannot add to or diminish the rights and obligations provided in Articles 5 and 29.

Rule 2
Composition of Panels

1. Any nominations of panel members proposed by the Secretary-General after the expiration of 30 days subsequent to the establishment of the panel shall be accepted as final, subject to the rules of conduct in Appendix 3 to these Rules.
2. Panelists' expenses, including travel and subsistence allowance, shall be met from the Energy Charter Secretariat budget in accordance with criteria to be adopted by the Charter Conference, based on recommendations of the Budget Committee.

Rule 3
Procedures for Multiple Complainants

1. In the circumstances referred to in paragraph 3(c) of Annex D, a single panel should be established to examine the complaints whenever feasible.
2. The single panel shall organize its examination and present its findings to the Charter Conference in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to disputes that are substantively similar, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Rule 4
Third Parties

1. The submissions filed to the panel by a party that has notified its interest in accordance with paragraph 2(b) of Annex D (hereafter referred to as a "third party") shall also be given to the parties to the dispute and shall be reflected in the panel report.

2. With reference to paragraph 3(a) of Annex D, parties to the dispute shall only refuse access by third parties to its submissions to the first meeting of the panel for compelling reasons to be evaluated by the panel.
3. If a third party considers that a measure already the subject of a panel proceeding materially affects compliance with the provisions applicable to trade under Article 5 or 29 or nullifies or impairs any benefit accruing to it directly or indirectly under the provisions applicable to trade under Article 29, that Contracting Party may have recourse to normal dispute settlement procedures under Annex D. Such a dispute shall be referred to the original panel wherever possible.

Rule 5

Fixing of Timetable and Working Procedures

1. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.
2. After consulting the parties to the dispute, the panel shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process and adopt, after consultation with the parties to the dispute, its working procedures and any additional rules of procedure referred to in paragraph 3(a) of Annex D. Panels shall follow the working procedures in Appendix 1 unless the panel decides otherwise after consulting the parties to the dispute.
3. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.
4. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.
5. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute.
6. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 2 of this Rule and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

Rule 6
Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Contracting Party it shall inform the authorities of that Contracting Party. A Contracting Party should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Contracting Party providing the information.
2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 2.

Rule 7
Confidentiality

1. Panel deliberations shall be confidential.
2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.
3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Rule 8
Communications with the Panel

1. There shall be no *ex parte* communications with the panel concerning matters under consideration by the panel.
2. Written submissions to the panel shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in these Rules shall preclude a party to a dispute from disclosing statements of its own positions to the public. Contracting Parties shall treat as confidential information submitted by another Contracting Party to the panel which that Contracting Party has designated as confidential. A party to a dispute shall also, upon request of a Contracting Party, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Rule 9
Timeframe for Panel Proceedings

1. In cases of urgency the parties to the dispute, panels and the Charter Conference shall make every effort to accelerate the proceedings to the greatest extent possible. In such cases, the panel shall aim to issue its report to the parties to the dispute within 90 days instead of the 180 days referred to in paragraph 3(a) of Annex D.
2. When the panel considers that it cannot issue its report within the 180 days referred to in paragraph 3(a) of Annex D, or within the 90 days in cases of urgency referred to in paragraph 1 of this Rule, it shall inform the Charter Conference in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to all Contracting Parties by the Secretariat exceed 270 days.
3. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the timeframes set out in paragraph 3(a) of Annex D and paragraph 1 and 2 of this Rule shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.
4. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of Annex D shall be notified to the Secretariat which shall circulate them to all Contracting Parties. Any Contracting Party may raise any point relating thereto at the Charter Conference.

Rule 10
The Final Report of the Panel

Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the Secretariat and the disputing Contracting Parties pursuant to paragraph 4(a) of Annex D. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

Rule 11
Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing

secretarial and technical support. In respect of legal and procedural aspects, the Secretariat may decide to seek the advice of the Secretariat of the WTO.

2. The Secretariat shall assist Contracting Parties in respect of dispute settlement at their request and may be asked to conduct special training courses for interested Contracting Parties concerning these dispute settlement procedures and practices so as to enable Contracting Parties' experts to be better informed in this regard. This assistance shall be provided in a manner ensuring the continued impartiality of the Secretariat.

APPENDIX 1

TO THE RULES OF PROCEDURE FOR PANEL PROCEEDINGS

STANDARD WORKING PROCEDURES

1. In its proceedings the panel shall follow the relevant provisions of Annex D and the Rules of Procedure for Panel Proceedings. In addition, pursuant to paragraph 2 of Rule 5, the following working procedures shall apply unless the panel decides otherwise after consulting the parties to the dispute. These working procedures may be adapted from time to time to reflect changes in the corresponding working procedures appended to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).
2. The panel shall meet in closed session. The parties to the dispute, and third parties, shall be present at the meetings only when invited by the panel to appear before it.
3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in Annex D and the Rules of Procedure for Panel Proceedings shall preclude a party to a dispute from disclosing statements of its own positions to the public. Contracting Parties shall treat as confidential information submitted by another Contracting Party to the panel which that Contracting Party has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Contracting Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.
4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments. Thereafter, but still before the first substantive meeting, the third parties shall file any written submissions they want to make pursuant to paragraph 2 (b) of Annex D.
5. Any request for a preliminary ruling to be made by the panel shall be submitted no later than in a party's first written submission. If the complaining party requests any such ruling, the respondent shall submit the response it may have in its first written submission. If the respondent requests any such ruling, the complaining party shall submit the response it may have prior to the first substantive meeting of the panel. The complaining party shall submit this response at a time to be determined by the panel after receipt and in light of the respondent's request. Exceptions to this procedure will be granted upon a showing of good cause.
6. Parties shall submit all factual evidence to the panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

7. The parties to the dispute have the right to determine the composition of their own delegation. In this regard, they may nominate private counsel and advisors. The parties shall have the responsibility for all members of their delegation and shall ensure that all members of their delegation act in accordance with the rules of Annex D, the Rules of Procedure for Panel Proceedings and the Standard Working Procedures, particularly in regard to confidentiality of the proceedings.
8. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.
9. All third parties, i.e., Contracting Parties that have notified their interest in accordance with paragraph 2(b) of Annex D, shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.
10. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.
11. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.
12. The parties to the dispute and any third party invited to present its views in accordance with paragraph 2(b) of Annex D shall make available to the panel a written version of their oral statements.
13. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.
14. Any additional procedures specific to the panel adopted pursuant to paragraph (3)(a) of Annex D.
15. Proposed timetable for panel work:
 - (a) Receipt of first written submissions of the parties:

(1) Complaining Party:		3-6 weeks
(2) Party complained against:		3 weeks
 - (b) Date, time and place of first substantive meeting

with the parties; third party session:	_____	1-2 weeks
(c) Receipt of written rebuttals of the parties:	_____	2-3 weeks
(d) Date, time and place of second substantive meeting with the parties:	_____	1-2 weeks
(e) Issuance of descriptive part of the report to the parties:	_____	2-4 weeks
(f) Receipt of comments by the parties on the descriptive part of the report:	_____	2 weeks
(g) Issuance of the interim report, including the findings and conclusions, to the parties:	_____	2-4 weeks
(h) Deadline for party to request review of part(s) of report:	_____	1 week
(i) Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j) Issuance of final report to the Secretariat and parties to dispute:	_____	2 weeks
(k) Circulation of the final report to the Contracting Parties:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

APPENDIX 2

TO THE RULES OF PROCEDURE FOR PANEL PROCEEDINGS

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Rule 6.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.
2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.
3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.
4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Contracting Party, it shall inform the government of that Contracting Party. Any Contracting Party shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.
5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.
6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

APPENDIX 3

TO THE RULES OF PROCEDURE FOR PANEL PROCEEDINGS

RULES OF CONDUCT

I. Governing Principle

Each person covered by these Rules (as defined in paragraph 1 of Section III below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of panel and arbitration proceedings, so that through the observance of such standards of conduct the integrity and impartiality of the dispute settlement mechanism are preserved. These Rules shall in no way modify the rights and obligations of Contracting Parties under Annex D or the Rules of Procedure for Panel Proceedings.

II. Observance of the Governing Principle

1. To ensure the observance of the Governing Principle of these Rules, each covered person is expected (1) to adhere strictly to the provisions of Annex D and the Rules of Procedure for Panel Proceedings; (2) 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; and (3) to take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.
2. Pursuant to the Governing Principle, each covered person, shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person 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.

III. Scope

1. These Rules shall apply, as specified in the text, to each person serving: (a) on a panel; (b) as an arbitrator pursuant to paragraph 6 of Annex D; or (c) as an expert participating in the dispute settlement mechanism pursuant to Rule 6 of the Rules of Procedure for Panel Proceedings. These Rules shall also apply to those members of the Secretariat called upon to assist the panel in accordance with Rule 11 of the Rules of Procedure for Panel Proceedings or to assist in formal arbitration proceedings pursuant to paragraph 6 of Annex D (hereinafter "Member of the Secretariat support staff"), reflecting their acceptance of established norms regulating the conduct of such persons as international civil servants and the Governing Principle of these Rules.

2. The application of these Rules shall not in any way impede the Secretariat's discharge of its responsibility to continue to respond to Contracting Parties' requests for assistance and information.

IV. Self-Disclosure Requirements by Covered Persons

1. (a) Each person requested to serve on a panel, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List (Annex 1) of examples of the matters subject to disclosure.

(b) Any member of the Secretariat described in paragraph III.1, who may expect to be called upon to assist in a dispute, shall be familiar with these Rules.

2. As set out in paragraph 4 below, all covered persons described in paragraph 1 shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.

3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels or in other dispute settlement roles.

4. (a) All panelists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 2 of these Rules. Such information would be disclosed to the Chair of the Charter Conference or to his/her duly authorised representative (hereinafter "Chair of the Charter Conference") for consideration by the parties to the dispute.

(b) When considered to assist in a dispute, members of the Secretariat shall disclose to the Secretary-General the information required under paragraph 2.

5. During a dispute, each covered person shall also disclose any new information relevant to paragraph 2 above at the earliest time they become aware of it.

6. The Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.

V. Confidentiality

1. Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.
2. During the proceedings, no covered person shall engage in *ex parte* contacts concerning matters under consideration. Subject to paragraph 1, no covered person shall make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing Appellate Body has been derestricted.

VI. Procedures Concerning Subsequent Disclosure and Possible Material Violations

1. Any party to a dispute, conducted pursuant to Annex D, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the Charter Conference or the Secretary-General, as appropriate according to the respective procedures detailed in paragraphs 5 to 13 below, in a written statement specifying the relevant facts and circumstances. Other Contracting Parties who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.
2. When evidence as described in paragraph 1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.
3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph 1.
4. Following the submission of such evidence to the Chair of the Charter Conference or the Secretary-General, as specified below, the procedures outlined in paragraphs 5 to 13 below shall be completed within fifteen working days.

Panelists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panelist, an arbitrator or an expert, the party shall provide such evidence to the Chair of the Charter Conference.
6. Upon receipt of the evidence referred to in paragraphs 1 and 2, the Chair of the Charter Conference shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.
7. If, after having consulted with the person concerned, the matter is not resolved, the Chair of the Charter Conference shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person concerned resigns, the Chair of the Charter Conference shall inform the parties to the dispute and, as the case may be, the panelists, the arbitrator(s) or experts.
8. In all cases, the Chair of the Charter Conference, in consultation with the Secretary-General, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs 1 and 2 above has occurred. Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.
9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.
10. The Chair of the Charter Conference shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

Secretariat

11. If the covered person who is the subject of the evidence is a member of the Secretariat, the party shall only provide the evidence to the Secretary-General, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute and the panel.
12. It shall be for the Secretary-General to take any appropriate action in accordance with the Staff Regulations. The Secretary-General shall consult with the person who is the subject of the evidence and the panel and shall, if necessary, take appropriate disciplinary action.

13. The Secretary-General shall inform the parties to the dispute, the panel and the Chair of the Charter Conference of his decision, together with relevant supporting information.
14. Following completion of the procedures in paragraphs 5 to 13, if the appointment of a covered person is revoked or that person is excused or resigns, the procedures specified in Annex D and the Rules of Procedure for Panel Proceedings for initial appointment shall be followed for appointment of a replacement, but the time periods shall be half those specified in Annex D and the Rules of Procedure for Panel Proceedings. The panel or the arbitrator, as the case may be, may then decide after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.
15. All covered persons and Contracting Parties concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in Annex D and the Rules of Procedure for Panel Proceedings.
16. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

VII. Review

These Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the Charter Conference as to whether to continue, modify or terminate these Rules.

ANNEX 1
TO THE RULES OF CONDUCT
ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED

This list contains examples of information of the type that a person called upon to serve in a dispute should disclose pursuant to the Rules of Conduct.

Each covered person, as defined in Rule III:1 of these Rules of Conduct has a continuing duty to disclose the information described in Rule IV:2 of these Rules which may include the following:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
- (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

ANNEX 2
TO THE RULES OF CONDUCT

Dispute Number: _____

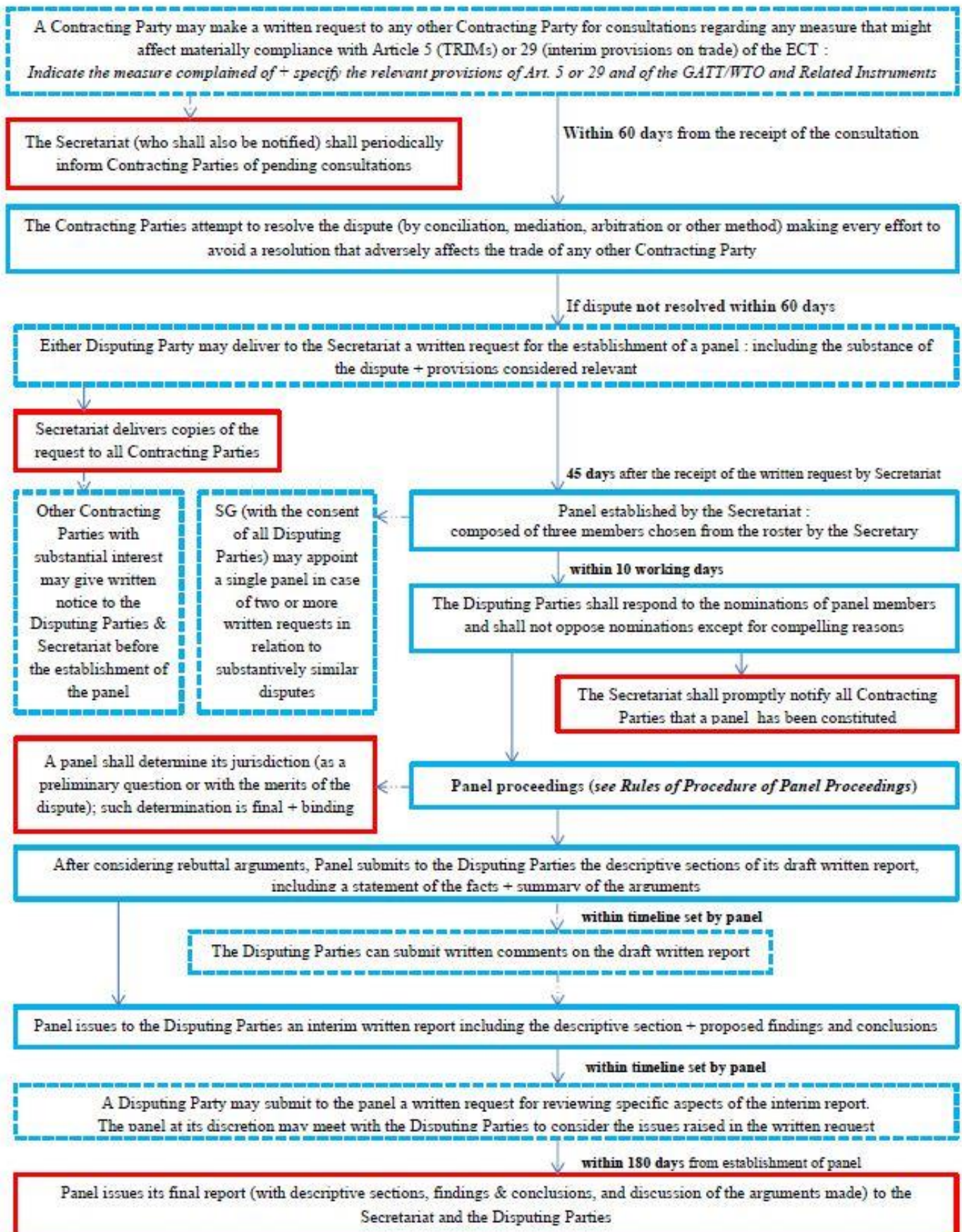
ENERGY CHARTER TREATY
DISCLOSURE FORM

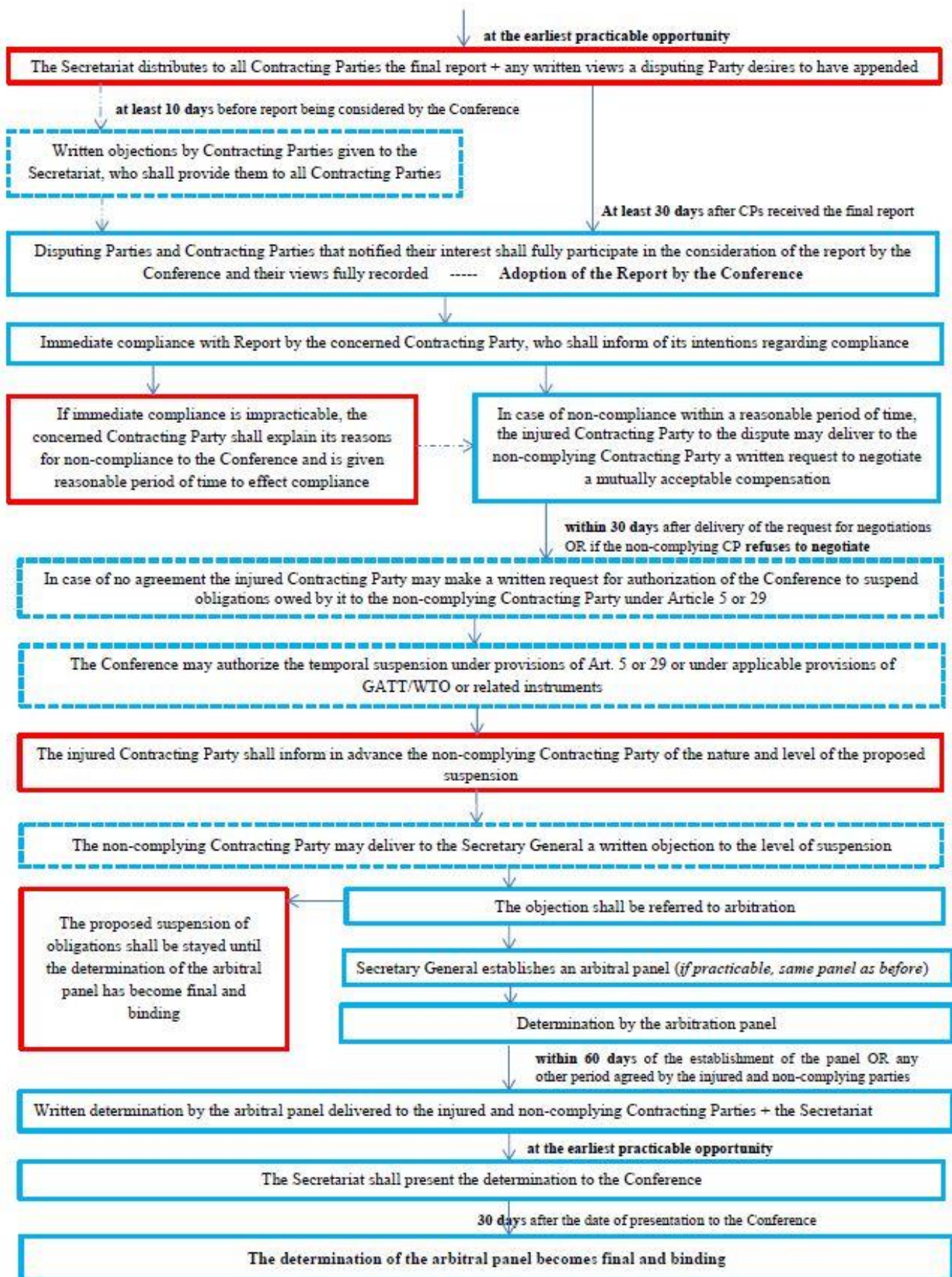
I have read Annex D to the Energy Charter Treaty, the Rules of Procedures for Panel Proceedings and the Rules of Conduct. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the Charter Conference makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.

Signed:

Dated:

TRADE DISPUTE SETTLEMENT (ANNEX D of the ECT)
between Contracting Parties at least one of which is not a party to the GATT or WTO
(CPs are encouraged to consult throughout the whole proceeding with a view to settling their dispute)







SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

1.4 TRANSIT

ENERGY CHARTER TREATY
Article 7
Transit

[DECLARATION With respect to Article 7

The European Communities and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law.

They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.]¹⁸

[...]

- (6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision.
- (7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute:
 - (a) A Contracting Party party to the dispute may refer it to the Secretary-General by a notification summarizing the matters in dispute. The Secretary-General shall notify all Contracting Parties of any such referral.
 - (b) Within 30 days of receipt of such a notification, the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.
 - (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days

¹⁸ Final Act of the European Energy Charter Conference, Declaration 3.

of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.

- (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.
 - (e) Notwithstanding subparagraph (b) the Secretary-General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute.
 - (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.
- (8) Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.
- (9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4).
- (10) For the purposes of this Article:
- (a) "Transit" means
 - (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or
 - (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.

- (b) "Energy Transport Facilities" consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.

ENERGY CHARTER TREATY
Annex N

List of Contracting Parties Requiring at least 3 Separate Areas to be Involved in a Transit

(In accordance with Article 7(10)(a))

Canada and United States of America

ENERGY CHARTER TREATY
Article 1.10
Definitions

(10) "Area" means with respect to a state that is a Contracting Party:

- (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
- (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.

**UNDERSTANDING OF THE ENERGY CHARTER CONFERENCE WITH RESPECT TO
ARTICLE 7(7) OF THE ENERGY CHARTER TREATY**

Statement made by the Conference Chairman on 29 June 2000

CCDEC2000 (3) TTG, 29 June 2000

It is confirmed that Article 7(7) of the Energy Charter Treaty provides for a conciliation mechanism and as such does not constitute a further appeal mechanism following a final judgement rendered by a competent judicial or arbitral tribunal.

MODEL ENERGY CHARTER EARLY WARNING MECHANISM

CCDEC2014 (14) TTG, 26 November 2014

The Energy Charter Conference

welcomed the work of the Trade and Transit Group in preparing a Model Energy Charter Early Warning Mechanism that parties can refer to, voluntarily, on a case by case basis, in order to prevent and overcome emergency situations in the energy sector related to the Transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines;

welcomed the availability of this Model Mechanism to the Signatories of the future International Energy Charter

Model Energy Charter Early Warning Mechanism

- (1) The Model Energy Charter Early Warning Mechanism has been prepared by the Trade and Transit Group and in the context of the Energy Charter Secretariat's Programme of Work for 2014. Parties can refer to it, voluntarily, on a case by case basis. It will be complementary to other mechanisms for early warning and dispute resolution agreed bilaterally between individual parties.
- (2) In the European Energy Charter, the Signatories expressed their desire to improve security of energy supply, and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.
- (3) The Signatories of the European Energy Charter further envisaged to broaden their cooperation in dealing with events in the energy sector with transfrontier consequences.
- (4) Under the Energy Charter Treaty, the Contracting Parties shall secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties and shall not, in the event of a dispute over any matter arising from Transit, interrupt or reduce or permit any entity to interrupt or reduce existing flows of Energy Materials and Products except in cases stated in subparagraph (6) of Article 7.
- (5) The Energy Charter Conference was mandated in Article 34 (3)(b) of the Energy Charter Treaty (ECT) to facilitate the implementation of the principles of the 1991 Charter and of the provisions of the Energy Charter Treaty and the Protocols. Article 35 (4) of the Energy Charter Treaty mandates the Secretariat to provide the Charter Conference with all necessary assistance for the performance of its duties.
- (6) The resolution of controversies in case of emergency was one of the aims stated in the Rome Statement adopted at the 20th Meeting of the Energy Charter Conference in Rome on 9 December 2009 (CCDEC2009 (14) GEN).
- (7) In the Road Map for the Modernisation of the Energy Charter Process, adopted at the 21st Meeting of the Energy Charter Conference, it was stated that the Energy Charter's approach to securing established flows of energy is a dual one, based on the legally

binding provisions of the Energy Charter Treaty as well as the multilateral forum of peers established under the Energy Charter Conference and its subsidiary bodies.

Definitions

- 1.1. **“Emergency situation”** is a situation with a significant disruption or physical interruption of supply of electricity, natural gas and oil within the Energy Charter constituency with cross-border significance;
- 1.2. **“Energy Security Contact Group”** is the primary working body under this Mechanism, which may be established by the Secretary General in view of a situation that could potentially lead to an emergency situation;
- 1.3. **“Energy Charter Monitoring Group”** is a working group that can be established by the Chair of the Contact Group in case of a need to confirm information gathered within the Energy Security Contact Group.

Objective and elements of the Model Energy Charter Early Warning Mechanism

- 2.1. The objective of the Model Energy Charter Early Warning Mechanism is to provide for a non-binding framework aimed at preventing and overcoming emergency situations in the energy sector related to the Transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines;
- 2.2. The methodology of the Model Energy Charter Early Warning Mechanism includes exchange of information and response to requests for information, consultations, confirmation of information and monitoring, risk evaluation and recommendations for action in view of an emergency situation or the threat of an emergency situation.

Transparency

3. Transparency on energy production and consumption, flows, free capacities of pipelines and grids, capacities of underground gas storage and their usage are essential to prevent energy emergency situations. The Energy Charter Conference encourages all market participants to work towards providing such transparency, including by using existing international and multilateral public and private cooperation platforms.

Initiation of the Model Energy Charter Early Warning Mechanism

- 4.1. The Model Energy Charter Early Warning Mechanism may be initiated by any Signatory of the European Energy Charter in case of an emergency situation or the threat of an emergency situation by notification to the Secretary General.
- 4.2. If an emergency situation or the threat of an emergency situation concerns two Signatories of the European Energy Charter that have a comparable bilateral early warning mechanism, it is understood that those Signatories will normally use the latter mechanism first. Those Signatories can however unanimously decide to use the Model Energy Charter Early Warning Mechanism immediately.

- 4.3. The notification should include relevant information, e.g. a description of the situation, name other parties that may be involved or affected and any information requested from those. The notifying party and the other parties that may be involved or affected will henceforth be named the "Parties Involved". The Model Early Warning Mechanism applies to Parties Involved subject to their approval.
- 4.4. Within 2 days from the reception of the notification, the Secretary-General will inform the Chairman of the Energy Charter Conference and its members and observers, through a communication of the Trade and Transit Group, of the fact that the Model Energy Charter Early Warning Mechanism has been initiated. He will forward the documentation received from the notifying party to those Signatories mentioned in the notification.
- 4.5. If a Signatory of the European Energy Charter who is not included in the initial notification believes that it is also involved or affected, it may send a written request to the Secretary-General to be represented in the Energy Charter Contact Group as one of the Parties Involved. The decision on the acceptance of that Signatory as one of the Parties Involved will be taken at the following meeting of the Energy Security Contact Group by consensus.
- 4.6. The Signatories mentioned in the notification are invited to respond promptly to the Secretary-General whether they wish to participate in the Model Early Warning Mechanism. In case they wish to participate, they should also provide their own assessment of the situation. The Secretary-General will make this information available to the Parties Involved.

Energy Security Contact Group

- 5.1. Following the exchange of written information any of the Parties Involved may request the Secretary-General to convene an Energy Security Contact Group. He shall do so no later than three days following the reception of such request.
- 5.2. Alternatively, the Secretary-General may convene the Energy Security Contact Group upon his own initiative.
- 5.3. The Energy Security Contact Group is chaired by the Secretary-General or his/her representative and will normally include representatives of the Parties Involved, the Chairmanship of the Energy Charter Conference (who will act as Vice-Chair of the Contact Group) and of the Energy Charter Secretariat. Should the Chairmanship be one of the parties concerned, the most senior Vice-Chairman of the Energy Charter Conference, as per definition in CC 464, not representing any Party Involved, will act in the capacity of the Conference Chairmanship for the meetings of the Energy Security Contact Group and as Vice-Chair of the Contact Group. The Group can decide, by consensus, on inviting further parties to participate in its meetings. If the Secretary General has the nationality of one of the Parties Involved, the Deputy Secretary-General or the Director at the Energy Charter Secretariat will chair the Group.
- 5.4. The Energy Security Contact Group encourages the exchange of information among the Parties Involved on issues they consider relevant in view of the prevention or resolution of an emergency situation. The Parties Involved may request information to be

provided, on voluntary basis and in compliance with applicable rules and legislation on confidentiality, by any of the other Parties Involved. The Chair of the Contact Group will disseminate information within the Contact Group. The Parties Involved may request the Chair to invite experts to provide information during designated parts of the meetings; they Chair will invite such experts unless any of the other Parties Involved objects.

5.5. The Energy Security Contact Group analyses available information in view of an actual threat to energy security. It may, among other things, compile a list of energy infrastructure that is critical for averting an emergency situation, e.g. upstream, midstream, downstream pipelines, metering stations, storage facilities, power generation and transmission facilities.

5.6. In view of a perceived risk to established flows of energy materials and products, and in case of a continued lack of transparency despite the efforts set out in section 3 and 5.3, the participants of the Energy Charter Contact Group are invited to consider possible measures to ensure transparency before an emergency situation occurs, including, e.g. with regard to

- Daily actual flows of gas, electricity and oil across borders from, through or to the areas of the parties involved;
- Daily nominations for flows of gas, electricity and oil across borders from, through or to the areas of the parties involved;
- Volumes transited as documented by the operators.

5.7. The Energy Security Contact Group will aim at:

- elaborating a common evaluation of the situation and of the possible further development of events;
- elaborating recommendations to eliminate the threat of an emergency situation or to overcome the emergency situation, for consideration by the parties involved;

When evaluating the situation and elaborating recommendations, the Energy Charter Contact Group should be guided by the provisions of the Energy Charter Treaty and the European Energy Charter, and by any bilateral or multilateral agreements or contracts among the Parties Involved that it is aware of.

5.8. Following the meetings of the Energy Security Contact Group, the Chair of the Contact Group will draft a report for the Signatories of the Energy Charter Treaty through the delegates of the Trade and Transit Group. The report will be cleared with the Parties Involved and the Vice-Chair of the Contact Group. In case consensus on the report cannot be reached, the Chair of the Contact Group will make sure that diverging views of the Parties Involved are adequately reflected in it. The Signatories of the Energy Charter Treaty may address requests for further information, as well as comments and proposals, to the Chair of the Contact Group, who will make those information, comments and proposals available within the Energy Security Contact Group and ensure follow-up as appropriate.

Energy Charter Monitoring Group

- 6.1. In case of a need to confirm the information gathered within the Energy Security Contact Group the Parties Involved, the Chair of the Contact Group, its Vice-Chair, or the Parties Involved may propose the establishment of an Energy Charter Monitoring Group. The Chair of the Contact Group will establish the Energy Charter Monitoring Group in case this is supported by all the Parties Involved and the Vice-Chair of the Contact Group.
- 6.2. The Energy Security Contact Group will decide, by consensus, on the composition of the Energy Charter Monitoring Group, its speaker and Terms of Reference, including a date when its mandate finishes.
- 6.3. As part of the Terms of Reference, the Parties Involved may agree, within their competence, to facilitate access of the members of the Energy Charter Monitoring Group to critical energy infrastructure established under 5.4. and to necessary information as well as to facilitate the work of the Monitoring Group throughout their presence on their territory.
- 6.4. The Energy Charter Monitoring Group, through its speaker, provides the Energy Security Contact Group with regular updates on their work. The Parties Involved may request, in consultation with the Chair and the Vice-Chair of the Contact Group, ad-hoc oral or written reports from the speaker of the Monitoring Group.

Costs

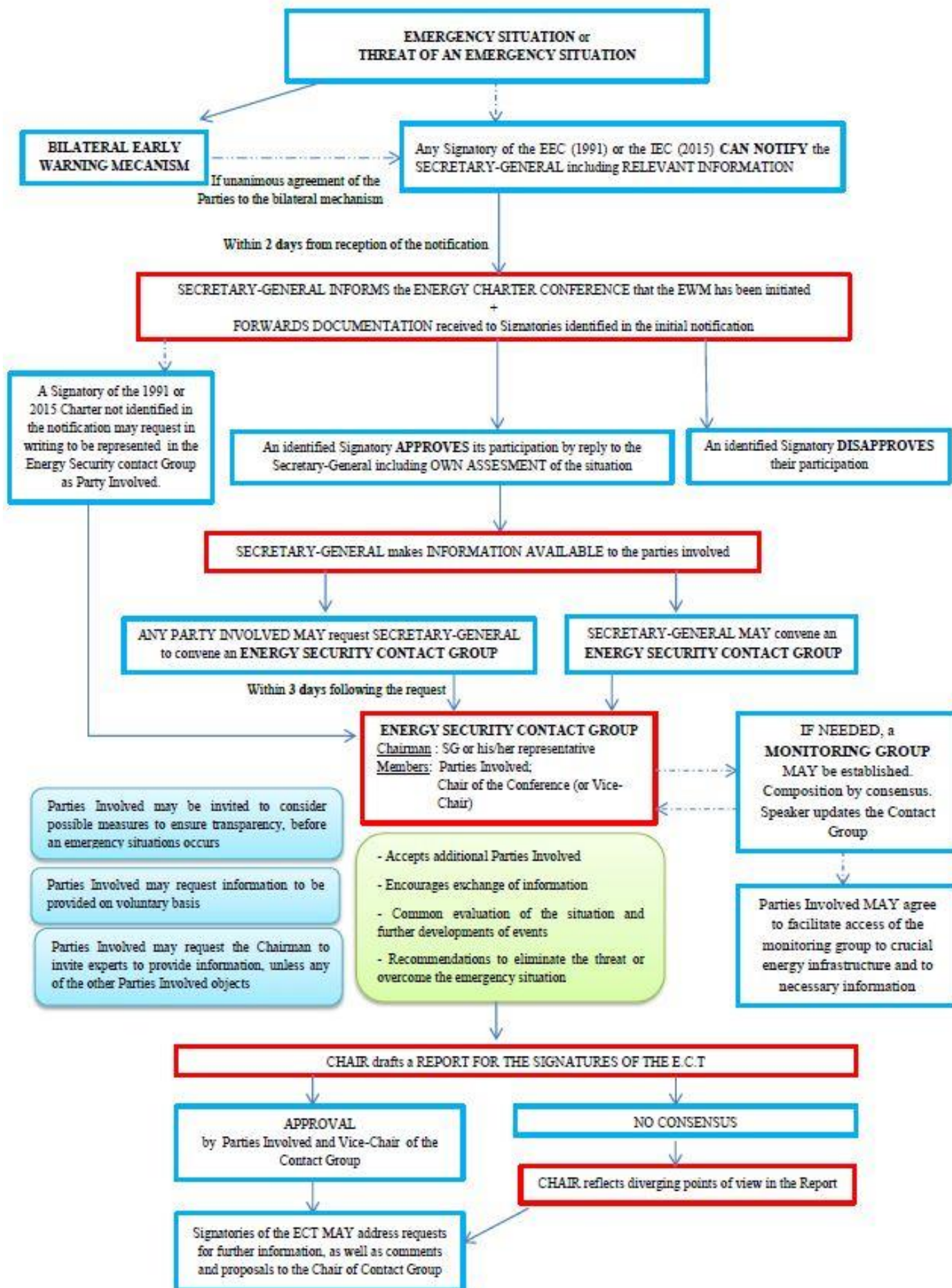
7. The costs of the work of the Energy Security Contact Group and the Energy Charter Monitoring Group, such as travel and communication, will normally be borne independently by their respective participants. Administrative support may be provided by the Energy Charter Secretariat.

Confidentiality

8. The participants of the Energy Security Contact Group take all necessary measures on the basis of the relevant legal and normative acts of the Parties Involved as well as in accordance with applicable international agreements, to protect confidential information received.

Final Provisions

9. This Decision does not constitute an international agreement or other legally binding document and does not establish rights and obligations governed by international law.



**RULES CONCERNING THE CONDUCT OF
CONCILIATION OF TRANSIT DISPUTES**
CCDEC1998 (11) TTG, 3-4 December 1998
Amended by CCDEC2015 (11) TTG, 21 October 2015

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TRANSIT CONCILIATION RULES

These Rules, adopted by the Energy Charter Conference under Article 7(7)(f) of the Energy Charter Treaty ('ECT'), apply to conciliation of disputes under Article 7(7)(a)-(c) of that Treaty.

The terms used in these Rules shall have the same meaning as in the Energy Charter Treaty.

Rule 1

Notification of a Dispute

- (1) The referral of a dispute to the Secretary-General by a Contracting Party shall be in writing and shall identify the parties to the dispute ("Parties"); summarise the relevant facts and the basis of the Contracting Party's claim; as well as confirm the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entities subject to the control or jurisdiction of the Contracting Parties party to the dispute.
- (2) The Contracting Parties party to the dispute may, at their own discretion, conclude an agreement in writing to refer the dispute to conciliation under these Rules before the exhaustion requirement contained in Article 7(7) of the ECT is fulfilled.
- (3) As soon as practicable after the receipt of the notification of a referral, the Secretary-General shall notify all Contracting Parties to the Energy Charter Treaty of the existence of the referral and invite them to indicate whether they consider that they are one of the other Contracting Parties concerned for the purposes of the appointment of the conciliator under Article 7(7)(b) of the ECT. The form of the notification to the Contracting Parties is a matter for the Secretary-General, but the Secretary-General shall ensure that sufficient information is provided to enable the Contracting Parties to make the necessary assessment of their interest.
- (4) The Secretary-General shall transmit a copy of the written notification of referral of the dispute to any Contracting Party identified therein as a Party. The Secretary-General may invite any Party which is identified in the referral to submit a statement by way of response for inclusion in the material which will be provided to the conciliator on his or her appointment. Such a Party is not bound to comply with this request.
- (5) In these Rules, the term 'Contracting Party' shall cover also states who apply provisionally Part II of the ECT.

Rule 2
Appointment of Conciliator

- (1) The Secretary-General shall decide on the appropriate form of the consultation about the appointment of the conciliator. In making the appointment, the Secretary-General shall have particular regard to the importance of appointing a conciliator who has or is likely to have the confidence of the Parties; will be independent and impartial; will have the expertise and experience relevant to the issues arising under the dispute; will avoid actual or apparent conflicts of interest; will respect the confidentiality requirements of these Rules; and will conduct the proceedings in a manner which ensures the integrity and reputation of the conciliation procedure.
- (2) The Secretary-General shall maintain a roster of qualified conciliators. Each Contracting Party shall have the right to nominate up to three candidates to be included in the list of conciliators. The format for such nomination is set out in Annex C.
- (3) The decision of the Secretary-General to appoint a particular person is final, subject to Rule 4(1).
- (4) At the time of appointment, the conciliator shall sign the declaration in Annex A of these Rules and shall disclose any information that could reasonably be expected to be known to him or her at the time which is likely to affect or give rise to justifiable doubts as to his or her independence or impartiality. The disclosure shall include the type of information described in the Illustrative List in Annex B.
- (5) The terms of appointment of the conciliator shall include a statement by the Secretary-General listing the Parties and other Contracting Parties concerned for the purposes of the conciliator's declaration in Annex A and inform the conciliator of any information relevant to the conciliation.
- (6) The Secretary-General may, in consultation with the conciliator and upon written agreement of the Parties to the dispute, inform the public about the fact that a conciliation procedure has been initiated with regard to the given dispute.
- (7) If the Secretary-General elects in accordance with Article 7(7)(e) of the ECT not to appoint a conciliator, he or she shall inform the Parties and any other Contracting Party concerned of his or her decision in writing as soon as possible.

Rule 3
Resignation, Death or Incapacity of Conciliator

- (1) A conciliator may resign by submitting his or her resignation to the Secretary-General.

- (2) If a conciliator resigns, dies or, in the opinion of the Secretary-General, becomes incapacitated, unable or fails to perform his or her duties (including compliance with time limits), the Secretary-General shall immediately notify the Parties and the other Contracting Parties concerned of that fact. The proceeding shall be regarded as suspended for the purpose of the time limit in Article 7(7)(c) of the ECT.
- (3) The Secretary-General, having regard to the particular stage which the proceedings had reached, may encourage the Parties to agree on the most expeditious method of proceeding.
- (4) The Secretary-General, in consultation with the Parties and the other Contracting Parties concerned, shall appoint a new conciliator as soon as possible, but in any event no later than 30 days after the resignation, death or incapacity of the conciliator. The Secretary-General shall provide the new conciliator with the evidence, including statements and materials, collected during the course of the conciliation proceedings.
- (5) The Secretary-General may as part of the terms of appointment of a new conciliator determine, if necessary, a time limit for the conduct of the conciliation. The time limit may reflect the agreement of the Parties or, in the absence of their agreement, the Secretary-General's judgement about the most appropriate time limit having regard to the particular stage of the proceedings, the circumstances of the dispute and the objective of a speedy resolution of the dispute.

Rule 4
Disqualification of Conciliator

- (1) Any Party or other Contracting Party concerned which has or comes into possession of evidence of conduct by the conciliator which is inconsistent with the independent and impartial conduct of the conciliation, including the avoidance of the appearance of a conflict of interest, shall immediately inform the Secretary-General in writing.
- (2) The Secretary-General shall decide as expeditiously as possible, having regard to the need to allow the conciliator the opportunity to respond, whether the conciliator should be disqualified. The Secretary-General may decide to suspend the proceedings temporarily. The Secretary-General shall advise the Parties and the other Contracting Parties concerned of his or her decision as to the disqualification of the conciliator.
- (3) The Secretary-General, having regard to the particular stage which the proceedings had reached, may encourage the Parties to agree on the most expeditious method of proceeding.
- (4) The Secretary-General, in consultation with the Parties and the other Contracting Parties concerned, shall appoint a new conciliator as soon as possible, but in any event no later than 30 days after the date of the disqualification of the conciliator. The Secretary-General shall provide the new conciliator with the evidence, including

statements and materials, collected during the course of the conciliation proceedings. The new conciliator, in consultation with the Parties, shall determine how such evidence may be used.

- (5) The Secretary-General may as part of the terms of appointment of a new conciliator determine, if necessary, a time limit for the conduct of the conciliation. The time limit may reflect the agreement of the Parties or, in the absence of their agreement, the Secretary-General's judgement about the most appropriate time limit having regard to the particular stage of the proceedings, the circumstances of the dispute and the objective of a speedy resolution of the dispute.

Rule 5
Objections to Competence

- (1) The conciliator shall rule on his/her competence.
- (2) Any objection that the dispute is not within the competence of the conciliator, shall be filed by a Party with the conciliator within one week from the notification of the appointment of the conciliator or from the moment the facts on which the objection is based are known to the Party at that time.
- (3) The conciliator may on his/her own initiative consider, at any stage of the proceeding, whether the dispute before him/her is within his/her competence.
- (4) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The conciliator may deal with the objection as a preliminary question (within one week after he/she receives the notification of the objection) or join it to the merits of the dispute. If the conciliator overrules the objection or joins it to the merits, the proceedings on the merits shall be resumed. If the conciliator decides that the dispute is not within his/her competence, he/she shall close the proceeding and draw up a report to that effect, in which he/she shall state his/her reasons.

Rule 6
Conduct of Conciliation Proceedings

- (1) The conciliator shall conduct the conciliation proceedings in such a manner as he or she considers appropriate, subject to these Rules and the principles of impartiality, equity and justice.
- (2) At the earliest possible opportunity, the conciliator shall consult the Parties identified in the referral to ascertain their views as to the matters in dispute and to ensure that the Parties are properly identified at the outset of the proceedings. This may be done by the means the conciliator considers the most appropriate, including through questionnaires, conferences, hearings or the submission of written or other material.

- (3) The conciliator shall ensure that any information provided to him or her by one Party is made available to the other Party or Parties. The conciliator may make an exception to the rule of full disclosure where he or she determines that the information in question is commercially confidential and the Party concerned has given reasons why the disclosure would damage its interests.
- (4) After consulting the Parties, the conciliator shall determine the place for meeting or taking of oral statements, having regard to the circumstances of the conciliation proceedings and the need for the costs of the proceedings to be contained. The conciliator shall consider the desirability of using the facilities of the Energy Charter Secretariat and, with the agreement of the Parties, may make arrangements with the Secretary-General for such use.

Rule 7
Representation and Assistance

The Parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other Party or Parties, the conciliator and the Secretary-General.

Rule 8
Witnesses and Experts

- (1) The conciliator may request evidence or expert advice from persons who have information or expertise relevant to the dispute and such evidence or advice shall be made available to the Parties.
- (2) Each Party, at any stage of the proceeding, may request that the conciliator hear the witnesses and experts whose evidence the Party considers relevant. The conciliator shall fix a time limit within which such hearing shall take place.
- (3) Witnesses and experts shall be examined by the conciliator. Questions may also be put to them by the Parties under the control of the conciliator.
- (4) An official of a Party may, if so authorized, appear as a witness or expert and produce such information as may be needed for the proceedings. The request for an appearance shall indicate specifically on what matters and in what capacity the official will be questioned.
- (5) If a witness or expert is unable to appear at the place of the hearing, the conciliator, with the agreement of the Parties, may make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere. The Parties shall receive a copy of any such written deposition or shall have the right to participate in any such examination.

Rule 9
Administrative Assistance

In order to facilitate the conduct of the conciliation proceedings, the conciliator, with the agreement of the Parties, may arrange for administrative or technical assistance by the Energy Charter Secretariat or any other suitable institution or person.

Rule 10
Co-Operation of Parties with the Conciliator

- (1) The Parties shall co-operate in good faith with the conciliator and, in particular, at his or her request, shall furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the conciliator to hear witnesses and experts whom he or she desires to call. The Parties shall also facilitate visits to and inquiries at any place connected with the dispute that the conciliator desires to undertake.
- (2) The Parties shall comply with any time limits agreed with or fixed by the conciliator.

Rule 11
Proposals for Settlement of the Dispute

- (1) A Party, on its own initiative or at the invitation of the conciliator, may submit to the conciliator proposals for a settlement of the dispute.
- (2) The conciliator, at any stage of the conciliation proceedings, may make proposals for a settlement of the dispute.

Rule 12
Agreement by the Parties

- (1) An agreement between the Parties to a resolution of the dispute or a procedure to achieve such resolution shall be in writing and signed by the Parties.
- (2) The conciliator shall inform the Secretary-General in writing of the fact that an agreement between the Parties has been reached. The Secretary-General shall notify all the Contracting Parties to the Energy Charter Treaty that such agreement has been reached.
- (3) The Secretary General may, upon written agreement of the Parties, inform the public about the fact that such agreement has been reached.

Rule 13
Recommendation/Decision of the Conciliator

- (1) Where the Parties have not reached agreement within the time limit provided for in Article 7(7)(c) of the ECT or in Rules 3(5) or 4(5), the conciliator shall:
 - (a) record in writing his or her recommendation either for a resolution to the dispute or a procedure to achieve such resolution and his or her decision on interim tariffs and other terms and conditions to be observed for Transit including the date of effect;
 - (b) include a statement of reasons for his or her recommendation and decision; and
 - (c) provide signed copies of his or her recommendation and decision to the Parties and the Secretary-General.
- (2) The Secretary-General shall:
 - (a) deposit a signed copy of the recommendation and the decision in the archives of the Secretariat;
 - (b) notify all Contracting Parties of the fact that a recommendation and decision on interim tariffs has been made.
- (3) The Secretary-General may, upon the written agreement of the Parties, inform the public of the fact that a recommendation and decision on interim tariffs has been made.

Rule 14
Termination of Conciliation Proceedings

- (1) The conciliation proceedings are terminated by:
 - (a) the signing of an agreement under Rule 12 by the Parties; or
 - (b) the making of the recommendation and decision on interim tariffs by the conciliator under Rule 13.
 - (c) If the conciliator considers that there is appropriate evidence that the case at hand has received a final binding decision rendered by a competent juridical or arbitral tribunal.
- (2) For the avoidance of doubt, the decision of the conciliator under Rule 13 above (which the Parties undertake to observe in accordance to Art. 7.7.d of the ECT) is of interim

nature and binding for 12 months following the date of effect contained in the decision or until resolution of the dispute, whichever is earlier.

- (3) The Parties may, at their own discretion, agree to observe and ensure that the entities under their control or jurisdiction observe the conciliator's decision for any additional period of time.

Rule 15
Languages

- (1) The conciliator, after consulting the Parties, shall decide the language or languages for the conduct of the proceedings.
- (2) If the conciliator decides to use more than one language, any document may be provided in either language. Either language may be used at hearings, subject, if the conciliator so decides, to translation and interpretation. The conciliator shall ensure that his or her recommendation and decision is available in the language or languages he or she has decided on for the proceedings.

Rule 16
Costs

- (1) The conciliator may request the Parties to deposit an amount as an advance for the costs described in sub-paragraphs 2(a) to (d) below. All amounts deposited by the Parties under this paragraph shall be paid to the Secretary-General who shall make the disbursements for such costs listed in paragraph (2).
- (2) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and notify the Parties and the Secretary-General of such costs in writing. The term "costs" includes only:
 - (a) the fee of the conciliator, which is to be set at the time of appointment by the Secretary-General, in accordance with Regulation 14 of the Administrative and Financial Regulations of the International Centre for Settlement of Investment Disputes;
 - (b) the travel and other expenses of the conciliator;
 - (c) the travel and other expenses of witnesses or experts requested by the conciliator under Rule 8(1);
 - (d) the costs associated with the use of facilities for the conduct of hearings, other than the premises of the Energy Charter Secretariat;

- (e) the cost of any administrative assistance provided under Rule 8 by a person or institution other than the Energy Charter Secretariat; and
 - (f) the costs incurred during the proceeding for translation and/or interpretation under Rule 15.
- (3) Unless the agreement concluded by the Parties under Rule 12 provides for the apportionment of the costs, the conciliator shall apportion the costs between the Parties bearing in mind the particular circumstances of the proceedings and notify the Parties and the Secretary-General of his or her decision in writing. All other expenses incurred by a Party are to be borne by that Party.
- (4) The Secretary-General shall render an accounting to the Parties of the deposits received and return any unexpended balance to the Parties or request a final payment taking into account the decision of the conciliator as to the apportionment of costs.

Rule 17
Confidentiality

- (1) Nothing in these Rules derogates from the legal rules of the Parties in respect of treatment of confidential information, including those relating to intellectual property rights.
- (2) Any Party which declines to provide confidential information in response to a request under Rules 6 or 10 shall provide reasons and a non-confidential summary of the information that may be used in the proceedings. Where an exception to the rule of full disclosure is made under Rule 6(3), the Party concerned shall also provide a non-confidential summary of the information to the other Party or Parties in a form that may be used in the proceedings.
- (3) The conciliator, the Parties and all persons involved in the conciliation proceedings in whatever capacity shall keep confidential all matters relating to the conciliation proceedings. Information gathered in the course of these proceedings shall only be used for the purposes of these proceedings. Confidentiality extends to the terms of the agreement between the Parties under Rule 12 and the recommendation and decision of the conciliator under Rule 13, unless the Parties otherwise agree or the disclosure is necessary for purposes of implementation and enforcement.

Rule 18
Role of Conciliator in Other Proceedings

The conciliator shall not act as an arbitrator or as a representative or counsel in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation

proceedings. The Parties and the other Contracting Parties concerned shall not present the conciliator as a witness in any such proceedings.

Rule 19
Admissibility of Evidence in other Proceedings

The Parties shall not rely on or introduce as evidence in any arbitral, judicial or administrative proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceeding:

- (a) views expressed or suggestions made by any Party in respect of a possible settlement of the dispute;
- (b) admissions made by any Party in the course of the conciliation proceedings;
- (c) proposals made by the conciliator; or
- (d) the fact that a Party had indicated their willingness to accept a proposal for settlement made by the conciliator.

ANNEX A

Conciliation No.:

DECLARATION

I have read and taken note of the Rules Concerning the Conduct of Conciliation of Transit Disputes and shall ensure that the conciliation proceedings shall be conducted in accordance with such Rules. I shall consider only issues raised, and necessary to, the fulfilment of my responsibilities under the Rules.

I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the content of any agreement between the Parties to this dispute under Rule 12 or any recommendation and decision I may make under Rule 13, unless their disclosure is authorised by the Parties as stated in Rule 17.3.

I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Rules and the terms of my appointment by the Secretary-General.

I shall not act as an arbitrator or as a representative or counsel in any arbitral or judicial proceedings in respect of a dispute that is the subject of these conciliation proceedings.

I disclose herewith* any information likely to affect my independence or impartiality or which could give rise to justifiable doubts as to the integrity and impartiality of these conciliation proceedings and shall immediately advise the Secretary-General of any change in my circumstances which might be relevant to the performance of my function as a conciliator.

In the event that I resign or am unable to conclude the conciliation proceedings, I shall return all documents and materials that have come into my possession as a consequence of my appointment to the Secretary-General.

Signed:

Dated:

* If appropriate, attachment by the conciliator

ANNEX B

ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED

This list contains examples of information of the type that a conciliator appointed in respect of a Transit dispute should disclose under the Rules.

Each conciliator has a continuing duty to disclose the information described in Rule 2(4), which may include the following:

- (a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
- (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
- (c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
- (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
- (e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from the conciliator's employer, business associates or immediate family members).

ANNEX C

NOTIFICATION FORMAT FOR ROSTER OF CONCILIATORS

NOMINATING COUNTRY

Curriculum Vitae for Persons Proposed for a List of potential conciliators following ECT Art. 7

1. **Name:**
2. **Sectorial Experience**
List here any particular sectors of expertise:
3. **Nationality(ies):**
4. **Nominating Member:**
5. **Date of birth:**
6. **Current occupations:**
7. **Post-secondary education**
8. **Professional qualifications**
9. **Dispute-related experience**
 - a. Served as a conciliator
 - b. Served as an arbitrator
10. **Other transit-related experience**
 - a. Government work
 - b. Private sector work
11. **Teaching and publications**
 - a. Teaching in law and policy
 - b. Publications in law and policy

CHART 1

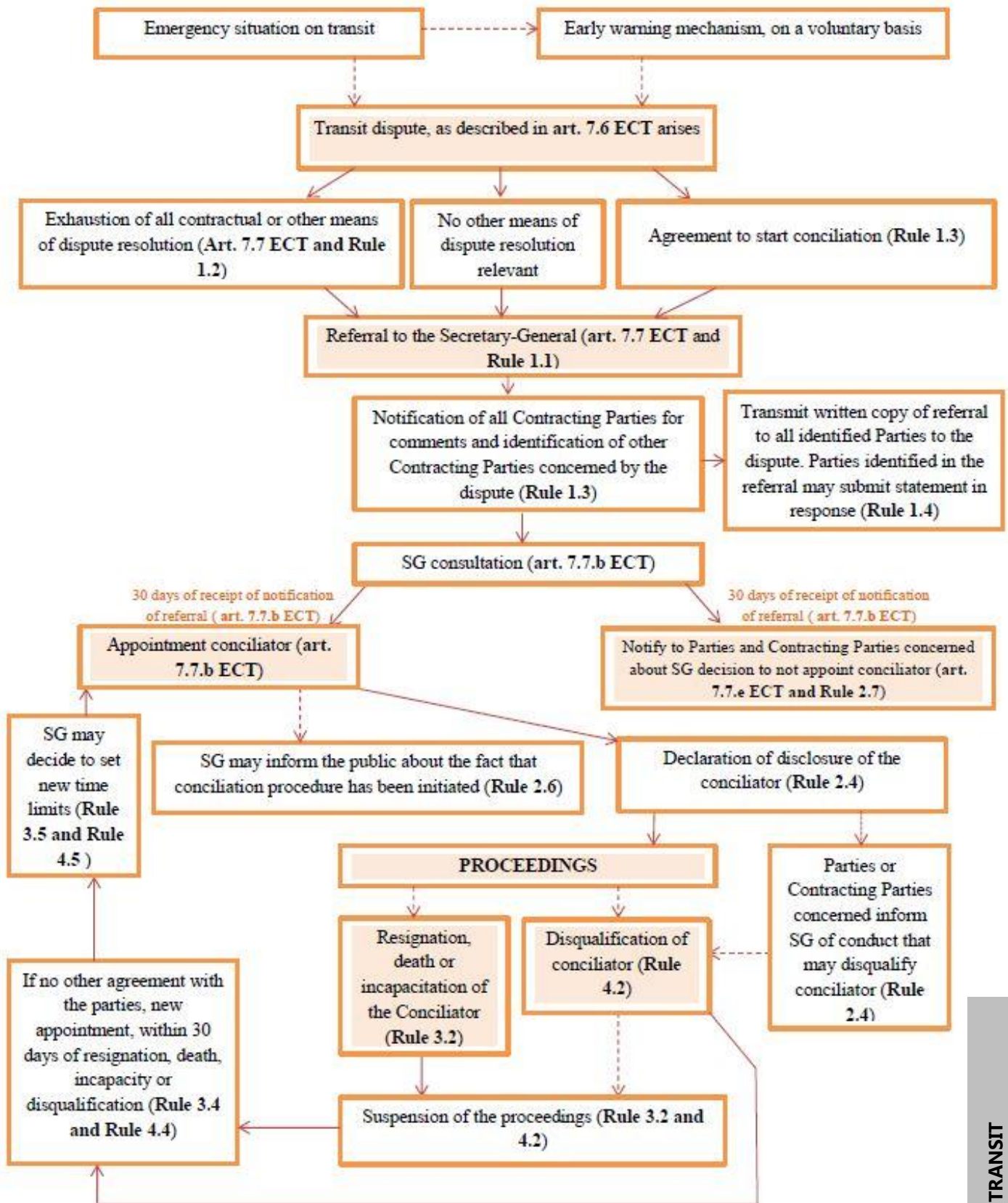
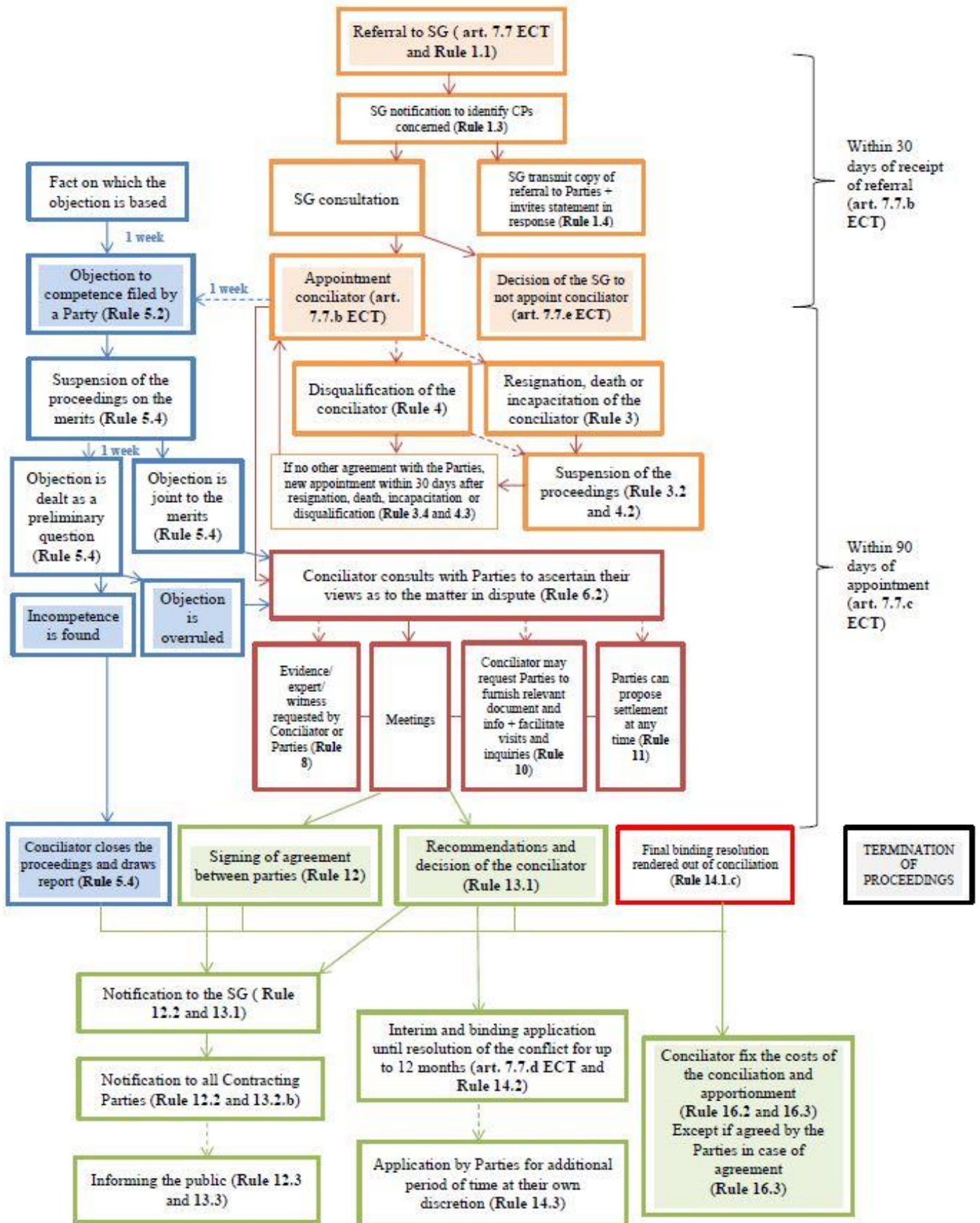


CHART 2



COMMENTARY TO THE RULES CONCERNING THE CONDUCT OF CONCILIATION OF TRANSIT DISPUTES

CCDEC2016 (7) TTG, 20 June 2016

The Conference

- (1) **welcomed** the work of the Trade and Transit Group and **endorsed** the Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes (the Conciliation Rules) as a helpful, non-binding explanatory tool to facilitate understanding and uniform application of the Conciliation Rules;
- (2) **encouraged** Contracting Parties to consider to use, on voluntary basis, the Conciliation mechanism to facilitate a fast and amicable solution of inter-state transit disputes.

COMMENTARY TO THE RULES CONCERNING THE CONDUCT OF CONCILIATION OF TRANSIT DISPUTES

1. The Rules Concerning the Conduct of Conciliation of Transit Disputes ('the Conciliation Rules') were adopted by the Energy Charter Conference ('the Charter Conference') on 3 December 1998,¹⁹ pursuant to Article 7(7)(f) of the Energy Charter Treaty (ECT).²⁰ The Conciliation Rules are binding and deal mainly with procedural issues.
2. The Conciliation Rules were developed, with the input of the industry and several dispute resolution institutions, based on the following models:
 - Rules of Procedure for Conciliation Proceedings, adopted pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention);
 - Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC);
 - UNCITRAL Conciliation Rules;
 - Permanent Court of Arbitration (PCA), Optional Conciliation Rules.
3. During the negotiations on the Transit Protocol in the early 2000s, several delegations and stakeholders considered that some ambiguities and uncertainties of Article 7(6) and 7(7) of the ECT (in particular, the concept of 'exhaustion of all relevant... resolution remedies previously agreed' and of 'any matter arising of that transit') had inhibited a proper use of the Conciliation mechanism. As a consequence, in 2010 the Charter Conference decided to carry out further work to make the Conciliation Rules more effective since resolution of transit controversies in case of emergency was considered

¹⁹ CCDEC 1998 (11).

²⁰ 'The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.'

key for energy security.²¹ After several years of discussion, the Conciliation Rules were amended by the Charter Conference in 2015.²²

4. Although the conciliation mechanism has not been used yet, it is of the utmost importance to have efficient and user-friendly rules for the conduct of conciliation of transit disputes. An effective conciliation mechanism for inter-state transit disputes, together with the non-binding Early Warning Mechanism (EWM),²³ could be considered a comparative advantage of the Energy Charter since no other multilateral agreement contains similar mechanisms to effectively deal with emergency transit controversies in the energy sector.
5. The Secretariat, following the request of the Charter Conference,²⁴ prepared a commentary of the Conciliation Rules to facilitate understanding and uniform application. The Commentary does not impose the interpretation to be given to individual provisions but rather serves as a reference, non-binding explanatory tool: the conciliator remains free to use the Commentary when useful and is not required to give reasons for disregarding it.

THE NATURE OF THE CONCILIATION PROCESS UNDER ARTICLE 7(7) OF THE ECT

6. During the negotiations of the ECT (1991-1994), fast resolution of transit disputes was considered important enough as to include a specific, tailor-made mechanism to urgently solve transit disputes while securing non-interruption of cross-border energy flows in the meantime.
7. Such tailor-made mechanism for transit disputes, contained in Article 7(7) of the ECT, can be considered as a hybrid of voluntary conciliation and binding dispute resolution of interim nature (usually, by definition, conciliator's recommendations are not binding). Due to such hybrid nature, it effectively serves the objective of ensuring international energy security with immediate effect rather than finding full answers to the details of contractual and operational arrangements that might be disputed among the parties.
8. The first proposal concerned conciliation by the then Governing Council of the Energy Charter (currently, the Charter Conference).²⁵ This was challenged by some countries that saw no need for the Governing Council to reconcile disputes (as it was considered a purely political institution) and preferred some binding resolution of such disputes. It was also the opinion of the Chair of the Working Group drafting the ECT, Mr. Sidney W. Fremantle,²⁶ that the representatives of the Contracting Parties at such meeting of the Governing Council would probably need rather special expertise if the meeting was to achieve its objective of reconciliation. Therefore, it was considered simpler and more

²¹ 'Road Map for the Modernisation', Area C (Emergency Response), CCDEC 2010 (10).

²² CCDEC 2015 (11).

²³ CCDEC 2014 (14). The Early Warning Mechanism aims at preventing and overcoming emergency situations in the energy sector related to the transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines.

²⁴ Activity 1.7 in the Secretariat's Programme of Work for 2016-2017: CCDEC 2015 (21).

²⁵ Article 11.7 of Draft Basic Agreement (BA) 6, Document 4/92, of 20 January 1992.

²⁶ UK, International Energy Unit, Department of Trade and Industry.

satisfactory for the Secretary General himself to appoint a conciliator.²⁷

9. In February 1993, Poland proposed a two-tier process – conciliation and, in case conciliation does not resolve a dispute, arbitration with clear time limits.²⁸ Discussions took place at a sub-group established on 23 February 1993 to examine the Polish proposal. The sub-group focused on two major issues: (i) who should conduct the proceedings and (ii) the nature of a decision under the discussed proceedings.
10. After some consultations with the industry, who strongly suggested that this mechanism should only come to play when all existing contractual arrangements for dispute resolution had been exhausted, a draft was produced in March 1993²⁹ without a specific reference to arbitration (since the Chair of the Working Group believed that using the term ‘arbitration’ for an interim binding decision might lead to confusion).³⁰ As a result, the conciliator was empowered to decide the interim (not final) tariffs and other terms and conditions for transit, which have to be observed by the Contracting Parties to the dispute for 12 months after the date specified by the conciliator or until resolution of the dispute through other way (whichever is earlier). The conciliator was given no power to make a final ruling on the tariffs and other terms and conditions.
11. As stated by the Chair of the Energy Charter Conference on 29 June 2000, at the 5th Meeting of the Conference, the transit conciliation mechanism ‘does not constitute a further appeal mechanism.’³¹ The aim of the mechanism was to have an immediate, flexible and fast way of leading parties out of an impasse. There is not an intention to interfere or challenge a final resolution reached by the relevant previously agreed dispute resolution remedy. Therefore, Rule 14(1)(c) (introduced in 2015) clarifies that the conciliation proceedings terminate if the conciliator considers that there is appropriate evidence that the case at hand has received a final binding decision rendered by a competent tribunal.
12. While starting the conciliation process depends on the voluntary referral of the dispute by one Contracting Party to the Secretary General, the other Contracting Parties parties to the dispute are obliged to intervene in the conciliation and cannot oppose its development (except for objections to competence as discussed in Rule 5) due to the unconditional, nondiscretionary nature of the dispute referral. According to Article 7(7)(b) of the ECT, once a referral is received by the Secretary General, he/she has the obligation to appoint a conciliator.³² Should a Contracting Party party to the dispute decide not to intervene once the conciliation process has started, if there is no agreement of the Parties within the time limit provided for in Article 7(7)(c) of the ECT or in Rules 3(5) or 4(5) the conciliator is empowered to decide the interim tariffs and other terms and conditions to be observed for the transit in dispute.
13. According to Article 7(6) of the ECT, prior to the conclusion of the procedure contained

²⁷ Letter from the Chairman of WG II to the Secretary General, 12 February 1993.

²⁸ Comment of Poland to Article 11.6 in Draft BA 35, Document 15/93, of 3 February 1993. The proposal was supported by Russia, Belarus and Hungary; no-one opposed.

²⁹ Article 11.7 of Draft BA 37, Document 20/93, of 1 March 1993.

³⁰ Letter from the Chairman of WG II to the Secretary General, 18 February 1993.

³¹ Document CC 173, annex III, of 17 July 2000.

³² Except in the case provided for in Article 7.7.e of the ECT.

in Article 7(7) of the ECT, a Contracting Party cannot (i) interrupt or reduce established transit related to the dispute, or (ii) require or permit entities within its jurisdiction or under its control to interrupt or reduce such transit. Only after the expiration of the 12 months compulsory application of the conciliator's interim decision is the transit country allowed to interrupt or reduce the transit in dispute if there is still no solution to the dispute. The objective is to prevent using such interruption or reduction of transit as a way of imposing the point of view of the transit country in disputes about parameters of that Transit, before conciliation has attempted. The only exceptions are when such interruption/reduction is (i) provided for in a contract or other agreement governing such transit or (ii) it is permitted in accordance with the conciliator's decision.

14. In addition, Article 24(3) of the ECT stipulates that any measures adopted by a Contracting Party for the protection of its essential security interests (including those taken in time of war, armed conflict or other emergency in international relations), for the maintenance of public order or relating to the implementation of national policies respecting non-proliferation of nuclear weapons or needed to fulfil its international nuclear non-proliferation obligations, should not constitute a disguised restriction on transit.

TIMELINE OF THE CONCILIATION PROCESS

15. Acknowledging the fact that in international energy transit disputes time is of the essence, the conciliation process in Article 7(7) of the ECT was designed to provide a fast track resolution within a strict timeframe to be observed by the parties to the dispute. As a consequence, Rule 10(2) requests the Parties 'to comply with any time limits agreed with or fixed by the conciliator.'
16. Since the Contracting Party party to the dispute notifies the Secretary General, the latter has 30 days to appoint a conciliator. The conciliator shall seek an agreement of the parties within a time limit of 90 days; should the parties to the dispute fail to reach an agreement, the conciliator shall issue an interim decision on interim tariffs and terms and conditions that shall be observed within the following 12 months unless before then the parties reach an agreement or the dispute is resolved by other relevant means. Therefore, since the start of the process until the adoption of the interim tariffs, terms and conditions there is a maximum of four months (unless there are exceptional issues regarding objection to the competence of the conciliator, disqualification of the conciliator...).
17. The conciliation process (as well as its relation with the Energy Charter Early Warning Mechanism) is outlined in the two flow charts included at the end of the Commentary.

GENERAL DEFINITIONS

18. The Conciliation Rules adopted in 1998 were essentially minimalist and procedural in nature. Therefore, they did not elaborate on definitions or issues that were unresolved in the context of the ECT itself.

19. As a consequence, while the Conciliation Rules expressly mention upfront that '[t]he terms used in these Rules shall have the same meaning as in the Energy Charter Treaty' there are some terms in the Conciliation Rules that are neither defined in the Treaty nor in the Conciliation Rules.
20. In order to facilitate the interpretation of those terms, in line with the ECT and the discussions during the negotiation of the Conciliation Rules, the Commentary includes the following general definitions:

A. '*Transit*'

21. The Conciliation Rules refer to 'Transit' (in capital letters), which has to be interpreted in accordance to the definition contained in Article 7(10)(a) of the ECT (emphasis added):
- (i) the *carriage* through the Area of a Contracting Party, or to or from port facilities in its *Area* for loading or unloading, of *Energy Materials and Products originating in* the Area of another state and *destined for* the Area of a third state, so long as either the other state or the third state is a Contracting Party; or
 - (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.
22. The term 'Area' is defined in Article 1(10) of the ECT as:

(a) the territory under sovereignty of Contracting Party that includes land, internal waters and the territorial sea, and

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organisation, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.

Norway opposed using the term 'Area' in Article 7(10) of the ECT and preferred the word 'territory' to limit the territorial scope to land territory, internal waters and territorial sea, excluding the continental shelf and exclusive economic zones.³³ While

³³ Document CONF-64, 55/93, of 7 July 1993: specific comment of Norway to then Article 8 (Transit).

such proposal was not accepted (in fact, the aim of the negotiators was to include in the concept of Transit energy materials originating in the continental shelf),³⁴ Article 1(10) of the ECT makes the application of the treaty to the continental shelf subject to the international law of the sea and a Declaration was introduced by the EU and Norway (without any implication to other Contracting Parties) clarifying that Article 7 of the ECT does not affect existing international law on jurisdiction over submarine cables and pipelines.³⁵

23. The definition of 'Energy Materials and Products' is provided in Article 1(4) of the ECT. It covers all items included in Annexes EMI or EMII, based on the Harmonised System of the World Customs Organization (WCO) and the Combined Nomenclature of the EU.
24. The meaning of the expression 'originating in', within the ECT context, was not clarified during the negotiations of the Treaty. Nevertheless, this is a familiar concept in trade treaties, including the GATT, and it generally has been applied to mean that the goods must be the 'products of' a country instead of 'coming directly from' that country, though sometimes the two interpretations merge because of processing in the country that they directly 'come from.' Therefore, for the purposes of the Conciliation Rules, it is suggested to follow GATT practice and distinguish between 'originating in' and 'coming from', with the former meaning 'products of' while the latter term refers to the geographical routing of the product immediately prior to its entry.
25. The concept of 'destined for' is also used in GATT, as for example in the article XI(1) prohibition on restrictions on exportation of products 'destined for the territory of another GATT party. For the purposes of the Conciliation Rules, the term should be construed as referring to the ultimate destination, rather than to the next country the goods will pass through (there is a substantial amount of work done within the GATT on how the destination is to be documented).
26. Since the first version of Article 7(10)(a) of the ECT in June 1993, USA –supported by Japan– requested to replace the term 'carriage' for 'movement over land' and to include an explicit exclusion of maritime transport. Nevertheless, the term 'carriage' was never removed from the wording of Article 7(10) of the ECT. No specific definition of such term was either included or discussed during the negotiations of the ECT.

B. 'Dispute'

27. According to Article 7(7) of the ECT, the conciliation procedure 'shall apply to a dispute described in paragraph (6)'; which refers to a 'dispute over any matter arising from that Transit' of Energy Materials and Products (emphasis added). The ECT does not provide a more detailed definition of the types of dispute that can be referred to the conciliation procedure.
28. The International Court of Justice (ICJ) considers 'Dispute' as a situation in which two

³⁴ E.g. Letter of the Chairman of the ECT negotiations, Mr. Fremantle, to the Legal Subgroup Chair, of 22 July 1994.

³⁵ Declaration 3 with respect to Article 7 of the ECT.

sides hold clearly opposite views concerning the question of performance or non-performance of the obligations under the Treaty.³⁶ The existence of a dispute presupposes some communication between the parties involved: 'A mere assertion [*that a dispute exists with the other party*] is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence.'³⁷ Silence of a party to the Treaty is not considered to be a proof of the inexistence of the dispute.³⁸ Instead, silence as well as failure to respond, is a sign of lack of agreement on the invoked obligations stemming from the Treaty.

29. In any case, the disagreement must have some practical relevance instead of being purely theoretical; while actual damage is not required, the dispute must be more than simple grievances. In case of an emergency situation (or the threat of an emergency situation) which have not yet evolved into real dispute, Contracting Parties can refer to the Early Warning Mechanism to defuse the controversy at an early stage. Only when the threat or emergency situation escalates into a full dispute Contracting Parties would refer the dispute to the conciliation mechanism under Article 7(7) of the ECT.
30. Initially,³⁹ the expression used was dispute over 'terms and conditions' of the transit. Nevertheless it was considered that such expression 'could limit the types of transit dispute eligible for the conciliation' procedures.⁴⁰ Therefore, the dispute covered by Arts. 7(6) and 7(7) ECT is over 'any matter' arising from transit and not only the interruption or reduction of the existing energy flow.
31. While a narrow interpretation of the term 'Dispute' was proposed in the early 2000s limiting the conciliation to disputes 'related only to interruption and reduction of the existing flow of Energy Materials and Products',⁴¹ such interpretation was challenged in regards to its consistency with Article 7(6) of the ECT and the proposed Conference decision was not approved.
32. It is extremely important to delimit the scope of the 'Dispute' at the early stage of the conciliation to avoid future discussions about the exact mandate to the conciliator. Therefore, according to Rule 6(2), at the earliest possible opportunity, the conciliator shall consult the Parties identified in the referral to ascertain their views as to the matters in dispute.
33. In order to ensure that a dispute over the same transit is referred only once to the conciliation procedure, Article 7(7)(e) of the ECT allows the Secretary General to decide under his/her discretion ('may elect') not to appoint a conciliator if in his/her judgement the dispute concerns Transit that is or has been the subject of the conciliation procedure unless the previous dispute has been resolved. Since a second notification of what may

³⁶ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 *ICJ Rep.* 65, at 74.

³⁷ *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 *ICJ Rep.* 319, at 328.

³⁸ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, 1988 *ICJ Rep.* at 28, para. 38.

³⁹ Article 11 of Draft BA 6, of 21.01.1992

⁴⁰ Room Document 20, of 24 February 1993 (WGII).

⁴¹ Document CC196 (amended), of 5 February 2002.

seem to be basically the same dispute could vary in its terms from the first notification, some factual judgment on whether it is really the same dispute is inevitable. That factual judgment is left to the Secretary General with a strong indication that he/she should avoid a repetition of the conciliation process for the same dispute.

34. Thus, the purpose of the Article 7.7.e is to prevent that the sending or receiving country could initiate a new process based on the same or similar dispute over the same transit in order just to delay the final interruption of the transit. Otherwise there would be no pressure on them to agree on a solution, and any reasonable demands by the transit country could be resisted indefinitely by raising new disputes over the same transit.
35. Nevertheless, in case of late knowledge of any circumstances that might lead to the conciliator's potential disqualification according to Rule 4, the Secretary General may decide, at the request of a Contracting Party party to the dispute, re-opening the conciliation procedure under Article 7.7.e on the same dispute over the same Transit.

C. 'Contracting Parties party to the dispute'

36. Article 1(2) of the ECT defines 'Contracting Party' as '[a] state or Regional Economic Integration Organization⁴² which has consented to be bound by this Treaty [ECT] and for which the Treaty [ECT] is in force.'
37. Nevertheless, Signatories who apply the whole ECT provisionally can also be parties to the dispute. Therefore, a new Rule 1(5) was added in 2015⁴³ to clarify that Signatories⁴⁴ that apply provisionally the whole ECT may invoke the conciliation mechanism as well. As a consequence, for the purposes of the Conciliation Rules, the term 'Contracting Party' shall cover also Signatories of the ECT who apply provisionally the whole ECT. The reference to Part II in Rule 1(5) was to stress the importance of applying provisionally Article 7 on Transit.
38. In principle, the written notification of the referral of the dispute shall identify all 'Contracting Parties party to the dispute' (see Rule 1(1)) and the terms of appointment of the conciliator shall include a statement by the Secretary General listing the 'Parties' (i.e. 'Contracting Parties party to the dispute') for the purposes of the conciliator's declaration in Annex A. In addition, the conciliator shall, at the earliest possible opportunity, ensure that the 'Contracting Parties party to the dispute' are properly identified at the outset of the proceedings (Rule 6(2)).
39. A transit dispute could realistically affect or involve a state who is not a Contracting Party to the ECT. The views of that state party to the dispute or its support might be important for the amicable resolution of the dispute. As the Legal Advisory Committee

⁴² The term Regional Economic Integration Organisation is defined in Article 1(3) of the ECT as 'an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.'

⁴³ CCDEC 2015 (11).

⁴⁴ Unless otherwise expressly mentioned, the term 'Signatory' in this Commentary refers to a Signatory of the ECT (which is not open for signature anymore).

of the Energy Charter pointed out,⁴⁵ participation of a non-Contracting Party in the Conciliation Process is neither explicitly provided nor prohibited by Article 7(7) of the ECT. Therefore, in 2014 it was proposed⁴⁶ to allow a non-Contracting Party party to the dispute to be invited to participate in an already started conciliation proceeding (i) upon agreement of the Contracting Parties party to the dispute (ii) if the non-Contracting Party party to the dispute agreed to comply with the conciliator's decision under the same conditions as the Contracting Parties party to the dispute. However, the proposal did not gather enough support among delegates to be put forward to the Conference for approval. In any case, those non-Contracting Parties party to the dispute could still appear in the Conciliation process as witnesses (or even as part of the representation of a Contracting Party party to the dispute).

40. Rule 1(1) of the Conciliation Rules uses the expression 'Parties' or 'Parties to the dispute' to refer to all 'Contracting Parties party to the dispute.' Only Contracting Parties party to the dispute:

- can initiate the conciliation process (Article 7(7)(a) of the ECT and Rule 1 of the Conciliation Rules); neither entities, nor Contracting Parties who are not party to the dispute, can start the conciliation process;
- can submit a statement to the Secretary General for inclusion in the material which will be provided to the conciliator on his or her appointment (Rule 1(4));
- can agree to inform the public about (i) the fact that a conciliation procedure has been initiated with regard to the given dispute (Rule 2.6); (ii) an agreement has been reached (Rule 12(3)); and/or (iii) a recommendation and decision on interim tariffs has been made (Rule 13(3));
- can agree on the most expeditious method of proceeding in case of disqualification of the conciliator (Rule 4(3)) or if the conciliator resigns, dies or, in the opinion of the Secretary General, becomes incapacitated, unable or fails to perform his/her duties (Rule 3(2));
- can agree on a new time limits in case of a new conciliator (Rules 3(5) and 4(5));
- can object that the dispute is not within the conciliator's competence (Rule 5(2));
- shall be consulted by the conciliator, at the earliest possible opportunity, to ascertain their views as to the matters in dispute (Rule 6(2));
- shall receive any information provided to the conciliator (Rule 6(3)) including evidence and advise requested by the conciliator (Rule 8(1));
- shall be consulted about the place for meeting or taking of oral statements (Rule 6(4)) and on the language(s) for the conduct of the proceedings (Rule 15);
- can request that the conciliator hear the witnesses and experts whose evidence the Party considers relevant (Rule 8(2)), as well as to question –under the control of the conciliator– witnesses and experts (Rule 8(3)); and can agree to written depositions or for the examination of evidence taken elsewhere (Rule 8(5));
- can agree on having administrative or technical assistance of the Energy Charter Secretariat or other suitable institution (Rule 9); can agree on making arrangements with the Secretary General for using the facilities of the Energy Charter Secretariat (Rule 6(4));

⁴⁵ Document LAC 1/14 of 29 August 2014.

⁴⁶ Document TTG 131 of 24 March 2014.

- shall provide any information requested by the conciliator, facilitate visits to places connected to the dispute and comply with fixed/agreed deadlines (Rule 10);
- may submit proposals for a settlement of the dispute (Rule 11(1)) or agree to a resolution of the dispute / procedure to achieve such resolution (Rule 12(1));
- shall receive copies of the conciliator's recommendations/decision (Rule 13(1)(c));
- can, at their own discretion, agree (Rule 14(3)) to observe and ensure that the entities under their control or jurisdiction observe the conciliator's decision for any additional period of time beyond the 12 months of Article 7(7)(d) of the ECT;
- may be requested to deposit an amount as an advance for the costs and pay the final costs of the proceedings in accordance with the conciliator's decision or the agreement reached (Rule 16).

41. In addition, 'Contracting Parties party to the dispute' have other rights and obligations shared with the 'other Contracting Parties concerned' (see para. 43 below).

42. It is worth noting that Article 7(7)(d) of the ECT refers to 'Contracting Parties' (not to 'Contracting Parties party to the dispute') when mentioning the obligation to observe and ensure compliance with any interim decision of the conciliator. In comparison, (i) Article 27(3)h of the ECT expressly refers to 'Contracting Parties party to the dispute' as the only ones on which the arbitral award shall binding upon; while (ii) Article 26(8) of the ECT mentions that '[e]ach Contracting Party' shall carry out without delay any investment award and shall make provision for the effective enforcement in its Area of such awards. Therefore, it can be concluded that all Contracting Parties to the ECT undertake to observe and ensure compliance with the conciliator's decision (this could be the case for example of a Contracting Party involved in the Transit subject to the conciliators' decision but who is not a party to the dispute).

D. 'other Contracting Parties concerned'

43. According to Article 7(7) of the ECT and the Conciliation Rules, 'other Contracting Parties concerned' share some rights and obligations (in relation to the conciliation proceedings) with the 'Contracting Parties party to the dispute':

- must be consulted by the Secretary-General before appointing a conciliator (Article 7(7)(b) of the ECT and Rules 1(3), 3(4) and 4(4));
- shall be informed as soon as possible of the Secretary-General's decision not to appoint a conciliator (Rule 2(7));
- shall be informed about death, resignation or incapacity of the conciliator, as well as consulted about a new appointment (Rule 3(2));
- shall immediately inform the Secretary-General in case they come into possession of evidence of conduct by the conciliator which is inconsistent with the independent and impartial conduct of the conciliation (Rule 4(1)); and shall be advised by the Secretary-General of his/her decision as to the disqualification of the conciliator (Rule 4(2));

- shall not present the conciliator as a witness in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings (Rule 18);
- shall keep confidential all matters relating to the proceedings (Rule 17(3)).

44. The reference in Rules 6(3) and 17(2) to 'Party concerned' is not to 'other Contracting Parties concerned' but to the 'Party' requested to disclose confidential information.
45. Nothing in the Conciliation Rules prohibits 'other Contracting Parties concerned' to participate in the conciliation process as witnesses, experts or as part of the representation of a 'Contracting Party party to the dispute'. Rules 7 and 8(2) give discretion to the 'Contracting Parties party to the dispute' to decide on the composition of their representation and on who they want to call as witnesses/experts, while Rule 8.1 allows the conciliator to call as witness/expert whoever has information relevant to the dispute. In fact, it would be helpful for the effective implementation of the agreement or conciliator's decision to have heard the position of those 'other Contracting Parties concerned.'
46. The Conciliation Rules allow Contracting Parties to propose themselves as 'Contracting Parties concerned' (Rule 1(3)), based on what the Secretary-General will prepare a final list of 'other Contracting Parties concerned' (Rule 2(5)) to be included in the terms of appointment of the conciliator for the purposes of his/her declaration in Annex A.
47. Considering the relevant role that 'other Contracting Parties concerned' can play in the conciliation proceedings, it can be understood that the group of 'other Contracting Parties concerned' consists of any 'Contracting Party' (no entities or non-Contracting Parties) that (a) is involved in the specific Transit (but not directly involved in the specific dispute) either (i) as a transit country or (ii) as a country of destination or as a country of origin of the Energy Products and Materials related to that specific Transit, and (b) is and/or may be affected by event(s) that is(are) subject-matter to the dispute. It could also be considered that in cases involving a Contracting Party member of a REIO, if the later is also a Contracting Party could be considered as 'other Contracting Party concerned.'
48. For example, in case of the *Southern Gas Corridor* (which includes SCP, TANAP and TAP), a particular dispute may involve just two Contracting Parties ('Contracting Parties party to the dispute'), while the remaining Contracting Parties (including the EU) involved in the corridor (connected transit from Azerbaijan to the EU), which may be affected by event(s) that is(are) subject-matter to the dispute, have a relevant interest in the resolution of such dispute ('other Contracting Parties concerned').



E. 'exhaustion of all relevant ... dispute resolution remedies previously agreed'

49. The requirement to *exhaust* all *relevant* contractual or other dispute resolution remedies previously agreed (if any) between the Contracting Parties party to the dispute or between any entity referred to in Article 7.6 of the ECT and an entity of another Contracting Party party to the dispute was introduced in Article 7.7 of the ECT at the proposal of the industry who considered that:

any special procedures should only come into play once whatever existing contractual arrangements for dispute resolution had been exhausted. In our experience, there is quite an incentive on both the pipeline operator and the customer to arrive at a negotiated commercial conclusion –where the dispute is genuinely commercial– rather than to invoke outside regulatory authorities.⁴⁷

Exhaustion

50. Neither the ECT provides a definition of the term 'exhaustion,' nor was the meaning of 'exhaustion' discussed during the negotiations of the ECT. Nevertheless:

- On 29 June 2000, in a statement at the 5th Meeting of the Energy Charter Conference, its Chairman declared that art 7(7) of the ECT 'does not constitute a further appeal mechanism';⁴⁸
- Rule 14(1)(c) clarifies that the conciliation proceedings terminate if the conciliator considers that there is appropriate evidence that the case at hand has received a final binding decision rendered by a competent juridical or arbitral tribunal.

51. Therefore, it could be concluded that if the relevant dispute resolution mechanism has resulted in a final, binding decision there is no dispute to be resolved any more and as a consequence, no need to resort to the conciliation proceedings.

52. However, some Inter-Governmental Agreements (IGAs) dealing with Transit only include as a dispute resolution mechanism the referral of the dispute to a non-binding consultative Commission⁴⁹ or negotiations⁵⁰ so there is no possibility to obtain a final, binding decision. In such cases, the 'exhaustion' requirement would be fulfilled by having on good faith those negotiations or discussions by the commission; if the result still has not solved the dispute, Contracting Parties are then entitled to move to the conciliation process. Similarly, if it could be proved that there was no realistic chance to resolve the dispute at stake in consultations (e.g. the other Contracting Party made clear that will not agree on any solution), the exhaustion of such negotiation requirement

⁴⁷ OFGAS, letter to Chairman Fremantle, 17 February 1993.

⁴⁸ CCDEC 2000 (03).

⁴⁹ E.g. IGA between Azerbaijan and Georgia (Baku-Supsa IGA), 8 March 1996.

⁵⁰ E.g. IGA between Russia, Bulgaria and Greece relating to the 'Burgas-Alexandroupolis' Oil Pipeline, 15 March 2007; IGA Qatar and the UAE (Dolphin Gas Pipeline), 26 September 2004; most of the IGAs regarding the South Stream Pipeline; IGA Afghanistan, India, Pakistan and Turkmenistan (TAPI), 11 December 2010; IGA Albania, Greece and Italy (TAP), 13 February 2013.

becomes futile and Contracting Parties should be entitled to refer to conciliation.

53. In other cases, the IGA allows the referral of the dispute to arbitration 'unless otherwise agreed by the Parties on the way to resolving the dispute'⁵¹ (allowing therefore to agree on referring the dispute to conciliation before going to arbitration).
54. In addition, by analogy, *mutatis mutandis*, to the exceptions applicable in public international law (Diplomatic Protection and BITs), it could be argued that there is no obligation to comply with the 'exhaustion' requirement under Article 7(7) of the ECT if:
- The previously agreed remedy provide *no reasonable possibility of effective redress*: e.g. referral of the dispute to the *ad hoc* arbitration requires the agreement of both parties and one of them refuses; there is discrepancy as to the actual institution agreed due to an unlucky wording of the clause; the agreed institution does not exist anymore; in case of a specific Board with members appointed by both Contracting Parties, one of the Contracting Parties has not nominated its members and refuses to do so...
 - There is *undue delay* in the previously agreed remedy attributable to the 'Contracting Party party to the dispute' alleged to be responsible: e.g. does not appoint its arbitrator and the applicable rules do not provide a solution (for example an external appointing authority)...
55. During the negotiations of Article 7 of the ECT,⁵² it was discussed that in case the Contracting Parties parties to the dispute cannot agree on whether the alleged previously agreed dispute remedy had been exhausted or properly applied, the question should be considered by the conciliator who could, if he felt it appropriate, recommend that the parties should return to existing contractual procedures or continue with the conciliation proceedings. This was materialised in 2015 with a new Rule 5 (objections to competence).

Which dispute resolution remedies have to be considered?

56. Article 7(7) of the ECT refers to three cumulative requirements regarding the dispute resolution mechanisms that have to be 'exhausted': (i) previously agreed remedies; (ii) relevant for the specific dispute at hand related to transit and (iii) entered into between Contracting Parties or between the entities mentioned in Article 7(6) of the ECT and the entities of another 'Contracting Party party to the dispute'.

(i) previously agreed

57. While there is no specific guidance as to the meaning of the term 'previously agreed' in relation to Article 7(7) of the ECT, it could be applied by analogy the meaning given to 'prior international agreements' entered into by Contracting Parties (in Article 16 of the

⁵¹ E.g. IGA between Russia and Austria (South Stream Pipeline), 24 April 2010.

⁵² Room Document 20, of 24 February 1993 (WGII).

ECT). The reference is to those agreements agreed prior to the commencement of the conciliation process, not only to those agreed before the entry into force of the ECT for the specific Contracting Party.

(ii) relevant for the specific dispute at hand

58. The wording 'relevant for the specific dispute' makes clear that not all previously agreed contracts or existing dispute resolution methods have to be exhausted. Only those that refer specifically to the dispute at hand. E.g. if the dispute is over quality and the agreed mechanism only refers to tariffs, it would not be 'relevant.'
59. It is important to mention that application of Article 27 of the ECT is explicitly excluded by Article 28 of the ECT for certain disputes arising out of the interpretation or application of the ECT (Articles 5 and 29). Article 7 of the ECT is not expressly excluded. Therefore, Article 27 of the ECT would be considered as 'other resolution remedy previously agreed between the Contracting Parties' only when the specific transit dispute at hand relates to an obligation contained in Article 7 of the ECT. Other transit disputes not directly linked to Article 7 of the ECT (pricing, quantity, quality...) are not covered by Article 27 of the ECT and, in those cases Article 27 is not considered as 'other resolution remedy previously agreed between the Contracting Parties.' This was confirmed by the Legal Advisory Committee in 2014.⁵³
60. While the dispute resolution mechanism under Article 26 of the ECT is a previously agreed mechanism between Contracting Parties, it refers to investors and is not specifically designed for solving transit disputes: it does not address breaches of obligations under Article 7 of the ECT but breaches of obligations under Part III of the ECT (investment). Therefore, it is not a relevant dispute resolution remedy.

(iii) entered into between....

61. Only at the end of the negotiations (in September 1994) the wording of the exhaustion requirement was amended to 'make it clear that any existing dispute procedures agreed between companies, as well as those agreed between governments, should be applied before entering into' the conciliation process.⁵⁴ Before, the wording of Article 7(7) referred only to 'contractual or other dispute resolution remedies' previously agreed by the 'Contracting Parties party to the dispute.'
62. Dispute resolution remedies agreed between a Contracting Party and a company (a host government agreement), should not be considered, unless the form and substance of such agreement is substantially defined by an Intergovernmental Agreement (IGA) between two or more Contracting Parties. Similarly, dispute resolution remedies agreed between companies should only be considered (for the exhaustion requirement) if they

⁵³ Document LAC 1/14 of 29 August 2014.

⁵⁴ Appendix II to document CONF. 104, p. 3, of 14 September 1994.

involve an entity subject to the control/jurisdiction of the Transit 'Contracting Party party to the dispute' (only a Transit state or its enterprise would threaten to interrupt Transit).

Agreement to refer the dispute to conciliation before the exhaustion

63. The Legal Advisory Committee considered that the requirement of 'exhaustion' applies only when a Contracting Party wants to impose conciliation under Article 7(7) of the ECT on another Contracting Party. On the other hand, when Contracting Parties want to voluntarily agree on the application of the conciliation mechanism of Article 7(7) of the ECT, 'exhaustion' is not required.
64. In fact, it would be possible to start conciliation under Art. 7(7) ECT prior to the arbitration provided for in Article 27 of the ECT or in the Intergovernmental Agreement governing the Transit if there is an express agreement of the 'Contracting Parties party to the dispute.' Indeed, Article 27(2) of the ECT states that a Contracting Party may submit the dispute to arbitration except otherwise agreed in writing. Therefore, Contracting Parties could agree to go conciliation instead or prior to arbitration.
65. As a result, Rule 1(2) (introduced in 2015) allows the 'Contracting Parties party to the dispute' to conclude an agreement in writing to refer the dispute to conciliation before the exhaustion requirement contained in Article 7(7) of the ECT is fulfilled.

*Rule 1
Notification of a dispute*

66. As has been mentioned, there is no obligation for any Contracting Party to refer the Transit dispute to the conciliation process under Article 7(7) of the ECT. Therefore, the conciliation is triggered only through the voluntary notification of the dispute by a Contracting Party to the Secretary-General.
67. Nevertheless, nothing prevents two or more Contracting Parties party to the dispute to jointly invoke the conciliation mechanism. If several states invoke the conciliation mechanism for the same dispute or Transit, the Secretary-General could combine them in one procedure for the sake of efficiency and to avoid having incompatibility among different conciliators' decisions relating to the same dispute or Transit.
68. The referral of a dispute shall be in writing and shall (i) identify the parties to the dispute ('Parties'); (ii) summarise the relevant facts and the basis of the Contracting Party's claim; (iii) as well as confirm the exhaustion requirement contained in Article 7(7) of the ECT.
69. The content of the referral is of special relevance since:
 - as soon as practicable after its reception, the Secretary-General shall notify all Contracting Parties inviting them to consider whether they consider themselves as 'other Contracting Parties concerned.' In order to make a reasoned judgment on whether a Contracting Party considers itself as 'concerned' with a specific dispute the relevant information about the dispute is needed;

- a copy has to be transmitted by the Secretary-General to any Contracting Party identified in the referral as 'Party', who can submit (there is no obligation) a statement by way of response to be sent to the conciliator upon his/her appointment. Again, in order for a Contracting Party to prepare a founded reply, the relevant information about the dispute is needed;
- the Secretary-General needs to decide (based on the referral and the reply of the 'Parties') whether, in his/her judgment, the 'Dispute' concerns Transit that is or has been the subject of the conciliation process without resolving the dispute (in which case, according to Article 7(7)(e) of the ECT, the Secretary General may elect not to appoint a conciliator).

70. Once a Contracting Party has voluntarily triggered the conciliation process for a specific dispute, other Contracting Parties identified as 'Party' in the referral (defendants) cannot oppose the development of the conciliation process (except for objections to competence as discussed in Rule 5) and have the obligation to co-operate with the conciliator as requested in Rule 10. While such 'Parties' can decide not to provide an initial response (as provided in Rule 1(4)) or even not to intervene at all during the proceedings, such approach will not avoid the conciliator adopting a decision on the interim tariffs and other terms and conditions that they will have to observe for 12 months.

Rule 2

Appointment of conciliator

71. Within 30 days after notification of the dispute, the Secretary-General, in consultation with the parties to the dispute and other Contracting Parties concerned, shall appoint a conciliator (Article 7(7)(b) of the ECT) unless, in his/her judgment, it is considered that the dispute concerns Transit that is or has been the subject of the conciliation process without resolving the dispute (Article 7(7)(e) of the ECT).
72. This prior consultation requirement was introduced at the request of Norway to avoid leaving the choice of the conciliator to the Secretary-General alone in view of the important powers entrusted to the conciliator.⁵⁵ There is no specific reference about the mechanism to be used for such consultation. On the contrary, it is under the discretion of the Secretary-General to decide on the appropriate form for such consultation. Flexibility is important since the aim is to have an appointment in the shortest delay possible (and in any case within 30 days after the notification of the dispute).
73. In making the appointment, the Secretary-General shall have particular regard to the importance of appointing a conciliator who has or is likely to have the confidence of the Parties; will be independent and impartial; will have *the expertise and experience relevant to the issues arising under the dispute*; will avoid actual or apparent conflicts of interest; will respect the confidentiality requirements of these Rules; and will conduct the proceedings in a manner which ensures the integrity and reputation of the conciliation procedure.

⁵⁵ Specific comment (c) to Draft Article 11.7.c, Annex I to Room Document 20, of 24 February 1993.

74. The final decision on the appointment lies with the Secretary-General, subject only to the disqualification process provided in Rule 4.
75. At the time of the appointment, the conciliator shall sign the declaration of confidentiality, impartiality and independence (included as Annex A to the Conciliation Rules) and shall disclose any information that could reasonably be expected to be known to him/her at the time which is likely to affect or give rise to justifiable doubts as to his/her independence or impartiality. An illustrative list of information to be disclosed (financial interests, professional or family relations...) is included as Annex B to the Conciliation Rules. To facilitate the disclosure of the conciliator, his/her terms of appointment shall include a statement by the Secretary-General listing the 'Parties' and 'other Contracting Parties concerned' as well as including any information relevant to the conciliation. Nevertheless, the duty of the conciliator to disclose any information relevant for the purposes of impartiality and independence is of continuous character and is not limited to the time of his/her appointment.

the expertise and experience relevant to the issues arising under the dispute

76. In 2015, the Charter Conference added to Rule 2(1) the requirement that a conciliator 'will have the expertise and experience relevant to the issues arising under the dispute.' This addition, in line with the requirement contained in Article 7(7)(b) of the ECT, was introduced in view of possible concerns that the conciliator might not have the necessary expertise and experience to deal with a complex Transit dispute. It does not mean that the conciliator needs to have any particular experience or knowledge with the specific Transit object of the dispute.

a roster of qualified conciliators

77. Since early in the discussion of the ECT there was a proposal for the Secretariat to 'maintain a list of expert conciliators based on the suggestions of Charter countries and other sources.'⁵⁶ However, the value of the list of conciliators was questioned until recently, mainly in relation to (i) the status of this list and (ii) the basis for selection.
78. After several discussions, in 2015 the Charter Conference introduced Rule 2(2) according to which the Secretary-General shall maintain a roster of qualified conciliators. This is a non-binding, consultative list that aims at facilitating the Secretary General's task of nominating a reliable conciliator according to Article 7(7)(b) of the ECT. The roster could accelerate the selection procedure (indicating relevant information such as particular expertise and availability of conciliators), while strengthening the involvement and confidence of the Parties in the Conciliation Mechanism. It is also consistent with international practice: several international dispute resolution institutions (such as ICSID or the PCA) maintain a non-binding roster of potential arbitrators and/or conciliators.

⁵⁶ Specific comment (c) to Draft Article 11.7.c, Annex I to Room Document 20, of 24 February 1993.

79. Each Contracting Party can nominate up to three candidates to be included in the list of conciliators, which should be available to all Contracting Parties. The Conciliation Rules include a specific format for such nomination (Annex C). Of course, the 'Parties' could agree on a conciliator who is not in the roster or suggest additional names (not included in the roster) for the consideration of the Secretary-General.

inform the public

80. According to Rule 2(6) (added in 2015), the Secretary-General may, in consultation with the conciliator and upon written agreement of the Parties, inform the public about the fact that a conciliation procedure has been initiated with regard to the given dispute. Cases of Transit disputes in the past have raised strong interest from the public and it is becoming the general rule to provide more transparency regarding the resolution of international disputes involving states.

Rule 3

Resignation, death or incapacity of conciliator

81. According to Rule 3, which follows international practice, if a conciliator resigns, dies or, in the opinion of the Secretary-General, becomes incapacitated, unable *or fails* to perform his or her duties (*including compliance with time limits*), the Secretary-General shall immediately notify the Parties and the other Contracting Parties concerned of that fact and, in consultations with them, shall appoint a new conciliator as soon as possible, but no later than 30 days after the resignation, death or incapacity of the conciliator.

82. Depending on the particular stage of the proceedings, the Secretary-General may encourage the Parties to agree on the most expeditious method of proceeding, but if they do not reach an agreement, the Secretary-General has the obligation to appoint the new conciliator.

83. In 2015, Rule 3(1) was amended to include the case in which the conciliator fails to perform, including compliance with time limits. This modification was considered as an important mechanism to secure conciliator's compliance with the timeline and the Conciliation Rules. This guarantee would make the Parties more confident on the smooth and adequate conduct of the conciliation proceedings. While the conciliation proceedings are conducted privately without the involvement of the Secretary-General, if the Parties are concerned with the conciliator's conduct they can inform the Secretary-General about it at any stage of the proceedings in order to apply Rule 3.

84. The conciliation proceedings *are suspended* until a new conciliator is appointed, so the deadline (of 90 days) provided in Article 7(7)© of the ECT stops running. The Secretary-General may determine, if necessary, a time limit for the conduct of the conciliation. The time limit may reflect the agreement of the Parties or the Secretary-General's judgement about the most appropriate time limit having regard to the particular stage of the proceedings, the circumstances of the dispute and the objective of a speedy resolution of the dispute.

Rule 4
Disqualification of conciliator

85. The conciliator shall be independent and impartial, as well as avoid actual or apparent conflict of interest. Therefore it is the conciliator's obligation to keep his/her declaration under Annex A constantly updated if needed and to immediately advise the Secretary-General of any relevant change in his or her circumstances that could give rise to concerns about his/her independence and impartiality.
86. According to Rule 4, which follows international practice, any Party or 'other Contracting Party concerned' who has or comes into possession of evidence of conduct by the conciliator which is inconsistent with the independent and impartial conduct of conciliation, including the avoidance of the appearance of a conflict of interest, shall immediately inform the Secretary-General in writing. Should a Party or a 'Contracting Party concerned' fail to disclose properly and on time such information, such Party or 'Contracting Party concerned' will not be able later to rely on the lack of impartiality/independence of the conciliator to oppose the binding decision of the conciliator.
87. Nevertheless, it is for the Secretary-General to decide, as expeditiously as possible and after considering the conciliator's reply, whether or not the conciliator should be disqualified. Contrary to the cases provided for in Rule 3, the conciliation proceedings are not automatically suspended. It would depend on the discretion of the Secretary-General whether or not the conciliation proceedings are suspended temporarily.
88. If the Secretary-General decides to disqualify the conciliator, he/she, in consultation with the Parties and the other Contracting Parties concerned, shall appoint a new conciliator as soon as possible, but no later than 30 days after disqualification.
89. Similar to the cases provided for in Rule 3, depending on the particular stage of the proceedings, the Secretary-General may encourage the Parties to agree on the most expeditious method of proceeding, but if they do not reach an agreement, the Secretary-General has the obligation to appoint the new conciliator.
90. The Secretary-General may also determine, if necessary, a time limit for the conduct of the conciliation. The time limit may reflect the agreement of the Parties or the Secretary-General's judgement about the most appropriate time limit having regard to the particular stage of the proceedings, the circumstances of the dispute and the objective of a speedy resolution of the dispute.

Rule 5
Objections to competence

91. It was already considered during the negotiations of Article 7 of the ECT,⁵⁷ that in case there was no agreement on whether the alleged previously agreed dispute remedy had been exhausted or properly applied, the question should be considered by the conciliator who could, if he/she felt it appropriate, recommend that the parties should

⁵⁷ Room Document 20, of 24 February 1993 (WGII).

- return to existing contractual procedures or continue with the conciliation proceedings.
92. This suggestion was materialised in 2015 with a new Rule 5 (objections to competence) adapted from ICSID Rules on Conciliation (Rule 29 on Objections to jurisdiction).⁵⁸ It empowers the conciliator to decide whether the case complies with the exhaustion requirement, the dispute is one covered by Art. 7(7) ECT... avoiding lengthy arbitrations under Article 27 of the ECT to decide on the competence of the conciliator prior to the conciliation proceedings. As mentioned before, time is of the essence in dealing with Transit disputes.
93. Any objection that the dispute is not within the competence of the conciliator shall be filed by a Party with the conciliator within one week from the notification of the appointment of the conciliator or from the moment the facts on which the objection is based are known to the party at that time. Once such objection is raised, the proceedings on the merit shall be suspended. The conciliator may choose either to deal with the objection as a preliminary question or join it to the merits of the dispute. If the conciliator overrules the objection or joins it to the merits, the proceedings on the merit shall be resumed.
94. If the conciliator decides that the dispute is not within his/her competence, it shall close the proceeding and draw up a report to that effect, in which he/she shall state the reasons.
95. The conciliator may also consider on its own initiative, at any stage of the proceeding, whether the dispute is within his/her competence.

Rule 6
Conduct of Conciliation Proceedings

96. Following international practice, Rule 6.1 empowers the conciliator to conduct the conciliation proceedings in such a manner as he or she considers appropriate, subject to the Conciliation Rules and the principles of impartiality, equity and justice. Usually, the conciliator will have a first, introductory meeting with the 'Parties' in order to mutually agree on the procedural issues and any particular time limits.
97. Similarly, if the 'Parties' cannot agree, the conciliator will decide on the place for the meetings taking into account the circumstances of the conciliation proceedings (e.g. choose a neutral place for both 'Parties') and the need for the costs of the proceedings (e.g. the place for the oral evidence could be different from that of the meetings if most of the experts/witnesses are located in, or close to, a specific country saving costs and time for the proceedings). As expressly suggested in the Conciliation Rules, the Energy Charter Secretariat should be considered as a potential, neutral place for the meetings.
98. In addition, as a preparation for the proceedings, the conciliator will delimit –with the support of the 'Parties'– the scope of the 'Dispute' at hand as well as properly identify all

⁵⁸ The 'Commission' mentioned in Rule 29 of the ICSID's Conciliation Rules can be composed of just one member (Art. 29.2.a of the ICSID Convention): '*The Commission shall consist of a sole conciliator or ...*'.

the 'Parties.' This may be done by the means he/she considers the most appropriate.

99. It goes without saying that conciliation shall be conducted in transparency for all the parties involved. Therefore, the conciliator shall make available to all 'Parties' any information provided to him or her unless he or she determines that the information in question is commercially confidential and the Party affected has given reasons why the disclosure would damage its interests. Rule 17 contains further developed rules regarding confidentiality since it is one of the main arguments used by states in order not to provide relevant information.

Rule 7

Representation and assistance

100. As sovereign states and following international practice, the Parties may be represented or assisted by persons of their choice. For example, they can have a government official, a diplomat, an in-house government lawyer, external lawyer of different nationality... It is up to the Parties to consider how to best represent their interests during the proceedings. Usually, the representation should include a government official knowledgeable on the 'Dispute' at hand and someone with enough authority to facilitate effective discussion on potential settlement agreements.
101. The general rule is to keep the team as small as possible in order to maximise engagement. If it is the case that any proposed settlement reached in the conciliation would need to be made contingent upon ratification by a Minister or cabinet etc, then this must be made clear at the earliest stage possible during the proceedings. In these circumstances the conciliator may insist that the relevant party acting for the state at the proceedings should have authority 'effectively to recommend' the outcome of the conciliation to the ratifier.
102. In any case, for the sake of transparency, their names and addresses shall be communicated in writing to the conciliator, the other party or parties, and the Secretary General.

Rule 8

Witnesses and experts

103. During the proceedings, the conciliator may request evidence or expert advice from persons who have information or expertise relevant to the dispute (Rule 8(1)). This could include also requesting an independent expert for advising him/her on the determination of the interim tariffs. According to Rule 10(1), the Parties must use the means at their disposal to enable the conciliator to hear witnesses and experts whom he or she desires to call (e.g. when the conciliator wants to hear a particular government official who has relevant information or experience in relation to the specific Transit or dispute at hand).
104. Also the Parties may request, at any stage, that the conciliator hear the witnesses and experts whose evidence the Party considers relevant. This would allow a Party to call as witness a Contracting Party concerned. Rule 8(4) also expressly allows a Party to

- propose the participation of one of its government officials as witness or expert; in order for the request to be properly considered by the conciliator (who will decide on whether to authorise it or not), the request has to detail the specific issues on which the government official will be questioned and under which capacity will be questioned.
105. Witnesses and experts have the obligation (together with the Parties when they are aware) to disclose any circumstances that could give rise to concerns about their independence and impartiality. The Conciliator will take into account such information when assessing the relevance and usefulness of the expert report or witness statement. This is in accordance with international practice.
106. The conciliator is the main conductor of the examination of witnesses and experts (independently on whether they were suggested by the Parties or by the conciliator). Nevertheless, the Parties can also put some questions to the experts/witnesses under the control of the conciliator (to avoid pressure or inadequate questions, to control timing...).
107. To facilitate a smooth functioning of the proceedings within the strict deadlines, the Conciliation Rules allows the conciliator, with the agreement of the Parties and when the witness/experts is unable to appear at the venue of the conciliation, to make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere (e.g. the witness/expert may suffer health problems).

Rule 9

Administrative assistance

108. As in the case of international arbitration, conciliation proceedings may take place *ad hoc* (organised and administered directly by the conciliator and the Parties) or with the administrative help of an international institution (the Energy Charter Secretariat, PCA...). While involving an external institution would increase the costs, it would also facilitate the smoothness of the proceedings (since the external institution will handle the communications, the arrangement of logistics...).
109. The conciliator, with the agreement of all the Parties, may arrange for administrative or technical assistance by the Energy Charter Secretariat or any other suitable institution or person. The apportionment of the costs for such assistance should be done in accordance to Rule 16.

Rule 10

Co-operation of parties with the Conciliator

110. As mentioned before, the Parties must co-operate in good faith among them and with the conciliator in order to achieve the objective of the conciliation within the strict deadlines contained in Article 7(7)(b) of the ECT. Therefore, during the conciliation proceedings, the Parties should comply in good faith with the requests of the conciliator to provide relevant documents, information and explanations, to facilitate the appearance of witnesses/experts requested by the conciliator and to facilitate visits and inquires at any place connected with the dispute. Of course, under the limits provided in Rule 17, the Parties could allege confidentiality of part of the requested

information.

111. The Parties also have to comply with any time limits agreed with or fixed by the conciliator. Failing to comply with timelines may result in conciliator not accepting their papers; if documents are not provided, it may also affect the conciliator's decision.

Rule 11

Proposals for settlement of the dispute

112. The main objective of the conciliation proceedings under Article 7(7) of the ECT is an amicable fast-track resolution of the dispute without interrupting the flows of energy goods. Therefore, according to Rule 11, the Parties and the conciliator may make proposals for settlement of the dispute at any stage of the conciliation proceedings. The invitation of the conciliator to the Parties is not an obligation (though the Parties should consider it in good faith as part of their obligation to co-operate).
113. Usually, such proposals will be made to the conciliator (not directly to the other Parties), who will then try to facilitate their discussion either selling the proposal as his/her own suggestion or expressly mentioning that it comes from one of the Parties; the conciliator could also combine all the proposals received into a single proposal potentially agreeable to all the Parties.
114. Those proposals will be kept confidential and the Parties shall not rely on or introduce them as evidence in any arbitral, judicial or administrative proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceeding (Rule 19).

Rule 12

Agreement by the parties

115. Any agreement between the Parties (on a resolution of the dispute or a procedure to achieve such resolution) shall be in writing and signed. According to Rule 14(1) the signing of the agreement will terminate the conciliation proceedings.
116. The conciliator shall inform the Secretary-General in writing of the fact that an agreement has been reached, so that the Secretary-General can notify all Contracting Parties about the fact that an agreement has been reached. This will strengthen the confidence of the Contracting Parties in the effectiveness of the conciliation process. However, details of the agreement remain confidential under Rule 17(3) unless the Parties otherwise agree or the disclosure is necessary for purposes of implementation and enforcement of the agreement.
117. Given the public interest in certain Transit disputes, in 2015, a new amendment to Rule 12 was introduced to make clear that the Secretary-General may, upon the written agreement of the Parties, issue a public statement informing that an agreement has been reached.

Rule 13
Recommendation/Decision of the conciliator

118. If the parties have not reached the agreement within the required strict time limits (90 days according to article 7(7)(c) of the ECT unless additional time has been determined –Rules 3(5) and/or 4(5)), the conciliator shall record in writing his or her *recommendation* either for a resolution to the dispute or a procedure to achieve such resolution, as well as his or her *decision* on interim tariffs and other terms and conditions to be observed for Transit including the date of effect. Copies signed by the conciliator (including a statement of reasons and the date of effect) should be provided to the Parties and the Secretary-General.
119. In turn, the Secretary-General (acting as public notary or depositary of the recommendation and decision) will keep a copy at the archives of the Secretariat and will notify all Contracting Parties of the fact that a recommendation and decision has been made.
120. Given the public interest in certain transit disputes, a new amendment to Rule 13, adopted in 2015, allows the Secretary General, upon the written agreement of the Parties, to issue a public statement informing that a recommendation and decision has been made by the conciliator.
121. Given the immense financial and operational impact of the conciliator's ruling at least until the final settlement of the dispute, during the early 2000s it was discussed the possibility of including an appeal mechanism to ensure that the conciliator had observed both the Conciliation Rules and the principles of due process.⁵⁹ It was proposed that a Party could challenge the conciliator's decision on one or more of the following grounds: (i) an excess of the conciliator's power, (ii) the lack of reasoning on which the decision was based or (iii) if the decision was manifestly unjust. However, this appeal mechanism was refused by delegations since it seemed to make the conciliation procedure overly complex and inefficient.⁶⁰ While the Conciliation Rules do not contain a specific appeal mechanism, if a Party disagrees with the decision, it can still refer to arbitration under Article 27 of the ECT.

Decision on interim tariffs and other terms and conditions to be observed

122. The determination of transit charges is a complex and controversial matter. For multiple usage, there is no unique right answer provided by cost analysis since the costs are largely the fixed capital. In fact, when the Conciliation Rules were approved by the Charter Conference one delegation noted the importance of clarifying the methodology of tariff calculation to be applied.⁶¹
123. During the elaboration of the Conciliation Rules, it was discussed whether a particular model should be proposed, but nothing was concluded leaving the decision to the conciliator (who could appoint an expert to advise him/her on this matters, as allowed

⁵⁹ Documents TRS 56 (of 16 January 2002) and TRS 59 (of 20 February 2002).

⁶⁰ Document TRS 60, of 27 March 2002.

⁶¹ CCDEC 1998 (11).

by Rule 8). The Energy Charter has published several analyses on methodologies and tariff principles for oil, gas and electricity.⁶²

124. The term 'other terms and conditions' refers to conditions that are essential for allowing continued flows such as, the modes and dates of payment, quality of energy materials and products or other technical characteristics.

125. In 2002, it was proposed that following a final resolution the interim tariffs already paid should be balanced against the tariffs determined in the final resolution. This provision was argued to be a logical consequence from the interim nature of the decision. While nothing was finally concluded, it is of course possible that the final resolution of the dispute concerning Transit tariffs, whether negotiated or by a judicial or arbitral decision, requires that, in the overall context of the resolution of that dispute, any difference between the interim tariffs and the tariffs determined in the final resolution of the dispute be reimbursed inclusive of interest.

Rule 14

Termination of conciliation proceedings

126. According to Rule 14 the conciliation proceedings are terminated if: (i) the Parties have signed an Agreement (Rule 12); (ii) the conciliator has made the recommendation and decision on interim tariffs (Rule 13); or (iii) the conciliator has considered that there is appropriate evidence that the case at hand has received a final binding decision rendered by a competent juridical or arbitral tribunal. The later was added in 2015 in order to clarify that the conciliation proceedings do not represent any appeal mechanism for a final binding decision rendered by a competent juridical or arbitral tribunal.

The interim nature of the decision

127. It is important to stress that the conciliator's decision has an interim character and seeks to provide an incentive to the Parties to force themselves to reach an agreement during the conciliation. Therefore, this interim decision by no means aims at setting a precedence for common pricing and terms for the energy transit within the Energy Charter's constituency. Moreover, since the details of the interim decision remain confidential (unless the parties otherwise agree or the disclosure is necessary according to Rule 17(3)), the decision cannot prejudice any ongoing commercial negotiations on Transit.

128. In fact, the interim decision on transit tariffs and other terms and conditions shall be observed by the Contracting Parties for 12 months following the date of effect contained in the decision or until resolution of the dispute, whichever is earlier (Article 7(7)(d) and Rule 13). After that time, interruption or reduction of transit (Article 7(6) of the ECT) could no longer be forbidden (unless there is an express agreement of the Parties).

⁶² <http://www.energycharter.org/what-we-do/trade-and-transit/trade-and-transit-thematic-reports/>

129. Rule 14(2) was introduced in 2015 in order to avoid any potential confusion regarding the deadlines contained in Articles 7(7)(d) (the period of 12 months starts '*following the conciliator's decision*') and 7(7)(c) (the period of 12 months starts '*from the date which the conciliator shall specify*'). The Legal Advisory Committee explained that the proposed Rule 14(2) followed the wording of Article 7(7)(c) since it was the most logical interpretation, as reflected also in the existing Rule 13(1)(a) (the conciliator's interim decision should contain '*the date of effect*').
130. A Party who is not satisfied with the conciliator's decision could try to reach an agreement during those 12 months or go directly to arbitration if still available (under Article 27 of the ECT or if provided under the intergovernmental agreement in case conciliation fails). In fact, Article 7(7)(d) of the ECT as well as Rules 18 and 19 envisage that the dispute will be resolved at some stage after the interim decision of the conciliator, presumably through international arbitration.
131. In 2015, Rule 14(3) was introduced allowing the Parties, at their own discretion, to agree to observe and ensure that the entities under their control or jurisdiction observe the conciliator's decision for any additional period of time. This solution can be particularly useful for the Parties in case they are close to reach an agreement at the end of the compulsory 12 months and need some guarantee that the conditions decided by the conciliator will continue to apply during the time they still need to finalize the discussions. The source of legal obligation to observe this decision, is not the ECT, but the express agreement between the Contracting Parties party to the dispute.

To observe in accordance to Article 7(7)(d)

132. Article 7(7) of the ECT stipulates the obligation of Contracting Parties to observe and ensure that the entities under their control or jurisdiction observe any interim decision for 12 months following the date specified by the conciliator or until resolution of the dispute, whichever is earlier. A breach by a Contracting Party of the obligation to observe and ensure that the entities under its control or jurisdiction observe the interim decision would amount to a breach of the ECT, giving rise to the mechanisms under Article 27 of the ECT.

Rule 15
Languages

133. Since usually Transit disputes may involve Contracting Parties with different official languages, it is important to agree at the early stages of the conciliation on the language or languages to be used for the conduct of the proceedings. If there is no agreement of the Parties, the conciliator will take a final decision on this. While during discussions on the Conciliation Rules in 1997 it was considered to use one or both official languages of the Secretariat (English and/or Russian), the final conclusion was to leave the choice of the language to the Parties and/or the conciliator.
134. The conciliator of course will take into account whether the Parties had contractually agreed in their dispute resolution clauses which language shall rule such proceedings.

135. It is not infrequent in recent times to have two languages for the conduct of international proceedings allowing the Parties to produce their documents and have the witness/experts statements in any of the agreed languages. While this increases the costs of the process, it also provides some comfort and confidence for the Parties.
136. If the conciliator decides to use more than one language, either language may be used for the documents to be provided by the Parties and at hearings (subject, if the conciliator so decides, to translation and interpretation which costs will be apportioned according to Rule 16). In any case, the recommendation and decision of the conciliator shall be available in all the languages of the proceedings.

Rule 16

Costs

137. According to Rule 16, the conciliator may request the Parties to deposit an amount as an advance for the costs, which should be paid to the Secretary-General. This is normal international practice followed in case of international arbitration or conciliation.
138. The final costs of the conciliation (listed exhaustively in Rule 16(2)) shall be fixed by the conciliator upon termination of the conciliation proceedings and notified in writing to the Secretary-General and the Parties. Unless the agreement of the Parties provides otherwise, each Party will cover its own expenses, those incurred by its representatives and the witnesses/experts it requested while the conciliator will apportion the remaining costs of the conciliation by taking into account the particular circumstances of the proceedings.
139. The fee of the conciliator is to be set up by the Secretary-General at the time of his/her appointment and shall be in accordance with Regulation 14 of the ICSID Administrative and Financial Regulations.⁶³
140. Upon the termination of the proceedings and after the conciliator has fixed the costs, the Secretary-General shall render an accounting of the deposits received and return any unexpected balance to the Parties (or request a final payment following the decision of the conciliator as to the apportionment of costs).

Rule 17

Confidentiality

Internal confidentiality

141. The Parties have a duty of co-operation with the conciliator. Therefore, if a Party declines to provide confidential information in response to a request under Rules 6 or 10, it shall provide to the conciliator the reasons and a non-confidential summary of the information that may be used in the proceedings. Where an exception to the rule of full disclosure is made under Rule 6(3), the Party opposing the disclosure shall also provide a non-confidential summary of the information to the other Party or Parties in a form that may be used in the proceedings.

⁶³ <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partC-chap03.htm#r14>

142. While this can be considered as a standard practice in international arbitration, Rule 17(2) should not be construed as providing an excuse for Contracting Parties to refuse to co-operate with the conciliator or limit the information provided to the conciliator.⁶⁴
143. Due to the great variety of legal systems involved in the Energy Charter's constituency, it was important to mention upfront in the Rule regarding confidentiality that nothing in the Conciliation Rules derogates from the Parties own obligations (domestic or international) in respect of treatment of confidential information, including those relating to intellectual property rights.

External confidentiality

144. Rule 17(3) requires that all matters relating to the conciliation proceedings shall be kept confidential by the conciliator, the Parties and all persons involved in the conciliation proceedings in whatever capacity unless the Parties otherwise agree or the disclosure is necessary for purposes of implementation and enforcement. This means that the requirement of confidentiality extends also to witnesses, experts and any others involved in administrative and technical assistance.
145. The wording 'information gathered in the course of these proceedings shall only be used for the purposes of these proceedings' (Rule 17(3)) extends confidentiality provisions to intra-Party circulation of information.

Rule 18

Role of conciliator in other proceedings

146. According to Rule 18, the conciliator shall not act as an arbitrator or as a representative or counsel in any arbitral or judicial proceedings in respect to a dispute that is the subject of conciliation proceedings. The conciliator shall also not be called as a witness in any such proceedings.
147. Since the decision of the conciliator made as a result of the conciliation proceedings is interim, and the parties have not reached an agreement, it is expected that the dispute will be finally resolved in other relevant arbitral or judicial bodies. The prohibition of the conciliator to participate in any respect in any following procedures ensures confidentiality of the parties and the principles of impartiality and independence of the conciliation procedure.

Rule 19

Admissibility of evidence in other proceedings

148. The Parties shall not rely on or introduce as evidence in any arbitral, judicial or administrative proceedings (e.g. anti-trust investigations), whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings

⁶⁴ Report of the Legal Advisory Committee, of 16 March 1998.

views expressed or suggestions made by any Party in respect of a possible settlement of the dispute; admissions made by any party in the course of the conciliation proceedings; proposals made by the conciliator; or the fact that a Party had indicated their willingness to accept a proposal for settlement made by the conciliator.

149. There was no need to include a reference to the conciliator's recommendations and decisions in this Rule since confidentiality for those documents was already expressly required in Rule 17(3) (unless the Parties otherwise agree or the disclosure is necessary for purposes of implementation and enforcement).



SETTLEMENT OF DISPUTES WITH INVESTORS

ENERGY CHARTER TREATY

Article 26 Settlement of Disputes between an Investor and a Contracting Party

[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.]⁶⁵

- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
- (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
 - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

[UNDERSTANDING With respect to Article 26(2)(a)

Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.]⁶⁶

- (b) in accordance with any applicable, previously agreed dispute settlement procedure;
or
 - (c) in accordance with the following paragraphs of this Article.
- (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
 - (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

⁶⁵ Final Act of the European Energy Charter Conference, Understanding 17.

⁶⁶ Id., Understanding 16.

- (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
 - (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).
- (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
- (a)(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
 - (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
 - (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or
 - (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
- (5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
- (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
 - (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and
 - (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

- (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.
- (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
- (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".
- (8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

Article 1 Definitions

[...]

- (5) "Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

[UNDERSTANDING With respect to Article 1(5)

- (a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.*
- (b) The following activities are illustrative of Economic Activity in the Energy Sector:*
- (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;*
- (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;*

- (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;*
 - (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;*
 - (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;*
 - (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and*
 - (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.]⁶⁷*
- (6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
 - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - (d) Intellectual Property;
 - (e) Returns;
 - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date")

⁶⁷ Final Act of the European Energy Charter Conference, Understanding 2.

provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

[UNDERSTANDING With respect to Article 1(6)

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's

- (a) financial interest, including equity interest, in the Investment;*
- (b) ability to exercise substantial influence over the management and operation of the Investment; and*
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.*

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.]⁶⁸

[DECLARATION With respect to Article 1(6)

The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).]⁶⁹

- (7) "Investor" means:
- (a) with respect to a Contracting Party:
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

⁶⁸ Final Act of the European Energy Charter Conference, Understanding 3.

⁶⁹ Id, Declaration 1.

- (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
- (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

Article 15 Subrogation

- (1) If a Contracting Party or its designated agency (hereinafter referred to as the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the "Party Indemnified") in the Area of another Contracting Party (hereinafter referred to as the "Host Party"), the Host Party shall recognize:
 - (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and
 - (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.
- (2) The Indemnifying Party shall be entitled in all circumstances to:
 - (a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and
 - (b) the same payments due pursuant to those rights and claims,

as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.
- (3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

Article 16 Relation to other Agreements

[DECISION. With respect to the Treaty as a whole

In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to

*the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.*⁷⁰

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

- (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
- (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.

⁷⁰ Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

ANNEX ID**List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to international Arbitration at a Later Stage under Article 26**

(In accordance with Article 26(3)(b)(i))

1. Australia
2. Azerbaijan
3. Bulgaria
4. Canada
5. Croatia
6. Cyprus
7. The Czech Republic
8. European Union and EURATOM⁷¹
9. Finland
10. Greece
11. Hungary
12. Ireland
13. Italy
14. Japan
15. Kazakhstan
16. Norway
17. Poland
18. Portugal
19. Romania
20. The Russian Federation
21. Slovenia
22. Spain
23. Sweden
24. United States of America

⁷¹ Editor's note: originally, the European Communities.

ANNEX IA

List of Contracting Parties Not Allowing An Investor Or Contracting Party to Submit a Dispute Concerning the Last Sentence of Article 10(1) to International Arbitration

(In accordance with Articles 26(3)(c) and 27(2))

1. Australia
2. Canada
3. Hungary
4. Norway

GUIDE ON INVESTMENT MEDIATION

CCDEC2016 (12) INV, 19 July 2016

The Conference

- (1) **welcomed** the work of the Investment Group and **endorsed** the Guide on Investment Mediation as a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes;
- (2) **encouraged** Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat;
- (3) **welcomed** the willingness of the Contracting Parties to facilitate effective enforcement in their Area of settlement agreements with foreign investors in accordance with the applicable law and the relevant domestic procedures.

GUIDE ON INVESTMENT MEDIATION

The Guide on Investment Mediation⁷² is designed to (i) explain the mediation process in general (ii) facilitate tips and (iii) explain the role of the Energy Charter Secretariat (ECS) and other institutions. The aim is to have an explanatory document that could be voluntarily used by governments and companies to take the decision on whether to go for mediation and how to prepare for it.

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1. **What is Mediation?**
2. **Mediation as Part of the ECT Dispute Resolution Mechanisms**
3. **Proposing Mediation**
4. **Assessing Mediation**
5. **Preparing for Mediation**
6. **The Role of the Party and Legal Representatives**
7. **Mediation Rules and the Role of Institutions**
8. **Selecting the Mediator(s)**
9. **Basic Rules of the Proceedings**
10. **Preliminary Matters**
11. **The Mediation Process**

⁷² The Guide was prepared with the support of the International Mediation Institute (IMI), the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Court of Arbitration of the International Chamber of Commerce (ICC), the UN Commission on International Trade Law (UNCITRAL) and the Permanent Court of Arbitration (PCA).

- 12. **Settlement**
- 13. **Enforcement of the Settlement Agreement**
- 14. **Barriers to Settlement**

1. WHAT IS MEDIATION?

Mediation is a process in which a neutral third party, a mediator, meets with the disputing parties and actively assists them in reaching a settlement based on their business interests and risk assessments or policy considerations and not only their legal positions. 'Mediation' as used herein is intended to cover both the concepts of mediation and conciliation. The process is designed to assist parties in reaching a settlement, with minimum time and cost. In this informal but organized process, the mediator facilitates negotiation among the parties to help them identify interests, develop settlement options and overcome barriers to settlement. It assists parties to take a strategic overview of their positions, even if no settlement is reached.

Virtually every case in which negotiation is appropriate is suitable for mediation, whether direct negotiations have taken place or a different form of dispute settlement process, such as for example arbitration is pending. Mediation is often seen as a process to be used at the outset of a dispute, but can be initiated at any time, and can take place while arbitration is ongoing.⁷³ Therefore, the key question is *when* mediation will be a helpful instrument for the disputing parties: the earlier a mediation takes place, the less information parties may have available but can save more on legal costs.

Mediation differs from arbitration in that participation is entirely voluntary and the process depends on the co-operation of the parties. The mediator does not issue a binding decision. A successful mediation results in a settlement agreement, which may result in solutions other than mere compensation.

The parties have complete control over whether they agree or not and, if they do, over the content of the agreement. Mediation is a much quicker form of dispute resolution than arbitration (usually months versus years). It should be seen as a good adjunct to arbitration, permitting the parties often to resolve a dispute without ultimately having to resort to arbitration.

⁷³ E.g. There is no provision in the ICSID Convention that would prevent an ICSID Conciliation proceeding once an arbitration proceeding has commenced (Art. 26 of the ICSID Convention envisioned that parties may explicitly agree to pursue another remedy, e.g. conciliation or mediation, alongside ICSID arbitration). Similarly, neither the UNCITRAL Arbitration and Conciliation Rules, nor the SCC Arbitration and Mediation Rules contain any provision preventing mediation/conciliation once the arbitration proceeding has commenced.

2. MEDIATION AS PART OF THE ECT DISPUTE RESOLUTION MECHANISMS

The Energy Charter Treaty (ECT) encourages amicable resolution of investment disputes and allows parties to an investment dispute to resort to mediation at any point in time.

2.1 During the three months cooling-off period (or required amicable discussion prior to submitting the dispute for resolution to courts or arbitral tribunals)

Article 26.1 of the Energy Charter Treaty states that investment disputes related to breaches of obligations under Part III of the treaty 'shall, if possible, be settled amicably.' There is no specific constraint within the ECT as to which mechanisms could be used under such 'amicable settlement' process within the three months cooling-off period. Therefore, parties are free to agree to use *good offices*,⁷⁴ *structured negotiation*,⁷⁵ *mediation* or *conciliation* using existing mechanisms⁷⁶ or even agreeing on a tailor-made mechanism. Nevertheless, as stressed by Art. 26.2 of the ECT, a party to the dispute needs to 'request' amicable settlement before proceeding towards international arbitration or the domestic courts.

While available arbitral awards under the ECT have not confirmed the existence of a duty to mediate in Article 26.1 of the ECT, they confirmed that parties need to seriously attempt to reach an amicable settlement:

- (i) In the *Petrobart* case, the arbitral tribunal found the three letters addressed and sent to the Prime Minister must be accepted as requests for amicable settlement for the purposes of Article 26(2) of the ECT and that Petrobart therefore satisfied the condition laid down in that provision.⁷⁷
- (ii) In the *Amto* case, the arbitral tribunal considered that '[t]he request for amicable settlement required by Article 26(2) ensures that a State party is notified of a dispute prior to the initiation of an arbitration and has an opportunity to investigate and take steps to resolve the dispute.'⁷⁸
- (iii) In the *Stati Ascom* case, the tribunal considered that 'it is clear that the intention of

⁷⁴ A trusted third party facilitates parties in a dispute to establish contact and to begin to explore ways to reach an amicable settlement. This is usually a preliminary mechanism that could lead to a structured negotiation or to mediation.

⁷⁵ Typically, no third party is involved. Instead, both sides collaborate closely as a team to solve a problem.

⁷⁶ See section 7 of the Guide.

⁷⁷ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award of 29.03.2005, at page 73, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-004a.pdf>

⁷⁸ *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award of 26.03.2008, at para. 50, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-010a.pdf>

Art. 26 ECT is to provide an opportunity of three months to the Parties to settle the dispute. In view of this obvious intention, the Tribunal considers that to be a procedural requirement rather than one of jurisdiction, at least as long as the Parties have indeed had such a three months opportunity.⁷⁹ The tribunal awarded a stay of the proceedings with the intention of providing the parties a window of settlement. Parties tried but failed to reach an agreement.

An exception is contained in the *Mohammad Ammar Al-Bahloul* case, where the arbitral tribunal considered that the State failure to demonstrate a willingness to reach an amicable settlement made unnecessary to comply with the three month cooling-off period.⁸⁰

2.2. After the three months cooling-off period

Conciliation is expressly mentioned, though not defined, in Art. 26.3 of the ECT as one of the options the investor could choose in case the dispute is not settled amicably within the three months cooling-off period. While Art. 26 of the ECT does not mention any specific conciliation rules, Art. 26.4.a refers (among other options) to the ICSID Convention and ICSID Additional Facility Rules, therefore including an express reference to ICSID Conciliation.

According to the *travaux* and current wording of Art. 26.3 of the ECT, it appears clear that:

- (i) it is for the investor to choose whether or not to opt for conciliation,⁸¹
- (ii) such option was always linked to the 'unconditional' consent by the Contracting Party: the drafts do not provide a definition of 'unconditional' consent, but imply an obligation on the part of the Contracting Party. Indeed, in a communication explaining the introduction of the 'unconditional consent', one of the initial drafters states:⁸²

'... the contracting party to this Agreement would be consenting in advance to

⁷⁹ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC Case No. 116/2010, Award of 19.12.2013, at paras. 828-830, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-028a.pdf>

⁸⁰ *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability of 2.09.2009, at paras. 154-156, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/ISDSC-020pa.pdf>

⁸¹ Since draft BA 10, of 19 March 1992, it is expressly stated that '... the dispute [shall] at the request of the investor concerned be submitted to international arbitration or conciliation.' Although the final drafting eliminates such wording, Art. 26.2 and 4 ECT still refers to the investor's choice.

⁸² Unclassified fax of Mr. A. Young (Legal Advisers, FCO) to Mr. V. Vesely (Conference Secretariat) on 10 January 1992 explaining the combination of the Dutch proposal and the initial draft of Art. 26 ECT.

disputes being settled by [ICSID or its Additional Facility] or other international arbitration where neither of the two previous alternatives are available.’

Although initially the unconditional consent was limited to the submission of disputes to international arbitration, soon it was expressly extended also to conciliation.⁸³ By voluntarily acceding to the ECT, the Contracting Party agrees that if both parties cannot resolve the dispute amicably, the investor can require recourse to conciliation.

- (iii) if an Investor chooses to submit the dispute to conciliation but there is no final agreement, the investor is not barred from pursuing arbitration. In this regards, the Australian Delegation stated already in 1992 (without any delegation opposing) that ‘it will be necessary to find wording to ensure that going to conciliation does not prevent a party then seeking arbitration.’⁸⁴ In fact, the fork in the road clause (Article 26.3.b.i) refers only to domestic proceedings or previously agreed dispute resolution mechanisms.
- (iv) The fork in the road (Art. 26.3.b.i ECT) only applies in relation to domestic proceedings or other previously agreed mechanisms, so even if an investor starts international arbitration under Art. 26.4 ECT or under the agreement of the parties after the dispute arises, there is still a possibility of staying the proceedings and attempting to resolve the dispute through conciliation.

2.3 Settlement agreements reached in ECT investment cases

Based on publicly available information, there has been a settlement agreement in eight investment cases: *ČEZ v. Albania* (2013), *Slovak Gas Holding BV et al v. Slovak Republic* (2012), *Türkiye Petrolleri Anonim Ortaklığı v. Kazakhstan* (2011), *EVN AG v. The Former Yugoslav Republic of Macedonia* (2010), *Vattenfall v. Germany* (2011), *Barmek Holding A.S. v. Azerbaijan* (2006); *Alstom Power Italia SpA, Alstom SpA v. Mongolia* (2004), and *AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary* (2002).

In these cases, the arbitration proceedings were discontinued due to the later settlement entered into by the parties. Out of these eight cases, at least three settlements were embodied in an award and are publicly available.

⁸³ Draft BA-31, of 21 December 1992.

⁸⁴ Annex 5 to draft BA 10, of 19 March 1992.

3. PROPOSING MEDIATION

Mediation can be used in any type of dispute, including those where numerous parties are involved. Any party to an investment dispute arising under the Energy Charter Treaty may propose the use of mediation to the other party directly or through a neutral third party, including the Energy Charter Secretariat.

The potential assistance of the Secretariat with good offices, mediation and conciliation was highlighted by the Energy Charter Conference in 2014 as an example of how to emphasise amicable investment dispute settlement.⁸⁵ In 2016 the Conference further encouraged ECT Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution and to consider the good offices of the Energy Charter Secretariat. During the last years, the Energy Charter Secretariat has provided its good offices prior to the investor resorting to international arbitration (sometimes the Secretariat was copied in the triggering letter) and after the initial stages of arbitration. Investors and governments are encouraged to involve the Secretariat before the triggering letter is sent to facilitate discussion at the relevant level before the dispute escalates.

The Energy Charter Secretariat, through its good offices can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings; and even help the parties to overcome initial procedural hurdles, for example facilitating the premises of the Secretariat for the initial meetings, administering the mediation process...

4. ASSESSING MEDIATION

In order to assess the usefulness of mediation for a particular dispute, parties could consider whether:

- both parties prefer to keep control over the outcome of the dispute;
- the monetary costs of pursuing litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- a fast resolution is of the utmost importance;
- maintaining a relationship is more important than the substantive outcome;
- there is no deep personal hostility and distrust between the parties;
- parties do not require interim relief;
- parties do not just seek quantum or a specific technical issue;

⁸⁵ CCDEC2014 (06), Point 5.

- matters of fundamental principle are not at stake;
- both parties can involve their respective decision-making authorities;
- a party would seek some non-monetary relief such as an apology, a public statement or acknowledgment to third parties...;
- neither side is certain that it will prevail in litigation or arbitration.

To facilitate governmental assessment on whether to opt for mediation, states could establish conflict management systems (in addition to dispute prevention strategies).⁸⁶ Those systems could include training of relevant government officials, empowering a specific agency/department to coordinate with relevant governmental bodies and negotiate disputes with investors, facilitating the budgeting for mediation costs (a lengthy approval process may hinder the decision to go to mediation) and clarifying the process for formal approval of the government consent to a settlement agreement.

5. PREPARING FOR MEDIATION

Once all parties have agreed in principle to have a mediation, there are various steps that parties should undertake to prepare for the mediation:

5.1. Step one 1: Logistics

There are practical considerations that need to be dealt with in order to make it happen. These include:

- whether to use a service provider or set the mediation up by the parties
- length of mediation
- choice of venue – neutral venue is often preferred but not essential
- agreeing mediation agreement or rules to conduct the mediation by, including whether or not the agreement to mediate constitutes a bar to court proceedings or a bar to initiate arbitration
- choice of mediator
- language of the mediation process
- what issues and disputes are intended to be resolved
- degree of confidentiality
- costs of the mediation - agreeing these with the mediator and how parties share

⁸⁶ It is usually easier to solve the controversy with a foreign investor before it escalates into a full dispute under the Treaty. Therefore, institutional mechanisms could be established to prevent disputes from emerging: (i) effective channels of communication among different ministries and governmental agencies dealing with investments, as well as between them and foreign investors; (ii) double checking compatibility of obligations under ECT and BITs when enacting laws and implementing policy measures; (iii) maintaining a list of potential areas where disputes with investors can arise; (iv) early response to controversies...

these costs (including whether or not in case of an unsuccessful mediation the costs are to be treated as costs of the litigation)

- what should be the outcome of the proceedings and nature of a potential settlement agreement

5.2. Step two: Documents

The mediator will need to understand the background and key issues in the case, so each party will normally need to prepare the following documents for the mediator:

a) Case summary

It is normal for a written mediation case summary to be prepared by each party, to be circulated to the mediator and all other parties. It is not sufficient simply to reproduce the Statements of Case used in the proceedings. The summary is a document for use in a consensual process intended to find a settlement, and which is off the record for all litigation purposes. Its aim should be to identify the key issues. It serves as a brief explanation of what the dispute is about and should aim to provide:

- a perspective of the dispute to the other parties - the statement is a persuasive tool that starts the groundwork for the subsequent negotiations
- the mediator with the necessary background to the dispute in order to facilitate a discussion
- clarification of the respective positions of the parties - the strengths and weaknesses - and their involvement in the mediation process
- link to supporting documentation.

b) Supporting documents

Critical documentary evidence will vary from case to case. The principle is to provide a small relevant bundle of core documentation that adds to the mediation case summary rather than replaces the submission including:

- Key contracts & agreements
- Key correspondence
- Photographs which assist understanding
- Charts or diagrams that are particularly informative
- Relevant and important extracts from key expert reports
- Spreadsheets where useful to highlight quantum elements

5.3. Step three: Preparing your team

The final step in getting ready for the mediation is making sure your team is prepared.

a) Who should attend

The general rule is to keep the team as small as possible in order to maximise engagement. At a minimum the Party representative with the maximum degree of authority to reach an agreement should attend. The issue of authority here is particularly important for the state party. If it is the case that any proposed settlement reached in the mediation would need to be made contingent upon ratification by a Minister or cabinet etc, then this must be made clear in the mediation agreement or at the earliest stage possible during the mediation proceedings. In these circumstances a mediator may insist that the relevant party acting for the state at the mediation should have authority 'effectively to recommend' the outcome of the mediation to the ratifier.

It is not always necessary to have a legal advisor (whether in-house counsel, external counsel or a combination) in the team since mediation would focus on interests. Nevertheless, it is useful to have an initial legal assessment of the potential outcome of the dispute if taken to arbitration/court.

b) Mediation strategy

Parties and their teams should work together to develop a clear strategy for engaging in the mediation process. This would include:

- Review your objectives and considering the other party's objectives
- Review issues and factual context
- Review legal context and likely costs of this route to resolution
- Look at ways to create value in the mediation- what else can be put on the table?
- Have a clear sense of alternatives to not settling in mediation

Develop a clear negotiation strategy considering the starting point for your offers, likely concessions and 'walk away' point.

6. THE ROLES OF THE PARTY AND LEGAL REPRESENTATIVES

In case a party decides to involve legal representatives, they have to function as a team. Party representatives have the best understanding of their interests and are the most likely

to embrace creative solutions. It is preferable for a party to be represented by someone who does not feel a need to defend past actions, who can be relatively objective and unemotional, but who has a thorough knowledge of the facts. It will be helpful for the representatives of the parties to relate well to each other and to be experienced negotiators. Each representative should be a decision maker authorized to negotiate and enter into or recommend a settlement.

The legal representatives could:

Counseling and Preparation

- Counsel on the advisability of settlement and mediation
- Persuade parties to agree to the mediation process
- Help design or adapt the mediation procedure
- Help select a mediator or mediation provider
- Educate the party about the mediation process and the legal issues
- Help the party think through goals for the process
- Draft statements for submission to the mediator
- Prepare for effective presentations by lawyers and client
- Counsel on management or suspension of arbitration
- Ensure the confidentiality of the process

Participation in the Mediation Proceedings

- Advocate in a non-confrontational manner designed to impress the mediator and other side with the reasonableness of your position
- Listen carefully to the other side's statements, so as to understand their interests
- Ask questions
- Answer questions about legal claims, etc.
- Serve as a sounding board for the client, brainstorming and discussing settlement options as the mediation progresses
- Help the client articulate business concerns and formulate proposals
- Avoid compromise of the client's legal position should the mediation fail
- Be aware of legal ramifications of possible solutions and options
- Help to draft the settlement agreement and assure its enforceability

7. MEDIATION RULES AND THE ROLE OF INSTITUTIONS

Under Article 26(1) of the ECT, investors and Contracting Parties are free to choose any mediation or conciliation rules (see comparative Annex), such as those of:

- IBA - International Bar Association
- ICC - International Chamber of Commerce
- ICSID - International Centre for Settlement of Investment Disputes
- PCA - Permanent Court of Arbitration
- SCC - Stockholm Chamber of Commerce
- UNCITRAL - United Nations Commission on International Trade Law

Under Article 26.3 of the ECT, the Contracting Parties have given their unconditional consent to ICSID conciliation (Article 26.4.a of the ECT refers, among other options, to the ICSID Convention and ICSID Additional Facility Rules, therefore including reference to ICSID Conciliation).⁸⁷ Therefore, the investor could revert to ICSID conciliation without any additional agreement with the defendant Contracting Party. In case the investor prefers to use other conciliation or mediation rules, the agreement of the defendant Contracting Party would be required.

Institutions (such as PCA, ICC, ICSID, SCC, CEDR) and the Energy Charter Secretariat can further assist with the mediation process in several ways:

- Help to secure the agreement of parties to participate in the process
- Facilitate information on costs that would help parties to secure the necessary funding on time
- Help to identify candidates well qualified to serve as mediator in the particular dispute, secure the agreement of all parties to the retention of one of the candidates, recruit that person and make remuneration arrangements
- Help the parties to overcome initial procedural hurdles, that may block them from organizing a first meeting with the mediator, for example agreeing on the place of the meeting, language of the proceedings, etc.
- Administer the proceedings
- Provide assistance to help secure visas to travel to the place of the meeting

8. SELECTING THE MEDIATOR(S)

In most cases a single mediator (in principle of a nationality other than that of the parties) is most suitable, however in complex or politically sensitive cases co-mediation may be appropriate. In that case two mediators can be appointed, representing different disciplines, technical expertise or cultural backgrounds. A co-mediation with a commercial mediator

⁸⁷ The reference would also include the ICSID Fact-Finding (additional Facility) Rules, which offer parties the opportunity to constitute a Committee to inquire into and report on relevant circumstances in the pre-dispute phase. The report is limited to findings of fact; it does not contain recommendations and is not an award.

and a person with political/diplomatic background could also be explored. In case of co-mediation it may also happen that each party would appoint one of the co-mediators. The size and complexity of the case will influence the selection of the mediator. The styles, personalities and orientation of mediators vary.

The selection of an experienced, trustworthy and capable mediator is vital. A mediator is not vested with the legal authority of a judge or arbitrator, but must rely on his/her own resources and on the voluntary commitment and co-operation of the parties. Therefore, the most important criteria/standard for the mediator is that both parties trust him/her. The proposed standards below are just for reference.

Standards for mediators

A good mediator:

- is available to timely conduct the mediation process
- is trained and has experience as a mediator, with a thorough understanding of the negotiation process
- is impartial, independent, and fair and so perceived
- inspires trust
- is able to understand people's motivations
- is an active listener, articulate and persuasive
- is capable of understanding the facts of a dispute, including surrounding circumstances, even if he/she is not an specialist in the substantive field of the investment at issue
- has experience in investment dispute resolution proceedings
- is able to analyse complex problems and get to the core
- is a problem solver; creative and imaginative in developing proposals and knows when to make them
- has regional or international reputation, giving more credibility to the outcome of the process
- has government experience or experience in dealing with governments

Where the parties have in writing expressly opted for the application of specific mediation rules, these will set out a procedure for the appointment of the mediators, which will be followed. Where this choice has not expressly been made, the parties may request the Secretary General of the ECS to act as an appointing authority.

The mediator's fees (if any) will be determined before appointment. Those fees, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation, but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal. Shared costs will not include costs that

each party incurs in preparing its own case, attending meetings and instructing representatives. The parties will bear these costs themselves.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously and will sign a declaration of independence, confidentiality and impartiality. It is strongly advised that the parties and the mediator enter into a mediation agreement to cover the basic aspects of the process and their relation (confidentiality, deadlines, authority of the mediator, identification of the parties involved, fees of the mediator...).

9. BASIC RULES OF THE PROCEEDINGS

There is no one right way to conduct a mediation, but some basic principles and rules are to be observed. The following basic rules normally apply to all mediations, subject to any changes on which the parties and the mediator(s) agree and subject to any specific set of rules chosen by the parties to govern the mediation process.

- a. The process is voluntary and depends on the co-operation of the parties. The mediator does not issue a binding decision.
- b. Each party may withdraw at any time by written notice to the mediator and the other party or parties.
- c. The mediator is neutral, independent and impartial.
- d. The mediator controls the procedural aspects of the mediation. The parties cooperate fully with the mediator.
 - (i) The mediator is free to meet and communicate separately with each party.
 - (ii) The mediator decides in consultation with the parties when to hold joint meetings with the parties and when to hold separate meetings. The mediator fixes the time and place of each session and its agenda in consultation with the parties. There is no formal written, audio or video record of any meeting. Formal rules of evidence or procedure do not apply.
 - (iii) Unless otherwise agreed by the parties, the mediator decides, if necessary, the language in which the mediation is to be conducted and whether any documents should be translated.
- e. Each party is represented at each mediation conference by a representative

authorized by a written delegation of authority legally effective pursuant to the laws of the jurisdiction where the party is domiciled, to negotiate a resolution of the dispute and to execute a settlement agreement. Each party may be represented by more than one person though the mediator may limit the number of persons representing each party.

- f. The mediation process is to be conducted expeditiously. Each representative undertakes to make every effort to be available for meetings.
- g. The mediator does not transmit information received in confidence from any party to any other party or any third party, unless authorized in writing to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.
- h. The mediator and any persons assisting the mediator is disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation), unless the applicable law to the proceeding provided otherwise
- i. If the dispute goes into arbitration, the mediator will not serve as an arbitrator, unless the parties agree otherwise.
- j. The mediator may withdraw at any time by written notice to the parties. A new mediator will then be appointed.

10. PRELIMINARY MATTERS

10.A Initial Consultation with the Mediator

Before dealing with the substance of the dispute, the parties and the mediator should discuss preliminary matters, such as the ground rules, place and time of meetings, and each party's need for documents or other information in the possession of the other. This initial consultation can take place as a physical meeting between the parties and the mediator or by telephone/skype conference.

The initial consultation of the parties with the mediator serves several purposes:

- The parties are given an opportunity to make an assessment on the mediator.
- The mediator will discuss the entire mediation process, including the ground rules, with

the parties. They may agree on modifications.

- If they have not done so previously, they should draft a mediation agreement with the mediator.
- A meeting schedule may be discussed.
- The mediator and the parties will discuss the role(s) the mediator will have in the parties' negotiations.
- The parties will begin to familiarize the mediator with the dispute.
- The mediator can confirm that the parties have a genuine interest in resolving their dispute and will engage persistently through the mediation process.
- The parties' representatives will begin to talk to each other in a manner appropriate to their joint goal of reaching an accommodation.
- There will be discussion of who will represent the parties at future sessions, and the extent of their authority. If the stakes are large, it may not be possible for the negotiators to have complete authority to sign a settlement agreement, but each should have authority to negotiate a settlement, and the authority of the negotiators should be comparable.
- The exchange of certain information may be discussed (see section B below).

10.B Exchange of Information

Before the first substantive mediation conference, each party normally submits to the mediator a written statement summarizing the background and present status of the dispute and such other material and information as it deems helpful to familiarize the mediator with the dispute. The parties may also agree to submit jointly certain other materials. The mediator may request any party to provide clarification and additional information. The mediator may limit the length of written statements and supporting material. The mediator may direct the parties to exchange concise written statements and other materials they submit to the mediator to further each party's understanding of the other party's viewpoints.

The mediator should expressly agree in writing to keep confidential any materials or information received. It is normal that the parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the consent of the latter.

At the conclusion of the mediation process, upon request of a party, the mediator without retaining copies returns to that party all written materials and information which that party had provided to the mediator.

10.C Confidentiality of the Process

The parties normally agree that the mediation process, and all negotiations, statements and documents expressly prepared for the purposes of the mediation shall be 'without prejudice.' The entire mediation process is then confidential. Unless agreed among all the parties or required by law or ordered by the Court, the parties and the mediator may not disclose to any person any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceedings.

Nevertheless, heightened expectations of confidentiality in mediation limit the ability of states to disclose and explain mediated settlements publicly. The state party may therefore wish to define an internal monitoring mechanism that requires the state's representative in the mediation regularly to report to a group of officials with full access to the file about the progress of the discussions and any proposal that may have been made by the mediator. Such documentation strengthens the legitimacy of the settlement in the eyes of the general public and shields public officials from potential criticism regarding the appropriateness of concessions or payments to the other party. This also facilitates to rebuttal potential allegations of corruption over the settlement agreement.

Furthermore, governments increasingly face the request for more transparency and it may be politically difficult for governments to keep confidential the fact that a mediation is taking place and even the terms of the settlement agreement. In fact, some modern domestic legislation on transparency require states to publish any agreement reached with foreign investors. Therefore, parties could agree to disclose the fact that the mediation is taking place and the main aspects of the settlement agreement.

In any case, a single spokesperson should be designated to deal with media and an internal document with the basic facts of the case and Frequently Asked Questions should be distributed to those agencies involved.

10.D Length of Proceedings

The length of mediation proceedings depends on factors such as the complexity of the case, the number and availability of the parties, the urgency, and the difficulty of reaching agreement on the facts and on settlement terms. The mediator should discuss with the parties the likely length of time required for each phase of the proceeding. If arbitration has already commenced, the commencement of mediation does not operate to stay those proceedings, unless the parties expressly agree to this with the arbitrators. Nevertheless, the usual practice is to request the arbitral tribunal for such a stay to facilitate the mediation

process and to avoid increasing arbitration costs.

10.E The Seat of the Mediation

The seat of mediation determines the subsidiary application of the local mediation law for procedural and enforcement issues when the rules chosen by the parties are silent. It may also have a future impact in case there is an international agreement for the enforcement of settlement agreements, since the seat of the mediation could determine the applicability of such international agreement.

If possible, the mediation should occur at a convenient, neutral site, agreed by the parties and the mediator. There should be sufficient space for both joint sessions and separate meetings. Some meetings could take place in a different place or even through a virtual environment (making a better use of technology to save time and costs). The offices of the Energy Charter Secretariat are available for mediations of disputes under the ECT.

11. THE MEDIATION PROCESS

The process is flexible and mediators will adjust their approach according to the dispute and the parties they are working with.

11.A The Opening

As a general practice, the mediation begins with some form of joint opening meeting or phone/video-conference where the parties outline their perspectives and the mediator explains the process and principles of mediation. The mediator may ask the parties to submit such written materials as they consider necessary or advisable on an agreed time schedule. A statement summarizing the background and status of the dispute is likely to be the principal document. If arbitration is pending, documents such as the briefs may be submitted. If an exchange of certain documents between the parties has been agreed upon, that exchange also should occur during this phase of the proceedings.

11.B Joint sessions and caucus (separate meetings with each party)

After the initial conference and exchange of written materials, a joint session is usually scheduled with the mediator, the parties and their advisors attending. During joint session, the parties' representatives will normally state their views orally in an informal manner and will address the conflicting views of the other party or parties. Each party will present its position in what it considers the most effective manner. Usually there will be opportunities for rebuttal and for discussion and clarification of issues. The formality of the rules of

evidence will not hinder the proceedings and the presentations will not be transcribed. The mediator will prescribe the sequence of presentations, may impose time limits and is likely to ask clarifying questions.

Following the joint session, the mediator may caucus in a private meeting with each party. The parties will be encouraged to be more candid in such a private meeting in the knowledge that any confidential information shared with the mediator will be respected and not disclosed without their specific consent. The mediator may well elicit in confidence information not disclosed at the joint session. The mediator may explore certain aspects of the party's presentation and may request additional materials. The mediator will explore with each party representative his or her underlying interests and aims, will identify barriers to settlement and will help the parties address those barriers.

The mediator must understand the case fully from each side's perspective; the mediator should then assure that each side better understands how the case looks from the other side's viewpoint. The mediator should avoid expressing views on legal issues. The mediator, to be effective, must be kept fully informed of all developments and must be able to control dialogue between the parties. The mediator may conclude at any stage that it is preferable to keep the parties apart.

11.C Negotiation of settlement terms

Negotiation is most productive when the parties focus on their underlying interests and concerns, avoiding fixed positions which can obscure what a party really wants. The mediator can help the parties crystallize their own interests and understand each other's interests, defuse adversarial stances and develop a more cooperative approach. The mediator can narrow or expand the range of issues as appropriate for effective resolution of a particular dispute. The mediator can help each party to generate ideas, to develop options and alternative proposals that will lead to a mutually acceptable solution, and to try out unusual solutions.

The first settlement proposal is not likely to be the last. It may provide a basis for negotiation. At this juncture, some mediators will usually engage in 'shuttle diplomacy,' i.e. meet with the parties individually to try to bridge a gap or develop a more acceptable solution; other mediators are likely to conduct joint sessions to bring the parties together. When conveying one party's position to the other, the mediator must take care to state that position accurately. On some occasions, the mediator may consider it advisable to meet with the principals of the parties, separately or together, outside the presence of lawyers. Any such meetings should occur only if the principals and their lawyers agree to them.

Some mediators prepare the first draft of a settlement agreement, seek the parties' comments, and prepare successive drafts until all parties are in agreement. If the parties do not develop mutually acceptable settlement terms the mediator, only with the parties' consent, (a) may submit a settlement proposal, and (b) if the mediator feels qualified to do so, may give the parties an evaluation of the likely outcome of the case. When submitting a settlement proposal it may be advisable for the mediator to assure the parties that acceptance of the proposal by either party will not be communicated to the other, unless and until the other also accepts.

12. SETTLEMENT

If a settlement is reached, the representatives of the parties draft a settlement agreement incorporating all settlement terms, which may include mutual general releases from or discharges of all liability relating to the subject matter of the dispute. This draft will be circulated among the parties and the mediator, amended as necessary, and formally executed. Initially, a preliminary memorandum of understanding may be prepared at the mediation and executed by the parties; the memorandum should make it expressly clear whether it is intended to be binding or not.

It is important to make sure that the settlement agreement settles all 'related' (potential) claims arising out of the same measure (e.g. subsidiaries, shareholders...). The settlement agreement should aim at a broad release of all claims each party has against the other. However, sometimes, a settlement agreement will only cover part of the dispute, leaving the rest to be discussed by an arbitral tribunal, domestic court or any other previously dispute settlement procedure.

It is important to consider the following relevant issues:

- Common agreement on the facts of the dispute;
- How the settlement agreement will be recorded (in a private document, authenticated by witness or by a public Notary). It is important to comply with the legal formalities of the defendant state and of the country in which the agreement is signed;
- Law applicable to the settlement agreement;
- Who drafts the initial version of the agreement?;
- Press releases vs. non-disclosure clauses;
- Lump-sum payments vs. instalments on specific deadlines or according to the terms of the initial contract;
- Requirement of a bank guarantee to secure compliance with the settlement agreement and/or liquidated damages (damages whose amount the parties designate for the injured party to collect as compensation upon a specific breach e.g., late performance

with the settlement agreement);

- Monitoring requirements?;
- Arbitration clause in case of breach of the settlement agreement?;
- What happens with taxes over the compensated amount?;
- Who has the authority to bind each party?;
- What are the specific requirements in the legal system of the defending state for the enforcement of private agreements (notarization, full determination of the amount to be paid....)
- Inclusion of the amount to be paid in the state's budget to secure its payment

One of the advantages of mediation is the ability of the parties to structure solutions other than an amount of damages to be paid, ie, the parties may agree on modified or new contractual arrangements, they may explore new opportunities for collaboration, or they may find other ways to satisfactorily structure their relationship. In some cases, state enterprises may in some instances face difficulties posed by domestic laws regarding public tenders, but this should not be a preclusion to a discussion of possible models by which disputing parties may settle their dispute.

13. ENFORCEMENT OF THE SETTLEMENT AGREEMENT

Settlement agreements are binding contracts and therefore, they must be complied by both parties. Parties may agree on the applicable law to such agreement (which will decide its validity, required formalities, performance...); otherwise the tribunal competent to discuss compliance or validity of the settlement agreement will apply its own conflict of laws rules to identify the applicable law.

Where arbitration proceedings have been commenced pursuant to the ECT, the settlement may provide that the parties will request the arbitral tribunal to incorporate such settlement agreement into the award. This facilitates the enforcement of the settlement in case of a party's reluctance to comply with its terms since arbitral awards may be enforced internationally through instruments such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This may also apply in the event of domestic proceedings in case it is allowed by the domestic procedural rules. Even if no arbitration proceedings had commenced, some mediation rules allow the parties, subject to the consent of the mediator, to agree to appoint the mediator as an arbitrator and request him/her to confirm the settlement agreement in an arbitral award.

Another possibility to secure future enforcement of the settlement is to request in the settlement agreement a first demand bank guarantee (which can be directly enforced in

case of breach of the settlement agreement) and/or liquidated damages (to compensate the injured party upon a specific breach) together with a dispute resolution clause.

14. BARRIERS TO SETTLEMENT

Common barriers to settlement are outlined below. These barriers should be identified and addressed in a mediation proceeding, and often they can be overcome with the assistance of the mediator.

a. Differing Perceptions

Perceptions can differ about a number of issues relevant to settlement. Do the parties have different views regarding the facts? Do they disagree about what proposition the facts prove? Is this disagreement based on each side having access to limited information? Has the foreign investor full knowledge and information of the activities carried out (and how they were done) by the local subsidiary through which the investment was carried out? Is disagreement primarily the result of each side's partisan assessments of the evidence and its implications? Do the parties have different views as to how the law will be applied or as to the likelihood of success at trial? Do the parties have different views of what is at stake? Do they make different assessments concerning the value of those stakes? It is very common for each party to be unduly optimistic about its chances of success, particularly during the early stages.

b. Extrinsic Pressures, Linkage

Are there pressures working on one or more parties that cut against prompt settlement? Do time constraints operate differently on the parties? Has personal animosity hindered rational decision taking? Is resolution of this dispute linked to other similar disputes, pending or contemplated? Does either side have constituencies that would criticize a settlement? Are there 'strategic' considerations to avoid settlement, e.g., to discourage other suits?

c. Process Failures

Communication problems between the parties or their lawyers are a common barrier. Does the negotiation process afford sufficient opportunities to devise and explore settlement options? Do the lawyers have different incentives than their clients' interests?

d. Delay Considered Advantageous

A party may believe, rightly or wrongly, that it will benefit from delay. When a dispute arises while a business relationship is ongoing, both parties have an incentive to put the matter behind them, although a party might seek to abuse the mediation process with delay tactics. Even when there is no continuing relationship, there are likely to be advantages to all parties in having the matter resolved in a timely manner. A trained and

experienced mediator will remain vigilant to protect the mediation process from unnecessary delay.

e. Parties

All of the parties with a stake in the dispute are not present for negotiations. Consider whether non-disputants with a stake be invited to participate?

f. Information

Parties may believe that they are not in a position to properly assess their own or the other side's position until, for example, after disclosure of documents, statements of witnesses or reports of experts. This is an argument more for postponement of settlement than for its abandonment.

g. Fear of potential allegations of corruption

As mentioned before, an internal monitoring mechanism and some transparency of the process will facilitate to ease fears of potential allegations of corruption or abuse of powers towards the government authorities representing the state in such mediation. In addition, the administration of the mediation process by a neutral institution in compliance with any national anti-bribery and corruption laws applicable in the country in which the mediation will take place could reinforce the arguments against corruption allegations.



TRAVAUX PRÉPARATOIRES

The Energy Charter Secretariat has maintained the archives of the Energy Charter process since its inception.⁸⁸ In particular, the Secretariat keeps the documentary *travaux préparatoires* relating to the negotiation of the European Energy Charter, the Energy Charter Treaty, its related Protocols (1991-1994) and the Trade Amendment (1994-1998). In addition, the Secretariat has recordings of some of the meetings (1991-1994) of the negotiating groups (the audio *travaux préparatoires*).

The *travaux préparatoires* (both audio and documentary) are accessible to the public under the policy approved by the Energy Charter Conference on CCDEC2016 (12) INV. The *travaux préparatoires* can be consulted in digital format at the Energy Charter Secretariat.

De-restriction of some documents of the *travaux préparatoires* and new policy on access to the *travaux préparatoires*

CCDEC2016 (12) INV, 19 July 2016

The Conference

- **Confirmed** the new policy on access to the *travaux préparatoires* of the European Energy Charter, the Energy Charter Treaty, its related Protocols (1991-1994), and the Trade Amendment (1994-1998) as set out in Annex I;
- **De-restricted** and **allowed** the publication online of the documents listed in Annex II, together with an article-by-article analysis of the successive drafts of the ECT; the publication online should take place in December 2016;
- **De-restricted** the official documents issued by the (Provisional) Conference and the (Provisional) Secretariat in relation to the negotiations of the European Energy Charter, the Energy Charter Treaty, its related protocols (1991-1994) and the Trade Amendment (1994-1998).

⁸⁸ Section IX of the Final Act of the European Energy Charter Conference, 17 December 1994.

ANNEX I

New policy on access to the *travaux préparatoires*

- a. In relation to documentary *travaux préparatoires*.

The documentary *travaux préparatoires* are composed of:

- Drafts of the European Energy Charter, the Energy Charter Treaty, its Protocol provisions (1991-1994), and the Trade Amendment (1994-1998), including comments by negotiating parties;
- Position papers issued by negotiating parties, private and public companies and other international organisations;
- Correspondence between members of the Secretariat, members of the Working Groups and delegations;
- Reports of the Legal Sub-Group; and
- Meeting invitations, agendas and other administrative documents.

These documents fall within three categories:

- i. Documents which do not identifiably express the views of specific countries, organisations or individuals;
- ii. Documents which identifiably express the views of specific countries, organisations or individuals but that do not contain any express restriction to their dissemination;
- iii. Documents expressly containing a confidentiality/restriction stamp on them.

All enquirers may consult all of the documentary *travaux préparatoires* referred to above, and to take copies of documents belonging to categories (i) and (ii);

Documents belonging to category (iii) cannot be reproduced unless their issuer has made them accessible to the public or grants specific consent in writing for its reproduction.

Any requests for exceptions to the above policy should be made in writing to the Secretary-General of the Secretariat, who will request the confirmation of the country, individual or organization concerned.

- b. In relation to audio *travaux préparatoires*. All enquirers may listen to the audio *travaux préparatoires* at the Secretariat's office, but no enquirers may make recordings or copies of any of the audio *travaux préparatoires*.

ANNEX II

List of documents to be available on the public website

The documents in red are already publicly available at the Energy Charter website.

1. Draft Treaty, Basic Protocol to the European Energy Charter, 20 August 1991.
2. BP 2, Basic Protocol, 12 September 1991.
3. BA 4, Basic Agreement, 31 October 1991.
4. BA 6, Basic Agreement, 21 January 1992.
5. BA 12, Basic Agreement, 9 April 1992.
6. BA 13, Basic Agreement, 19 June 1992.
7. BA 14, Basic Agreement, 24 June 1992.
8. BA-15, Basic Agreement, 12 August 1992.
9. BA-18, Trade and transit related Articles, 18 September 1992.
10. BA-22, Basic Agreement, 21 October 1992.
11. BA-26, Basic Agreement, 25 November 1992.
12. BA-31, Basic Agreement, 21 December 1992.
13. BA-35, Basic Agreement, 9 February 1993.
14. BA-37, Basic Agreement, 1 March 1993.
15. CONF 50, Draft Energy Charter Treaty (Basic Agreement) – Compromise text, 15 March 1993.
16. CONF 56, Draft ECT – Second version, 1 May 1993.
17. CONF 60, Draft ECT – third version, 1 June 1993.
18. CONF 64, Draft ECT – fourth version, 7 July 1993.
19. CONF 72, Draft ECT – fifth version, 11 October 1993.
20. CONF 82, Draft ECT – sixth version, 20 December 1993.
21. CONF 96, Draft ECT – seventh version, 17 March 1994.
22. CONF 98, Draft ECT – Chairman`s Compromise Text, 22 April 1994.
23. Interim Text – Final Act of the Conference on the ECT, 20 June 1994.
24. Interim Text – Final Act of the Conference on the ECT, 25 June 1994.
25. CONF 104, Note from the Conference Chairman – Adoption of the ECT, 14 September 1994.
26. Final Act of the European Energy Charter Conference, 17 December 1994.
27. The Energy Charter Treaty, 17 December 1994.
28. CONF 115, Summary of the Sixteenth Plenary Session of the Energy Charter Conference - Adoption of the Energy Charter Treaty, 6 January 1995.
29. T 31, Consolidated draft text for a tariff standstill, 21 June 1996.
30. Protocol of Correction to the Energy Charter Treaty, 2 August 1996.
31. T 36, Tariff Standstill; Draft Chairman`s compromise proposal, 30 October 1996.
32. CC 96, Agenda item 4 – Working Group II (Draft Trade Amendment), 17 October 1997.
33. CC 100, Trade Amendment, 14 November 1997.
34. CC 107, Trade Amendment and Inclusion of Energy-Related Equipment, 3 December 1997.
35. CC 113, Texts for Adoption, 4 March 1998.
36. Final Act of the International Conference and Decision by the Energy Charter Conference in Respect of the Amendment to the Trade-Related Provisions of the ECT, 24 April 1998.
37. CCDEC 2013 (17), Conference decision on Technical changes to Annexes EM I, NI and EQ I, 6 Dec. 2013.



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