

**ENERGY CHARTER
SECRETARIAT**

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Related documents: CC 555, Mess. 1294/16

DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Adoption of the Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes

By document CC 555, dated 1 June 2016, the Conference was invited to approve a draft conference decision in relation to the Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes.

As specified by Rule 19(b) of the Rules of Procedure concerning the adoption of decisions by correspondence, members of the Energy Charter Conference were informed that any delegation that wished to object to this proposal should notify the Secretariat of its position in writing by 20 June 2016.

Having received no objections within the specified time limit, **on 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.

Keywords: Conciliation Rules, Conciliation of Transit Disputes, Commentary

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 1998,¹ pursuant to Article 7.7.f of the Energy Charter Treaty (ECT).² 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 key for energy security.³ After several years of discussion, the Conciliation Rules were amended by the Charter Conference in 2015.⁴
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),⁵ could be

¹ CCDEC 1998 (11).

² 'The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.'

³ 'Road Map for the Modernisation', Area C (Emergency Response), CCDEC 2010 (10).

⁴ CCDEC 2015 (11).

⁵ 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.

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,⁶ 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).⁷ 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,⁸ 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 satisfactory for the Secretary General himself to appoint a conciliator.⁹
9. In February 1993, Poland proposed a two-tier process – conciliation and, in case

⁶ Activity 1.7 in the Secretariat's Programme of Work for 2016-2017: CCDEC 2015 (21).

⁷ Article 11.7 of Draft Basic Agreement (BA) 6, Document 4/92, of 20 January 1992.

⁸ UK, International Energy Unit, Department of Trade and Industry.

⁹ Letter from the Chairman of WG II to the Secretary General, 12 February 1993.

conciliation does not resolve a dispute, arbitration with clear time limits.¹⁰ 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 1993¹¹ 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).¹² 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.’¹³ 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.¹⁴ 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

¹⁰ 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.

¹¹ Article 11.7 of Draft BA 37, Document 20/93, of 1 March 1993.

¹² Letter from the Chairman of WG II to the Secretary General, 18 February 1993.

¹³ Document CC 173, annex III, of 17 July 2000.

¹⁴ Except in the case provided for in Article 7.7.e of the ECT.

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 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.¹⁵ While 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),¹⁶ 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.¹⁷

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

¹⁵ Document CONF-64, 55/93, of 7 July 1993: specific comment of Norway to then Article 8 (Transit).

¹⁶ E.g. Letter of the Chairman of the ECT negotiations, Mr. Fremantle, to the Legal Subgroup Chair, of 22 July 1994.

¹⁷ Declaration 3 with respect to Article 7 of the ECT.

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 sides hold clearly opposite views concerning the question of performance or non-performance of the obligations under the Treaty.¹⁸ 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.’¹⁹ Silence of a party to the Treaty is not considered to be a proof of the inexistence of the dispute.²⁰ 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

¹⁸ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 *ICJ Rep.* 65, at 74.

¹⁹ *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, 1962 *ICJ Rep.* 319, at 328.

²⁰ *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.

ECT.

30. Initially,²¹ 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.²² 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’,²³ 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 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

²¹ Article 11 of Draft BA 6, of 21.01.1992

²² Room Document 20, of 24 February 1993 (WGII).

²³ Document CC196 (amended), of 5 February 2002.

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 Organization²⁴ 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 2015²⁵ to clarify that Signatories²⁶ 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 of the Energy Charter pointed out,²⁷ 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 proposed²⁸ 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

²⁴ 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.’

²⁵ CCDEC 2015 (11).

²⁶ Unless otherwise expressly mentioned, the term ‘Signatory’ in this Commentary refers to a Signatory of the ECT (which is not open for signature anymore).

²⁷ Document LAC 1/14 of 29 August 2014.

²⁸ Document TTG 131 of 24 March 2014.

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);

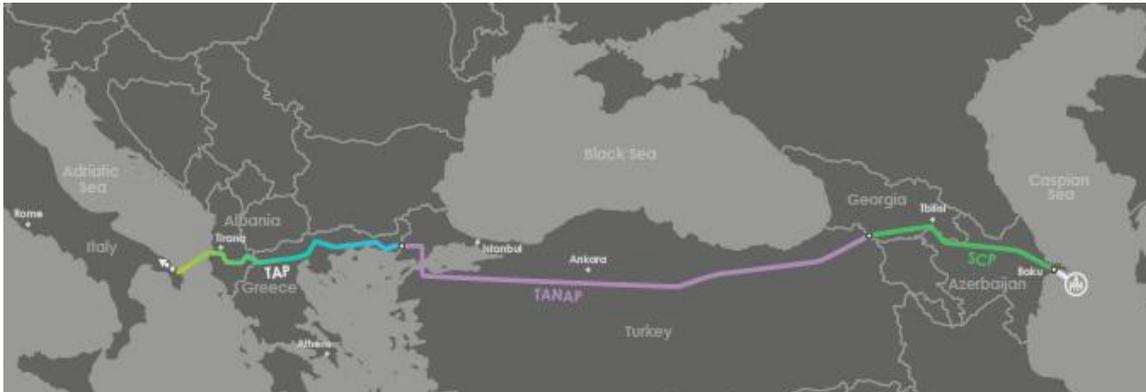
- shall provide any information requested by the conciliator, facilitate visits to places connected to the dispute and comply with fixed/agreed deadlines (Rule 10);
 - may submit proposals for a settlement of the dispute (Rule 11.1) or agree to a resolution of the dispute / procedure to achieve such 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 SG 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.²⁹

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',³⁰

²⁹ OFGAS, letter to Chairman Fremantle, 17 February 1993.

³⁰ CCDEC 2000 (03).

- 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 Commission³¹ or negotiations³² 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 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’³³ (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...

³¹ E.g. IGA between Azerbaijan and Georgia (Baku-Supsa IGA), 8 March 1996.

³² 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.

³³ E.g. IGA between Russia and Austria (South Stream Pipeline), 24 April 2010.

- 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,³⁴ 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 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

³⁴ Room Document 20, of 24 February 1993 (WGII).

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 2014.³⁵
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.³⁶ 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 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).

³⁵ Document LAC 1/14 of 29 August 2014.

³⁶ Appendix II to document CONF. 104, p. 3, of 14 September 1994.

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 SG 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 cooperate 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.³⁷ 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

³⁷ Specific comment (c) to Draft Article 11.7.c, Annex I to Room Document 20, of 24 February 1993.

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.
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.’³⁸ 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.
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

³⁸ Specific comment (c) to Draft Article 11.7.c, Annex I to Room Document 20, of 24 February 1993.

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.c 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,³⁹ 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 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).⁴⁰ 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

³⁹ Room Document 20, of 24 February 1993 (WGII).

⁴⁰ 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 ...*’.

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 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.⁴¹ 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.

⁴¹ Documents TRS 56 (of 16 January 2002) and TRS 59 (of 20 February 2002).

However, this appeal mechanism was refused by delegations since it seemed to make the conciliation procedure overly complex and inefficient.⁴² 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.⁴³
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 by Rule 8). The Energy Charter has published several analyses on methodologies and tariff principles for oil, gas and electricity.⁴⁴
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

⁴² Document TRS 60, of 27 March 2002.

⁴³ CCDEC 1998 (11).

⁴⁴ <http://www.energycharter.org/what-we-do/trade-and-transit/trade-and-transit-thematic-reports/>

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).
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 raise 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.⁴⁵
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.
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

⁴⁵ <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partC-chap03.htm#r14>

conciliator.⁴⁶

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.

⁴⁶ Report of the Legal Advisory Committee, of 16 March 1998.

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 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).

CHART 1

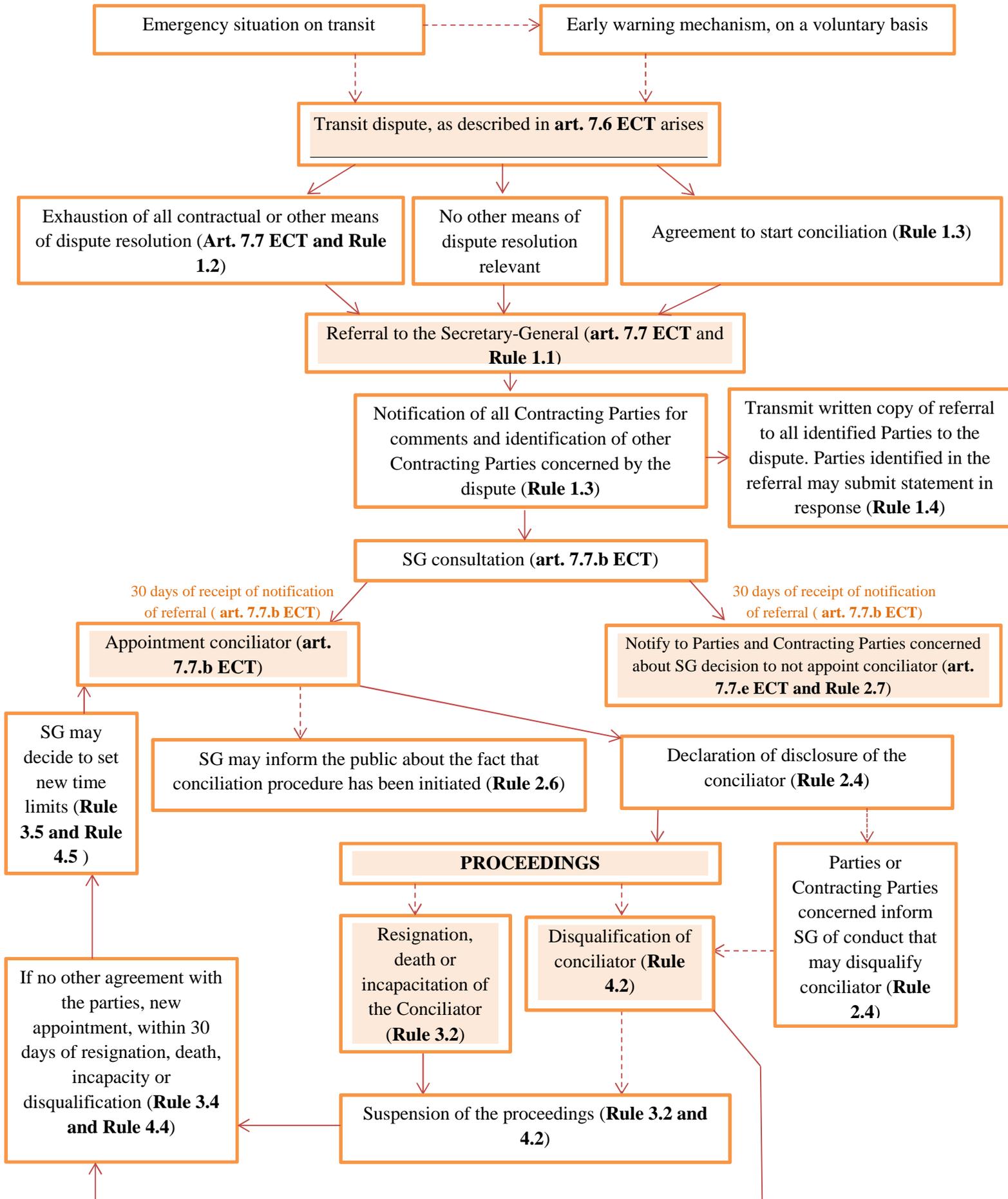


CHART 2

