

## II

*(Acts whose publication is not obligatory)*

## COUNCIL

## COUNCIL DECISION

of 26 November 1998

**on the position to be taken by the European Community on the rules concerning the conduct of the conciliation of transit disputes to be adopted by the Energy Charter Conference**

(1999/37/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Article 3(2) of Council and Commission Decision 98/181/EC, ECSC, Euratom <sup>(1)</sup>,

Having regard to the initiative from the Commission,

Whereas the Energy Charter Treaty was signed on 17 December 1994 by the European Communities and their Member States;

Whereas the European Communities and a large majority of their Member States deposited their instruments of approval or ratification of the Energy Charter Treaty on 16 December 1997 with the Depositary, the Government of the Portuguese Republic;

Whereas the remaining Member States will ratify the Energy Charter Treaty soon;

Whereas the Energy Charter Treaty entered into force on 16 April 1998;

Whereas Article 7 of the Energy Charter Treaty provides that each Contracting Party is to take the necessary measures to facilitate the transit of energy materials and prod-

ucts consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such energy materials and products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges;

Whereas the said Article also contains provisions which are applicable to a dispute over any matter arising from transit;

Whereas Article 7 of the Energy Charter Treaty provides that the Charter Conference is to adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators;

Whereas draft rules concerning the conduct of the conciliation of transit disputes were discussed at the Charter Conference held on 23/24 April 1998; whereas the Charter Conference agreed that these draft rules should serve as guidance pending their formal approval;

Whereas the Charter Conference to be held on 3/4 December 1998 should formally adopt these draft rules as finalized in the meantime;

Whereas the Community should approve these draft rules in the Charter Conference,

<sup>(1)</sup> OJ L 69, 9. 3. 1998, p. 1.

HAS DECIDED AS FOLLOWS:

*Sole Article*

The rules concerning the conduct of the conciliation of transit disputes, as set out in the Annex, shall be approved on behalf of the Community in the Charter Conference <sup>(1)</sup>.

Done at Brussels, 26 November 1998.

*For the Council*  
*The President*  
M. BARTENSTEIN

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<sup>(1)</sup> These rules were formally adopted by the Charter Conference on 3 December 1998.

## ANNEX

## RULES CONCERNING THE CONDUCT OF THE CONCILIATION OF TRANSIT DISPUTES

These Rules, adopted by the Energy Charter Conference under Article 7(7)(f) of the Energy Charter Treaty, apply to the 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 and Articles referred to shall be those of that 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'); it shall summarise the relevant facts and the basis of the Contracting Party's claim and 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. 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 themselves to be one of the other Contracting Parties concerned for the purposes of appointing a conciliator under Article 7(7)(b). 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.
3. 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.

**Rule 2: Appointment of conciliator**

1. The Secretary-General shall decide on the appropriate form of the consultation on the appointment of the conciliator. In making the appointment, the Secretary-General shall have particular regard to the importance of appointing a conciliator who:
  - (i) has, or is likely to have, the confidence of the Parties;
  - (ii) will be independent and impartial;
  - (iii) will avoid actual or apparent conflicts of interest;
  - (iv) will respect the confidentiality requirements of these Rules; and

(v) will conduct the proceedings in a manner which ensures the integrity and reputation of the conciliation procedure.

2. The decision of the Secretary-General to appoint a particular person is final, subject to Rule 4(1).
3. At the time of appointment, the conciliator shall sign the declaration in Appendix 1 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 Appendix 2.
4. The terms of appointment of the conciliator shall include a statement by the Secretary-General of his opinion as to the Parties and other Contracting Parties concerned for the purposes of the conciliator's declaration and inform the conciliator of any information relevant to the conciliation.
5. If the Secretary-General elects in accordance with Article 7(7)(e) 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 or unable to perform his or her duties, 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).
3. The Secretary-General, having regard to the particular stage reached in the proceedings, 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 judgment concerning 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 reached in the proceedings, 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 judgment concerning 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: Conduct of conciliation proceedings**

1. The conciliator shall conduct the conciliation proceedings in such 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 6: 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 7: Witnesses and experts**

1. The conciliator may request evidence or expert advice from persons who have information or expertise relevant to the dispute. Such evidence or advice shall be made available to the Parties.
2. Each Party, at any stage of the proceeding, may request the conciliator to hear the witnesses and experts whose evidence the Party considers relevant. The conciliator shall fix a time 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 authorised, 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 8: 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 9: Cooperation of parties with the conciliator**

1. The Parties shall cooperate 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 10: 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 11: 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.

**Rule 12: Recommendation/decision of the conciliator**

1. Where the Parties have not reached agreement within the time limit provided for in Article 7(7)(c) 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.

**Rule 13: Termination of conciliation proceedings**

The conciliation proceedings are terminated by:

- (a) the signing of an agreement under Rule 11 by the Parties; or
- (b) the making of the recommendation and decision on interim tariffs by the conciliator under Rule 12.

**Rule 14: Languages**

1. The conciliator, after consulting the Parties, shall decide in what language or languages the proceedings are to be conducted.
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 are available in the language or languages he or she has decided on for the proceedings.

**Rule 15: 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). 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 7(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 14.
3. Unless the agreement concluded by the Parties under Rule 11 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 unexpected balance to the Parties or request a final payment taking into account the decision of the conciliator as to the apportionment of costs.

**Rule 16: 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 5 or 7 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 5(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 be used only for the purposes of these proceedings. Confidentiality extends to the terms of the agreement between the Parties under Rule 11 and the recommendation and decision of the conciliator under Rule 12, unless the Parties otherwise agree or the disclosure is necessary for purposes of implementation and enforcement.

**Rule 17: 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 18: 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 his or her willingness to accept a proposal for settlement made by the conciliator.

*Appendix 1*

Conciliation No.: .....

**DECLARATION**

I have read and taken note of the Rules Concerning the Conduct of the Conciliation of Transit Disputes and shall ensure that the conciliation proceedings are conducted in accordance with such Rules. I shall consider only issues raised and those necessary for 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 11 or any recommendation and decision I may make under Rule 12.

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 of my resignation or my being 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.

*Appendix 2***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(3), 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).
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