

Draft Procedural Act No. 01/2011 PHLG-EnC of the Permanent High Level Group of the Energy Community of 23/03/2011 laying down the rules governing the arbitration procedure in staff matters under Article 14 of the Staff Regulations

Secretariat's comments and proposals

Author of the proposal	The Secretariat understands that the final proposal will be submitted by the European Union, in compliance with Articles 87 and 82 of the Treaty.
Article 6	<p>(1a) Since Contracting Parties hold the presidency by rotation for one year, appointing members and substitute members to the Arbitration Committee for a period of four years may not be optimal. Each Contracting Party could appoint a member and a substitute member one year before taking over the presidency, for a period of two years. This does not apply to the European Commission, which could appoint members and substitute members for a longer period of time.</p> <p>(1b)-(1c) The Staff Regulations provide that the Arbitration Committee shall decide by unanimity, regardless of the matters to be decided upon. In order not to contravene the Staff Regulations, which is an act higher in hierarchy, decisions by a majority need to be excluded from the proposal (with the exception of Article 7(3)).</p> <p>(2) Disclosure should be made within a certain period of time after appointment (i.e., 7 days). Members and substitute members should provide a statement regarding their impartiality and independence, and should have a continuous obligation of disclosure throughout the proceedings or their mandate, whichever is longer in time.</p>
Article 7	This provisions should apply to substitute members as well.
Article 8	(3) The Staff Regulations provide that the Arbitration Committee shall decide by unanimity, regardless of the matters to be decided upon. In order not to contravene to the Staff Regulations, which is an act higher in hierarchy, this paragraph

needs to be deleted. The only instance when the Arbitration Committee could be deciding by majority should be in case of an objection to a member or a substitute member of the Arbitration Committee (Article 7). Also, in order to ensure a fair and transparent process, the decisions and awards of the Arbitration Committee should always be accompanied by their reasoning.

Article 12

The Arbitration Committee should also set a final date by which the proceedings should be concluded and the report of the Arbitration Committee should be issued. The proceedings should be as expedited as possible and, ideally, the total timeframe should no span over longer than five months. The other deadlines in the procedural act should be adjusted accordingly.

Article 17

(1) The proposal by the European Commission includes, in paragraph 1 of this Article, a prohibition of recording the settlement in form of an award if the settlement is incompatible with the principle of sound financial management. This is completely unheard of in arbitration. The Arbitration Committee consists of members who are no experts in budgetary matters, but in labour law. It also has a clear task, to support the staff member and the Secretariat in reaching the best compromise possible. The proposal by the European Union would lead, in practice, to an overlap of functions between the Arbitration Committee and the Budget Committee. According to the Energy Community Budgetary Procedures, it is the duty of the director to inform the Budget Committee on all matters relating to the budgetary and financial management, and not of any other committee. Also, the Budget Committee has at least three ordinary meetings per year, which leaves enough time for the director to inform them of any consequences settlements under Article 14 of the Staff Regulations may have.

(2) The main task of the Arbitration Committee is to support the parties in reaching an agreement. Therefore, a refusal, by the Arbitration Committee, to record a settlement, may only occur in case the Arbitration Committee finds that the settlement breaches fundamental principles from the Staff Regulations (as the basis of the

proposed PA). The decision not to record a settlement should be reasoned and unanimous.

Article 19

(2a) The Arbitration Committee should address any recommendations to the Secretariat in the first place, and not directly to the Ministerial Council. The recommendations should be part of the award. In case the award contains recommendations, the Secretariat will also be given a deadline (no longer than three months) to assess them and decide whether structural changes or improvements are needed. Upon the expiry of the three-month deadline, the Secretariat will send an update to the Arbitration Committee with regard to their recommendations. After reviewing the update from the Secretariat, the Arbitration Committee may then decide, by unanimity, to raise the open issues with the Ministerial Council.

In case the award of the Arbitration Committee contains recommendations, the mandate of the Arbitration Committee will be extended either (i) until the Arbitration Committee receives a report from the Secretariat; (ii) until after receiving the report from the Secretariat and when no unanimity can be reached within the Arbitration Committee on whether to address the Ministerial Council or not; or (iii) until after the Arbitration Committee addresses the Ministerial Council.

Draft amendments proposed by the European Union (**in bold**)

PROCEDURAL ACT

No. 01/2011 PHLG-EnG of the Permanent High Level Group of the Energy Community of 23/03/2011 laying down the rules governing the arbitration procedure in staff matters under Article 14 of the Staff Regulations

The Permanent High Level Group of the Energy Community,

Having regard to the Treaty establishing the Energy Community ("the Treaty"), and in particular Articles

53(e) and 86 thereof,

Having regard to Article 14 of the Staff Regulations of the Energy Community, as adopted by the

Ministerial Council on 17 December 2007 and amended by Procedural Act PA/2009/04/MC-EnC of 18 December 2009,

Having regard to the proposal from the Secretariat,

HAS ADOPTED THIS PROCEDURAL ACT:

Article 1

Definitions

(1) The definitions provided for in Article 2.1 of the Staff Regulations apply.

(2) For the purpose of these Rules, the following definitions apply instead or in addition to those in Article 2.1 of the Staff Regulations:

- "Employer": The Energy Community, represented by the Director of the Energy Community Secretariat or, where the Director is the initiator of the case, the Deputy appointed by the Director –

"Employee": A person who has concluded an Employment Agreement as a staff member of the Secretariat or who has been appointed as its Director.

- "Party" either the Employer or the Employee, which are together the "Parties"

- "Registrar": the person designated in application of Article 3

- "Award" is the position of the Arbitration Committee on a dispute between the Employer and an Employee concerning the Staff Regulations.

Article 2

Purpose

These rules govern the arbitration procedure provided for in Article 14 of the Staff Regulations, which aim at solving disputes between the employer and the employee concerning the Staff Regulations **and safeguarding a productive working environment in the Energy Community Secretariat.**

Article 3

Arbitration Committee Registrar

(1) The Legal Counsel of the Energy Community Secretariat shall assist the Arbitration Committee in the procedures, by performing the function of registrar (the "Registrar").

(2) Should the Legal Counsel be a party to the case, or in case of conflict of interest, this function will be performed by the most senior member of the Secretariat's Legal Department.

(3) Article 7 applies analogously. An objected Registrar shall continue to exercise the functions of Registrar pending the decision on the objection.

Article 4

Arbitration request

(1) In case of dispute between the employer and the employee concerning the Staff Regulations, either party may seize the Arbitration Committee, by a motivated request in writing.

(2) The arbitration request shall be addressed to the Registrar by registered mail.

(3) The arbitration request shall state, as a minimum:

(a) the name and address of the initiator;

(b) the designation of the party against whom the request is made;

(c) a description of the claim;

(d) the relief or remedy sought by the initiator including an explanation for the relief or remedy sought and indication of any pecuniary amount, if sought.

(e) any documents offered in support.

(4) All evidence must be submitted together with the arbitration request. The later submission will not be admissible unless its late submission is duly explained and itself supported by evidence.

(5) An arbitration request must be filed not later than three months following the event **or following the termination of the events** that gave rise to the dispute in question.

(6) The arbitration request may be withdrawn by the initiating party at any time by registered letter addressed to the Registrar. Within five days, the Registrar shall inform thereof the other party and the members of the Arbitration Committee or, had this not been appointed yet, to the representatives referred to in Article 5 of these rules.

Article 5

Notification of the arbitration request

Within **seven** days from the date of receipt of the request, the Registrar shall send a copy of the request - as registered at the Energy Community Register - to the following addressees:

- the member of the European Commission representing the Vice-Presidency at the PHLG;
- the PHLG member representing the Contracting Party holding the Presidency of the Energy Community at the date of the notification of the arbitration request;
- the PHLG member representing the Contracting Party that will hold the Presidency of the Energy Community for the following term;
- the other party concerned.

Article 6

Appointment of the Arbitration Committee

(1) Within twenty one days from the date of the notification referred to in Article 4, each of the Contracting Parties holding the current and forthcoming Presidencies, as well as the European Commission, shall appoint a member of the Arbitration Committee and one substitute member and shall notify the contact details of the appointed persons to the Registrar **unless they have appointed a permanent member and a permanent substitute member of the Arbitration Committee that become responsible for the arbitration request in accordance with paragraph (1a).**

(1a) The European Commission **and any Contracting Party** may appoint a permanent member and a permanent substitute member of the Arbitration Committee for a period of up to four years. Permanent members and permanent substitute member appointed by the Commission **or by a Contracting Party holding the current or forthcoming Presidencies** become responsible for an arbitration request from the date of the notification referred to in Article 5, at which point in time the Commission or the Contracting Party that appointed them shall notify the contact details of the appointed persons to the Registrar. ~~The mandate of permanent members and substitute members of the Arbitration Committee whose contact details have been notified to the Registrar shall not terminate before the termination of proceedings in accordance with Article 10.~~

(1b) Within fourteen days from the date of the notification referred to in Article 5, the Arbitration Committee may start exercising its functions provided that at least **two** ~~one~~ members and one substitute member have been appointed in accordance with paragraphs (1) or (1a).

~~(1c) Pending the appointment of all three members of the arbitration committee, the following rules shall apply:~~

- ~~(i) In case one member and one substitute member of the Arbitration Committee have been appointed, the Arbitration Committee shall be composed of this member and this substitute member and shall decide by unanimity.~~

~~(ii) In case two members of the Arbitration Committee have been appointed, the Arbitration Committee shall be composed of these two members and shall decide by unanimity.~~

~~(iii) The Arbitration Committee cannot decide on awards pursuant to Article 18 and on objections raised against members of the Arbitration Committee in accordance with Article 7.~~

(2) The mandate of permanent members and substitute members of the Arbitration Committee whose contact details have been notified to the Registrar shall not terminate before the termination of proceedings in accordance with Article 19.

~~(32) Within seven days from appointment, m~~Members and substitute members shall disclose any circumstances likely to give rise reasonable doubts as to his or her impartiality or independence. The duty of disclosure remains for the whole duration of the mandate of the Arbitration Committee.

(3) The Registrar shall communicate the identities and CV of the appointed members to both parties.

Article 7

Objection to a member or a substitute member of the Arbitration Committee

(1) One or both parties may object to one or several members or substitute members of the Arbitration Committee only if circumstances exist that give rise reasonable objective doubts as to his impartiality or independence.

(2) A party who intends to object to a member or a substitute member of the Arbitration Committee shall, within twenty one days after the date of the communication foreseen in Article 6(3) or after becoming aware of any circumstance referred to in paragraph 1 of the present Article, send a written statement of the reasons for the objection to the Arbitration Committee.

(3) In case the objection concerns a member of the Arbitration Committee, and unless the objected member withdraws from his office or the other party agrees to the objection, the Arbitration Committee shall decide on the objection by majority of its members, whereby the objected member will be replaced by his / her substitute. In case a member withdraws, it shall be replaced by its substitute member.

(4) In case the objection concerns a substitute member, and unless the respective substitute member withdraws from his office or the other party agrees to the objection, the Arbitration Committee shall decide on the objection by unanimity. If the Arbitration Committee upholds the objection, or if the other party agrees to the objection, the Contracting Party or the European Commission shall appoint another substitute member.

Article 8

Arbitration Committee competence, powers **and voting rules in procedural matters**

(1) A plea contesting jurisdiction of the Arbitration Committee shall be raised not later than at the submission of the response. A plea that the Arbitration Committee is exceeding the scope of its authority shall be raised as soon as possible, but in any event not later than 21 days after the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(2) The power conferred upon the Arbitration Committee includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(3) The Arbitration Committee shall always decide by unanimity, with the exception of decisions taken under Article 7(3) of the present procedural act. ~~Without prejudice to Article 6(1c), the Arbitration Committee shall take decisions under Articles 8 to 15 by majority of its members.~~ All decisions and awards of the Arbitration Committee shall be reasoned.

Article 9

Equal treatment of parties

(1) The parties shall be treated with equality and impartiality by the Arbitration Committee.

(2) Contacts between the Arbitration Committee and the parties shall be limited to written exchanges, which shall be added to the file.

(3) Each party shall be given a full opportunity of presenting its case.

Article 10

Place of arbitration

(1) The place of arbitration is established in Vienna. Meetings in Vienna shall normally take place at the premises of the Energy Community Secretariat.

(2) Notwithstanding paragraph 1 of this Article, the Arbitration Committee may meet at any place it considers appropriate for consultation among its members, for hearing witnesses or the parties, or for inspection of documents.

Article 11

Language

(1) The language to be used in the proceedings shall be English. This shall apply to any written statement by a party, any hearing and any award, procedural decision or other communication by the Arbitration Committee.

(2) The Arbitration Committee may ask the parties to provide - at the parties' own expenses - a translation into English of those documents presented as evidence whose original is written in another language.

Article 12

Timetable

(1) The duration of the proceedings, including any oral hearings and post-hearing submissions, shall not be longer than five months.

(2) As soon as practicable after its constitution and after inviting the parties to express their views, the Arbitration Committee shall establish the provisional timetable of the proceedings. The Arbitration Committee may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed unless set by these Rules.

(3) The mandate of the Arbitration Committee shall expire after five months from appointment.

Article 13

Response

(1) Within a period of ~~sixty~~thirty days from the date of the communication referred to in Article 5, the respondent shall respond, stating, as a minimum:

- (a) the name and address of the respondent;
- (b) the evidence and arguments relied on in response to the arbitration request;
- (c) the nature of any evidence offered by it, where appropriate.

(2) All evidence must be submitted together with the Response. The later submission will not be admissible unless its late submission is duly explained and itself supported by evidence

(3) The response shall be addressed to the Registrar by registered mail. Within five days from the date of receipt of the response the Registrar shall send a copy of the response - as registered at the Energy Community Register - to the members of the Arbitration Committee and the other party concerned.

Article 14

Hearing and written proceedings

(1) The Arbitration Committee may decide to hold an oral hearing for the presentation of evidence or for oral argument, or to conduct the proceedings on the basis of documents and other materials only.

(2) The parties shall be given sufficient advance notice, and in any event at least ~~21~~14 days of any hearing and of any meeting of the Arbitration Committee for the purposes of inspection of documents.

(3) All statements, documents or other information supplied to the Arbitration Committee by one party shall be communicated by the Registrar to the other party. Also any expert report or other document or evidence on which the Arbitration Committee may rely in making its decision shall be communicated to the parties.

(4) Either party may not amend or supplement its request or response during the course of the proceedings, unless the Arbitration Committee considers it appropriate to allow such amendment having regard to the justification for the delay in making it.

Article 15

Default of a party

(1) Should the respondent fail to communicate his response in accordance with Article 13 the Arbitration Committee shall continue the proceedings without treating such failure in itself as an admission of the initiator's allegations

(2) Should any party fail to appear at a hearing or to produce documentary evidence, the Arbitration Committee may continue the proceedings and make the award on the evidence before it.

Article 16

Rules applicable to the substance of the dispute

(1) The Arbitration Committee shall decide the dispute in accordance with the rules applicable to the staff of the Energy Community, as adopted by the Energy Community institutions and bodies.

(2) The Arbitration Committee shall moreover take into consideration the relevant minimum requirements and standards as reflected in the conventions and recommendations of the International Labour Organisation, where relevant.

Article 17

Settlement

(1) The purpose of the Arbitration Committee procedure is to settle disputes between employer and employee concerning the Staff Regulations. If, during the proceedings, the parties settle the dispute, the Arbitration Committee shall terminate the proceedings and record the settlement in the form of an arbitral award on agreed terms, ~~unless it decides, by majority of its appointed members, that the settlement results in financial consequences for the budget of the Energy Community that are incompatible with the principle of sound financial management. The voting rule is without prejudice to Article 6(1c).~~

(2) Where no settlement between the Parties on the dispute can be reached, **or where the Arbitration Committee concludes that the settlement breaches the Energy Community Staff Regulations, and thus refuses to record a settlement**, the Arbitration Committee shall terminate the proceedings by award **pursuant to Article 18**. The award is without prejudice to the procedure under Article 15 of the Staff Regulations.

Article 18

Arbitration Committee award

(1) The Arbitration Committee shall decide by unanimity of its members, as laid down in Article 14 of the Staff Regulations.

(2) Where no unanimity can be reached, the Arbitration Committee shall declare so and terminate the proceedings.

(3) The award, which shall state the reasons upon which it is based, shall be made in writing and shall be signed by the three members.

(4) The award shall also contain a position on the costs of the procedure. Article 21 applies.

(4a) If the Arbitration Committee considers that the parties' settlement may result in financial consequences for the budget of the Energy Community that are incompatible with the principle of sound financial management, it shall make a statement in this regard in the award. The director of the Secretariat shall put the issue on the agenda of the next Budget Committee.

(5) The Registrar shall deliver to each party a copy signed by all three members of the Arbitration Committee.

Article 19

Termination of proceedings

(1) The proceedings are terminated by the award of the Arbitration Committee or by termination in accordance with paragraph 2 of this Article.

(2) The Arbitration Committee shall declare the termination of the proceedings when:

(a) the initiator withdraws his claim;

(b) the parties settle the dispute or otherwise agree on the termination of the proceedings;

(c) the Arbitration Committee cannot reach an agreement on an award;

(d) the Arbitration Committee finds that the continuation of the proceedings has for any other reason become impossible.

(2a) In case it finds that the proceedings reveal potential structural or serious deficiencies in the Energy Community Secretariat's working environment, the Arbitration Committee may address recommendations to the **Ministerial Council Secretariat. ~~Without prejudice to Article 6(1c), such recommendations shall be adopted by majority of the members of the Arbitration Committee.~~ They shall take account of the Employee's right to the protection of personal data.**

(2b) The Secretariat shall assess the recommendations of the Arbitration Committee and shall, within three months from their receipt, provide the Arbitration Committee with a report on their implementation.

(2c) Should the Arbitration Committee decide that the actions undertaken by the Secretariat in response to the recommendations are unsatisfactory, it may then address the Ministerial Council.

(2d) In case the report of the Arbitration Committee contains recommendations, the proceedings shall be extended either (i) until the Arbitration Committee receives a satisfactory report from the Secretariat; (ii) until after receiving the report from the Secretariat and when no unanimity can be reached within the Arbitration Committee on whether to address the Ministerial Council or not; or (iii) until after the Arbitration Committee addresses the Ministerial Council.

(3) The mandate of the members of the Arbitration Committee **appointed pursuant to Article 6(1)** terminates with the termination of the proceedings.

Article 20

Time limits

(1) Any period of time referred to in these Rules for the taking of any procedural step corresponds to calendar days and shall be calculated as follows:

(a) where a period expressed in days is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;

(b) periods shall include official holidays, Sundays and Saturdays.

(2) If the period would otherwise end on a Saturday, Sunday or an official holiday in Austria, Belgium or one of the Contracting Parties having appointed the members of the Arbitration Committee, it shall be extended until the end of the first following working day.

Article 21

Costs of the procedure

(1) The members of the Arbitration Committee shall not receive any compensation for this activity.

(2) The costs of travelling for the members appointed by the Contracting Parties shall be paid under the Reimbursement Rules of the Energy Community.

(3) Where the unsuccessful party is the Employer, it may be requested to pay the travel costs of the successful employee.

Article 22

Entry into force

This Procedural Act shall enter into force upon adoption.

Article 23

Availability of these rules The Director of the Energy Community Secretariat shall make this Procedural Act available to the Parties to the Energy Community within seven days of its adoption.

Done in Vienna on XXX

For the Permanent High Level Group