

PROCEDURAL ACT N° 2008/01/MC-EnC
OF THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY

of 27 June 2008

**on the Rules of Procedure for Dispute Settlement under the
Treaty**

The Ministerial Council of the Energy Community,

Having regard to the Treaty Establishing the Energy Community, and in particular Articles 90 to 94 as well as Articles 86, 87 and 82 thereof,

Having regard to the proposal by the Secretariat,

Whereas it is of crucial importance that the provisions of the Treaty, including the Decisions adopted thereunder, are properly implemented in the national legal orders of the Parties and correctly applied by their authorities,

Whereas each Party to the Treaty is responsible for the timely implementation and correct application of Energy Community law within its own legal system,

Whereas the Treaty establishes a system of dispute settlement within the Energy Community by decision of the Ministerial Council,

Whereas the procedure leading up to such a decision may be initiated by a Party, the Secretariat or the Regulatory Board,

Whereas the Treaty gives private bodies the right to approach the Secretariat with complaints,

Whereas a Party concerned has the right to make observations in response to the request or complaint,

Whereas the Ministerial Council may decide on the existence of a breach by a Party of its obligations,

Whereas the Ministerial Council may further decide on the existence of a serious and persistent breach and on possible sanctions resulting therefrom,

Whereas the Treaty provisions establish a framework which requires more detailed procedural rules for practical implementation,

Whereas the Ministerial Council on 29 June 2007 concluded that a formal process at a level below the Ministerial will have to be considered for the issue of non-implementation of Treaty commitments by Parties to the Treaty,

Whereas the Permanent High Level Group, at its meetings on 11 March and 26 June 2008, endorsed the present Procedural Act,

HAS ADOPTED THIS PROCEDURAL ACT:

Title I

General Provisions

Article 1

Purpose

These rules specify the procedure to be followed in cases of failure by a Party (hereinafter "the Party concerned") to comply with a Treaty obligation or to implement a Decision addressed to it within the required period (hereinafter "Energy Community law") as established by Articles 90 to 93 of the Treaty (hereinafter "dispute settlement procedure").

Article 2

Failure to comply

(1) A Party fails to comply with its obligations under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law.

(2) Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional or local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.

Article 3

Burden of proof

The burden of proving the allegation of non-compliance by a Party with Energy Community law and to place before the Ministerial Council the information needed to enable it to determine whether the obligation has not been fulfilled shall rest on the initiator of the proceedings within the meaning of Article 10(1). Where, however, the Party invokes an exemption to a rule or general principle of

Energy Community law, it is incumbent upon the Party concerned to prove that the requirements for such exemption are fulfilled.

Article 4

Dispute settlement procedures and private disputes

Dispute settlement procedures must relate to a violation by a Party of Energy Community law and may not concern disputes between private parties.

Article 5

Case register

(1) The Secretariat keeps a case register at its premises under the control of the Legal Counsel.

(2) Each dispute settlement procedure case shall be assigned an official case number. Incoming and outgoing documents shall be registered under this number in the case file. If several pending cases concern the same subject matter, they may be consolidated and processed under the same case number..

(3) The representatives of the Energy Community institutions and their staff shall not disclose information acquired or exchanged by them pursuant to this Procedural Act and of the kind covered by Energy Community Staff Regulation 3.5. a), unless the present Rules permit such disclosure.

Article 6

Access to the case file

(1) At their request, Parties, Participants and Observers to the Treaty, the complainant as well as private or public bodies with a legitimate interest (hereinafter "interested parties") shall have access to the case file, subject to an eventual request by complainants to confidential treatment.

(2) In cases of doubt, the Director of the Secretariat shall take a decision on the existence of a legitimate interest of private or public bodies requesting access to the case file.

(3) The Secretariat shall adopt a Procedural Act laying down specific rules on access to the case file.

Article 7

Procedural documents

(1) The language of the procedure is English. Any procedural documents expressed in another language shall be accompanied by a translation into English.

(2) All procedural documents shall bear a date, the case number and the name and the address of the sender.

(3) The original of every procedural document shall be signed by a person authorised to represent the sender by law, by its constitution or by authorization.

(4) If a procedural document does not comply with the requirements set out in paragraphs 1 to 3, the Secretariat shall prescribe a reasonable period within which the sender is to comply with them.

Article 8

Costs

Costs incurred by all parties to the procedure are not recoverable.

Article 9

Time-limits

(1) Unless otherwise indicated, time-limits established by these Rules and time-limits prescribed by the competent institutions shall be binding.

(2) Time-limits shall be prescribed so as to specify the precise date on which the required action is to take place rather than expressing periods in days, weeks, months etc. Where that day is a Saturday, Sunday or an official holiday, the deadline shall be extended until the end of the first following working day.

(3) Time-limits may be extended by the institution that prescribed it upon a reasoned application.

(4) Communication by telefax and email shall be deemed sufficient for the purposes of compliance with the time-limits.

Title II

The course of the proceedings

Chapter I

Preliminary Procedure

Article 10

Scope and purpose

(1) When initiating a dispute settlement procedure within the meaning of Article 11, the Secretariat shall carry out the preliminary procedure set out in this Title.

A Party or the Regulatory Board shall initiate dispute settlement procedures either by notification to the Secretariat or directly by submitting a reasoned request to the Ministerial Council in accordance with Article 28 below.

(2) The purpose of the preliminary procedure is to establish the factual and legal background of cases of alleged non-compliance, and to give the Party concerned ample opportunity to be heard. In this respect, the preliminary procedure shall enable the Party concerned to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position.

Article 11

Initiation of a dispute settlement procedure

(1) A dispute settlement procedure may be initiated by the Secretariat by way of an opening letter in accordance with Article 12 below.

(2) The Secretariat initiates procedures in response to alleged non-compliance arising from either a complaint by a private body, a notification by a Party or by the Regulatory Board or by its own initiative. Within the Secretariat, the Legal Counsel shall coordinate the procedure.

(3) The decision to initiate a dispute settlement procedure shall be made publicly available on the Energy Community website, stating the date of sending out the opening letter, the Party concerned and a brief summary of the subject-matter.

Article 12

Opening letter

(1) If the Secretariat considers that a possible non-compliance of which it has become aware or issues raised in a complaint warrant the opening of a dispute settlement procedure, it addresses an opening letter to the Party concerned, requesting it to submit its observations within a specified time period. This period shall normally be two months.

(2) The Party concerned is requested to adopt a position on the points of fact and of law raised in the opening letter.

Article 13

Reasoned opinion

(1) In the light of the reply or absence of a reply from the Party concerned, the Secretariat may address a reasoned opinion to that Party. The reasoned opinion must contain a coherent and detailed statement of the reasons which led the Secretariat to conclude that the Party concerned failed to fulfil its obligations under the Treaty.

(2) The reasoned opinion shall call on the Party concerned to comply with Energy Community law within a specified time period. This period shall normally be two months.

Article 14

Submission to the Ministerial Council

In the light of the reply or absence of a reply from the Party concerned, the Secretariat may bring the matter to the attention of the Ministerial Council by way of a reasoned request in accordance with Article 28 below.

Article 15

Request for information

(1) The Secretariat may, by simple request, require any authority of the Party concerned to provide all necessary information at any stage of the preliminary procedure.

(2) The Secretariat may also request information from other natural or legal persons.

Article 16

Interested parties

(1) Interested parties may submit written observations to the Secretariat within one month of the publication provided for in Article 11(3).

(2) Private and public bodies other than Parties, Participants and Observers shall substantiate the required legitimate interest in writing.

(3) Any written observations received shall be immediately forwarded to the Party concerned and shall be attached to the reasoned request referred to the Ministerial Council.

Article 17

Urgency

(1) In cases of urgency due to the risk of serious and irreparable damage to an objective of the Treaty, the Secretariat may, on the basis of a *prima facie* finding of non-compliance, refer a reasoned request to the Ministerial Council directly.

(2) The Ministerial Council shall review the existence of urgency.

Article 18

Suspension and discontinuance of the procedure

(1) The Secretariat may, at any point of the preliminary procedure, decide to suspend or discontinue the procedure, in particular where the Party brings the state of non-compliance with Energy Community law to an end or where it makes credible commitments as to its intention to amend its legislation, administrative or judicial practice. Such decision may also be taken where the

Party concerned successfully refutes factual assumptions or convincingly counters the legal arguments made by the initiator.

(2) To achieve the results described in paragraph 1, the Secretariat may enter into informal bilateral discussions with the Party concerned. A short report on the results achieved shall be submitted by the initiator to the Ministerial Council upon closure of the file and be included to the case file.

(3) The Secretariat may reopen the procedure where there has been a material change in any of the facts on which the decision was based, where the Party concerned acts contrary to its commitments or where the decision was based on incomplete, incorrect or misleading information provided by that Party.

(4) Where the procedure was initiated by a Party or the Regulatory Board, pursuant to the second sentence of Article 10(1), the Secretariat shall discontinue the preliminary procedure at the request of the initiator. This does not preclude the Secretariat to initiate a procedure on its own motion.

Chapter II

The role of private bodies

Article 19

Right to approach the Secretariat

(1) Private bodies may lodge a complaint with the Secretariat against a Party arising from any measure the complainant considers incompatible with Energy Community law.

(2) The notion of private body encompasses all natural and legal persons as well as companies, firms or associations having no legal personality.

Article 20

Subject-matter

(1) A complaint has to relate to a failure to comply with Energy Community law by a Party as defined above in Article 2.

(2) A complaint against an EU Member State will be passed on to the European Commission. The Secretariat will inform the complainant and the Ministerial Council of the transfer to the European Commission. Such transfer shall be without prejudice to the obligations arising from Title III and IV of the Treaty.

Article 21

Form of the complaint

- (1) A complaint shall be made to the Secretariat in writing, by letter, fax or e-mail.
- (2) Complainants should send supporting documentary evidence, if available, and copies of relevant correspondence with the national authorities of the Party.

Article 22

Acknowledgment of receipt

- (1) Following registration by the Secretariat and assignment of a case number, an acknowledgement will immediately be sent to the complainant.
- (2) The complainant shall be asked to indicate whether he/she wishes their complaint to be treated in a confidential or non-confidential manner. The Secretariat will abide by the choice a complainant has made regarding confidentiality, i.e. disclosure of his/her identity, in its communication with the authorities of the Party concerned, other interested parties or the general public. Where a complainant has not indicated his/her choice, the Secretariat shall presume that the complainant has opted for non-confidential treatment.
- (3) The Secretariat will keep the complainant informed of the course of the procedure.

Article 23

Information of the Party concerned

In its opening letter, the Secretariat shall inform the Party concerned that it acts upon complaint.

Article 24

Request for information

The Secretariat may, by simple request, require the complainant to provide all necessary information at any stage of the preliminary procedure.

Article 25

Reaction by the Secretariat

The Secretariat shall endeavour to decide whether to submit a reasoned request to the Ministerial Council or to discontinue the case within six months of registration of the complaint. The complainant shall be notified by the Secretariat in advance of this decision.

Article 26

Withdrawal of the complaint

Withdrawal of the complaint shall not affect the right of the Secretariat to pursue the procedure further.

Article 27

Notification by a Party or by the Regulatory Board

Articles 21 to 25 shall apply by analogy to cases where the Secretariat initiates a preliminary procedure upon notification by a Party or the Regulatory Board.

Title III

Procedure before the Ministerial Council

Chapter I

Breaches by a Party of its obligations (Article 91 of the Treaty)

Article 28

Reasoned request

(1) A reasoned request for a decision of the Ministerial Council pursuant to Article 90 of the Treaty may be submitted by the Secretariat either upon complaint, upon notification by a Party or the Regulatory Board, or by its own initiative. In these cases, the reasoned request shall be preceded by a preliminary procedure in accordance with the provisions laid down in Title II.

(2) A reasoned request may also be submitted by a Party or the Regulatory Board directly. In that case, the Party or the Regulatory Board may ask the Secretariat for factual information and legal advice before submitting the reasoned request.

(3) The reasoned request shall be based on concrete factual findings and backed up by sufficient legal analysis. The reasoned request shall contain a proposal for the decision to be taken by the Ministerial Council pursuant to Article 91 of the Treaty.

(4) The reasoned request with the relevant excerpts from the case file annexed shall be submitted to the Presidency and the Vice-Presidency at least five months before the relevant meeting of the Ministerial Council. A copy of the

reasoned request shall be sent to the Secretariat in case the latter is not the initiator.

(5) The reasoned request shall be published on the Energy Community's website providing for confidentiality of the complainant, where applicable.

Article 29

Scope of the decision

(1) The Ministerial Council decides on the proposal made in the submitted reasoned request. It applies Energy Community law including these Rules.

(2) In its decision, the Ministerial Council shall either establish the existence of a breach by a Party of its obligations arising from Energy Community law according to the proposal, or dismiss the request entirely or partially.

Article 30

Notification of the Party concerned

(1) The Presidency shall, within seven days after receiving it, forward the reasoned request and the annexes to the Party concerned.

(2) Within two months following receipt of a copy of the reasoned request, the Party concerned may reply in writing.

Article 31

Draft agenda for the Ministerial Council

The Presidency and the Vice-Presidency, in accordance with Item IV.4 of the Rules of Procedure of the Ministerial Council, shall put the reasoned request for decision on the draft agenda for the next meeting of the Ministerial Council.

Article 32

Advisory Committee and Regulatory Board

(1) Before taking the decision pursuant to Article 91 of the Treaty, the Presidency and the Vice-Presidency shall ask an Advisory Committee for its opinion on the reasoned request, taking into account the reply by the Party concerned. The Ministerial Council shall not be bound by the opinion of the Advisory Committee.

(2) The Advisory Committee shall be composed of three members appointed by the Ministerial Council by unanimity for a renewable term of two years, including one member nominated by the European Community. Members shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in the respective Party.

(3) The Advisory Board shall adopt its opinion by a majority including the positive vote of the member nominated by the European Community. The opinion shall be provided within two months and shall be available in sufficient time for distribution to the members of the Ministerial Council in accordance with Item IV.4 of the Rules of Procedure of the Ministerial Council. The opinion shall also be submitted to the Permanent High Level Group preparing the Ministerial Council meeting in question.

(4) The Advisory Committee shall adopt its internal rules of procedure with the assistance of the Secretariat.

(5) In cases concerning statutory, technical and regulatory rules within the meaning of Article 58(a) of the Treaty, the Presidency and the Vice-Presidency shall also ask the Regulatory Board to provide a written opinion within two months, unless the Regulatory Board initiated the procedure in question.

Article 33

Request for additional information

The Presidency and the Vice-Presidency may request additional information and documentation from the initiator and the Party concerned.

Article 34

Decision by the Ministerial Council

(1) At its meeting, or, as the case may be, by correspondence, the Ministerial Council takes its decision in accordance with Article 29(2).

(2) The decision by the Ministerial Council shall be taken in accordance with the rules laid down in Article 91(1) of the Treaty.

(3) The decision shall be signed by the Presidency. It shall be sent to the Party concerned, the submitter of the reasoned request and the Secretariat. The Advisory Committee's or the Regulatory Board's opinion shall be appended to the Ministerial Council's decision.

Article 35

Decision in the absence of a reply

Where the Party concerned, after having been duly informed, fails to reply in its defence in due time, a decision shall be taken based on the facts available to the Ministerial Council at the time of its deliberations.

Article 36

Publication of the decision

The decision taken by the Ministerial Council shall be made publicly available on the website of the Secretariat.

Article 37

Binding nature of the decision

The decision by the Ministerial Council shall be binding on the Parties concerned from the date of its adoption.

Article 38

Consequences of a decision establishing failure to comply

(1) Where the Ministerial Council establishes the existence of a breach of a Party's obligation pursuant to Article 91 of the Treaty, the Party concerned shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law.

(2) The Secretariat, in accordance with Article 67(b) of the Treaty, shall review the proper implementation by the Party concerned of the decision by the Ministerial Council, and may again bring the matter before the Ministerial Council on the grounds of a failure to take the necessary measures to comply with the decision.

Chapter II

Serious and persistent breaches (Article 92 of the Treaty)

Article 39

Serious and persistent breach

The Ministerial Council shall establish the existence of a serious and persistent breach by a Party of its obligations under the Treaty taking into account the particularities of each individual case.

Article 40

Request

(1) A Party, the Secretariat or the Regulatory Board may request the Ministerial Council to determine the existence of a serious and persistent breach without a preliminary procedure.

(2) The request may follow up on a prior decision taken by the Ministerial Council under Article 91 of the Treaty or raise a new issue.

(3) The request shall set out the allegations against the Party concerned in factual and legal terms. It shall also contain a proposal as to concrete sanctions to be taken in accordance with Article 92(1) of the Treaty.

(4) The request shall be submitted to the Presidency and the Vice-Presidency at least 60 days before the respective meeting. A copy shall be submitted to the Secretariat for registration. The request shall not be made public.

Article 41

Decision-making procedure

(1) The Presidency shall, within seven days after receiving it, forward the request to the Party concerned and ask it for a reply to the allegations made in the request.

(2) The Presidency and the Vice-Presidency may ask the Advisory Committee for its written opinion.

(3) The decision by the Ministerial Council on the existence of a serious and persistent breach shall be taken in accordance with Articles 92(1) and 93 of the Treaty.

(4) The decision taken by the Ministerial Council shall be made publicly available on the Secretariat's website.

Article 42

Sanctions

(1) In the decision establishing the existence of a serious and persistent breach, the Ministerial Council shall determine sanctions in accordance with Article 92(1) of the Treaty and specify a time-limit.

(2) The obligations of the Party concerned under the Treaty shall in any case continue to be binding on that Party.

(3) The Ministerial Council shall at each subsequent meeting verify that the grounds continue to apply on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed.

Chapter III

Revocation of decisions

Article 43

Procedural aspects

(1) The Ministerial Council, in accordance with Articles 91(2) and 92(2), may decide by simple majority to revoke decisions taken under Articles 91(1) and 92(1) respectively. Revocation of a decision may be proposed by any Party.

(2) The Ministerial Council shall give reasons for its decision to revoke a previous decision and shall make the revocation decision publicly available on the Energy Community website.

(3) A revocation shall not affect decisions taken within the domestic legal orders following up the initial decision by the Ministerial Council.

Title IV

Final Provisions

Article 44

Amendments to Rules of Procedure of the Ministerial Council

(1) In Item VII.5. of Procedural Act No. 2006/01 on Internal Rules of Procedure of the Ministerial Council of the Energy Community, the text after the semicolon is deleted. The semicolon is replaced by a full stop.

(2) In Item VII.6. of Procedural Act No. 2006/01 on Internal Rules of Procedure of the Ministerial Council of the Energy Community, the last sentence is deleted.

Article 45

Addressees

This Procedural Act is addressed to and shall be binding on all Parties to the Treaty and institutions set up under the Treaty.

Article 46

Entry into force

This Procedural Act shall enter into force upon adoption

Article 47

Review

The Rules of Procedure in this Procedural Act shall be reviewed in the light of experience within two years of their adoption upon proposal by the Secretariat.

Article 48

Publication

The Director of the Energy Community Secretariat shall make this Procedural Act available to all Parties and institutions under the Treaty within 7 days after its adoption and to the public on the website of the Energy Community.

Done in Brussels on 27 June 2008

For the Ministerial Council

Presidency

A handwritten signature in green ink, appearing to read "W. A. Wansley", is written over the word "Presidency".