EXPLANATORY NOTE

Draft Procedural Act on the Rules of Procedure for Dispute Settlement under the Treaty

BACKGROUND OF THE PROPOSAL

Title VII of the Treaty establishing the Energy Community introduces a legal mechanism to enforce the obligations assumed by the Parties by their signature, namely to implement the *acquis* as provided for in the Treaty itself and the decisions taken under that Treaty.

Turning binding obligations into enforceable obligations constitutes the decisive step towards a Community built on the rule of law. Making use of the dispute settlement procedure provided for in Articles 90 to 93 will help clearing away the bigger and smaller barriers on the way to full Treaty implementation and thus constitutes an important contribution to achieving the goals of the Treaty. In particular, the enforcement of obligations and the settlement of disputes are indispensable for giving investors the reliability and protection which is indispensable for creating an attractive investment climate within the Energy Community.

Articles 90 to 93 are fully applicable from the entry into force of the Treaty. There is an increasing awareness among market operators of the possibilities given to them by the Treaty provisions and in fact, dispute settlement procedures have already been initiated through complaints by private companies. Given the existence of rules in the Treaty, the purpose of the present proposal is not to establish a dispute settlement procedure, but to structure it. By doing so, the draft Procedural Act fills in the blanks left by the Treaty itself. It is necessary to codify the details of such procedure at this moment in time to avoid a plethora of unstructured dispute settlement procedures initiatives in the future.

The main features of the present draft Procedural Act have their basis in the Treaty provisions, in the Rules of Procedure of the Ministerial Council and MC Conclusions. They built on experience made in other international organisations as far as applicable. In particular, the draft mainly aims at:

- Clearly defining the roles of all actors in a dispute settlement procedure;
- Giving a Party concerned by a dispute settlement procedure ample opportunity to express its opinion in the course of a preliminary procedure;
• Structuring a dialogue between the Secretariat and the Party concerned with the possibility of settling disputes amicably;

• Ensuring that a reasoned request eventually to be submitted to the Ministerial Council in terms of content fulfils the requirements laid down by the Treaty as well as Item VII. 2 of the Ministerial Council Rules of Procedure;

• Providing assistance to the Ministerial Council in finding a decision on potentially very complex factual and legal matters by introducing optional consultation of an advisory committee or the Regulatory Board, as envisaged by Conclusion 4 of the Ministerial Council in Montenegro on 29 June 2007 and Article 58 of the Treaty respectively.

The Permanent High Level Group is invited to consider the following draft Procedural Act.
PROCEDURAL ACT N°…

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 93 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 but 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 meeting on 11 March 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. 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. Several cases concerning the same subject-matter shall be merged 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.

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. Where this is not the case, the sender shall provide such translation upon request.

(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

Purpose

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 or by its own initiative. Within the Secretariat, the Legal Counsel shall coordinate the procedure.

(3) Initiation of a dispute settlement procedure by a Party or the Regulatory Board shall be made through a notification to the Secretariat. The ensuing preliminary procedure shall be carried out by the Secretariat without prejudice to the right of a Party or the Regulatory Board to submit a reasoned request to the Ministerial Council pursuant to Article 14.

(4) 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 one month.

(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 initiator to conclude that the Party concerned failed to fulfill its obligations under the Treaty.

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

Article 14
**Reasoned request**

(1) In the light of the reply or absence of a reply from the Party concerned, a Party, the Secretariat or the Regulatory Board may bring the matter to the attention of the Ministerial Council by way of a reasoned request.

(2) 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.

(3) Before submitting a reasoned request to the Ministerial Council, Parties or the Regulatory Board may ask the Secretariat for factual information and legal advice.

(4) The reasoned request including annexes shall be submitted to the Presidency and the Vice-Presidency at least three months before the relevant meeting of the Ministerial Council.

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

**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(4).

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

(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.

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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 define 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.

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, respecting the choice of confidentiality.

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.

Title III

Procedure before the Ministerial Council

Chapter I

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

Article 27

Scope of the decision

(1) The Ministerial Council decides on the proposal made in the reasoned request submitted to it. 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 dismisses the request entirely or partially.

Article 28

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 one month following receipt of a copy of the reasoned request, the Party concerned may reply in writing.

Article 29

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 30

Advisory Committee and Regulatory Board

(1) Before taking the decision pursuant to Article 91 of the Treaty, the Presidency and the Vice-Presidency may 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 majority including the positive vote of the member nominated by the European Community. The opinion shall be available in due 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.

(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 may also consult the Regulatory Board, unless the latter has submitted the reasoned request in question.

Article 31

Request for additional information

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

Article 32

Decision by the Ministerial Council

(1) At its meeting, or, as the case may be, by correspondence, the Ministerial Council makes a decision stating whether or not the Party concerned has breached its obligations under Energy Community law.

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

(3) The decision shall be signed by the Presidency. It shall be sent to the Party concerned, the initiator and the Secretariat. Where available, the Advisory
Committee’s or the Regulatory Board’s opinion shall be appended to the Ministerial Council’s decision.

Article 33

**Decision by default**

Where the Party concerned, after having been duly informed, fails to reply in its defense, a decision shall be taken against it by default.

Article 34

**Publication of the decision**

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

Article 35

**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 36

**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, including compensation for damages sustained.

(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 37

**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 38

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 accomplishing a prior 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 an issue so far not dealt with by the Ministerial Council.

(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 39

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 40

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 on which the decision establishing the existence of a serious and persistent breach was made and sanctions were imposed continue to apply.

Chapter III

Revocation of decisions

Article 41

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 reason 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 42

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 43

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 44

Entry into force

This Procedural Act shall enter into force upon adoption

Article 45

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 … on 27 June 2008

For the Ministerial Council

Presidency