

PROCEDURAL ACT OF THE ENERGY COMMUNITY SECRETARIAT

2018/5/ECS on the Establishment of a Dispute Resolution and Negotiation Centre

The Energy Community Secretariat,

Having regard to the Treaty establishing the Energy Community, and in particular Article 67(e) thereof;

Given that the challenges of energy reform in many countries entail disputes between various actors in that process, and that such disputes involve in particular the states, their public authorities, market participants, civil society and investors;

Considering that the Energy Community's objective of creating stable regulatory and market frameworks capable of attracting investment requires structures suitable for rational, neutral, quick, efficient and sustainable resolution of such disputes;

Taking into account experience showing that most jurisdictions lack such structures and that the prevailing international mechanisms, be it investor-state arbitration or commercial arbitration, are expensive, sometimes politicized, time-consuming and often too adversarial to resolve energy disputes in a sustainable and cost-effective manner, and in particular they do not suit the needs of consumers and the interests of small and medium enterprises, and therefore may not be the appropriate forum to resolve energy disputes in general and smaller-scale disputes in particular;

Convinced that institutional negotiation and mediation can play an important role not only in the resolution of commercial and investments disputes, but also in the framework of dispute settlement under the Treaty, in particular during the preliminary procedure established under the Dispute Settlement Rules of Procedure which aims at resolving disputes at an early stage before they reach the Ministerial Council;

Noting that alternative dispute settlement methods such as mediation and conciliation are gaining importance as alternatives to litigation and arbitration, especially due to their focus on preserving the relationship between the parties, their flexible approach and their minimal costs;

Building on the expertise gained by the Secretariat not only in the understanding of energy markets in transition, but also in negotiating and mediating mutually beneficial solutions in several high-profile investor-state disputes to date;

Considering that in order to avoid energy disputes in the first place, the capacity of national authorities to negotiate agreements as diverse as international agreements, finance agreements, project agreements, supply agreements, investment contracts etc. needs to be improved;

Intending to establish a forum for dispute resolution and negotiation, as well as to offer dispute resolution and negotiation facilitation services for the benefits of national authorities, market participants, civil society and investors;

the Secretariat

ADOPTS THE FOLLOWING PROCEDURAL ACT:

Title I Scope of application and definitions

Article 1 Establishment of a Dispute Resolution and Negotiation Centre

1. A Dispute Resolution and Negotiation Centre is hereby established within the Secretariat (hereinafter “the Centre”).
2. The purpose of the Centre shall be to promote and provide facilities for the resolution of disputes within the Energy Community between states and national authorities on the one hand, and private parties on the other; commercial disputes between private parties; disputes between states and national authorities; or disputes between the Parties to the Energy Community Treaty and the Secretariat.
3. The Centre shall offer facilities for the resolution of disputes in the following constellations:
 - a. Facilitation of negotiations for the settlement of disputes between private parties, between private parties and states and/or their national authorities, and between states and/or their national authorities (“third-party disputes”);
 - b. Negotiations in the context of Article 19(2) of Procedural Act 2015/04/MC-EnC of 16 October 2015 on amending Procedural Act of the Ministerial Council 2008/01/MC-EnC of 27 June 2008 on Rules of Procedure for Dispute Settlement under the Treaty (hereinafter “the Dispute Settlement Procedures”), including third-party mediation (“dispute settlement negotiations”);
 - c. Assisting negotiations by Parties, Participants or Observers to the Treaty and/or their authorities and public companies with other states and international organizations, their authorities, public companies or private parties (“negotiation support”).
4. Article 1(3) does not exclude any other form of dispute settlement which may, in the future, be offered by the Centre, such as, but not limited to, arbitration of disputes between private parties, between private parties and states and/or national authorities, and between states and/or national authorities of other states.
5. Upon a reasoned request by a Party or Observer to the Treaty to the Director of the Secretariat, a certain class or classes of disputes may be excluded from the range of activities covered by paragraphs 3 and 4, to the extent any support to their resolution by the Centre is prohibited under national or international law.

Article 2 Definitions

For the purposes of this Procedural Act,

1. “Arbitration” means the settlement of a dispute by an arbitrator or an arbitration tribunal based on an arbitration agreement between the disputing parties and on procedural arbitration rules to be adopted by the Centre;

2. “Dispute” means a conflict between two or more parties related to the production, transportation, distribution, sale and purchase, or consumption of energy (including the associated products, services, capital etc.), as well as consumer protection and environmental issues in the field of energy, arising out of an agreement, an investment, obligations under national or international law etc., regardless of whether they are already subject to litigation or arbitration or other kinds of dispute settlement mechanisms;
3. “Disputing party” means a state, a natural person, a private or a public entity, an association etc. subject to a dispute;
4. “Facilitation” means the service offered by the Centre to lead and support the process of negotiation of a third-party dispute under terms and conditions agreed with the disputing parties in a Memorandum of Understanding (Article 8), with a view to reach a settlement of their dispute. The purpose of the facilitation is to reach a settlement mutually acceptable by and agreeable to the disputing parties;
5. “Mediation” means a form of facilitation which includes a more active involvement by the mediator, including by making concrete proposals for the settlement of a dispute by the mediator;
6. “Party”, “Participant” and “Observer” have the meaning accorded to these terms by the Treaty establishing the Energy Community.

Article 3 Management of the Centre

1. The Centre shall be functionally attached to the Legal Unit. It shall be chaired by the Head of that Unit under the supervision of the Director. A staff member of the Legal Unit shall perform the function of registrar.
2. The Centre shall be supported by a group of five distinguished individuals with experience in the areas covered by the Centre. Members of this group shall serve without remuneration.
3. The Centre shall not aim for or make any profit and shall not charge for the use of its facilities and services. This is without prejudice to fees for third-party mediators or arbitrators to the extent envisaged by these Rules and the procedural rules adopted under Article 5.

Article 4 Costs associated with dispute resolution

Other than the fees referred to by Article 3(3), costs incurred by disputing parties, their agents, counsel, advocates as well as witnesses and experts shall only be recoverable in case it is so decided in the context of an arbitration.

Article 5 Procedural Rules

Upon consultation with the group established according to Article 3(2), the Centre shall develop procedural rules for the activities performed by the Centre in accordance with Article 1(3) and 1(4)

of this Procedural Act, including model Memorandum of Understanding, model facilitation, expert determination, mediation and arbitration clauses, as well as a code of conduct for facilitators and disputing parties. Such rules shall be adopted by the Director and published on the website of the Secretariat.

Title II Facilitation of Third-Party Disputes (Article 1(3)(a))

Article 6 Request for Facilitation

1. Any disputing party wishing to submit a dispute to the Centre for facilitation, mediation or any other type of dispute settlement, may address a request in writing to that effect to the Centre. The request can also be sent by the disputing parties jointly.
2. The request shall contain the following information:
 - a. the name and address of the disputing parties;
 - b. a short summary of the dispute, including claims made by either party and any relief sought and damages claimed;
 - c. a short summary of the course of any pending proceedings, in case the dispute is already subject to litigation, arbitration, or any other form of dispute settlement;
 - d. any other documents deemed necessary for the purpose of the negotiation.
3. The registrar shall register the request. In case the request was submitted by one disputing party, a copy of the request will be sent upon registration to the other disputing party/parties. All disputing parties will be provided with a copy of the applicable Procedural Rules and a draft Memorandum of Understanding, together with a draft procedural timetable.

Article 7 Post-award Facilitation

1. Parties to a dispute may also request, and arbitration tribunals may decide, to involve the Centre in the facilitation of elements of disputes not or not entirely resolved by an award. Parties to a dispute may also request the Centre to assist them with the implementation of an award, including with regard to the technical, economic or legal aspects of such implementation.
2. The request under Article 7 shall also contain a copy of the award.
3. Post-award facilitation is not meant to be an appeal against a final arbitral award. It will not re-judge a dispute, but it will offer the support of a facilitator for those elements of the dispute, arising after the award had been issued. Post-award facilitation will be without prejudice to any appeal, annulment or any recourse against an arbitral award provided by the applicable legal framework.

Article 8 Memorandum of Understanding

1. Following the registration of the request, the Centre shall provide the disputing parties with a draft Memorandum of Understanding to be signed by all disputing parties consenting to the facilitation of the resolution of the dispute, and the chair of the Centre.
2. The Centre shall develop and publish a model Memorandum of Understanding. The Memorandum of Understanding shall include provisions for the place of negotiations, the proposed timeframe, confidentiality, effect on pending legal disputes, role and powers of the facilitator, a draft schedule for the negotiations etc.
3. Unless the disputing parties and the Centre agree to a longer period, negotiations shall take place within a period of three months starting with the signature of the Memorandum of Understanding by all disputing parties and the Centre. In all cases, the purpose of the facilitated negotiations is to reach a settlement as soon as possible in order to minimize the costs and adverse effects of a dispute.
4. Unless the disputing parties and the Centre agree otherwise, the place of the negotiations shall be at the premises of the Energy Community Secretariat in Vienna. Negotiations may also take place by videoconference or other means of telecommunication if the disputing parties and the facilitator so agree.
5. Unless the disputing parties and the Centre agree otherwise, and without prejudice to Article 9(3) below, the negotiations shall remain confidential.
6. The disputing parties and the Centre may amend the Memorandum of Understanding, for example by extending the timeframe by mutual consent at any stage of the procedure. The consent shall be expressed in writing.
7. The disputing parties may also, upon written notification to the facilitator and to the Centre, expand the scope of the negotiations in order to cover related disputes or disputes which arose after the commencement of the negotiations.
8. The facilitator does not have the authority to impose upon the disputing parties a solution to their dispute.

Article 9 Appointment of a facilitator

1. Depending on the nature and scope of the dispute, the facilitator shall be selected by agreement of the disputing parties and the Centre from the experienced staff of the Secretariat.
2. If no agreement is reached by the disputing parties, the Centre shall appoint the facilitator.
3. The facilitator may be supported by other staff of the Secretariat. In such case, all the duties of the facilitator (including the duty of confidentiality) shall extend to the supporting staff of the Secretariat.
4. Before commencement of the negotiations, the facilitator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality of independence. This obligation remains throughout the negotiation proceedings.

- a. The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration will serve as guidance as to what circumstances require disclosure. In any case, Red List and Orange List circumstances shall at all times be disclosed.
 - b. When in doubt whether a circumstance should be disclosed or not, disclosure should always prevail. Following disclosure, the disputing parties may request the Centre to appoint another facilitator.
5. The services of the facilitator and other staff shall be free of charge. Travel and accommodation costs shall be covered by the disputing parties in accordance with the Memorandum of Understanding, unless an exemption is made by the Centre upon motivated request by one or both disputing parties.

Article 10 Conduct of the negotiations

1. The negotiations will be conducted in accordance with the procedural rules adopted as per Article 5 of this Procedural Act. The rules shall not prevent the disputing parties, together with the facilitator, to agree on an alternative manner in which the negotiations shall be conducted.
2. In all cases, the facilitator will pay particular consideration to the circumstances of the case, the positions and interests of the parties, to the applicable legal framework and will aim for a swift resolution of the dispute.
3. The facilitator may also, upon request of the parties or out of own initiative, arrange bilateral meetings with disputing parties separately.
4. All information exchanged during the negotiations shall remain confidential. The information exchanged during a bilateral meeting shall not be disclosed to the other disputing party/parties, unless the disputing party/parties engaged in the respective meeting expressly agree/s to the disclosure.
5. All correspondence and information exchanged during the negotiations shall be without prejudice to any litigation or arbitration proceedings on the same subject-matter.
6. At any time during the negotiations, the Parties jointly may refer the dispute or a part of it to an expert to make a determination on one or more technical points disputed by the parties. The expert will be part of the Secretariat's staff, or an expert from the Secretariat's Roster of Experts. The determination will be binding for the Parties and for the Facilitator, and it shall be in writing, include a description of the issue referred, state the reasons on which it is based, be signed and dated.
7. If the determination is made by an expert from the Secretariat's staff, it will be free of charge. If an expert from the Roster of Experts will be engaged, the expert's costs will be equally divided between the Parties. A cost overview will be provided, free of charge, before proceedings with the determination.

Article 11 Termination and outcome of the negotiations

1. The negotiation proceedings are considered terminated in one of the following circumstances: when a settlement agreement is reached by the disputing parties; when one of the disputing parties, or all the disputing parties jointly, submits a note to the facilitator, the Centre and the Secretariat, that the negotiations are terminated; and upon expiry of the deadline as per Article 8(3) or any other deadline established in the Memorandum of Understanding, and no extension has been agreed upon as per Article 8(6) above.
2. Unless the disputing parties agree otherwise in the Memorandum of Understanding, the objective of facilitated negotiations is to settle a dispute by agreement of the disputing parties. The facilitator's consent is not a prerequisite for the agreement.
3. Where applicable, the facilitator shall work towards compliance of the outcome with Energy Community law during the negotiations.
4. The outcome of the facilitated negotiations shall be registered by the Centre. In agreement with the disputing parties, the Centre shall publish a note on the outcome on the website of the Secretariat.
5. Upon request of one or both disputing parties, the Centre will confirm the transparency and correctness/fairness of the negotiations.

Article 12 Follow-up measures

The disputing parties may engage the Secretariat in follow-up measures such as the implementation of any settlement agreement upon consent of the Director of the Secretariat.

Title III Negotiations and Mediation in Dispute Settlement Procedures (Article 1(3)(b))

Article 13 Compliance with Energy Community law

The following rules are meant to implement Article 19(2) of the Dispute Settlement Procedures and facilitate the swift closure of dispute settlement cases during the preliminary procedure established therein. Their application may not compromise the full implementation, applicability and primacy of Energy Community law in the Party concerned, nor affect any other national or international procedures in which compliance with Energy Community law is relevant.

Article 14 Bilateral negotiations after opening a dispute settlement procedure

1. Before the Secretariat opens a dispute settlement procedure against a Party to the Treaty in a case of non-compliance, the Centre shall review whether the case is suitable for a settlement. A case is suitable for a settlement in particular where compliance can be reached within a commonly agreed timeframe, and/or where the Party concerned can reach compliance with the assistance of the Secretariat. The suitability assessment shall be included in the case file.
2. If the case is considered suitable for a negotiated settlement, the Opening Letter sent in accordance with Article 13 of the Dispute Settlement Procedures shall include an invitation

to the Party concerned to request negotiations using the facilities of the Centre and propose a procedural calendar for the negotiations.

Article 15 Mediation after the Reasoned Opinion

1. If the negotiations carried out in accordance with Article 13 do not lead to a settlement of the case, or if no such negotiations take place and a Reasoned Opinion is issued by the Secretariat, the Centre may offer to the Party concerned, or the Party concerned may request that the dispute be mediated by a neutral third-party mediator.
2. Such mediation shall be agreed upon in writing between the Secretariat, the Party concerned and the mediator within the deadline for reply set in the Reasoned Opinion. The agreement shall specify the scope and timeframe of the mediation as well as the role of the mediator in line with the Procedural Rules to be adopted under Article 5.
3. The Centre shall establish a panel of mediators of high moral character and recognized competence in the fields of energy negotiations from which the Secretariat and the Party concerned may choose a person by consensus. The panel shall include experienced mediators, members of the negotiation network (Article 20 below), representatives of companies and investors and civil society organizations in a well-balanced manner. The composition of the panel shall be published on the website of the Secretariat.
4. In order to be admitted to the panel, mediators shall accept a uniform fee based on a per diem to be set by the Centre upon approval of the Director. Unless the agreement between the Secretariat and the Party concerned provide otherwise, the costs of mediation (including the fee, travel and accommodation costs) shall be shared equally between the disputing parties.
5. The mediator shall actively help find a solution to the dispute settlement case in the broadest possible manner and not limited by the subject-matter of the case. This may include commitments to assistance by the Secretariat, commitments to future regulatory and legislative changes by the Party, and commitments made by the complainant where applicable. The solution may also include commitments for support by third parties such as international organizations, donors or domestic parties. For this purpose, they may be invited to the mediation.
6. Solutions agreed upon by the Secretariat and the Party concerned in the course of the mediation shall be reflected in an agreement or memorandum which gives credible assurances of the solution being implemented and provides the basis for the case being closed by the Secretariat.

Article 16 Place of negotiations and mediation

Negotiations under Articles 13 and 14 shall be preferably held at the Centre's premises in Vienna or, if more appropriate, in the Party concerned or at any another place. Costs associated with the participation in the negotiations cannot be reimbursed by the Secretariat.

Article 17 Representation of the Centre

The Centre shall be represented by the Head of Legal Unit or the Senior Energy Lawyer and the rapporteur in the case concerned. The Party concerned shall decide about its representatives. The

Centre may request other public or private parties to be present if deemed beneficial for the settlement of the dispute.

Article 18 Role of the complainant

In cases initiated upon complaint, the Centre shall also invite the complainant to be present in negotiations and mediations initiated under Articles 13 and 14, unless the Party concerned objects based on legitimate reasons of overriding interest.

Article 19 Publication

In accordance with Article 19(2) of the Dispute Settlement Procedures, the Centre shall draft a report on the results of the negotiations and the closure of the case for submission to the Ministerial Council and publication on the website of the Secretariat.

Title IV Negotiation support provided to Parties, Participants or Observers to the Treaty (Article 1(3)(c))

Article 20 Network of negotiators

1. The Centre shall establish a network of negotiators involving energy negotiators representing the governments of Parties, Participants or Observers to the Treaty.
2. The Centre shall organize regular exchanges of experience and best practices (including model clauses), trainings and disseminate relevant information to the network.
3. The members of the network shall be invited to exchange information between them and the Centre with regard to the negotiations for public or private law contracts and agreements as well as non-binding instruments in areas such investments, project financing, supply or transit agreements, international relations etc in the energy sector.

Article 21 Requesting negotiation support

1. When a Party, Participant or Observer intends to enter into negotiations for an agreement or non-binding instrument of the kind described in Article 20(3) above, it may inform the Centre and may request advice and support in the negotiations.
2. The request shall be in writing and specify whether the support should be provided by the Centre and/or other members of the network.
3. Unless excluded by the Party, Participant or Observer, the Centre and/or members of the network may participate in the negotiations.
4. Unless the Director of the Secretariat decides otherwise, expenses associated with negotiation support shall be borne by the Party, Participant or Observer requesting the support.

Article 22 Compliance and impact assessment

1. At any point before the closure of formal negotiations, the Party, Participant or Observer concerned may notify to the Secretariat the draft agreement or non-binding instrument and

request an assessment of compliance with Energy Community law and/or its impact on the Energy Community Single Market, the environment and security of supply in the Energy Community.

2. The Secretariat shall provide its assessment within four weeks following the request.

Article 23 Confidentiality

The Centre and the members of the network shall respect the confidentiality of all information exchanged under this Title.

Title V Final provisions

Article 24 Legal aid

The Centre shall analyze the possibility for the establishment of a legal aid fund for Parties concerned by dispute settlement procedures under Article 90 of the Treaty.

Article 25 Entry into force

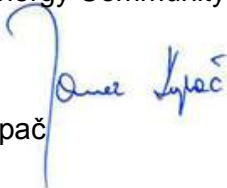
This Procedural Act shall enter into force upon adoption.

Article 26 Publicity

The Secretariat shall make this Procedural Act and any amendments available on its website.

For the Energy Community Secretariat

Janez Kopač
Director

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Done in Vienna, 25 October 2016