

DECISIONS

COUNCIL DECISION (EU) 2019/117

of 21 January 2019

on the position to be taken on behalf of the European Union within the Joint Council established under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, as regards the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part ⁽¹⁾ ('the Agreement') was signed by the Union and its Member States on 10 June 2016. It has been provisionally applied between the Union, of the one part, and Botswana, Lesotho, Namibia, Eswatini and South Africa, of the other part, since 10 October 2016, and between the Union and Mozambique since 4 February 2018.
- (2) Pursuant to Article 102(1) of the Agreement, the Joint Council is to have the power to take decisions in respect of all matters covered by the Agreement.
- (3) Pursuant to Article 89(1) of the Agreement, the Joint Council is to adopt Rules of Procedure and a Code of Conduct for arbitrators and mediators. Therefore, the Joint Council is to adopt, at its first meeting, a decision with regard to the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators acting under Part III of the Agreement.
- (4) It is appropriate to establish the position to be taken on the Union's behalf within the Joint Council concerning the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators.
- (5) The position of the Union within the Joint Council should therefore be based on the attached draft Decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Joint Council as regards the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators shall be based on the draft Decision of the Joint Council attached to this Decision.

⁽¹⁾ OJ L 250, 16.9.2016, p. 3.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 21 January 2019.

For the Council
The President
F. MOGHERINI

DRAFT

DECISION No 2/2019 OF THE JOINT COUNCIL

of ...

on the adoption of the Rules of Procedure for dispute avoidance and settlement and the Code of Conduct for arbitrators and mediators

THE JOINT COUNCIL,

Having regard to the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part ('the Agreement'), and in particular Article 89(1) and Articles 100, 101 and 102 thereof,

HAS ADOPTED THIS DECISION:

Article 1

The Rules of Procedure for dispute avoidance and settlement, as set out in Annex I to this Decision, are hereby adopted.

Article 2

The Code of Conduct for arbitrators and mediators, as set out in Annex II to this Decision, is hereby adopted.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at ... on ...

For the Joint Council

Minister for Trade of

EU representative

ANNEX I

Rules of Procedure for dispute avoidance and settlement*Article 1***Definitions**

In these Rules of Procedure and in accordance with Part III (Dispute avoidance and settlement) of the Agreement:

- (a) 'administrative staff', in respect of an arbitrator, means individuals under the direction and control of an arbitrator, other than assistants;
- (b) 'adviser' means an individual retained by a Party to advise or assist that Party in connection with the arbitration proceedings;
- (c) 'the Agreement' means the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed on 10 June 2016;
- (d) 'arbitrator' means a member of the arbitration panel;
- (e) 'arbitration panel' means a panel established under Article 80 of the Agreement;
- (f) 'assistant' means an individual who, under the terms of appointment and under the direction and control of an arbitrator, conducts research or provides assistance to that arbitrator;
- (g) 'complaining Party' means any Party that requests the establishment of an arbitration panel under Article 80 of the Agreement;
- (h) 'day' means a calendar day;
- (i) 'Party' means a Party to the dispute;
- (j) 'Party complained against' means the Party that is alleged to be in violation of the provisions covered under Article 76 of the Agreement; and
- (k) 'representative of a Party' means an employee or any individual appointed by a government department, agency or any other public entity of a Party who represents the Party for the purposes of a dispute under the Agreement.

*Article 2***Notifications**

1. Any request, notice, written submission or other document of the arbitration panel shall be sent to both Parties at the same time.

Any request, notice, written submission or other document of a Party which is addressed to the arbitration panel shall be copied to the other Party at the same time.

Any request, notice, written submission or other document of a Party which is addressed to the other Party shall be copied to the arbitration panel at the same time, where appropriate.

2. Any notification referred to in paragraph 1 shall be made by email or, where appropriate, any other means of telecommunication that provide a record of the sending thereof. Unless proven otherwise, such notification shall be deemed to be delivered on the date of its sending.

3. All notifications shall be addressed to the Directorate-General for Trade of the European Commission of the European Union and to the SADC EPA States coordinator, provided for in Article 105 of the Agreement.

4. Minor errors of a clerical nature in a request, notice, written submission or other document related to the arbitration panel proceedings may be corrected by delivery of a new document clearly indicating the changes.

5. If the last day for delivery of a document falls on a public holiday of the European Commission or of the SADC EPA State or States concerned, the document shall be deemed delivered on the next business day.
6. Depending on the nature of the dispute, all requests and notifications addressed to the Trade and Development Committee shall also be copied to the other relevant subcommittees established under the Agreement.

Article 3

Appointment of arbitrators

1. If, pursuant to Article 80 of the Agreement, an arbitrator is selected by lot, the Chairperson of the Trade and Development Committee shall promptly inform the Parties of the date, time and venue of the lot.
2. The Parties may be present during the lot, and the lot shall be carried out with the Party or Parties that are present.
3. The Chairperson of the Trade and Development Committee shall notify, in writing, each individual who has been selected to serve as an arbitrator of his or her appointment. Each individual shall confirm his or her availability to both Parties within five days of the date on which he or she was informed of his or her appointment.
4. If the list referred to in Article 94 of the Agreement has not been established or does not contain sufficient names at the time a request is made pursuant to Article 80(3) of the Agreement, the arbitrators shall be drawn by lot from the individuals who have been formally proposed by one or both of the Parties.

Article 4

Organisational meeting

1. Unless the Parties agree otherwise, they shall meet the arbitration panel within 10 days of its establishment in order to determine such matters as the Parties or the arbitration panel deem appropriate, including:
 - (a) the remuneration and expenses to be paid to the arbitrators, in accordance with World Trade Organization (WTO) standards;
 - (b) the remuneration to be paid to assistant(s), the total amount of which shall not exceed 50 % of the remuneration paid to the arbitrator(s); or
 - (c) the timetable of the proceedings.
2. Arbitrators and representatives of the Parties may take part in the meeting referred to in paragraph 1 via telephone or video conference.

Article 5

Terms of reference

1. Unless the Parties agree otherwise, within seven days of the date of establishment of the arbitration panel, the terms of reference of the arbitration panel shall be:
 - (a) to examine, in the light of the relevant provisions of the Agreement cited by the Parties, the matter referred to in the request for the establishment of the arbitration panel;
 - (b) to make findings on the conformity of the measure at issue with the provisions covered under Article 76 of the Agreement; and
 - (c) to deliver a report in accordance with Articles 81 and 82 of the Agreement.
2. If the Parties agree on other terms of reference, they shall notify the agreed terms of reference to the arbitration panel within the time period set out in paragraph 1.

*Article 6***Written submissions**

The complaining Party shall deliver its written submission no later than 20 days after the date of establishment of the arbitration panel. The Party complained against shall deliver its written submission no later than 20 days after the date of delivery of the written submission of the complaining Party.

*Article 7***Operation of the arbitration panel**

1. The Chairperson of the arbitration panel shall preside at all its meetings. The arbitration panel may delegate to the Chairperson the authority to make administrative and procedural decisions.
2. Unless otherwise provided in Part III of the Agreement or in these Rules of Procedure, the arbitration panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
3. Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may permit arbitrators' assistants to be present at its deliberations.
4. The drafting of any decision or report shall remain the exclusive responsibility of the arbitration panel and shall not be delegated.
5. Where a procedural question arises that is not covered by Part III of the Agreement and the Annexes thereto, the arbitration panel, after consulting the Parties, may adopt an appropriate procedure that is compatible with those provisions.
6. When the arbitration panel considers that there is a need to change any of the time periods for the proceedings other than the time periods set out in Part III of the Agreement or to make any other procedural or administrative adjustment, it shall inform the Parties, in writing and after consulting them, of the reasons for the change or adjustment and of the new time period or adjustment needed.

*Article 8***Replacement**

1. If an arbitrator is unable to participate in the proceedings, withdraws or needs to be replaced, a replacement shall be selected in accordance with Article 80(3) of the Agreement.
2. When a Party considers that an arbitrator does not comply with the requirements of Annex II (Code of Conduct for arbitrators and mediators) and for this reason should be replaced, that Party shall notify the other Party within 15 days of the date on which it obtained sufficient evidence of the arbitrator's alleged failure to comply with the requirements of that annex.
3. The Parties shall consult one another within 15 days of the notification to the other Party.
4. The Parties shall inform the arbitrator of his or her alleged non-compliance and may request the arbitrator to take steps to remedy the alleged non-compliance. They may also, if they so agree, remove the arbitrator and select a new arbitrator in accordance with Article 80 of the Agreement.
5. If the Parties fail to agree on the need to replace the arbitrator, other than the Chairperson of the arbitration panel, either Party may request that this matter be referred to the Chairperson of the arbitration panel, whose decision shall be final.
6. If the Chairperson of the arbitration panel finds that the arbitrator does not comply with the requirements of Annex II (Code of Conduct for arbitrators and mediators), the new arbitrator shall be selected in accordance with Article 80 of the Agreement.
7. If the Parties fail to agree on the need to replace the Chairperson, either Party may request that this matter be referred to one of the remaining members of the list of individuals established under Article 94 of the Agreement selected to act as Chairperson of the arbitration panel. His or her name shall be drawn by lot by the Chairperson of the Trade and Development Committee. The individual so selected shall make a decision as to whether the Chairperson complies with the requirements of Annex II (Code of Conduct for arbitrators and mediators). That decision shall be final.

If the decision is that the Chairperson does not comply with the requirements of Annex II (Code of Conduct for arbitrators and mediators), the new Chairperson shall be selected in accordance with Article 80 of the Agreement.

Article 9

Hearings

1. Based upon the timetable determined pursuant to point (c) of Article 4(1), after consulting with the Parties and the other arbitrators, the Chairperson of the arbitration panel shall notify the Parties of the date, time and venue of the hearing. This information shall be made publicly available by the Party in whose territory the hearing takes place, unless the hearing is closed to the public.

2. Unless the Parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is an SADC EPA State or the Southern African Customs Union (SACU), as the case may be, and in the territories of the SADC EPA States if the complaining Party is the European Union. If the dispute concerns a measure maintained by an SADC EPA State, the hearing shall take place in the territory of that State, unless that State gives written notice to the arbitration panel within 10 days of its establishment that another venue should be used.

3. The Party complained against shall bear the expenses derived from the logistical administration of the hearing, including the costs relating to renting the venue for the hearing. Such costs shall not include any costs for translation or interpretation, or any costs associated with or payable to the advisers, the arbitrators or the arbitrators' administrative staff or assistant(s).

4. The arbitration panel may convene additional hearings if the Parties so agree.

5. All arbitrators shall be present during the entirety of the hearing.

6. Unless the Parties agree otherwise, the following persons may attend the hearing, irrespective of whether the hearing is open to the public or not:

- (a) representatives of a Party;
- (b) advisers;
- (c) assistants and administrative staff;
- (d) interpreters, translators and court reporters of the arbitration panel; and
- (e) experts, as decided by the arbitration panel pursuant to Article 90 of the Agreement.

7. No later than seven days before the date of a hearing, each Party shall deliver to the arbitration panel and to the other Party a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives and advisers who will be attending the hearing.

8. Pursuant to Article 89(2) of the Agreement, the hearings of the arbitration panel shall be open to the public, unless the arbitration panel decides otherwise on its own motion or at the request of the Parties.

9. The arbitration panel shall, in consultation with the Parties, decide on appropriate logistical arrangements and procedures to ensure that hearings which are open are managed in an effective way. These procedures could include the use of live web-broadcasting or of closed-circuit television.

10. The arbitration panel shall conduct the hearing in the following manner, ensuring that the complaining Party and the Party complained against are afforded equal time in both argument and rebuttal argument:

Argument

- (a) argument of the complaining Party;
- (b) argument of the Party complained against.

Rebuttal argument

- (a) reply of the complaining Party;
- (b) counter-reply of the Party complained against.

11. The arbitration panel may direct questions to either Party at any time during the hearing.

12. The arbitration panel shall arrange for a transcript of the hearing to be prepared and delivered to the Parties within a reasonable amount of time after the hearing. The Parties may comment on the transcript, and the arbitration panel may consider those comments.

13. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within 10 days of the date of the hearing.

Article 10

Questions in writing

1. The arbitration panel may at any time during the proceedings submit questions in writing to one or both Parties. Any questions submitted to one Party shall be copied to the other Party.

2. Each Party shall provide the other Party with a copy of its responses to the questions submitted by the arbitration panel. The other Party shall have an opportunity to provide comments in writing on the Party's responses within seven days of the delivery of that copy.

Article 11

Confidentiality

1. Each Party and the arbitration panel shall treat as confidential any information submitted by the other Party to the arbitration panel that the other Party has designated as such. When a Party submits to the arbitration panel a written submission which contains confidential information, it shall also provide, within 15 days, a submission without the confidential information and which can be disclosed to the public.

2. Nothing in these Rules of Procedure shall preclude a Party from disclosing statements of its own positions to the public to the extent that, when making reference to information submitted by the other Party, it does not disclose any information designated by the other Party as confidential.

3. The arbitration panel shall meet in closed session when the submission and arguments of a Party contains business confidential information. The Parties shall maintain the confidentiality of the arbitration panel hearings when the hearings are held in closed session.

Article 12

Ex parte contacts

1. The arbitration panel shall not meet or communicate with a Party in the absence of the other Party.

2. An arbitrator shall not discuss any aspect of the subject matter of the proceedings with one or both of the Parties in the absence of the other arbitrators.

Article 13

Amicus curiae submissions

1. Unless the Parties agree otherwise within five days of the date of the establishment of the arbitration panel, the arbitration panel may receive unsolicited written submissions from a natural person of a Party or a legal person established in the territory of a Party that is independent from the governments of the Parties, provided that they:

(a) are received by the arbitration panel within 10 days of the date of the establishment of the arbitration panel;

(b) are directly relevant to a factual or a legal issue under consideration by the arbitration panel;

(c) contain a description of the person making the submission, including for a natural person his or her nationality and for a legal person its place of establishment, the nature of its activities, its legal status, its general objectives and its source of financing;

- (d) specify the nature of the interest that the person has in the arbitration panel proceedings; and
- (e) are drafted in the languages chosen by the Parties in accordance with Article 15(1) and (2) of these Rules of Procedure.

2. The submissions shall be delivered to the Parties for their comments. The Parties may submit comments, within 10 days of the delivery, to the arbitration panel.

3. The arbitration panel shall list in its report all the submissions it has received pursuant to paragraph 1 of this Article. The arbitration panel shall not be obliged to address in its report the arguments made in such submissions; however, if it does, it shall also take into account any comments made by the Parties pursuant to paragraph 2 of this Article.

Article 14

Urgent cases

In cases of urgency referred to in Part III of the Agreement, the arbitration panel, after consulting the Parties, shall adjust, as appropriate, the time periods referred to in these Rules of Procedure. The arbitration panel shall notify the Parties of those adjustments.

Article 15

Translation and interpretation

1. During the consultations referred to in Article 77 of the Agreement, and no later than the meeting referred to in Article 4(1) of these Rules of Procedure, the Parties shall endeavour to agree on a common working language for the proceedings before the arbitration panel.

2. If the Parties are unable to agree on a common working language, the rules set out in Article 91(2) of the Agreement shall apply.

3. The Party complained against shall arrange for the interpretation of oral submissions into the languages chosen by the Parties.

4. Arbitration panel reports and decisions shall be issued in the language or languages chosen by the Parties. If the Parties have not agreed on a common working language, the interim and final report of the arbitration panel shall be issued in one of the working languages of the WTO.

5. Any Party may provide comments on the accuracy of the translation of any translated version of a document drawn up in accordance with these Rules of Procedure.

6. Each Party shall bear the costs of the translation of its written submissions. Any costs incurred for translation of a ruling shall be borne equally by the Parties.

Article 16

Other procedures

The time periods laid down in these Rules of Procedure shall be adjusted in line with the special time periods provided for the adoption of a report or decision by the arbitration panel in the proceedings under Articles 84, 85, 86 and 87 of the Agreement.

ANNEX II

Code of Conduct for arbitrators and mediators*Article 1***Definitions**

In this Code of Conduct:

- (a) 'administrative staff' means, in respect of an arbitrator, individuals under the direction and control of an arbitrator, other than assistants;
- (b) 'assistant' means an individual who, under the terms of appointment and under the direction and control of an arbitrator, conducts research or provides assistance to that arbitrator;
- (c) 'candidate' means an individual whose name is on the list of arbitrators referred to in Article 94 of the Agreement and who is under consideration for selection as an arbitrator under Article 80 of the Agreement;
- (d) 'mediator' means an individual who has been selected as mediator in accordance with Article 78 of the Agreement;
- (e) 'member' or 'arbitrator' means a member of an arbitration panel established under Article 80 of the Agreement.

*Article 2***Governing principles**

1. In order to preserve the integrity and impartiality of the dispute settlement mechanism each candidate and arbitrator shall:
 - (a) get acquainted with this Code of Conduct;
 - (b) be independent and impartial;
 - (c) avoid direct or indirect conflicts of interest;
 - (d) avoid impropriety and the appearance of impropriety or bias;
 - (e) observe high standards of conduct; and
 - (f) not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or fear of criticism.
2. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties.
3. An arbitrator shall not use his or her position on the arbitration panel to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence him or her.
4. An arbitrator shall not allow past or existing financial, business, professional, personal or social relationships or responsibilities to influence his or her conduct or judgement.
5. An arbitrator shall avoid entering into any relationship or acquiring any financial interest that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.
6. An arbitrator shall exercise his or her position without accepting or seeking instructions from any government, any international governmental organisation or international non-governmental organisation or any private source, and shall not have intervened in any previous stage of the dispute assigned to them.

*Article 3***Disclosure obligations**

1. Prior to the acceptance of his or her appointment as an arbitrator under Article 80 of the Agreement, a candidate requested to serve as an arbitrator shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings.

2. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including financial interests, professional interests, or employment or family interests.
3. The disclosure obligation under paragraph 1 is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the proceedings.
4. A candidate or an arbitrator shall communicate to the Trade and Development Committee for consideration by the Parties any matters concerning actual or potential violations of this Code of Conduct as soon as he or she becomes aware of them.

Article 4

Duties of arbitrators

1. Upon acceptance of his or her appointment, an arbitrator shall be available to perform and shall perform his or her duties thoroughly and expeditiously throughout the proceedings, and with fairness and diligence.
2. An arbitrator shall consider only the issues raised in the proceedings and necessary for a decision and shall not delegate this duty to any other person.
3. An arbitrator shall take all appropriate steps to ensure that his or her assistants and administrative staff are aware of, and comply with, the obligations incurred by arbitrators under Articles 2, 3, 4 and 6 of this Code of Conduct.

Article 5

Obligations of former arbitrators

1. Each former arbitrator shall avoid actions that may create the appearance that he or she was biased in carrying out the duties or derived advantage from the decision of the arbitration panel.
2. Each former arbitrator shall comply with the obligations set out in Article 6 of this Code of Conduct.

Article 6

Confidentiality

1. An arbitrator shall not, at any time, disclose any non-public information concerning the proceedings or acquired during the proceedings for which he or she has been appointed. An arbitrator shall not, in any case, disclose or use such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
2. An arbitrator shall not disclose a decision of the arbitration panel or parts thereof prior to its publication.
3. An arbitrator shall not, at any time, disclose the deliberations of an arbitration panel, or any arbitrator's view, or make any statements on the proceedings for which he or she has been appointed or on the issues in dispute in the proceedings.

Article 7

Expenses

Each arbitrator shall keep a record and render a final account of the time devoted to the proceedings and of his or her expenses, as well as the time and expenses of his or her assistants and administrative staff.

Article 8

Mediators

This Code of Conduct shall apply to mediators, *mutatis mutandis*.
