REPORT

BY THE ENERGY COMMUNITY SECRETARIAT
ON
THE DISPUTE SETTLEMENT CASES

I. BACKGROUND AND SCOPE

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 in the Treaty itself and the decisions taken under that Treaty.

Articles 90 to 93 are fully applicable from the entry into force of the Treaty. However, this process was strongly supported by the development and adoption of the Rules of Procedure for Dispute Settlement under the Energy Community Treaty. With the adoption of the Dispute Settlement Rules, the Ministerial Council in June 2008 breathed life into the Treaty provisions by providing the structure and legal certainty needed for routine application. The main features of the Rules are a two-step preliminary procedure to be carried out by the Secretariat on its own initiative or upon complaint, and details of the decision-making procedure before the Ministerial Council, including the creation of an Advisory Committee.

Thus, further to the increasing awareness among market operators of the possibilities given to them by the Treaty provisions, the availability of clear procedural mechanism lead to initiation of concrete cases of Dispute Settlement.

This report provides information on the cases, filed with the Energy Community Secretariat, along the Treaty requirements and the established Rules on Dispute Settlement, applicable by the Energy Community.

II. DISPUTE SETTLEMENT CASES – HISTORY AND DEVELOPMENT

The adoption of the Dispute Settlement Rules made an immediate impact. The Secretariat has, as of 15 April 2009, received five complaints by private bodies. This is even more remarkable considering the limited number of market players.

Upon receiving a complaint, the Secretariat assesses the merits of a case and decides whether to initiate a formal (preliminary) procedure. So far, the Secretariat

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has done that in one case. Before initiating a procedure, however, the Secretariat will sound out possible solutions to the case in an informal way.

In the first of the five cases, **Case ECS-1/08** against Bosnia and Herzegovina, the case could be closed already in this informal way. It concerned a customs register fee levied on electricity imports amounting to 1% of the import value. In the Secretariat’s preliminary assessment, this practice constitutes a breach of Article 41 EnC on the free movement of goods. In October 2008, the Secretariat had a meeting with all authorities concerned as well as the complainant in Sarajevo, where all legal and practical aspects were discussed. As a result, Bosnia and Herzegovina accepted to change its practice and exempt all imports from Parties to the Energy Community from customs register fee upon request of the importer. With the complainant being satisfied with the outcome, the Secretariat closed the case. This case may be considered a model for good cooperation between the Party concerned and the Secretariat in dispute settlement cases.

In **Case ECS-2/08** against the former Yugoslav Republic of Macedonia, the Secretariat initiated a formal procedure in September 2008 by way of an Opening Letter. The case concerns two aspects of the Law on Energy amended in 2008, namely market foreclosure in the regulated electricity market and the discontinuation of supplying the distribution system operator with electricity necessary to cover so-called commercial losses. The Secretariat received a reply to its Opening Letter by the government and is currently preparing next steps. This includes sounding out possible solutions to the dispute with the parties involved at a meeting scheduled in early May 2009 in Skopje.

The third of the cases initiated in 2008, **Case ECS-3/08** against the Republic of Serbia, is currently in the informal stage. The case concerns certain Articles of Regulation No 1228/2003 related to inter-TSO compensation and congestion management. The Secretariat initiated talks with both the complainant and the Republic of Serbia and will make any further actions dependent on the outcome of these talks. As of 15 April 2009, talks with the Republic of Serbia have not yet taken place.

As a spin-off of pending Case ECS-2/08, the Secretariat received two more complaints against the former Yugoslav Republic of Macedonia by the same company, **Cases ECS-4/08** and **ECS-1/09** respectively. Both cases concern different aspects of denial of third party access, as well as an allegedly discrimination in price regulation by the regulatory authority. These cases are currently in the informal stage and will be made part of the discussions in Skopje in May 2009.

It may be concluded from this brief overview that the dispute settlement procedure has become a living instrument in very short time, and that there is a real demand from private operators for protection of their rights in the emerging Energy Community markets. The lessons learned from the application of the Dispute Settlement Rules in the first year of their existence also indicate that a good cooperation between the Secretariat and the Party concerned is key in finding a way to appropriate and smooth solutions. Given the overall positive experience made so far, the Secretariat in the future will consider making use of its discretion to open *ex officio* procedures in appropriate cases.

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2 Article 12 of the Dispute Settlement Rules.
III. SOME CONCLUSIONS

The Treaty establishing the Energy Community, in its Articles 90 to 93, provides for a “dispute settlement” mechanism as an important means for the enforcement of the implementation commitments undertaken by the Parties to the Treaty. Not only may this procedure contribute to removing remaining obstacles to full Treaty implementation, but it also involves market operators as potential initiators and important players in the Energy Community.

The Energy Community Secretariat, in line with the Treaty and the dispute settlement rules, shall continue supporting a consensus approach towards solving the relevant cases. However, where no consensus can be achieved, the Secretariat shall strictly implement the rules, making efficient utilization of all available options they provide.