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European Energy Journal (EEJ) is a quarterly journal which presents accessible coverage on the key legal and regulatory energy issues and developments throughout Europe to practitioners and academics in the field. It reports recent and forthcoming legislative and regulatory changes in the areas of energy policy, internal market, energy competition law, energy security, energy efficiency, renewable energy and climate change. It covers European Energy Union case law, legislation and its implementation by Member States. With contributions from leading practitioners, judges, EU energy authority officials and academics, EEJ provides authoritative legal analysis of the law and policy, all of which is presented in an accessible manner.

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Claeys & Casteels Law Publishers bv
P.O. Box 2013 7420 AA
Deventer Netherlands

Phone 0031 570 606100

Fax 0031 570 606769

info@claeys-casteels.com

www.europeanenergyjournal.eu

Publisher: Aernoud J. Oosterholt

Coordination: Sandra Rensen

Layout: SuperStudio.be

This journal should be cited as follows:

2016/ 1 EEJ (pages reference)

SUBSCRIPTION INFORMATION

Four issues a year (March, June, September, December). The subscription includes EEJ Journal and EEJ Digital Newsletter. Subscription price hard copy EUR 395 per year, excl. VAT/ including postage and handling. Electronic editions EUR 395 per year, excl. VAT. Combination hard copy & electronic EUR 474 per year, excl. VAT/ including postage and handling. Multiple use subscription fees on request. Issue only service (order@claeys-casteels.com).

Claeys & Casteels Law Publishers bv, P.O. Box 2013, 7420 AA Deventer, Netherlands. Phone 0031 (0) 570 606100, Fax 0031 (0) 570 606769, info@claeys-casteels.com or order@claeys-casteels.com

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ISSN 2211-9175

The enforcement of European energy law outside the European Union

Does the Energy Community live up to the expectations?

By Dirk Buschle

Deputy Director and Head of Legal at the Energy Community Secretariat

*In the governance of their enforcement and dispute resolution system, international organizations show their true colours. Even if the law on substance, the *acquis*, is highly elaborate and its binding character is beyond doubt, the organization will not achieve its objectives if the enforcement suffers from lack of effectiveness or neutrality. This has been the perception of the Energy Community which, in a difficult social and geopolitical environment, indeed pursues reform goals as ambitious as the EU's for more advanced countries in Europe. The gap between the enforcement system for the implementation of the same *acquis communautaire* under EU law on the one hand and under Energy Community law on the other hand is one of the problems identified by Kopač above for the coherence and homogeneity of a pan-European legal and policy space for energy. Its shortcomings as well as the current reforms are the subject of the present article.*

1. Reform of the Energy Community enforcement system

The Energy Community pursues two key objectives, the reform of national energy sectors in its Contracting Parties as well as their integration in regional and pan-European markets. The mechanism to achieve these two objectives is adherence to binding rules of EU-origin – the *acquis communautaire*. The rule of law and the integration objective are the Energy Community's unique feature among other international organizations of relevance for energy. Enforcement of the *acquis* is addressed by

the Energy Community Treaty in Articles 90 *et seq.* under the heading of “dispute settlement”.

The enforcement/dispute settlement mechanism¹ is arguably the Energy Community's greatest weakness as we will further argue in this article. This was recognized by the European Commission which already in 2011 demanded that the Energy Community's “*regulatory scope should be ... combined with more effective implementation and enforcement.*”² The Energy Council in 2011 concluded that the Energy Community should be enhanced notably by “*encouraging full and timely implementation and enforcement of the *acquis*, as well as the removal of technical barriers, aiming at the creation of an Energy Community-wide energy market*” as well as “*adapting the decision-making and organisational structures of the Energy Community to future challenges.*”³ In 2013, the Council requested that “*possible ways of improving the institutional settings and the enforcement mechanism should be considered*”.⁴ In the same vein, the European Council insisted that the “*Energy Community ... should be reinforced so as to ensure the application of the *acquis* in*

1 See for detailed accounts Rozeta Karova, *The Disputes Settlement System of the Energy Community*, and Josefina Kuhlmann, *Energy Community Law Enforcement*, both in Buschle/Talus, *The Energy Community*, Cambridge 2015, pp. 25-68 and pp. 69-87 respectively.

2 Commission Communication: *The EU Energy Policy: Engaging with Partners beyond Our Borders*, 7.9.2011, COM(2011) 539 final.

3 Council of the European Union, *Conclusions of 25 November 2011*, 17615/11.

4 Council of the European Union, *Conclusions of 4 December 2013*, 16797/13.

those countries”.⁵ The European Parliament, in its turn, recommended “*adapting [the Energy Community’s] decision-making to future challenges, including by setting up legal control mechanisms to deal with deficient acquis implementation*”.⁶

From the perspective of an Energy Community institution, the Secretariat of the Energy Community, in its annual Implementation Reports, repeatedly warns of an implementation gap in the Contracting Parties, as well as the failure of national institutions to live up to the expectations as regards domestic enforcement. The Ministerial Council, the Permanent High Level Group and the Fora shared the Secretariat’s concerns on many occasions. In 2014, the Secretariat concluded that “*where national institutions fail, not only implementation, but also investor confidence suffers. The weaker the first line of defence is, the stronger the second one needs to be. The Secretariat in its enforcement practice takes complaints by investors always very serious, even when the compliance questions raised are very complex and have not yet been dealt with by EU institutions. ... But the shortcomings of the existing system become increasingly visible.*”⁷ Already in 2013, the Secretariat had published a report dedicated to the reform of the Energy Community Treaty,⁸ in which it called for the enforcement mechanism to be improved and upgraded and the sanctions available under the Treaty to be revisited. The Secretariat’s report contains an analysis of the shortcomings of the present model as well as concrete reform proposals.

In the public consultation on “An Energy Community for the Future” which aimed to collect views on the most strategic questions related to improving the functioning of the Energy Community, the need for more efficient enforcement mechanisms was emphasized by almost all stakeholders.⁹ It was common ground in essentially all submissions, in particular by

NGOs that “*the existing enforcement mechanism does not fulfil its role and should be strengthened*”.¹⁰

The question of reforming the enforcement mechanism has thus been on the table already before the High Level Reflection Group, mandated by the Ministerial Council and chaired by ITRE Chairman and former President of the European Parliament *Jerzy Buzek*, took up its work. In its final Report of June 2014, the High Level Reflection Group identified the absence of functioning enforcement mechanism as one of the main explanations for the failure of the Energy Community to fulfil several of its key expectations such as incomplete market reforms and creating a favourable and predictable investment climate:¹¹ “*Weak enforcement mechanism constitute one of the major obstacles to implementation of the acquis communautaire in the Contracting Parties.*”¹² “*It is fundamental for investors within the Energy Community to have a system enabling vigorous and independent enforcement in countries which may not provide for credible recourse paths for private and non-incumbent investors to pursue in case of breach of contract.*”¹³ To address the current deficiencies, the High Level Reflection Group considers “*a refurbishment of the institutional architecture is necessary, in particular to enable the enforcement of the far-reaching commitments the Parties accepted under the Treaty.*”¹⁴ It also concluded that the current political approach to sanctions “*does not satisfy the standards of an Energy Community based on the rule of law*”.¹⁵

Hence, already before 2015 there was broad explicit and implicit agreement among all stakeholders that the current enforcement/dispute settlement and sanctions mechanisms need a fundamental overhaul for the Energy Community to better deliver on its promises of energy sector reform and market integration.

5 European Council Conclusions of 27 June 2014, EUCO 79/14.

6 European Parliament Resolution of 23 October 2013 on the European Neighborhood Policy: towards a strengthening of the partnership (2013/2621(RSP).

7 State of Implementation in 2013/2014, in: Annual Implementation Report of the Energy Community Secretariat, 1 August 2014, p. 12.

8 www.energy-community.org

9 Energy Community Press Release, http://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=8781.

10 The publication of 20 civil society organizations entitled “Recommendations regarding the Reform of the Energy Community Treaty”, of June 2014, p. 21.

11 An Energy Community for the Future, p. 10.

12 An Energy Community for the Future, p. 19.

13 An Energy Community for the Future, p. 8.

14 An Energy Community for the Future, p. 19.

15 An Energy Community for the Future, p. 20.

In 2015, the Ministerial Council indeed took first steps to reform the current enforcement model. While they brought several concrete improvements, the very nature of the enforcement system still remains as it was originally conceived by the framers of the Energy Community Treaty.

2. Enforcement and dispute settlement under the Treaty – a critical evaluation

a. The procedure under Article 90 of the Energy Community Treaty

The procedure envisaged by Article 90 of the Energy Community Treaty tasks the Ministerial Council to look into “*reasoned requests*” brought to its attention by Parties or certain institutions of the Treaty¹⁶ and alleging the “*failure by a Party to comply with a Treaty obligation or to implement a Decision addressed to it*”. In contrast to what the heading of Title VII (“*Dispute Settlement*”) suggests, the Treaty thus provides for an infringement procedure of sorts to enforce compliance with Energy Community law, and not for a procedure for the settlement of disputes (in the way e.g. arbitration settles disputes between private parties or a private party and a state).

There is one major difference when comparing Articles 90 *et seq.* of the Energy Community Treaty to the model applied in the European Union (Article 258 *et seq.* TFEU¹⁷) or in the EFTA-pillar of the European Economic Area (Article 31 of the ESA/Court Agreement):¹⁸ the infringement procedure in the Energy Community does not lead up to decision by a court of law. Instead, the deciding authority in disputes about the compliance of a Party to the Treaty with Energy Community law¹⁹ is the Ministerial Council. The Ministerial Council is the supreme institution and the ultimate decision-maker in all areas covered by and procedures established under the Energy Community: it provides general policy guidelines,²⁰ amends

the Treaty,²¹ takes Decisions incorporating and adapting new *acquis communautaire*,²² adopts organizational and financial rules by way of Procedural Acts,²³ reports on the Energy Community’s activities,²⁴ acts in cases of crises and emergencies,²⁵ interprets the Treaty, and rules on dispute settlement and sanctions.²⁶ The Ministerial Council essentially covers all executive, legislative and judicial functions under the current governance framework of the Energy Community.

There was broad agreement among all stakeholders that the current enforcement/dispute settlement and sanctions mechanisms need a fundamental overhaul”

Despite the Energy Community following an enforcement model based on the review of non-compliances of its Parties with European law by a supreme decision-maker, Article 258 TFEU was not the model for Articles 90 *et seq.* of the Energy Community Treaty. The summary of the negotiations for the Energy Community Treaty by the Chairman of the Intergovernmental Conference and present Member of the Energy Community’s Advisory Committee, *Helmut Schmitt von Sydow*, is very telling in this respect:

“*The Energy Community procedures applicable to infringements of the Treaty are still imperfect.*”

Originally, a procedure modeled on Article 226 of the EC Treaty [now Article 258 TFEU] was envisaged ... However, practical problems emerged soon: The European Commission could hardly assume the role of guardian of the Treaty

16 Namely the Secretariat or the Regulator

17 Treaty on the Functioning of the European Union.

18 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 1994.

19 As defined by Article 1 of Procedural Act No 2008/01/MC-EnC of the Ministerial Council of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty and amended by Procedural Act 2015/04/MC-EnC of 16 October 2015 (“the Dispute Settlement Procedures”) as “*Treaty obligations or ... Decisions*”.

20 Article 47(a) of the Treaty.

21 Article 100 of the Treaty.

22 Articles 24, 25, 28, 32, 34, 35, 42, 43, 100 and 47(b) of the Treaty.

23 Articles 73, 74, 75 and 47(c) of the Treaty.

24 Article 52 of the Treaty.

25 Articles 39 and 45 of the Treaty

26 Articles 90 *et seq.* of the Treaty.

if the procedure was to address also potential infringements by the European Community [now: European Union] ... On the other hand, the Secretariat seemed to be not experienced and robust enough for the role of guardian. The problem of a conflict of interest militated against the involvement of the Court of Justice of the European Communities [now: European Union], and the Parties did not want to create a court among themselves nor involve an external court under public international law.

For this reason, the Treaty currently only provides for a political procedure which was inspired by Article 7 of the EU Treaty. Instead of a court of law, the Ministerial Council may determine that a Part violated its contractual obligations. In cases of serious and persistent breaches, the Ministerial Council may suspend certain rights of the Party concerned, in particular the suspension of voting rights and the right to participate at meetings.”²⁷

The model for the enforcement procedure of the Energy Community Treaty is thus Article 7 of the EU Treaty. As under Articles 90 et seq. of Treaty, a case initiated under Article 7 TEU may result in the existence of a (serious and persistent) breach of the Treaty as well as political sanctions (i.e. suspension of certain of the rights deriving from the application of the Treaty/ies). This provision was introduced into the TEU by the Treaty of Amsterdam as an instrument of ensuring that EU Member States respect certain common values. Its models at the time²⁸ were Article 6 of the UN Charter²⁹ and Article 8 of the Statute of the Council of Europe.³⁰ All these provisions have in common that they constitute an *ultima ratio* to act against

members of the respective organization which disrespect the organization’s founding objectives (such as democracy or human rights). Within the European Union, this procedure has never been applied to date.³¹ The European Commission considers that “*the procedure laid down by Article 7 of the Union Treaty ... is not designed to remedy individual breaches*”.³² Article 7 TEU is commonly perceived as a “*nuclear option*”,³³ which is hardly compatible with the routine enforcement of implementation commitments, including anything from essentially political conflicts to the most mundane case of non-transposition.

The fact that in the Energy Community the Dispute Settlement Procedures adopted in 2008 (and amended in 2015³⁴) subsequently streamlined and to some extent formalized the procedure leading up to a “simple” breach under Article 91 of the Treaty cannot conceal the diplomatic legacy of its enforcement rules. The Procedures main focus is on introducing a two-step preliminary administrative procedure which indeed follows the one applied by the Commission in cases under Article 258 TFEU, and to a lesser extent on the decision-making procedure before the Ministerial Council. The preliminary procedure’s main goal is to convince the Party concerned to rectify a case of non-compliance of its own accord.³⁵ In the Secretariat’s practice, aiming at an “amicable settlement” is even more relevant than in the practice of the European Commission. Such pragmatism has to make up for the lack of a robust enforcement procedure.

The current dispute settlement/enforcement procedure in the Energy Community essentially suffers from four main flaws, namely

- a. that the decision-making under the currently applicable procedure is politically biased and not exercised by jurists;

27 Translated from: *Helmut Schmitt von Sydow*, Die paneuropäische Energiegemeinschaft mit Südosteuropa, in: Epiney et al., Die Herausforderung von Grenzen – Le défi des frontières – Challenging Boundaries: Festschrift/ Mélanges en l’honneur de/ Essays in honor of Roland Bieber, Nomos 2007, p. 13.

28 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 6.

29 “A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.”

30 “Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”

31 In early 2016, the Commission initiated a so-called “pre-Article 7 procedure” based on a procedure created in 2014, http://europa.eu/rapid/press-release_IP-14-237_en.htm.

32 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15.10.2003, p. 7, ANNEX VIII.

33 <http://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law>.

34 See below.

35 Article 12 of the Dispute Settlement Procedures.

- b. that its sanction regime is not adequate to deter Parties from violating the Treaty;
- c. that it falls back behind the standards of similar integration agreements as well as the of the Council of Europe's;
- d. that it does not sufficiently contribute to giving investors the protection and reliability they depend on to feel safe to invest.

These four shortcomings were essentially addressed by the High Level Reflection Group's report. In the following, we will analyze them separately.

b. The diplomatic nature of dispute resolution in the Energy Community

In terms of enforcement or, in the Treaty's words: dispute settlement, the Ministerial Council's role is peculiar due to its composition, namely members of national governments. Dispute settlement under and enforcement of Energy Community law is thus essentially not judicial but diplomatic in nature. Diplomatic dispute resolution, in its pure form, is essentially characterized by (1) the absence of an obligation to come to a decision, (2) a congruence between decision-makers and the subject of the dispute, (3) the lack of judicial expertise, (4) the reliance on negotiation techniques instead of adjudication, (5) its ad-hoc character and the lack of procedural rules, (6) the lack of transparency and the impossibility for private actors or civil society to have direct access to dispute-resolution mechanisms.

Following these criteria, the enforcement/dispute settlement procedure currently applied in the Energy Community is indeed essentially diplomatic in nature, despite the improvements made by the adoption of Dispute Settlement Procedures in 2008.

(1) Obligation to decide

As regards making reaching a decision mandatory, the Treaty gives the institutions involved wide discretion. The Secretariat (or any other potential initiator of cases under Article 90) is free to decide whether or not to open a case in a particular situation, even if acting

upon complaint.³⁶ This discretion constitutes the first filter a potential conflict must pass to lead to a binding decision. The infringement procedures in place under EU and EEA law share this feature.³⁷ However, its practical relevance is much higher in the Energy Community, where the infringement procedure constitutes the only possible legal redress available. What is more, Article 91 of the Treaty seems to also give the Ministerial Council wide discretion as to whether or not to take a decision on the matter brought to its attention ("*The Ministerial Council may determine the existence of a breach by a Party of its obligations.*"³⁸). This corresponds to the Ministerial Council's discretion in revoking its decisions (Articles 91(2) and 92(2)) and to determine the existence of a serious and persistent breach (Article 92). It also echoes the wording of Article 7 TEU, the model for Articles 90 *et seq.* of the Energy Community Treaty. With regard to Article 7 TEU, the Commission already confirmed that "*Article 7 gives discretionary power to the Council*" and "*the Council's hands are not tied*" when it comes to taking a decision.³⁹ The second sentence of Article 91(1) ("*The Ministerial Council shall decide ...*"⁴⁰) does not address the question of whether the Ministerial Council is obliged to conclude any dispute settlement by way of a final decision. That provision rather determines the voting rules *if* the Ministerial Council is willing to take a decision under Article 91. While the Dispute Settlement Procedures introduced in 2008 limit the Ministerial Council's discretion to some extent,⁴¹ changing these rules is again at the discretion of the Ministerial Council. Finally, it is to be noted that the Treaty also gives the

36 See, in particular, Article 12 ("*may*"), Article 13 ("*if the Secretariat considers*") and Article 19 of the Dispute Settlement Procedures.

37 See, e.g. Case C-200/88 *Commission v Greece* [1990] ECR I-4299, paragraph 9.

38 Emphasis added.

39 Communication on Article 7 of the Treaty on European Union, p. 5.

40 Emphasis added.

41 "*The Permanent High Level Group shall include the reasoned request on the agenda of the next meeting of the Ministerial Council*", Articles 33(2) of the Dispute Settlement Procedures in their current version. Secondly, the Dispute Settlement Rules describing the course of action at the Ministerial Council meeting in present tense ("*The Ministerial Council decides on the proposal made...*", Article 29(1) of the Dispute Settlement Procedures [now Article 30(1)], "... the Ministerial Council takes its decision", "*The decision by the Ministerial Council shall be taken in accordance with the rules laid down in Article 91(1) of the Treaty*", Article 34(1) and (2) of the Dispute Settlement Procedures. Finally, Article 29(2) of the Dispute Settlement Rules [now Article 30(2)] limits the discretion of the Ministerial Council only as to the scope of its decision. *If* a decision is taken, the Ministerial Council must thus either follow the reasoned request or dismiss it partially or entirely (the *ne ultra petita* principle).

Ministerial Council wide discretion in revoking its final decision established under Articles 91 or 92.⁴² This is another feature copied from Article 7 TEU. Unlike the decision establishing an infringement, the decision to revoke always only requires the lowest of levels in the decision-making, namely simple majority. The existence of a discretionary revocation option in the Treaty itself means that even if a final decision establishing an infringement is reached, its validity and thus legal certainty remains fragile. By contrast, a revision of a judgment delivered by a court of law is possible only under narrowly defined exceptional circumstances.⁴³

The “nuclear option” is hardly compatible with the routine enforcement of implementation commitments, down to the most mundane case of non-transposition

(2) *Neutrality*

The lack of neutrality is arguably the most obvious flaw of the current dispute settlement procedure. That defect has been deplored by many observers, including the High Level Reflection Group.⁴⁴ To task an institution composed of members which represent potential Parties to infringement cases is blurring the line

42 Before the amendments of the Dispute Settlement Procedures in 2015, then Article 43(2) of the Dispute Settlement Procedures limited this discretion only marginally by requiring the Ministerial Council to give reasons for the revocation. A new paragraph 2 introduced in 2015 “reports on the factual circumstances” by the Secretariat and the Party concerned, “as well as a legal opinion by the Advisory Committee based on the two reports.” In an attempt to protect legal certainty and legitimate expectations, the Dispute Settlement Procedures aim to sustain any follow-up measures taken at the domestic level in the meantime, Article 42(3) of the Dispute Settlement Procedures, thus limiting the effect of revocation to *ex nunc*.

43 See, for instance, Article 44 of the Statute of the Court of Justice of the European Union.

44 An Energy Community for the Future, p. 22.

between being mandated to decide on a case and having an own interest in the outcome of the case. In legal terms, this is called bias.

The fact that Article 91 of the Treaty excludes the Party concerned from voting does not suffice to restore neutrality in decision-making. It would be naïve to assume that only because one minister is prevented from voting in a case against his/her country would make his/her peers look at the case objectively. A genuinely political body is inclined to dismiss actions based on its members’ fear to be exposed to similar actions, or on a general notion of solidarity between ministers.⁴⁵ This at least indirect interest in the outcome of any case may prevent members of the Ministerial Council from acting neutrally, even in otherwise non-controversial cases.

Admittedly, in the five cases so far referred by the Secretariat to the Ministerial Council, the latter did come to a decision under Article 91 of the Treaty against the Parties concerned. Does this practice indicate that the lack of neutrality does not prevent effective decision-making? The answer to this question is more complicated. One must keep in mind that the Dispute Settlement Procedures established an Advisory Committee of lawyers, the importance of which can hardly be overestimated. By proposing the ministers the legally “correct” decision – a proposal which is made public – it becomes practically very difficult for the decision-makers to deviate. Furthermore, the relative effectiveness of a biased decision-making procedure may also indicate that the Parties do not worry too much about being “condemned” if such a verdict will have no consequences, least of all sanctions. We will come back to this.

(3) *Legal expertise*

Along with the lack of neutrality, ministers are evidently also not trained lawyers specialized on European (energy) law, as would be required to resolve the legal questions at stake in disputes before the Ministerial Council. At least two of the cases which so far have been submitted to the Ministerial Council⁴⁶ raised legal issues of a

45 Dirk Buschle, *The Enforcement of Energy Law in Wider Europe*, in: Buschle/Hirsbrunner/Kaddous, *European Energy Law*, 2012, pp. 301 *et seq.*

46 Namely Case ECS-8/11 against Bosnia and Herzegovina and Case ECS-9/13 against Serbia.

high complexity, none of which has been subject to a procedure before the Court of Justice of the European Union before (as Article 94 of the Energy Community Treaty seems to presuppose). In the course of the preliminary procedure, complex case files have been created, including references to cases of the EU institution and doctrine. Ministers are evidently not prepared to grapple with the legal arguments made in this context. Moreover, practice shows that anything comparable to deliberations on the legal questions at stake so far have not taken place neither at the Ministerial Council meeting nor at the preparatory meeting of the Permanent High Level Group.

In an attempt to reinforce the legal element in the decision-making procedure, the Dispute Settlement Procedures establish an Advisory Committee, a body consisting of three lawyers which is to be heard in every case.⁴⁷ In terms of quality and independence of its members, this body is on par with any European supreme court.⁴⁸ The opinions given by the Advisory Committee indeed were relevant for the decision-making by the Ministerial Council. However, the Ministerial Council is taking the decision, and “*the Ministerial Council shall not be bound by the opinion of the Advisory Committee.*”⁴⁹ The Advisory Committee has been compared to the Advocate General at the Court of Justice of the European Union⁵⁰, a comparison which suggests a more advanced degree of judicialization. However, at the Court of Justice, an Advocate General’s opinion is subsequently analyzed as part of the case by trained and independent judges, which embeds it in the process of finding the correct *legal* solution of a case. That is not the case in the Energy Community.

That said, the creation and activation of the Advisory Committee has changed the character of the decision-making in enforcing of the Energy Community to the better. For the future, it may be conceivable that the Advisory Committee becomes the nucleus for a more judicialized dispute settlement and enforcement of the *acquis communautaire*.

47 Article 32 of the Dispute Settlement Procedures.

48 Article 32(3) of the Dispute Settlement Procedures.

49 Article 32(1) of the Dispute Settlement Procedures.

50 Petrov, *Legal Issues of Economic Integration*, 39 (2012), 331, 343.

(4) *Negotiation vs adjudication*

In the absence of juridical expertise, the main yardstick for the Ministerial Council in decision-making is political. Political decision-making, however, is not appropriate for a community based on the rule of law, and does not yield the desired results. Evidence for this exists on several levels.

Firstly, in the preliminary procedure the Secretariat as the default initiator of cases will do everything to find an amicable solution without taking a case to the Ministerial Council, precisely because of the latter’s political bias. However, the approach of settling cases through negotiations reaches its limits where the motivation of governments to engage in negotiations remains low due to the lack of effective sanctions. The Secretariat is currently working on approaches to professionalize the negotiations in open dispute settlement cases.

Secondly, we already describe the political bias and the lack of expertise characterizing the decision-making level in dispute/settlement cases. Consequently, enforcement decisions adopted by the Ministerial Council lack a legal reasoning and only contain an operative part. While they usually make reference to Reasoned Request,⁵¹ this does not amount to a full endorsement of the Secretariat’s comprehensive legal elaborations.⁵² In the absence of proper reasoning, the decisions of the Ministerial Council lack an in-depth consideration of the legal arguments at stake, as well as the balanced and nuanced approach which especially complex and “fresh” legal cases require. They also cannot be relied upon as precedence for future decisions.

Thirdly, procedural rules applicable to the decision-making before the Ministerial Council in “dispute settlement” cases are minimal. The Treaty essentially limits itself to determining the voting procedures. Article 91(1) of the Treaty stipulates that

51 See, e.g., Article 1 of Decision 2014/03/MC-EnC on the failure by the Republic of Serbia to comply with certain obligations under the Treaty of 23 September 2014. In the recitals of an Article 91-Decision, the Ministerial Council also only “has regard” to the opinion of the Advisory Committee.

52 In the recitals of an Article 91-Decision, the Ministerial Council only “take into account” the opinion.

... The Ministerial Council shall decide:

(a) by a simple majority, if the breach relates to Title II;

(b) by a two-third majority, if the breach relates to Title III;

(c) by unanimity, if the breach relates to Title IV.

The majority required for taking a decision in a dispute settlement procedure thus depend on the Title of the Treaty under which the rule in question was adopted. This unduly blends legislative decision-making into an enforcement context. It evidently differs from the rules applicable to a court of law or an arbitration tribunal, where majority voting (eventually complemented by dissenting opinions) is standard.

The Treaty seems to give the Ministerial Council wide discretion as to whether or not take a decision on an infringement

This voting system is also unpractical. The factual circumstances as well as its legal assessment do not correspond to the distinction made in Article 91 between different Titles of the Treaty. Many cases are based on violations of provisions from several Titles, either concurrently or alternatively. In particular, many of the specific obligations set out in the European energy *acquis* (Title II) are complemented by general and horizontal clauses in other Titles of the Treaty, such as the free movement of energy in Article 41 (Title IV) and the obligation to sincere cooperation in Article and non-discrimination in Article 7 (Title I). A case concerning import restrictions for energy between two neighbouring Contracting Parties, for instance, may be caught by both Titles II (the Directives' provisions on market opening) and IV (the free movement of goods). In practical terms, this may require the initiator of the case to split requests based on rules pertaining to different Titles of the Treaty.

Splitting cases up artificially along the lines of Article 91 leads to situations where one and the same case may have to be heard of following different voting mechanisms and does not support the desirable comprehensive appraisal of dispute settlement cases.

Further to Article 91 of the Treaty, the Dispute Settlement Rules⁵³ contain some rudimentary procedural rules⁵⁴ which obviously follow an “*as if* (the Ministerial Council was a court of law)” approach. This includes rules related to the content of the reasoned request,⁵⁵ the right of the Party concerned to a reply,⁵⁶ the burden of proof,⁵⁷ the scope of the decision,⁵⁸ decisions by default,⁵⁹ as well as the revocation of decisions.⁶⁰ In practice, the right of the Party concerned to a reply as well as the right of the Ministerial Council to request additional information, for instance, have never been exercised so far. Under these conditions, the Dispute Settlement Rules cannot conceal the fact that the decision-making essentially remains political and *ad hoc* in nature.

(5) Institutional and procedural consolidation

Despite the fact that the Ministerial Council is an institution established under the Treaty, the dispute resolution mechanism applied by it essentially functions *ad hoc*. The Ministerial Council is not a permanent institution, but meets only once per year.⁶¹ This resembles a feudal jurisdiction in medieval times rather than a modern-day dispute resolution body.⁶²

In 2015, the Secretariat had proposed that instead of the Ministerial Council, the Permanent High Level Group – meeting four times a year – should hear and decide on infringement cases in a first instance. This would have increased the regularity of dispute settlement. However, the

53 Article 30(1) of the Dispute Settlement Procedures clarifies that these Rules are binding on the Ministerial Council.

54 The Dispute Settlement Procedures mostly focus on the preliminary procedure carried out (in practice exclusively) by the Secretariat.

55 Article 29 of the Dispute Settlement Procedures

56 Article 31 of the Dispute Settlement Procedures.

57 Article 4 of the Dispute Settlement Procedures

58 A specification of the *ne ultra petita* principle, Article 30(2) of the Dispute Settlement Procedures.

59 Article 35 of the Dispute Settlement Procedures

60 Article 43 of the Dispute Settlement Procedures.

61 Article 50 of the Treaty. Decisions taken by written procedure are theoretically possible, but occur very rarely in practice.

62 Dirk Buschle, *The Enforcement of Energy Law in Wider Europe*, in: Buschle/Hirsbrunner/Kaddous, *European Energy Law*, 2012, pp. 301 et seq.

proposal met resistance in the legal services of Commission and Council without Treaty changes. As a compromise, the amendments eventually made to the Dispute Settlement Procedures by the Ministerial Council envisage that the Permanent High Level at any of its meetings is addressed with dispute settlement cases once the Advisory Committee has delivered its opinion.⁶³ Decisions, however, are still made by the Ministerial Council once per year.

(6) *Transparency and rights of access*

As regards the possibility for private actors or civil society to participate in enforcement/dispute settlement proceedings, Article 90(1) of the Treaty grants private bodies the right to approach the Secretariat with complaints. The Dispute Settlement Procedures define private bodies as “*all natural and legal persons as well as companies, firms and associations having no legal personality*”.⁶⁴ The Secretariat interprets and applies this term rather generously. As a legacy of the law governing infringement procedures inside the EU,⁶⁵ the right to complain did not correspond to a right to access the Ministerial Council directly or indirectly (through the Secretariat). In this respect, the 2015 amendments to the Dispute Settlement Procedures brought real improvements. While it remains the prerogative of the Secretariat to open or not a case and proceed with it, it must do so within six months.⁶⁶ If the Secretariat takes the view that the subject matter of the complaint does not give rise to a breach of Energy Community law, the complainant may bring the case to the Permanent High Level Group which may request the Secretariat to initiate a preliminary procedure.⁶⁷ While this is unprecedented in EU law, the procedure has not been applied yet.

In terms of transparency, the Treaty envisages making the proceedings of the authorities involved under Article 90, most notably the Secretariat and the Ministerial Council, accessible to the public. According to the Rules of Procedure of the Ministerial Council, the latter’s

meetings are not public. The Dispute Settlement Procedures, however, introduce several important improvements. Firstly, Article 7 grants a right to access to the case file also to third parties, however under the condition that they can demonstrate a “legitimate interest”. Whether or not a legitimate interest exists is to be decided by the Secretariat. Since 2015, third parties may also submit written observations to the Secretariat at any stage of the preliminary procedure.⁶⁸ Secondly, there are several publication requirements, namely a note related to the decision to initiate a preliminary procedure,⁶⁹ the reasoned request,⁷⁰ as well as any decision taken by the Ministerial Council, including the Advisory Committee’s opinion.⁷¹ This goes beyond the infringement actions in the EU as well as what is practiced in arbitration in most cases.

(7) *Conclusion*

We may conclude that while secondary legislation tries its utmost to “juridify” the enforcement procedure under Articles 90 *et seq.* of the Treaty – and has increased this effort with the 2015 amendments – decision-making still remains in essence a diplomatic one which cannot deny its origins in Article 7 TEU. This model falls behind enforceability of EU law in both the European Union and the EEA.

A political body is inclined to dismiss actions based on its members’ fear to be exposed to similar actions, or on a general notion of solidarity between ministers

⁶³ Article 33(2) of the Dispute Settlement Procedures.

⁶⁴ Article 20(2) of the Dispute Settlement Procedures.

⁶⁵ Both Articles 7 TEU and 258 TFEU, see above.

⁶⁶ Under old Article 25(1) of the Dispute Settlement Procedures, the obligation was only “*to endeavour to decide*”.

⁶⁷ Article 26 of the Dispute Settlement Procedures.

⁶⁸ Article 17 of the Dispute Settlement Procedures.

⁶⁹ Article 12(3) of the Dispute Settlement Procedures.

⁷⁰ Article 29(5) of the Dispute Settlement Procedures. By contrast, a request to determine the existence of a serious and persistent breach and sanctions may not be made public, see Article 40(4) of the Dispute Settlement Procedures.

⁷¹ Articles 36 and 41(4) of the Dispute Settlement Procedures.

c. *The Energy Community sanction regime*

(1) *Evaluation of the system applied in the Energy Community*

Compliance with legal obligations depends on the expectation of if and how these obligations will be enforced and whether and how non-compliance will be sanctioned. The ultimate test for any enforcement regime is the question of whether breaches (as identified by the Ministerial Council in the Energy Community) entail consequences. Without such consequences, a decision determining the existence of a breach is of symbolic relevance only. Leaving established breaches of Energy Community law unsanctioned amounts to giving up on the very idea of enforcement itself, and thus on the credibility of implementation. Implementation of European law in the Energy Community and the respect of commitments taken by its Parties, however, constitute the very essence of the Treaty. A community based on the rule of law cannot accept that one of its members disrespects its obligations. It risks moral hazard by other Parties and will undermine its very foundations.

The Energy Community Treaty actually does envisage consequences for breaches of its law.

Firstly, a Party “shall take all appropriate measures to rectify the breach and ensure compliance with Energy Community law”⁷² in the aftermath of a decision under Article 91. If it fails to do so, the Secretariat may bring the case again before the Ministerial Council.⁷³ The added value of this possibility is still to be tested; without any sanctions envisaged for such “simple infringements” such subsequent references may well result in an endless and ineffective chain of decisions by the Ministerial Council.

Secondly, Article 92 of the Treaty foresees sanctions for serious and persistent breaches. The provision very closely follows its model in Article 7 TEU. It reads:

“At the request of a Party, the Secretariat or the Regulatory Board, the Ministerial Council, acting by unanimity, may determine the existence of a serious and persistent breach by a Party of its

obligations under this Treaty and may suspend certain of the rights deriving from application of this Treaty to the Party concerned, including the suspension of voting rights and exclusion from meetings or mechanisms provided for in this Treaty.”

Hence, in cases of a serious and persistent breach, certain rights under the Treaty of the Party concerned may be suspended. In evaluating present Article 92(1) of the Treaty, the High Level Reflection Group acknowledges that “sanctions are essential for enforcement” and constitute “... the key for better implementation of the Treaty ...”. The High Level Reflection Group comes to the conclusion that “the current political approach of ‘suspending certain rights’ in reaction to a serious and persistent breach’ does not satisfy the standards of an Energy Community based on the rule of law”. The Group considers that “the sanctions foreseen by the Treaty lack any weight and do not provide an incentive for Contracting Parties to fulfil their obligations”.

This finding is confirmed by an analysis of the applicable rules as well as by practical experience.

What was said before about the essentially diplomatic nature of decisions taken by the Ministerial Council under Article 91 of the Treaty applies *a fortiori* also to Article 92. The provision envisages only a very limited range of sanctions, which are political in nature. They are limited to the suspension of Party’s rights deriving from the application of the Treaty. The Treaty lists three of these rights by way of examples, namely voting rights, the right to attend meetings and unspecified “mechanisms” provided for in the Treaty. The suspension of voting rights and the right to attend meetings, however, is counterproductive, as it may amount to excluding a Party from the ongoing integration process taking place in various institutions, fora and meetings organized by the Energy Community instead of providing an effective deterrence. Possible “sanctions” outside the scope of Article 92 such as state liability under the *Francovich* doctrine, or stalling/delaying the EU-accession process are either not applied or do not have the required immediate deterring effect.

Procedurally, the Ministerial Council has unlimited discretion on what to consider a

⁷² Article 38(1) of the Dispute Settlement Procedures.

⁷³ Article 38(2) of the Dispute Settlement Procedures.

serious and persistent breach, and according to which standards if any.⁷⁴ A preliminary procedure does not take place.⁷⁵ The involvement of the Advisory Committee is only optional⁷⁶ and depends on a discretionary decision by the Ministerial Council. The latter decides on a request under Article 92, which is not published, by unanimity. Confirming the Commission's findings in its Communication on Article 7 TEU, this places sanctions under Article 92 entirely in the realm of diplomacy and makes it inapt to react to breaches of concrete legal commitments.

It becomes practically very difficult for the ministers to deviate from the proposal made by the Advisory Committee of lawyers

Enforcement practice also confirms the non-workability of the existing sanctions regime. The first request for sanctions ever brought by the Secretariat to the attention of the Ministerial Council concerned Bosnia and Herzegovina, which has not adopted compliant gas legislation and was thus found to be in breach of the Treaty in 2013 by the Ministerial Council. Ahead of its meeting in 2014, the Ministerial Council for clearly political reasons did not support the idea of sanctions and only adopted a decision declaring the existence of a serious and persistent breach.⁷⁷ In view of the unanimity requirement for adoption, the Secretariat had to withdraw its request. It took another year and a frustrating lack of progress in Bosnia and Herzegovina until the Ministerial Council eventually adopted measures under Article 92 of the Treaty.⁷⁸

74 Commission, Communication on Article 7 of the Treaty on European Union, pages 3, 7.

75 Article 40(1) of the Dispute Settlement Procedures.

76 Article 41(2) of the Dispute Settlement Procedures.

77 Decision 2014/04/MC-EnC on the determination of a serious and persistent breach of the Treaty by Bosnia and Herzegovina of 23 September 2014.

78 See Alberto Quintavalla, Case law section on Decision D/2015/10/MC-EnC in this issue.

Accordingly, for one year the country was barred from participating in the decision-making on budgetary matters, its representatives' costs for attending Energy Community meetings will not be covered and the European Union "will analyse appropriate measures with regard to the suspension of financial support to projects in the gas sector".⁷⁹ While these measures seem very cautious and to some extent lack effect – no decision of budgetary nature will be tabled during 2016, for instance – the psychological impact of these first-ever sanctions imposed on a Party under a European integration agreement should not be underestimated.

Nevertheless, it is to be concluded that the Treaty currently lacks effective and deterring sanctions for breaches of the *acquis*. There are no consequences of "normal breaches". The qualification of a breach as "serious and persistent" and even more the determination and adoption of measures under Article 92 of the Treaty takes time and disproportionate political effort. Any future review of Article 92 should introduce rules ensuring that non-rectified breaches ensue penalties tantamount to the gravity of the breach and procedures which are de-politicized to the widest extent possible. The obvious benchmark for such a system is the one applicable in the European Union.

(2) *Comparison: The sanction regime in infringement actions in the European Union*

The Maastricht Treaty introduced the possibility to financially sanction the EU Member State failing to implement a judgment by the European Court of Justice. The Lisbon Treaty amended the respective provisions in the EU. After the Court has found that a Member State infringed EU law and that Member State has not complied with the respective judgment, the European Commission under Article 260(2) TFEU may refer the matter to the Court for a judgment on financial sanctions after having heard the Member State concerned. In simple cases of non-transposition, the request for sanctions may already be included in the action leading to the (first) judgment determining the infringement. The purpose of the sanction is to place the

79 Decision 2015/10/MC-EnC on imposing measures on Bosnia and Herzegovina pursuant to Article 92(1) of the Treaty of 16 October 2015.

Member State concerned under economic pressure which induces it to put an end to the breach established.⁸⁰ It can consist in a lump sum and/or penalty payment.⁸¹ While the lump sum option aims at creating an immediate dissuasive sanction, the rationale of the penalty payment is to penalize the delay in fulfilling the Court's decision by a daily payment imposed up to the end of the non-compliant conduct of the Member State concerned.

(3) Conclusion

In sum, the post-Lisbon sanction regime in the EU is the result of years of experiences and similar frustration as in the Energy Community. It significantly strengthened the effectiveness of the sanctions⁸² and improved the prompt transposition of directives by Member States. As it is based on transparent mathematical formulas consisting of objectively defined elements, it could be transposed also to the Energy Community with the necessary adaptations in the calculation formula.⁸³ Taking over the formula applied under the Lisbon Treaty would do away with the unpractical distinction between "normal" breaches and serious and persistent breaches under the Energy Community Treaty.

d. The limitation in remedies in the Energy Community in comparison with similar legal spaces

The discrepancy between the objective to be a community based on the rule of law and a largely political enforcement system is striking in itself. Compared to other European organizations based on the concept of exporting EU law and expanding the internal market, its limitations become even more evident. The most relevant point of reference is the European Economic Area created by an agreement between the European Union, its Member States and three EFTA States

(Iceland, Liechtenstein and Norway) in 1994. By way of the EEA Agreement, the participating EFTA States commit themselves to implement (also) the EU *acquis* in the area of energy, environment, competition etc. While the rules on substance thus largely overlap with those applicable under the Energy Community, the approach to enforcement differs fundamentally. Instead of establishing a joint enforcement institution as in the Energy Community (the Ministerial Council), the EEA Agreement copies the model applied within the EU also into the EFTA pillar. Following the rejection of a common EEA Court by the Court of Justice of the European Union,⁸⁴ an EFTA Court with similar competences as the EU Court of Justice was created for the three EFTA States. That Court is composed of three independent judges, nominated by but not representing the respective governments. The Court disposes of its own budget and staff and resides in Luxembourg in the vicinity of the EU Court of Justice. The case law of the latter has been made the point of reference for the EFTA Court in an attempt to ensure judicial homogeneity. The EFTA Court essentially applies the same remedies as the Court of Justice of the European Union, namely infringement actions, actions for annulment, actions for the failure to act, action for damages, and preliminary references. Compared to this, the Energy Community is the only organization applying EU law in Europe which only applies one remedy, an infringement procedure without a court. This, in itself, already constitutes an abnormality within one pan-European energy market. Besides, the lack of remedies other than infringement procedures may also undermine the effectiveness of the enforcement system and impair the standard of protection of market participants, civil society and customers.

(1) The absence of direct actions

Actions for annulment, actions for failure to act and actions for damages are jointly referred to as direct actions in EU and EEA law. Appeals for actions for annulment, in particular, are the judicial counterpart to any binding measures taken by EU or EEA institutions which may encroach upon individual rights. The right to appeal is not only an enunciation of the general rule of law, but an obligation under Article 6 of

⁸⁰ Court of Justice in Case C-304/02 *Commission v France*, at paragraph 91.

⁸¹ The Commission has published Communications on these provisions, setting general principles and criteria to guide the implementation of the sanction mechanism as well s formula for their calculation, see in particular Communication from Commission C(2013) 8101.

⁸² See the infringements score book at http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm#maincontentSec2.

⁸³ E.g. in the coefficient related to GDP and disregarding the coefficient related to weighted voting which does not exist in the Energy Community.

⁸⁴ Opinion 1/91.

the European Convention on Human Rights. All Contracting Parties, except Kosovo*, are members of this Convention.

The relevance of direct actions – and their absence in the Energy Community – cannot be dismissed with the argument that – unlike the European Commission and the EFTA Surveillance Authority – the Secretariat of the Energy Community currently has no executive powers. Such an argument fails to see that the powers given to the Secretariat and affecting national authorities and market players alike are significant and currently without counterbalance. For instance, whether or not the opinions adopted by the Secretariat under the competences given to it by the Third Energy Package – comparable to those of the European Commission – or under the new Dispute Settlement Procedures⁸⁵ are of binding character is far from clear. And other institutions of the Energy Community can and do adopt measures which in the European Union pillar of the Energy Community could be challenged before the Court of Justice (or its General Court). According to Article 76 read in conjunction with Articles 47, 53 and 58 of the Treaty, the Ministerial Council, the Permanent High Level Group and the Regulatory Board may adopt decisions. For instance, the Regulatory Board, which so far has not taken individual decisions, has been mandated by the Third Package as incorporated in and adapted for the Energy Community, to take decisions in cases where the Agency for the Cooperation of Energy Regulators (ACER) would be competent within the European Union. The same goes for decisions on cross-border cost allocation under the adapted TEN-E Regulation 347/2013 and will apply under the Network Codes once incorporated in the Energy Community. Whereas any decision taken by ACER evidently can be appealed to the General Court of the European Union under Article 263 TFEU, there is no appeal possible for a decision taken by the Regulatory Board in the Energy Community. Moreover, the Permanent High Level Group has already been tasked by the Ministerial Council to adopt Network Codes by way of decision.⁸⁶ Under EU law, the Network Codes are challengeable

⁸⁵ See below.

⁸⁶ Procedural Act No 01/2012/PHLG-EnC of 21 June 2012 laying down the rules governing the adoption of Guidelines and Network Codes in the Energy Community.

under Article 263 TFEU for Member States and companies or individuals alike. This is not the case in the Energy Community. Excluding direct actions from the Energy Community thus creates unequal conditions for stakeholders with the pan-European single energy market. It also falls foul of the standards for judicial protection set out by the European Convention of Human Rights.⁸⁷

(2) *The treatment of preliminary procedures*

Until recently, the Energy Community Treaty lacked the possibility for national courts to refer questions related to the interpretation of the *acquis* to the competent Energy Community institutions. As in the European Union, national courts of the Parties are called upon to apply and implement Energy Community law in the first place.⁸⁸ Within the EU and the EEA,⁸⁹ they benefit from preliminary reference procedures at the Court of Justice and EFTA Court, which support national courts in adjudicating individual cases and ensure the uniform application of European at the same time.

While a preliminary reference procedure, in itself, does not suffice to improve enforcement of the *acquis*, it can play an important role in educating and empowering national courts, as the history of the judiciary in the EU shows. It also introduces a strong element of transparency into judicial decision-making at domestic level, a source of many complaints by investors.

It is also to be noted that the Agreement on the European Common Aviation Area (ECAA) confers a right to national courts of the Contracting Parties to request an interpretation of the ECAA from the EU's Court of Justice.⁹⁰ Similarly, the planned Transport Community envisages a right of courts in the Contracting parties to refer preliminary questions to the Court of Justice of the European Union. The practicability of

⁸⁷ Case *Bosphorus vs Ireland* of 30 June 2005, see *Dirk Buschle*, *Die Energiegemeinschaft*, in: Armin Hatje/Peter-Christian Müller-Graff, *Europäisches Organisations- und Verfassungsrecht*, Nomos 2014, pp. 1239 et seq., paragraph 42.

⁸⁸ Under Case 26/62 *Van Gend en Loos* [1963] ECR 3 as extended to international agreements concluded by the Union by, inter alia, Cases 21-24/72 *International Fruit Company* [1972] ECR 1219 and 104/81 *Kupferberg* [1982] ECR 3641, Energy Community law is directly applicable.

⁸⁹ Article 34 of the ESA/Court Agreement.

⁹⁰ Article 16(2) ECAA.

this solution aside, it also leads to a conflict of interest, with the European Union being one of the Parties, as *Helmut Schmitt von Sydow* rightly pointed out.

By amending the Dispute Settlement Procedures in 2015, the Ministerial Council also created a procedure for the Energy Community which may be compared to a preliminary reference procedure. New Article 2 of the Procedures (“Cooperation between national authorities of the Contracting Parties and the Secretariat”) works in two directions. Firstly, *national administrative authorities* are to notify any questions concerning the interpretation or application of Energy Community law raised in proceedings before them to the Secretariat of the Energy Community.⁹¹ Secondly, *national courts* may notify the Secretariat such questions to the Secretariat, the basis for which the Contracting Parties are to create in procedural law.⁹² In both cases, the Secretariat may submit an opinion to the referring authority or court, for which it may consult the Advisory Committee. In its final decision or judgment, the national authority or court of the Contracting Party takes into account of the opinion submitted by the Secretariat.⁹³

The voting procedures unduly blend legislative decision-making into an enforcement context

The inspiration for this preliminary reference procedure was Articles 267 TFEU and 34 ESA/ Court Agreement for the national courts, and Article 15 of Regulation 1/2003⁹⁴ for administrative authorities. Although departing from the EU and EEA model in the details, this procedure is arguably the most important

91 Article 2(1) Dispute Settlement Procedures.

92 Article 2(2) Dispute Settlement Procedures.

93 Article 2(4) Dispute Settlement Procedures.

94 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

innovation in the 2015 amendment to the Dispute Settlement Procedures. It introduces a communication mechanism between the national and the supranational level (the Secretariat) to ensure the uniformity of Energy Community law application on the one hand, and the transmission of information and avoidance of infringement procedures against the Contracting Party concerned on the other hand. The procedure thus closes an important gap in the enforcement systems between the Energy Community and the European Union. Evidently, its success will be determined by the frequency of national courts and authorities referring questions.

(3) Conclusion

In conclusion, however, the enforcement model currently applied in the Energy Community still lags behind the EEA’s as the other multilateral treaty envisaging the implementation of EU *acquis communautaire* by non-EU countries, in particular due to the lack of direct actions. This creates unequal conditions in terms of enforceability. Besides the lack of a court and the lack of an effective sanction regime this constitutes the third deviation by the Energy Community from European enforcement standards.

e. *The failure of the current enforcement system to ensure investor protection*

It would be too easy and not appropriate to conclude from the previous sections’ analysis of the Energy Community’s deviation from the European enforcement standards that taking over that model in itself would resolve all problems related to enforcement/dispute settlement in the Energy Community. The European enforcement architecture, however, rests on one fundamental pillar: well-functioning institutions on the national level, both administrative institutions and courts. In that way, the European model was designed only as a second line of enforcement.

Unlike in the EFTA States, things look differently in the Contracting Parties to the Energy Community. As *Alan Riley* recently observed, “*the difficulty in South-East Europe is that the EU’s energy acquis is transmitted via the Energy Community into a region with limited support factors. For a host of historical and current*

reasons, the rule of law and the quality of public administration are very weak. It is difficult to see how the energy acquis can easily prosper in such a fragile environment.”⁹⁵ As a consequence, and especially in cases between investors and the State or any of its authorities and public companies – still the most common constellation in the energy sectors of all Contracting Parties – national courts cannot provide the level of confidence investors require. Hence enforcement on the level of the Energy Community institutions must be stronger, not weaker than in the EU and the EEA.

Currently, the Energy Community Treaty does not offer private operators any remedy capable of resolving investment disputes. This is a major deterrent to investment in the Contracting Parties.⁹⁶ The current system only allows for one type of remedy, a variant of public enforcement. In this system, “private bodies” can complain to the Secretariat and may bring their case only indirectly to the decision-maker, the Ministerial Council,⁹⁷ and only in cases relating to non-compliance with Energy Community law. Enforcement under the Energy Community (as well as the standard EU/EEA) model explicitly does not include dispute resolution between private parties or a private party and a state. Article 5 of the Dispute Settlement Procedures clarifies that “*dispute settlement procedures must relate to a violation by a Party of Energy Community law and may not concern disputes between private parties.*” Investment disputes, by contrast, are subject to litigation in national courts or international arbitration.

For manifold reasons, investors’ confidence in national courts is limited. Under these circumstances, they depend on arbitration. Constellations leading to an investment dispute can be investor-state or investor-investor (based on private law contracts, i.e. including cases where the Government or a public company is a signatory). For investor-state disputes, the Energy Charter opens a path towards arbitration in Article 26 of the Energy Charter Treaty.⁹⁸

⁹⁵ Alan Riley, *Deploying the Energy Incentive: Reinforcing EU Integration in South-East Europe*, CEPS Policy Brief No 296 of 8 July 2013.

⁹⁶ Riley, *loc cit.*

⁹⁷ New Article 26(2) of the Dispute Settlement Procedures.

⁹⁸ The three possible fora for such disputes are (1) the International Centre for the Settlement of Investment Disputes (ICSID), (2) a sole

arbitrator or an ad hoc arbitration tribunal established under the rules of the United Nations Commission on International Trade Law (UNCITRAL), and (3) the Arbitration Institute of the Stockholm Chamber of Commerce.

Meeting only once per year, the Ministerial Council resembles a feudal jurisdiction in medieval times rather than a modern dispute resolution body

Even where a pathway to arbitration exists (both in investor-state and investor-investor disputes), bringing a case to arbitration is a last resort for any investor. But an arbitration procedure is costly and lengthy. It may be affordable to big international investors, but small and medium enterprises, domestic companies or consumers will often shy the costs and rather choose to stay outside risky markets if arbitration is the only life-saver they can rely upon. It is those players, however, which can and should benefit most from market integration. Arbitration thus cannot replace a judicial institution granting access to justice for citizens and business, as a true public service, and not only to those who can afford it.

Furthermore, the initiation of an arbitration case is likely to burden the relation between investor and state often beyond repair. There have been examples for this in the Energy Community. Thus even where a possibility to go to arbitration actually exists, investors are confined to taking their disputes to litigation in national courts or to opt for the “nuclear option” of arbitration.

The Energy Community architecture should thus be complemented by a true dispute settlement mechanism – going beyond what enforcement of Treaty compliance under Articles 90 *et seq.* aims to achieve – which would offer investors and civil society direct recourse to a neutral dispute

settlement institution for the bulk of all possible disputes. Besides adjudication, such a mechanism should also include alternative dispute resolution methods such as mediation.

3. Conclusions and outlook

The reform of the Energy Community's enforcement architecture touches upon the very soul of the Community and the idea of expanding the internal market by way of exporting European law. To expect the full implementation of this law under conditions which are often less favourable than in the EU itself requires an enforcement in line with state-of-the-art in the European Union. As we saw in the introduction, the weakness of the Energy Community's enforcement system was identified as the most important areas of reform. While the Ministerial Council acted in a first step during 2015 by amending the Dispute Settlement Procedures, the calls for reform did not fall silent. In the context of creating an Energy Union, the European Parliament recently called "*on the Commission and the Member States to strengthen the Energy Community activities ... through, inter alia, better implementation and enforcement of EU law ...*". The Parliament also "*stresses that a strengthened Energy Community should be the pivotal arm of the EU's external energy policy and invites the Commission to come forward with concrete proposals based on the report of the High-Level Reflection Group for the reform of the Energy Community.*"⁹⁹ The Commission, on its part, committed "*to propose to strengthen the Energy Community, ensuring effective implementation of the EU's energy, environment and competition acquis, energy market reforms and incentivising investments in the energy sector. The goal is closer integration of the EU and Energy Community energy markets.*"¹⁰⁰ The reform discussion thus continues. Against that background we will look once again into the boldest of reform proposals, the creation of a Court, before taking stock of what was achieved during 2015 and what is to be expected during 2016.

a. Could an Energy Community Court be created?

The lack of a permanent and independent court constitutes the most obvious challenge to enforcement, but not the only one. Of equal concern is the lack of options for investors and civil society to seek protection of their rights and interests, as well as the fact that the available sanctions are ill-suited to achieve true implementation of the *acquis* by Contracting Parties, and thus the objectives of the Treaty: "*The Energy Community, while bringing the energy acquis ... of the Union into South-Eastern Europe, was not granted the supranational infrastructure to ensure uniform application of the acquis that exists within the EU. Given that the domestic legal infrastructure is much weaker than that of the EU member states as well, the likelihood of effective application of the acquis is, needless to say, problematic.*"¹⁰¹ Based on the analysis above, the High Level Reflection Group's proposal, namely that "*the dispute settlement procedure should be gradually replaced by a Court of Justice, based on the EU model as applied in the European Economic Area (EFTA Court). Before becoming a permanent institution, the Court could convene on an ad-hoc basis. The Court should also be accessible directly by individuals and companies*" is justified and addresses the shortcomings identified.

In the reform discussions that took place within the Energy Community institutions during 2015, it became clear that the creation of a court modelled on the successful EEA template was currently not an option for several Parties. In the meantime, however, the disparity in enforceability of European energy law between the EU pillar of the Energy Community on the one hand, and the non-EU Contracting Parties on the other hand has become more evident and affects the further integration within the Energy Community in concrete terms. It is thus not excluded that the questions comes back on the agenda in the mid-term. We note that the final articles of the amended Dispute Settlement Procedures call for review already in 2016 which "*shall include the approach towards measures under Article 92 of the Treaty and the institutional set up for dispute resolution.*"¹⁰²

99 European Parliament Resolution of 15 December 2015 – Towards a European Energy Union (2015/2113(INI)).

100 European Commission, A Framework Strategy for a Resilient Energy Union, COM(2015) 80 final, 25 February 2015.

101 Riley, loc cit.

102 Article 47 Dispute Settlement Procedures.

The creation of a court would require a decision to amend the Treaty. The amendments would relate to Title V of the Energy Community Treaty, which is covered by the Ministerial Council's competence to amend the Treaty under Article 100(i). From an international law perspective, the amendments would thus not require ratification by the Parties. From the national perspective, it is to be observed that the Parties' constitutions do not oppose the establishment of an international court¹⁰³ and in most cases already accept the jurisdiction of international courts (such as the European Court of Human Rights).

While secondary legislation tries its utmost to “juridify” the enforcement procedure, decision-making remains in essence a diplomatic one

From a perspective of EU law, the introduction of a court must be in compliance with the case law of the Court of Justice, in particular its seminal Opinion 1/91 on the establishment of an EEA Court. In this and subsequent Opinions, the Court held that an international agreement to which the EU is a party may indeed establish a court, the decisions of which can be binding on the Union and its institutions.¹⁰⁴ Under the circumstances present, however, the Court of Justice rejected the creation of an EEA Court as it was considered undermining the autonomy of the Union's legal order. The main reasons for this were (1) that the EEA Court would affect the allocation of responsibilities over EU Member States as defined in the treaties,¹⁰⁵ (2) that this Court would be tasked to interpret and apply EU law in a way conditioning the future interpretation of EU law by the Court of Justice,¹⁰⁶ (3) that the EEA Court would

also comprise judges from the EU Court of Justice,¹⁰⁷ and (4) that the EU Court of Justice's preliminary rulings given in cases referred by courts from EFTA States would have no binding effect.¹⁰⁸ The project of creating an EEA Court was subsequently abandoned and replaced by the model of an EFTA Court mirroring the EU Court of Justice in the EFTA pillar. This was acceptable to the Court of Justice of the European Union.¹⁰⁹

The establishment of an Energy Community Court would have to be distinguished from the case of the planned EEA Court (or any other judicial system ever rejected by the Court of Justice of the European Union). The major differences between the EEA and the Energy Community are that, (1) unlike the EEA Agreement, the Energy Community was not adopted on the basis of what is now Article 217 TFEU but on the provisions of commercial policy. Unlike the EEA, the Member States are not contracting parties to the Energy Community Treaty. The proposed Energy Community Court would not have jurisdiction over individual Member States and thus not impinge on the Court of Justice's exclusive jurisdiction in this respect.¹¹⁰ This was an important argument also in the Court of Justice's appraisal of the ECAA Agreement.¹¹¹ (2) Even though Energy Community law is modeled on and largely corresponds to EU energy law, it is not as comprehensive a legal body as EEA law due to the Energy Community's sectoral nature. Moreover, the bulk of Energy Community law binds only the Contracting Parties. The only provisions directly applicable to the European Union currently are the free movement of goods (Article 41) and non-discrimination (Article 7). Any other legal rules to be adopted under Title IV (an III) in the future would be genuine Energy Community rules, i.e. not replicating EU legislation. Moreover, the Court of Justice's concerns about the EEA's homogeneity rules would affect the autonomy of the EU legal order do not apply in the case of the Energy Community. The Energy Community does not contain anything similar to Protocol 35

103 See *Rozeta Karova*, *The Application of the EU Constitutional Principles in the Energy Community*, ENLR 2015, pp 176-186.

104 Opinion 1/91, paragraphs 40 and 70; Opinion 1/00, paragraph 20.

105 Opinion 1/91, paragraph 35.

106 Opinion 1/91, paragraph 46.

107 Opinion 1/91, paragraph 48.

108 Opinion 1/91, paragraph 61.

109 Opinion 1/92 of the Court.

110 In Opinion 1/91, the Court of Justice was concerned that “the EEA Court will have to rule on the respective competences of the [Union] and the Member States as regards the matters governed by the provisions of the agreement.”

111 Opinion 1/00, paragraph 16.

of the EEA Agreement which implicitly excludes direct effect and primacy. Unlike Article 6 of the EEA Agreement, current Article 94 is also not limited to the Court of Justice's rulings given prior to the date of signature of the Treaty. A clause introduced in the Treaty in the context of creating an Energy Community Court could reiterate the homogeneity commitment for all rulings to be given by that Court (similar to Article 16 of the ECAA Treaty),¹¹² and explicitly state that any ruling given by that Court would not prejudice the interpretation of EU law by the Court of Justice. (3) The proposed Energy Community Court would have no personal or functional links with the Court of Justice of the European Union, and (4) it would not have to envisage preliminary rulings referred to that Court.

Most importantly, however, it needs to be recalled that the only aspect of the proposed system which actually could be considered affecting the autonomy of the EU legal order, the binding effect of rulings against the European Union in cases pertaining to Titles III or IV of the Treaty, already exists in present Article 91. Enforcement is an indispensable consequence of the fact that the European Union assumed binding obligations under the Energy Community Treaty. The new and innovative element in the proposal to set up an Energy Community Court is not that Energy Community institutions can take decisions binding on the European Union, but that the relevant decision-making body is an independent court of law rather than a political Ministerial Council.

b. After 2015: Where do we stand with the reform of the Energy Community enforcement system?

On 16 October 2015, following a year of debate, the Ministerial Council of the Energy Community adopted amendments to the Dispute Settlement Procedures of 2008.¹¹³ As Treaty changes were not on the agenda, the room for manoeuvre was limited. Still, the improvements made to the enforcement system are considerable. Among

them is the cooperation mechanism between national authorities/courts and the Secretariat discussed above,¹¹⁴ an expedited procedure for simple non-transposition cases,¹¹⁵ the right of the Secretariat to ask national authorities to conduct inspections,¹¹⁶ the competence for the Permanent High Level Group to adopt interim measures in cases of urgency,¹¹⁷ and the possibility for complainants to "appeal" non-opening of a case to the Permanent High Level Group.¹¹⁸

Furthermore, the Advisory Committee was considerably strengthened. Instead of three as of today, it will comprise five members fulfilling the qualifications required for appointment to the highest judicial offices and elected for a renewable term of four years. The members of the Advisory Committee shall elect among themselves a President for the period of two years,¹¹⁹ which altogether should give this body greater weight. The increased importance is also visible in the new procedure following up on a reasoned request by the Secretariat: just like a court of law, the Advisory Committee will now conduct public hearings and receive written observations by all Parties and Participants to the Treaty, the Regulatory Board as well as the complainant and other persons having participated in the preliminary procedure.¹²⁰ The Ministerial Council will also be obliged to consult the Advisory Committee not only before adopting but also before revoking an infringement decision.¹²¹

Beyond procedural improvements, however, it proved difficult to change the decision-making process itself. Given the lack of support for the creation of a court, the Secretariat had proposed to establish the Permanent High Level Group as decision-maker in infringement cases¹²² in order to increase regularity and further depoliticize the enforcement procedure.¹²³ This was rejected. Instead, the new Dispute Settlement

112 Which the Court of Justice's Opinion 1/00 found compatible with EU law.

113 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.

114 Article 2 of the Dispute Settlement Procedures.

115 Article 11(3) of the Dispute Settlement Procedures.

116 Article 15(3) of the Dispute Settlement Procedures.

117 Article 18(2) of the Dispute Settlement Procedures.

118 Article 26(2) of the Dispute Settlement Procedures.

119 Article 32 of the Dispute Settlement Procedures.

120 Articles 31(2), 32(4) of the Dispute Settlement Procedures.

121 Article 43(2) of the Dispute Settlement Procedures.

122 Alternatively in the first instance, as applied e.g. under the WTO dispute settlement procedure consisting of a Panel and an Appellate Body.

123 Such conferral of powers would have arguably been possible under Articles 47 and 53 of the Energy Community Treaty.

Procedures in Article 33(2) envisage that the Permanent High Level Group shall hear both parties to the dispute (normally the Secretariat and one Party) as well as the President of the Advisory Committee as soon as possible after the adoption of the latter's opinion in the case. While the nature of such hearings remains to be established by practice, the obligation to have such an adversarial hearing in each case at least slightly moves the procedure closer to that applied by a court of law. After the Permanent High Level Group has heard the case, it includes the reasoned request on the agenda of the next meeting of the Ministerial Council and may propose the latter to deal with the case as an "A point", i.e. without further debate but following the voting procedures in Article 91 of the Treaty.

The main open issue on the reform agenda for 2016 thus remains the questions of sanctions. Article 47 of the amended Dispute Settlement Procedures explicitly envisages that "[t]he Rules of Procedure in this Procedural Act shall be reviewed in the light of experience upon proposal by the Secretariat in 2016. The review shall include the approach towards measures under Article 92 of the Treaty ...". Again, the objective must be to increase effectiveness, equality with the system applied within the European Union and fairness towards all Parties to the Treaty. This will require changes to the Treaty which, given string support from within the European Union, should no longer be out of bounds.

The views expressed in this contribution are strictly personal and cannot in any way be attributed to the Secretariat.