TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

In Case ECS-3/08, the Secretariat of the Energy Community against the Republic of Serbia, the

ADVISORY COMMITTEE,
composed of
Rajko Pirnat, Helmut Schmitt von Sydow, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community and Article 32 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty,

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 31 May 2016 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in Case ECS-3/08 against Serbia. The members of the Advisory Committee received a copy of all relevant documents of the case (including the replies of Serbia) from the Energy Community Secretariat. By e-mail dated 20 July 2016 the Advisory Committee was informed about the partial withdrawal of the Reasoned Request and provided with a new version including again all documents relevant to the case.

Pursuant to Article 46 (2) of the Dispute Settlement Rules cases initiated before 16 October 2015 shall be dealt with in accordance with the Dispute Settlement Rules applicable before the amendment adopted on that date. This case against Serbia was opened already on 17 September 2010 and is thus to be dealt with according to the original Dispute Settlement Rules as adopted on 27 June 2008.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Serbia failed to fulfil its obligations arising from Energy Community law. The Secretariat argues that Serbia by not using revenues resulting from the allocation of interconnection capacity on the interconnectors of Kosovo* with Albania, the Former Yugoslav Republic of Macedonia and Montenegro for one or more of the purposes specified in Article 6 (6) of Regulation (EC) 1228/2003 failed to comply with Article 6 of Regulation (EC) 1228/2003.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and with ICJ Opinion on the Kosovo declaration of independence.

Serbia submitted a reply to the original Reasoned Request on 21 July 2016 and replied to the amended Reasoned Request on 20 September 2016.

II. Preliminary Remarks

According to Article 32 (1) of the Procedural Act No 2008/01/MC-EnC of the Ministerial Council of the Energy Community on the Rules of Procedure for Dispute Settlement under the Energy Community Treaty, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. In this case only the amended and reduced Reasoned Request sent on 20 July 2016 will be discussed in this Opinion as the other allegations were withdrawn by the Secretariat.

The Advisory Committee, exercising its duty to give an Opinion on the Reasoned Request does not duplicate the procedure and therefore does not collect evidence itself. The Advisory Committee gives its Opinion on the basis of undisputed facts. Where the facts were not sufficiently determined by the Secretariat, including the Reasoned Opinion, the Advisory Committee is not in a position to give its decisive legal opinion on these allegations; instead, such cases of incomplete determination of facts are pointed out in the Opinion of the Advisory Committee.

On the basis of these principles the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

III. Legal context

Article 9 of the Treaty reads:

> *The provisions of and the Measures taken under this Title shall apply to the territories of the Adhering Parties, and to the territory under the jurisdiction of the United Nations Interim Administration Mission in Kosovo.*

Article 6 of the Treaty reads:

> *The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.*

Article 10 of the Treaty reads:

> *Each Contracting Party shall implement the acquis communautaire on energy in compliance with the timetable for the implementation of those measures set out in Annex I.*

Article 103 of the Treaty reads

> *Any obligations under an agreement between the European Community and its Member States on the one hand, and a Contracting Party on the other hand shall not be affected by this Treaty. Any commitment taken in the context of negotiations for accession to the European Union shall not be affected by this Treaty.*

Article 2 of Directive 2003/54/EC reads:

For the purpose of this Directive

[…]

3. 'transmission' means the transport of electricity on the extra high-voltage and high-voltage interconnected system with a view to its delivery to final customers or to distributors, but not including supply;

4. 'transmission system operator' means a natural or legal person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long term ability of the system to meet reasonable demands for the transmission of electricity;

[…]

13. 'interconnectors' means equipment used to link electricity systems;

[…]

Article 8 of Directive 2003/54/EC reads:

Member States shall designate, or shall require undertakings which own transmission systems to designate, for a period of time to be determined by Member States having regard to considerations of efficiency and economic balance, one or more transmission system operators. Member States shall ensure that transmission system operators act in accordance with Articles 9 to 12.

Article 9 of Directive 2003/54/EC reads:

Each transmission system operator shall be responsible for:

[…]

(c) managing energy flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services insofar as this availability is independent from any other transmission system with which its system is interconnected;

Article 2 of Regulation (EC) 1228/2003 reads:

For the purpose of this Regulation, the definitions contained in Article 2 of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (1) shall apply with the exception of the definition of 'interconnector' which shall be replaced by the following:

'interconnector' means a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States;.

The following definitions shall also apply:

[…]

(b) 'cross-border flow' means a physical flow of electricity on a transmission network of a Member State that results from the impact of the activity of producers and/or consumers outside of that Member State on its transmission network. If transmission networks of two or more Member States form part, entirely or partly, of a single control block, for the purpose of the inter-transmission system operator (TSO) compensation mechanism referred to in Article 3 only, the control block as a whole shall be considered as forming part of the transmission network of one of the Member States concerned, in order to avoid flows within control blocks being considered as cross-border flows and giving rise to compensation payments under Article 3. The regulatory authorities of the Member States concerned may decide which of the Member States concerned shall be the one of which the control block as a whole shall be considered to form part of;

[…]

Article 6 of Regulation (EC) 1228/2003 reads:

1. Network congestion problems shall be addressed with non-discriminatory market based solutions which give efficient economic signals to the market participants and transmission system operators involved. Network congestion problems shall preferentially be solved with non-transaction based methods, i.e. methods that do not involve a selection between the contracts of individual market participants.

2. Transaction curtailment procedures shall only be used in emergency situations where the transmission system operator must act in an expeditious manner and redispatching or countertrading is not possible. Any such procedure shall be applied in a non-discriminatory manner. Except in cases of 'force-majeure', market participants who have been allocated capacity shall be compensated for any curtailment.

3. The maximum capacity of the interconnections and/or the transmission networks affecting cross-border flows shall be made available to market participants, complying with safety standards of secure network operation.

4. Market participants shall inform the transmission system operators concerned a reasonable time ahead of the relevant operational period whether they intend to use allocated capacity. Any allocated capacity that will not be used shall be reattributed to the market, in an open, transparent and non-discriminatory manner.

5. Transmission system operators shall, as far as technically possible, net the capacity requirements of any power flows in opposite direction over the congested interconnection line in order to use this line to its maximum capacity. Having full regard to network security, transactions that relieve the congestion shall never be denied.

6. Any revenues resulting from the allocation of interconnection shall be used for one or more of the following purposes:

(a) guaranteeing the actual availability of the allocated capacity;

(b) network investments maintaining or increasing interconnection capacities;

(c) as an income to be taken into account by regulatory authorities when approving the methodology for calculating network tariffs, and/or in assessing whether tariffs should be modified.

Item 6 of the so-called Congestion Management Guidelines annexed to Regulation (EC) 1228/2003, as incorporated into the Energy Community acquis communautaire by Decision No 2008/02/MC-EnC of the Ministerial Council of 27 June 2008 reads:

6. Use of congestion income

6.1. Congestion management procedures associated with a pre-specified timeframe may generate revenue only in the event of congestion which arises for that timeframe, except in the case of new interconnectors which benefit from an exemption under Article 7 of the Regulation. The procedure for the distribution of these revenues shall be subject to review by the Regulatory Authorities and shall neither distort the allocation process in favour of any party requesting capacity or energy nor provide a disincentive to reduce congestion.

6.2. National Regulatory Authorities shall be transparent regarding the use of revenues resulting from the allocation of interconnection capacity.

6.3. The congestion income shall be shared among the TSOs involved according to criteria agreed between the TSOs involved and reviewed by the respective Regulatory Authorities.

6.4. TSOs shall clearly establish beforehand the use they will make of any congestion income they may obtain and report on the actual use of this income. Regulatory Authorities shall verify that this use complies with the present Regulation (EC) and Guidelines and that the total amount of congestion income resulting from the allocation of interconnection capacity is devoted to one or more of the three purposes described in Article 6(6) of Regulation.

6.5. On an annual basis, and by 31 July each year, the Regulatory Authorities shall publish a report setting out the amount of revenue collected for the 12-month period up to 30 June of the same year and the use made of the revenues in question, together with verification that this use complies with the present Regulation and Guidelines and that the total amount of congestion income is devoted to one or more of the three prescribed purposes.

6.6. The use of congestion income for investment to maintain or increase interconnection capacity shall preferably be assigned to specific predefined projects which contribute to relieving the existing associated congestion and which may also be implemented within a reasonable time, particularly as regards the authorisation process.

IV. Legal Assessment

A. Admissibility

1. Lack of jurisdiction

Referring to Article 103 of the Treaty, Serbia contests the jurisdiction of the Energy Community since the issue is already being treated within the process of Serbia's accession to the European Union. Serbia argues that Article 103 of the Treaty prescribes that the Treaty will not influence any obligation taken in the context of accession negotiations.

However Article 103 of the Treaty reads: "Any commitment taken in the context of negotiations for accession to the European Union shall not be affected by this Treaty." Thus, Article 103 of the Treaty is not a general derogation from obligations arising from the law of the Energy Community but allows Contracting Parties to enter into commitments which go beyond the *acquis* of the Energy Community in the perspective of accession and full incorporation of the *acquis communautaire*. The mere fact of ongoing accession negotiations is not sufficient to suspend all application of the existing law.

Serbia did not explain which specific commitment of its accession negotiations would authorise a derogation from the *acquis communautaire* concerning congestion management.

2. Competence for Treaty interpretation

Serbia states that the Reasoned Request submitted by the Secretariat is unfit for consideration by the Ministerial Council as it leaves the bounds of the Secretariat's competencies by giving an interpretation of the *acquis communautaire*. Serbia recalls that Article 94 of the Treaty prescribes that the acquis will be interpreted in accordance with the case law of the Court of Justice of the EU or, in the absence of such case law, by guidelines offered by the Ministerial Council who can delegate this task to the Permanent High Level Group.

However the Secretariat is competent for the proper implementation by the Parties of their obligations (Article 67(a) of the Treaty) and in particular for submitting Reasoned Requests to the Ministerial Council concerning such infringement procedures (Article 90 of the Treaty). Such application of the law to specific cases necessarily includes an interpretation of the law. Article 94 of the Treaty does not deny the Ministerial Council, upon request by the Secretariat, the competence to interpret the *acquis* in specific cases; it just states that, as to substance, such interpretation must be in conformity with the case law or with the pertinent general guidelines.

The Reasoned Request is admissible for consideration by the Ministerial Council.

B. Substance

The Secretariat estimates that Serbia has not respected Regulation (EC) 1228/2003 as incorporated into the law of the Energy Community by Decision 2008/02/MC-EnC of the Ministerial Council of 27 June 2008.

1. Applicable law

Serbia points out that these rules are no longer in force since they were replaced by Regulation (EC) 714/2009 as incorporated into Energy Community law by Decision

2011/02/MC-EnC of the Ministerial Council of 6 October 2011. Serbia argues that the Decision of the Ministerial Council determining a breach of Treaty obligations must be based on existing, not on obsolescent law, namely on the law in force at the moment of making such a Decision.

However, the Secretariat estimates that the case must be assessed in the light of the legislation in force at the close of the period foreseen by the Reasoned Opinion that the Secretariat issued during the preliminary phase of the infringement procedure. Indeed this interpretation follows settled case-law of the Court of Justice of the European Union concerning the infringement procedures under EU law (see point 66 and footnote 55 of the Reasoned Request).

In the present case, the Secretariat sent its Reasoned Opinion on 7 October 2011 inviting Serbia to rectify the situation by 7 December 2011 (annex 7 of the Reasoned Request, point 112). At the close of that period Decision 2008/02/MC-EnC concerning Regulation (EC) 1228/2003 was still in force as it was replaced only with effect of 1 January 2015 (Article 3 (1) of Decision 2011/02/MC-EnC of the Ministerial Council of 6 October 2011).

2. Use of revenues

The Secretariat estimates that Serbia did not use the revenues of congestion management for one or more of the three the purposes cited in Article 6 (6) of Regulation 1228/2003, namely (a) guaranteeing the actual availability of the allocated capacity, (b) network investments maintaining or increasing interconnection capacities, (c) as an income to be taken into account by regulatory authorities when approving the methodology for calculating network tariffs, and/or in assessing whether tariffs should be modified.

Serbia replies that the revenues were allocated in conformity with Article 165 of the Serbian Law on Energy from 2014 that transposed the principles and rules of Regulation (EC) 714/2009 and (EC) 1228/2003 into Serbian law. It states that the revenues were allocated to the general maintenance of the control area of the Serbian operator EMS to the benefit of all consumers of that area, including consumers in Kosovo*. The reliability of the Serbian infrastructure improves the security of supply, and energy is cheaper because the costs of system services are shouldered by EMS, the Serbian operator, without any participation of KOSTT and because the lack of the northern border of Kosovo* with Serbia which means that potential congestions in that direction are not taken into account.

The question whether or not KOSTT is a transmission system operator was controversially discussed between the parties of this case. To this day – up to a certain extent – the relationship between EMS, KOSTT and ENTSO-E is under discussion. However, the Advisory Committee is of the opinion that the exact legal determination of the status of KOSTT may remain undecided within the context of this case as it is an undisputed fact that EMS performs the congestion management on the three specified interconnectors (Albania, the Former Yugoslav Republic of Macedonia and Montenegro) and obtains the revenues for the allocation of the capacity.

However, as the Secretariat pointed out, the relevant system users are those using the transmission system interconnected with neighbouring systems, namely in the present case Albania, the Former Yugoslav Republic of Macedonia and Montenegro. The objective of the Regulation is not to generate income for the general budget of the system operator, but a) to guarantee capacity, b) to build infrastructure and c) to lower the tariffs under the control of the competent regulatory

authorities of the region concerned. Congestion fees should be used in order to avoid future congestion. Item 6.6 of the Congestion Management Guidelines (incorporated into the Energy Community law by Decision No 2008/02/MC-EnC of the Ministerial Council of 27 June 2008) states that the use of congestion income shall preferably be assigned to specific projects which contribute to relieving the existing associated congestions.

The allocation of congestion income to the general budget of the Serbian operator EMS is incompatible with Article 6 (6) of Regulation 1228/2003. As regards investments Serbia claims that it invested in Kosovo* as far as the system was available to it, namely the parts of the system situated in the northern part of Kosovo*. It mentions that it did not perform its duties on the parts of the system situated in the southern part. Furthermore, the investment into a 400 kV line between the Former Yugoslav Republic of Macedonia and Serbia was brought up as one of the investments carried out in line with Article 6 (6) of Regulation 1228/2003. The Secretariat, however, pointed out that the 400 kV interconnection between Serbia and the Former Yugoslav Republic of Macedonia did not have a connection to the network operated by KOSTT. Investments in interconnectors with the network operated by KOSTT, including the construction of new interconnectors, were financed solely by KOSTT (with the support of international donors), but not from the revenues obtained by capacity allocation by EMS.

These findings are sufficient to come to the conclusion that Serbia violated Article 6 (6) of Regulation (EC) 1228/2003 in the period mentioned above as congestion revenues were not used according to the said provision.

V. Conclusions

The Advisory Committee considers that Serbia failed to comply with Article 12 of the Treaty in conjunction with Article 6 (6) of Regulation (EC) 1228/2003.

Done in Vienna on 10 October 2016

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, Chairman