

Communication to the Aarhus Convention Compliance Committee on phase II of the Kostolac B Power Project and Serbia's failure to comply with Article 6 and Article 9 of the Convention

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II. Party concerned

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III. Facts of the communication

a. The Kostolac B Power Plant Project

1. The Project subject to this communication is TPP Kostolac B Unit 3, the planned third unit of the Kostolac B coal fired thermal power plant with an installed capacity of 350 MW (hereinafter; 'Kostolac B3'). Kostolac B 3 is part of the second phase ('phase II') of the 'Kostolac B Power Plant Project'. Also part of the second phase is the increase of capacity of the Drmno lignite mine from 9 million to 12 million tonnes annually. This increase of capacity was planned specifically to provide the new Kostolac B3 Unit with lignite. The first phase ('phase I') concerned retrofitting of the existing units Kostolac B 1 and 2.¹
2. On 20 August 2009, Serbia and the People's Republic of China signed a first memorandum of understanding ('MOU') regarding 'Economic and Technical Cooperation in the Area of Infrastructure'. A second MOU on cooperation in the energy field was signed on 13 May 2010.² This second MOU arranged for the development of infrastructure, including energy utilities in Serbia by Chinese companies, financed by loans by the Serbian government with the Chinese Export-Import Bank.
3. On 22 July 2010, state-owned electricity company 'EPS', its subsidiary 'Te-Ko Kostolac', and the Chinese construction and engineering company 'CMEC' agreed upon the development of 'Kostolac B Power Project'.³ It was agreed to split the project into two phases, as described in para. 1 above. On 8 December 2010, the parties signed a second agreement only concerning phase I of the project. The first phase was estimated to have a value of \$ 344,630,000; phase II was estimated to have a value of \$ 715,600,000.⁴
4. To finance the Kostolac B Power Project, the Government of Serbia took out two loans with the Chinese Export Import Bank, EPS is the 'end user' of these loans. The first loan was for \$ 293,000,000 covering 85% of the value of phase I. The second loan was for \$ 608,260,000, covering 85% of the value of phase II.⁵

b. Phase II of the Kostolac B Power Plant Project

¹ 'Preferential buyer credit loan agreement on phase II of the package project Kostolac-B Power Plant Project between the Government of the Republic of Serbia represented by the ministry of finance as borrower and the Export-Import Bank of China as Lender Dated December 17, 2014' (the '**Loan Agreement**'), pages 56 – 59 provide an overview of the project in Serbian. (Annex 1)

² 'Memorandum of Understanding between the National Energy Administration of the People's Republic of China and the Ministry of Mining and Energy of the Republic of Serbia' 13 May 2010. (Annex 2)

³ Loan Agreement, page 56. An English version of this 'pre-contract' dated November 2010 can be found in Annex 3.

⁴ *Ibid.*

⁵ Loan Agreement. (Annex 1).

5. On 20 November 2013, EPS, Te-Ko Kostolac and CMEC signed the agreement on phase II of the Kostolac B Power Project ('the **Development Contract**'). The Development Contract establishes more detailed obligations upon the parties related to phase II.⁶ That day, a press release was published on the website of the Ministry of Mining and Energy where the Minister was quoted as saying that;

*'(...) Serbia signed a contract to commit itself to construct a new block in the thermal power plant' and '(...) construction of the new thermal power plant in Kostolac should start by the end of 2014 and, when completed in 2019, together with the existing B1 and B2 units, it will meet about 20 percent of Serbia's electricity needs.'*⁷

These statements were made a month before the first EIA Decision for Kostolac B3 was adopted (30 December 2013).⁸

6. On 28 November 2013, eight days after the Minister's statements of 20 November and 3 weeks prior to the first EIA decision, the Serbian government approved the request for second loan with the Chinese Export Import Bank.⁹ The loan agreement was approved in December 2014 (the '**Loan Agreement**')¹⁰. As already mentioned above, the loan amount under the agreement is \$ 608,260,000. The loan became effective with the Chinese Export Import Bank 'Notification of Effectiveness' of 25 May 2015.¹¹ Starting from this date, the loan is being distributed in installments over the following 7 years, meaning roughly until May 2022.¹²
7. This Notification of Effectiveness of the Loan Agreement of 25 May 2015 commenced the payment scheme under the Development Contract. Accordingly, Art. 6 of the Development Contract required, advance payment of 25% of the project value has been paid by EPS to CMEC at this point in time (June or July 2015), which is 178.900.000 US dollars.¹³
8. It is unclear from the text of the Development Contract when the bi-monthly payments detailed in Article 6.1. (a) and 6.1. (b) were supposed to start exactly. However, it is clear that when the public participation round of mid-2017 started, a significant proportion of the loan had already been spent on Phase II, including on the Drmno mine expansion.

⁶ 'Contract Agreement for Phase II of the Kostolac B Power Plant Project' 20 November 2013 ('The Development Contract'). (Annex 4).

⁷ Ministry of mining and Energy, *Contract on Construction of New Block of TPP "Kostolac" Signed*, (20 November 2013) (Online publication – web archive) Accessible at: <https://web.archive.org/web/20140809193902/http://www.merz.gov.rs/lat/aktuelnosti/potpisan-ugovor-o-izgradnji-novog-bloka-te-kostolac>

The quotes are an unofficial translation in English.

⁸ See para 11.

⁹ Government Decision No: 48-10165 / 2013 of 28 November 2013.

¹⁰ Loan Agreement.

¹¹ The Export-Import Bank of China, 'notification of effectiveness', 25 May 2015. (Annex 5).

¹² Based on Art. 2 of the Loan Agreement, the loan will be distributed over 7 years and the repayment period is 20 years, with a 7 year grace period that coincides with the period of distribution of the loan.

¹³ 'The Development Contract', Article 6.

c. Environmental consent for Phase II of the Kostolac B Power Plant Project.

9. Under the Serbian Law for Environmental Impact Assessment, a decision approving either a screening or, if the screening determined the need for an environmental impact assessment ('EIA'), an EIA Study, is mandatory before a construction permit can be issued and the construction can start. The project developer is obliged to commence with the construction of the project no later than 2 years from the day of receipt of the decision of approval of EIA study.¹⁴
10. On 26 July 2013, the then 'Ministry of Energy, Development and Environmental Protection' issued a 'screening decision' stating that no EIA was necessary for the expansion of the Drmno mine from 9 million tons to 12 million tons per year.¹⁵ Even though certain aspects of the Drmno mine expansion should certainly have triggered the obligation to conduct an EIA Study (See also; paras. 55 to 58 of this communication).
11. On 30 December 2013, the first EIA Study for Kostolac B3 was adopted by an administrative decision.¹⁶ CEKOR challenged this decision before the Administrative Court as the EIA Study suffered from numerous deficiencies, and, in particular, did not contain any analysis of transboundary impacts. Moreover, no transboundary public participation had been conducted. Together with Romanian NGO Bankwatch Romania, CEKOR submitted a complaint to the Implementation Committee of the Espoo Convention in April 2014 (see paras xx below).
12. On 24 June 2016, the Administrative Court ruled in favor of CEKOR. The act adopting the first EIA was declared unlawful and the proceedings were returned to the Ministry for reconsideration.¹⁷ By this time, however, the decision had already expired and the EIA procedure had to be re-started.
13. A second EIA Study for Kostolac B3 was adopted by the Ministry of Environment with Decision No. 353- 02-00124 / 2017-16 in September 2017 ('the 2017 EIA Decision').¹⁸ Public participation for the Serbian public had been scheduled in early 2017, while consultations with the Romanian public were organized in late August 2017.
14. The 2017 EIA Decision was again challenged by CEKOR within the prescribed deadline. As of January 2020, no hearing has yet been scheduled.

¹⁴ Law on Environmental Impact Assessment ("Law on EIA") ("Official Gazette of the Republic of Serbia" no. 135/2004 and 36/2009) Article 18 and 28. (Annex 6)

¹⁵ Ministry of Energy, Development and Environmental Protection of the Republic of Serbia, Decision no. 353-02-901/2013-05. (Annex 7).

¹⁶ Ministry of Energy, Development and Environmental Protection of the Republic of Serbia, Decision no. 353-02-021 91/2013-05 (30 December 2013).

¹⁷ Judgement of the Administrative Court of Serbia III- 1 U no. 6832/2014 of 24.6.2016.

¹⁸ Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124/2017-16 of 28 September 2017, approving the second EIA study for the Kostolac B3 project. (Annex 8)

d. Construction permits for Kostolac B3

15. Article 137 of the Serbian Act on Planning and Construction¹⁹ stipulates that building permits can be issued for the entire facility or part of a facility if that part is a technical and functional unit.²⁰ The Serbian EIA Law provides that an EIA Decision approving an EIA Study must be part of the documentation that forms the basis of a construction permit.²¹ Therefore, the Ministry of Environmental Protection must approve the EIA Study *before* the Ministry of Planning and Construction issues a construction permit for a part of the technical or functional unit that is subject of the EIA Study.
16. Since early 2014, the Ministry of Construction, Transport and Infrastructure, has issued several construction permits for parts of the Kostolac B3, in addition, construction permits were issued for projects that contribute to the functioning of the Kostolac B3 Unit. According to news items, at least eight construction permits have been issued for Kostolac B3, covering at least 85% of the total project, by September 2019.²²
17. CEKOR is not aware of all of these eight construction permits, as it has never received any notification of them being issued. Below we give an overview of the construction permits that we are aware of and the actions CEKOR has taken in their regard.
18. Two construction permits for Kostolac B3, one for the chimney and one for the water treatment facility, were issued on 14 July 2017, roughly 10 weeks before the Ministry of Environmental Protection issued its 2017 EIA Decision.²³ The two construction permits date from 6 weeks *before* the consultation hearings with the Romanian public.
19. CEKOR challenged the construction permit for the chimney within the prescribed deadline. As of January 2020, no hearing has yet been scheduled.

On 20 November 2017, Reuters reports that the construction works on Kostolac B3 have started.²⁴

¹⁹ Law on Planning and Construction, "Official Gazette of the Republic of Serbia", No. 72/2009, 81/2009 - 64/2010, 24/2011, 121/2012, 42/2013, 50/2013, 98/2013, 132/2014, 145/2014, 83/2018, 31/2019 and 37/2019. (Annex 6).

²¹ Law on Environmental Impact Assessment, "Official Gazette of the Republic of Serbia" no. 135/2004 and 36/2009 (Annex 6).

²² Serbia-Energy.eu, 'Serbia: Over 85 % of preparations for the construction of TPP Kostolac unit B3 completed' (7 September 2019). Accessible at: <https://serbia-energy.eu/serbia-over-85-of-preparations-for-the-construction-of-tpp-kostolac-unit-b3-completed/>

²³ Ministry of Construction, Transport and Infrastructure of the Republic of Serbia, Decision No. 353-02-00111/2017/07 permitting the construction of the chimney of the Block B3 of the Kostolac plant.

Ministry of Construction, Transport and Infrastructure of the Republic of Serbia, Decision No. 351-02-00112/2017-07, permitting the construction of the water treatment facility for Block B3 of the Kostolac plant.

²⁴ Reuters.com, 'Chinese company starts construction of Serbian coal-fired power plant' (20 November 2017). Accessible at: <https://www.reuters.com/article/serbia-power-idUSL8N1NQ49F>.

20. On 15 April 2019, the construction permit for construction of the turbine, boiler and generator for Kostolac B3 was issued, representing 50% of the value of the project.²⁵ News items surrounding the issuing of this permit state that, by this time, the construction of the chimney and the water treatment systems are well on their way.²⁶ This can also be seen in pictures posted by the Ministry of Mining and Energy on twitter, of a visit of the Minister to the Kostolac B3 site.²⁷ As stated above, in September 2019 it was announced that the preparations for Kostolac B3 were 85% finished. CEKOR has made pictures of the Kostolac B3 site that show the development of the construction.²⁸ Two articles specifically mentions the deadline for the construction of Kostolac B3, which is 2020.²⁹

e. Access to justice and availability of injunctive relief in Serbian administrative procedures

21. In Serbia, an administrative appeal to a construction permit has no immediate suspensive effect and a project developer is allowed to continue construction at its own risk.

22. Article 23 of the Law on Administrative Disputes states the following;³⁰

“The claim, as a rule, does not delay execution of an administrative act against which it was submitted.

However, if the plaintiff requests so, the Court may delay execution of an adopted administrative act, until rendering of a court verdict, if the execution could cause damage which could be hardly compensated to the plaintiff, whereas delay would not be granted contrary to the public interest, nor if it would cause damage of bigger scope nor damage that could not be compensated by the opposite party, i.e. the interested party.

Exceptionally, a party in the administrative procedure may request the court to delay execution of administrative act even before the claim was submitted, in case:

- 1) *Of urgency*
- 2) *When the appeal to administrative act was submitted in administrative procedure and the appeal does not have possibility to suspend execution*

The court will decide on the submitted request for temporary suspension within 5 days from submission.”

23. Article 138a Act of Planning and Construction³¹ provides:

“Construction can be undertaken on the basis of a valid decision on a construction permit and notification of works referred to in Article 148 of this Law. The investor may also proceed with the construction on the basis of the final decision on the construction permit and the application of works referred to in Article 148 of this Law, at his own risk and responsibility.”

²⁵ Serbia-Energy.eu, ‘Serbia: TPP Kostolac unit B3 obtained its seventh construction permit’ (18 April 2019) Accessible at: <https://serbia-energy.eu/serbia-tpp-kostolac-unit-b3-obtained-its-seventh-construction-permit/>

²⁶ DANAS, ‘Sedma po redu dozvola za novu termoelektranu u Kostolcu’ (16 April 2019) Accessible at: <https://www.danas.rs/ekonomija/sedma-po-redu-doizvola-za-novu-termoelektranu-u-kostolcu/>

²⁷ Twitter of the Ministry of Mining and Energy of RS, tweet of 16 April 2019. (Annex 9).

²⁸ Photographs taken of Kostolac B3 by CEKOR in August and October 2019 (Annex 10).

²⁹ *Supra* note 22, 24.11

³⁰ The Law on Administrative Disputes (“Official Gazette of Republic of Serbia”, no. 111/2009) (Annex 6).

³¹ ‘Law on Planning and Construction’ (Annex 6).

Paragraph 3. of the same provision provides that:

“If a party has initiated an administrative dispute, and the investor, for this reason, does not start construction of the facility until the decision becomes final, the investor is entitled to compensation for damages and lost profits in accordance with the law, if the claim is found to be unfounded.”

f. Overview of decisions and agreements related to Kostolac B3

24. Please find below a table with a timeline and description of all the relevant agreements, decision and activities known to CEKOR and ClientEarth.

Date	Description
13.05.2010	MoU between the National Energy Administration of the People’s Republic of China and the Ministry of Mining and Energy of the Republic of Serbia.
22.07.2010	Agreement regarding the implementation of the ‘Kostolac B Power Project’, between EPS, Te-KO Kostolac and the China National Machinery & Equipment Import & Export Corporation (‘CMEC’).
08.12.2010	Agreement between EPS, Te-KO Kostolac and CMEC for the implementation of phase I of Kostolac B Project to the amount of 344.630.000 USD.
26.07.2013	Ministry of Energy, Development and Environmental Protection of the Republic of Serbia, Decision no. 353-02-901/2013-05. ‘Screening Decision’ for the Drmno mine expansion from 9 to 12 million tonnes of lignite per year, concluding that no further EIA is needed. This Screening Decision functions as the environmental consent needed for the construction permits needed for the mine expansion.
20.11.2013	Development Contract for Phase II of the Kostolac B Power Project between EPS, Te-Ko Kostolac and CMEC is signed.
28.11.2013	Government Decision No: 48-10165 / 2013 of 28 November 2013 approving the loan agreement for Phase II of the Kostolac B project with the Chinese Export Import Bank
30.12.2013	Ministry of Energy, Development and Environmental Protection of the Republic of Serbia, Decision no. 353-02-021 91/2013-05 dated of 30 December 2013 approving the first EIA for Kostolac B, Unit 3.
17.12.2013	The Loan Agreement for Phase II of the Kostolac B Power Plant Project between Serbia and the Chinese Export Import Bank is signed.
24.6.2016	Judgment of the Administrative Court of Serbia III- 1 U no. 6832/2014, cancelling the first EIA Decision of 30 December 2013.
14.02.2017	The second EIA for Kostolac B, Unit 3, is published and public consultations are announced in national newspaper ‘Blic’.
9.03.2017	First public consultations on the second EIA for Kostolac B, Unit 3, are held in Pozarevac, Serbia.
25.04.2017	A second draft of the second EIA, incorporating the remarks and objections from the public concerned is published on the website of the Ministry for Environmental Protection. The public concerned is invited to comment.
26.05.2017	Ministry of Construction, Transport and Infrastructure of the Republic of Serbia, Decision No. 351-02-00059/2017-07 of 26 May 2017, for buildings A, B and C and a catering building for workers.
15.06.2017	The Final version of the EIA for Kostolac B, Unit 3 is approved by the appointed Technical Commission. The

	final version is send to the Romanian authorities.
14.07.2017	Ministry of Construction, Transport and Infrastructure of the Republic of Serbia, Decision No. 353-02-00 111/2017/07 permitting the construction of the chimney of the Block B3 of the Kostolac plant.
14.07.2017	Ministry of Construction, Transport and Infrastructure of the Republic of Serbia, Decision No. 351-02-00 112/2017/07 from 14.7.2017 permitting the construction of the water treatment facility for Block B3 of the Kostolac plant.
31.08.2017 to 01.09.2017	Public consultation with hearings for the Romanian public concerned, organized in the Romanian border town of Oravica, Caras-Severin province, Romania.
28.9.2017	Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124/2017-16 of 28 September 2017, approving the second EIA study for the Kostolac B3 project.
15.4.2019	Ministry of Construction, Transportation and Infrastructure of the Republic of Serbia, Decision No. 351-02-00031 / 2019-07 of 15 April 2019, permitting the construction of the turbine, boiler and generator of Kostolac B, Unit 3.

IV. Provisions of the Convention with which non-compliance is alleged

25. Article 6 (4), Article 6 (8), Article 9 (3), Article 9 (4).

V. Nature of alleged non-compliance

Article 6, paragraph 4 of the Convention

26. Article 6 (4) states that ‘Each Party shall provide for early public participation, when **all options are open** and **effective** public participation can take place.’ As the Committee has consistently held, public participation does not fulfil the requirements of Art. 6(4) of the Convention, when at the time of the public participation the termination of a project has become a *de facto* impossibility. See findings on communications ACCC/C/2004/8 (Armenia), paras 29 and 42; ACCC/C/2006/16 (Lithuania), para. 74, ACCC/C/2006/17 (European Community), para. 54, ACCC/C/2009/38 (United Kingdom), para. 82 and ACCC/C/2009/44 (Belarus), para. 76.

27. In its findings on communication ACCC/C/2007/22 (France), the Committee clarified that this implies that the public authority may “*neither formally nor informally [be] prevented from fully turning down an application on substantive or procedural grounds*” at the time the public participation procedure takes place (para. 38). The Committee further specified that it is not sufficient that there is a formal possibility, *de jure* to turn down the application if in practice “*this never or hardly ever happens*”, meaning that *de facto*, this option is no longer open (ACCC/C/2007/22 (France), para. 39 – see also, ACCC/C/2009/41 (Slovakia), para. 63.

28. At the time the public participation procedure commenced – which started with the publication of the second EIA for Kostolac B3 on 14 February 2017, all options were no longer open because the decision to build the Kostolac B3 Unit had already been taken, evidenced by:

- a. the Loan Agreement signed between the Serbian authorities and the Export-Import Bank of China regarding Phase II of the Kostolac B Power Plant Project (28 November 2013);
- b. the Development Contract between EPS, CMEC and Te-KO Kostolac (20 November 2013), and
- c. the investments made by EPS into phase II of the Kostolac B Power project previous to the start of the public participation procedure (at least 25% of the total sum by mid 2015).

At the very least, the facts of this case show that the decision not to build the Kostolac B3 unit had become a *de facto* impossibility by early 2017, which was the time that the first public participation for the second EIA for Kostolac B3 started and there had been no public participation with the Romanian public yet.

29. In addition, EPS is bound to the payment schedule detailed in Article 6 of the Development Contract.³² Based on this payment schedule, we estimate that at least 25% of the total value of the Project, which would have been 178.900.000,- USD, had already been spend by mid-2015, 2 years before the public consultations.
30. The Loan Agreement between Serbia and the Export-Import Bank of China for Phase II entered in to effect on 25 May 2015.
31. In early 2017, it was therefore no longer factually possible for the public authorities to reject the application. Rather, the situation is comparable to that described by the Committee in its findings on communication ACCC/C/2012/76 (Bulgaria) where it held that; *'If the role of authorities when issuing EIA/SEA decisions was to merely rubber-stamp the policy decisions taken at a higher level, it would effectively deprive the environmental decision-making of any significance and make public participation in such procedures meaningless.'*³³
32. The case is also comparable to the Committee's findings on communication ACCC/C/2014/104 (the Netherlands). There as well the responsible authorities had made certain financial commitments prior to the public participation phase, in this case by way of a Memorandum of Understanding, in which the authorities agreed to compensation if the project would not be realized (see para. 77). In the present case, the public authorities had instead already paid out substantial amounts (as mentioned above, 178.900.000,- USD) by the time public participation started, meaning that these costs could equally not be recovered if the project would not go ahead.
33. The fact that the decision had *de facto* already been taken is further confirmed by the statements made by the Minister indicating that the project will be build. The Committee has previously noted with concern that statements made by public official that a project will go ahead prior to the conclusion of the public participation phase (see findings on communication

³² Annex 4, Article 6.

³³ ECE/MP.PP/C.1/2016/3, 7 March 2016, Para 66.

ACCC/C/2008/26 (Austria), para. 57). The statement, taken together with the above mentioned prior investments and agreements, clearly demonstrates that a decision to terminate the project was no longer possible.

34. For the above reasons, we submit that the Party concerned failed to comply with Art. 6 (4) of the Convention.

Article 6, paragraph 8 of the Convention

35. Article 6 (8) states that 'Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.' We consider that at least the following two construction permits violate Article 6 (8) of the Convention;

- a. Ministry of Construction, Transport and Infrastructure Decision No. 353-02-00 111/2017/07 from 14 July 2017 permitting the construction of the chimney of the Block B3 of the Kostolac plant
- b. Ministry of Construction, Transport and Infrastructure Decision No. 351-02-00 112/2017/07 from 14 July 2017 permitting the construction of the water treatment facility for Block B3 of the Kostolac plant

36. As mentioned above, based on Serbian law, all construction permits for EIA projects must be based on a prior EIA decision (Art. 5 of the Serbian EIA law). However, the construction permits mentioned in para. 35 do not refer to a specific EIA Decision but only generically state that they have been preceded by EIA, and do not refer to an administrative file number, or other form of identification.

37. The construction permits are considered to be part of the technical unit that is Kostolac B3. They would therefore (logically) have to be based on the EIA carried out in this context. However, the decision that approved the second EIA Study for Kostolac B3 is dated 28 September 2017, while both construction permits are dated 14 July 2017, 10 weeks before the EIA decision was issued, and 6 weeks before the public participation procedure for the public concerned residing in Romania was organized. Clearly, the outcome of this public participation phase cannot have been taken into account in the decision-making on these permits.

38. In light of the foregoing, we consider that the Party concerned failed to comply with Art. 6(8) of the Convention by issuing three construction permits prior to the completion of the pertinent public participation procedures.

Article 9, paragraph 2 and paragraph 4 of the Convention

39. Article 9 (2) of the Convention requires parties to provide access of the public concerned to review procedures relating to decisions, acts or omissions subject to Article 6 and other provision of the Convention.

40. Article 9 (4) sets general minimum qualitative standards that must apply to the review

procedures described in Article 9 (2), for example, they must provide ‘adequate and effective remedies’, including ‘injunctive relief’ as appropriate, and ‘not be prohibitively expensive’.

41. As explained in the Aarhus Implementation Guide³⁴; ‘when initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies must be able to issue an order to stop or to undertake certain action’. The Implementation Guide acknowledges that the need for injunctive remedies is especially pressing in environmental cases, as they often relate to the development of activities that, if allowed to proceed or continue during the court proceedings, will result in irreversible damage to health or the environment, and future compensation would likely be inadequate.
42. In this case, we acknowledge that Serbian law provides the possibility for injunctive measures in Article 23 (1) of the Serbian Law on Administrative Disputes. However, the wording is already limited; suspension of an administrative act can only be requested when, for example, the plaintiff *itself* will suffer irreparable damages and suspension will not harm the public interest.
43. A risk of irreparable damage to the environment is not sufficient to satisfy the requirement for the applicant to demonstrate that the applicant is itself at risk of irreparable damage. As the Committee held in its findings on communication ACCC/C/2012/76 (Bulgaria), in a decision on whether a permit should be suspended awaiting final judgement, national courts are required to conduct “*their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm*”.³⁵
44. By not providing for a possibility to order a suspension of the permit based on potential irreversible environmental harm, the Serbian legal framework does not comply with the requirement of Article 9(4) of the Convention.
45. Even if injunctive relief was ever granted to an environmental NGO, Article 138a of the Law on Planning and Construction exposes an applicant NGO to potentially prohibitive costs. The provision provides entitles the holder of the permit “to compensation for damages and lost profits in accordance with the law” if a permit is suspended but in the end the challenge against the permit is lost (see para. 23 above).
46. This provision, referring to liability under civil law, creates a potentially large financial risk and burden upon the plaintiff. It is likely that this provision was designed specifically to have a deterrent effect on plaintiffs to request suspensive measures.
47. CEKOR is a small environmental NGO with limited financial resources. It would have not been able to bear the burden of compensation of the potentially large damages and lost profits

³⁴ UNECE, ‘The Aarhus Convention, An Implementation Guide’ (Second edition, 2014) p. 200.

³⁵ ECE/MP.PP/C.1/2016/3, para. 77.

that EPS and the Serbian government would have suffered, in case they would have been granted suspensive measures.

48. It is for this reason that CEKOR has not requested suspensive measures under Article 23 (1) under the Law for Administrative Disputes in the administrative challenges they initiated related to Phase II of the Kostolac B Power Plant Project. First, CEKOR's lawyer knew that such applications would not be successful due to the restrictive wording of article 23 (1). Second, the financial risks associated with the suspensive measures brought CEKOR to the conclusion that a request for suspensive remedies would not be possible.
49. This lack of injunctive relief is particularly problematic because of the length of Serbia's administrative and court proceedings. There is no provision in the Law on Administrative Procedures obliging the court to resolve an administrative dispute within a binding time limit. Moreover, the Serbian Administrative Courts are congested with cases. It is not uncommon for it to resolve administrative disputes within about 3 years. Considering that an EIA approval decision is only valid for 2 years, administrative procedures where no suspensive measures are granted therefore do not provide an adequate and effective remedy as required by Article 9(4) of the Convention.
50. Based on the foregoing, we submit that Serbia fails to comply with Article 9, paragraph 4 of the Convention as it fails to meet the Convention's requirements regarding injunctive relief in challenges against environmental permits as well as the construction permits for EIA projects. This is a systemic failure to comply with the Convention, because it relates the legal framework applicable in Serbia.

VI. Use of domestic remedies

51. As can be summarized from this Communication, CEKOR has challenged the following decisions;
 - a. Ministry of Energy, Development and Environmental Protection Decision No. 353-02-021 91/2013-05 ('The 2013 EIA Decision')
 - b. Ministry of Construction, Transport and Infrastructure Decision No. 353-02-00111/2017/07 ('the chimney construction permit');
 - c. Ministry of Environmental Protection Decision No. 353- 02-00124 / 2017-16 ('the 2017 EIA Decision');
 - d. Ministry of Construction, Transportation and Infrastructure Decision No. 351-02-00031 / 2019-07 ('the boiler construction permit').
52. All these challenges are still within the first stage, and therefore, all domestic remedies are technically not exhausted.
53. However, in this specific case the domestic remedies described above obviously do not represent any '*effective and sufficient*' means of redress and, in any event, "application of the remedy is unreasonably prolonged".³⁶

³⁶ ECE/MP.PP/2/Add.8, para 21.

54. The remedies that are available under the Law on Administrative Disputes are in practice not effective and sufficient. An initiated administrative procedure does not automatically suspend an administrative act. The consequence of this has become painfully clear in the case of Kostolac B3.
55. The first challenge (point a. above) was successful and the EIA procedure had to be restarted. However, as explained in paras. 35-38 above, this challenge had not the effect of preventing further construction permits to be granted prior to the completion of the public participation phase. Therefore, also this court challenge did not provide an “effective and sufficient means of redress”.
56. The remaining three challenges (points b-d) are still pending before the Serbian courts, while Kostolac B3 itself is almost fully constructed.
57. As explained above, it is almost impossible for an environmental NGO in Serbia to be granted the suspensive measures available under the Law on Administrative Disputes. In addition, these measures come with a potential large financial risk for a plaintiff, due to provision 138a in the Law on Planning on Construction. A risk many environmental NGOs, including CEKOR, are not able to take. This systemic issue cannot be resolved by way of a domestic court challenge, as this issue goes back to the legal framework of Serbia.
58. Taking this together with the fact that the Serbian courts are considerably overburdened, and proceedings can take years, this means that even if an administrative challenge against a ministerial decision is won by CEKOR, Kostolac B3 will likely be fully constructed.³⁷

VII. Use of other international procedures

59. NGO Bankwatch Romania filed a complaint to the Espoo Convention Implementation Committee (‘ECIC’) in April 2014 in relation to Phase II of the Kostolac B Power Project. The complaint was filed following the first EIA Decision of December 2013 for the Kostolac B3 project, but also addressed the Drmno mine expansion to 12 million tonnes per year.
60. The complaint concerned the fact that Romania had not been notified, even though Serbia was required to do so under the Espoo Convention. During the ECIC’s 33rd meeting in March 2015 that a ‘Committee Initiative’ was initiated³⁸. The ECIC indeed identified a breach of the Espoo Convention and urged Serbia to comply with its obligations under the Convention. This issue was considered to have reached a satisfactory result by the ECIC as of April 2017,³⁹ after Serbia notified Romania of the Kostolac B3 power plant and assessed transboundary impacts in the 2016 EIA for Kostolac B3.

³⁷ CEKOR has made photographs of the development of Kostolac B3 in August and October 2019 (Annex 9).

³⁸ ECE/MP.EIA/IC/2015/2 (20 May 2015), para. 22-26. Accessible at: https://www.unece.org/fileadmin/DAM/env/documents/2015/EIA/IC/ece_mp.eia.ic.2015.2_e.pdf.

³⁹ ECE/MP.EIA/2017/8 (4 April 2017), para. 66-68. Accessible at: https://www.unece.org/fileadmin/DAM/env/documents/2017/EIA/MOP7/25_04_20_ece_mp.eia_2017_8_e.pdf.

61. The ECIC also agreed that the Drmno mine expansion is an activity listed in appendix I to the Convention and that the likelihood of a significant adverse transboundary impact could not be excluded. However, the ECIC noted that Serbia had concluded, on the basis of a ‘domestic EIA’ that that activity was not likely to cause adverse environmental impacts and that ‘consequently the application of the Convention had not been considered necessary’. Despite follow-up correspondence from ClientEarth and Bankwatch Romania, this conclusion was maintained, backed by the response of Romania did not intend to make use of its rights under the Espoo Convention regarding the extension of the Drmno open-pit mine’s capacity.⁴⁰
62. The Drmno mine expansion was never subject to an EIA, but environmental consent was given via approval of a screening that had concluded that there would be no likely environmental impact. This specific Screening Decision is also subject to a Complaint to the Secretariat of the Energy Community Treaty Secretariat for breaching the EIA Directive that is part of the Energy Community *Acquis*. The complaint was submitted in September 2018, but has not resulted in any dispute settlement proceedings yet.

VIII. Confidentiality

63. No confidentiality requested

IX. Supporting documentation

Annex No.	Description	Page
1.	‘Preferential buyer credit loan agreement on phase II of the package project Kostolac-B Power Plant Project between the Government of the Republic of Serbia represented by the ministry of finance as borrower and the Export-Import Bank of China as Lender Dated December 17, 2014.’ (The ‘ Loan Agreement ’)	62
2.	‘Memorandum of Understanding between the National Energy Administration of the People’s Republic of China and the Ministry of Mining and Energy on the Republic of Serbia on the Cooperation in the Energy Field’ (13 May 2010)	12
3.	‘VI. Pre Contract on implementation of the Project package Kostolac – B power Plant Project’ (English Version – November 2010)	6
4.	‘Contract Agreement for Phase II of the Kostolac B Power Plant Project’ 20 November 2013 (The ‘ Development Contract ’)	17
5.	The Export-Import Bank of China, ‘Notice of Effectiveness of Loan Agreement’ (25 May 2015)	1
6.	Overview of the relevant provisions in Serbian national law (in Serbian and English)	4
7.	Ministry of Energy, Development and Environmental Protection of the Republic of Serbia, Decision no. 353-02-901/2013-05 (26 July 2013) (with English Translation)	4

⁴⁰ ECE/MP/EIA/IC/2019/4 (24 October 2019), para. 42-44. Accessible at: https://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/45th_Session/Documents/1918449E.pdf.

8.	Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124/2017-16 (28 September 2017)	30
9.	Twitter of the Ministry of Mining and Energy of RS, tweet of 16 April 2019	2
10.	Photographs taken of Kostolac B3 by CEKOR in August and October 2019	2

X. Signature

64. Natasa Djereg, Director, CEKOR



Subotica, 27/01/2020

65. Maria Kleis-Walravens, Head of Energy, ClientEarth



Brussels, 27/01/2020