Dear honorable President

Dear honorable members of the Compliance Committee

Dear members of the Secretariat,

We would like to thank the Committee and the Secretariat for the opportunity to participate in this hearing. We are particularly grateful for allowing us to participate via an online platform – an essential accommodation for organizations with limited resources like ours. Even in the challenging circumstances of the current pandemic, the work of the Compliance Committee must continue.

During the hearing, the first Communicant, Client Earth, will be represented from UK by Ms. Eleni Diamantopoulou, LL.M., an England and Wales, and Greece qualified lawyer. My name is George Chasiotis, and I am a Greek qualified lawyer, LL.M. and senior legal advisor to the second co-Communicant, WWF Greece. The closing statement will be delivered by Eleni, and we will be both available to answer, to the best of our abilities, any questions that you may have.

This Communication concerns the permitting of energy-related activities in Greece. It is about a practice that, we believe, violates the Convention, deprives Greek citizens of their environmental rights and harms the environment. For the purposes of the opening statement, we will address, first, the facts underlying this Communication; second, their interpretation under the Convention, and the Compliance Committee's findings; and third, certain claims put forward by the Party concerned in their Response.

A. ON THE FACTS OF THE CASE AT HAND

Despite some appearance of complexity, the facts at the heart of this Communication are simple. Since 1999, and in every case since 2005 (when the Party concerned ratified the Convention), the Greek parliament has adopted, and repeatedly extended, a provision of statutory law. According to the letter of this provision, an operating license is granted to the power plants of two related operators – notably, PPC S.A. (the public electricity company, which was recently privatized), and its subsidiary, PPC Renewables S.A. A chronological list of those provisions is supplied with the transcript of this statement.[1] For your convenience, we have added the dates of entry into force of the Convention, as well as the EIA and IE directives, in an Annex.

One point of clarification must be made. The provision is described interchangeably in the materials of this Communication as Single Provisional Operation Permit, Temporary Integrated Operation Permit, Provisional License of Operation, or even Provisional Unified License of Operation.[2] All terms refer

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1 Communication, para. 27. The table was updated up to 2021 in our Update, Annex A.

2 See Communication, Annexes 9 to 15; Response by the Party concerned, pp. 7.

to the same institution. The translation of national law is always a challenge, but the reasons for this terminology will soon be apparent. Hereinafter, we will use the term of our original Communication – Single Provisional Operation Permit.

Terminological issues aside, the letter of the 2005 provision itself reveals its sweeping ambit, comprehensive intention and pinpoint precision. It was phrased as follows:[3]

> *the PPC shall continue operating the power production facilities it owns, which are operating or are being constructed according to its five or ten-year development plans… In particular, as regards the units of the previous passages, by virtue of this law a unified production license is granted to PPC SA, as well as a provisional unified license of operation until 31.7.2005…*

Repeated and timely extensions of the deadline have followed since, roughly at a pace of once every 2 years. All extensions total more than 15 years. The number of covered facilities, which were never listed in detail, has steadily expanded. In one case (2015), emergency legislation was called upon.[4] The current extension expires on 31.12.2021.[5]

The Communicants firmly believe, and strongly hope, that this hearing need not be oppositional. Therefore, as far as the Convention is involved, we would like to emphasize four undisputed points of convergence between the Communication and the Party concerned.

(a) The first, undisputed point is that the operation of those "power producing facilities" includes Annex I activities. Among them, most conspicuous are the Greek lignite-fired thermal power stations – including 2 of the top 30 European polluters, as identified in a 2021 report of the European Topical Center on Air Pollution.[6] A number of those facilities also fall under the ambit of point 20 of the same Annex, most notably hydroelectric dams, wind parks, medium combustion plants. Indeed, the fact that a certain number of the permittee facilities are subject to the EIA and the IE Directives is also beyond doubt.[7] PPC's 2019 "Sustainable Development Report" lists 12 thermal power plants, 32 autonomous and local power plants, 16 hydroelectric power plants, 18 small hydroelectric power plants, 29 wind farms, and one hybrid station.[8]

(b) The fact that the Single Provisional Operation Permit is equal to a "decision on whether to permit" seems also undisputed. This follows from the letter of the provision - "shall continue operating." It is the Greek legislator

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[3] Communication, Annex 9.

[4] Communication, paras 18, 27-28.

[5] Update, Annex A.

[6] S. Schuct, et al. (2021). Costs of air pollution from European facilities 2007-2021 (Eionet Report - ETC/ATNI 2020/4). European Topic Centre on Air pollution, transport, noise and industrial pollution, 2021. Available from: https://bit.ly/3yjzRlp

[7] Communication, paras. 1-10; Response by the Party concerned, pp. 14-17.

[8] PPC. (2019). Sustainable Development Report, p. 7. Available from: https://bit.ly/31O8vIt

herself that has chosen the word “permit” or “license” - not the Communicants. In fact, the Single Provisional Operation Permit is intended as a stopgap for the ordinary, administrative operation permit, which is a prerequisite for the operation of any electricity-producing facility. Had the Party concerned adhered to the ordinary permitting procedure (Picture 1), the operation permit would have followed the environmental permit, and none of them would have required a statutory provision. In other words, the ordinary procedure would have been a “tiered” permitting procedure, allowing for public participation at the early stage of the environmental impact assessment procedure. However, the Party concerned soundly and repeatedly rejected this option: in their own words, “in order for these plants not to operate on a random basis and without any provision, as well as for their operation not to be disturbed” – “disturbed”, apparently, by the demands of international law and the vagaries of environmental rights - “to a temporary permitting regime” – a temporary regime of, let us not forget, 15 years.[9] As the Committee has noted in the past, it is the “legal functions and effects” that matter, and not the labels under national law.[10]

PICTURE 1: THE ORDINARY PROCEDURE (WHICH WAS NOT FOLLOWED)

environmental Impact Assessment procedure, incl. public participation

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leading to

‖

environmental permit (AEPO) *or*

IED permit *or*

“decision on whether to permit” *or*

“development consent”

‖

On which “are based”

‖

other required permits or formalities

in accordance with activity

(e.g., construction permit, installation permit, filing of Seveso safety report)

‖

Incorporated, confirmed or subsumed by

‖

Operation permit

‖

which allows operation

9 Response by the Party concerned, p. 7.

10 ACCC/C/2011/58 (Bulgaria), para. 53, and references therein.

(c) A third point of convergence: none of the provisions of statutory law that introduced, updated and modified the Single Provisional Operation Permit was adopted pursuant to the requirements of article 6. The Response claims that environmental issues, including public participation, are assigned to a "separate framework".[11] We are baffled by the claim that "separate frameworks" may curtail the range of application of the Convention, or, to that effect, any international treaty – and especially one that requires a "clear, transparent and consistent framework."

(d) The final point of convergence – which touches on the question of the exhaustion of remedies, and of the applicability of article 9(2) - is the impossibility of direct judicial review of provisions of statutory law under the Greek Constitution. Indeed, under the latter, the jurisdiction of the Supreme Administrative Court (Council of State) pertains to "annulment upon petition" only of "enforceable acts of the administrative authorities".[12] Acts of Parliament are removed from the scope of direct judicial review,[13] and the Council of State has never accepted jurisdiction in a direct challenge against a statutory provision. Greece is not a country of centralized, strong-form constitutional review, in the model of the German *Bundesverfassungsgericht*.[14] Access to justice requires an enforceable administrative act. Shortly, we will examine to what extent this fundamental deficiency can be removed by some version of indirect or incidental judicial review.

B. ON SOME RELEVANT ACCC FINDINGS AND CONCLUSIONS

At this point, let us take a step back, and note that these questions are not novel for the Compliance Committee. The rich corpus of its findings and conclusions offers all the necessary resources for assessing the present case. Three families of findings and conclusions seem to be instructive.

(a) First and foremost, the extensions of the Single Provisional Operating License may be thought as an "update" of the operating conditions of certain facilities, in the sense of article 6(10). This is not the first time that the Committee considers "updates" granted by virtue of a statutory provision.[15] On

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[11] Response by the Party concerned, p. 7,8,10.

[12] Art. 95(1)(a) of the Constitution of Greece, available in semi-official form from: https://bit.ly/3oOP9LO . See, also: Communication, paras 15-18, 37 and Annexes 6 and 7; Response by the Party concerned, p. 12.

[13] Z. Szente, The principle of effective legal protection in administrative law – a comparison, in: Z. Szente et al. (2017). The principle of effective legal protection in administrative law: a European comparison. Routledge.

[14] The Council of State Website. (Undated). Available from: https://bit.ly/31PjQIg ; Greece. (2017). In: Association of the Councils of State and Supreme Administrative Jurisdictions. Tour of Europe. Available from: https://bit.ly/3IHd33W ; M. Ioannidis. The Courts. In: E. Venizelos et al. (ed.). (2020). The Oxford Handbook of Modern Greek Politics. Oxford ; R. Dixon, The forms, functions, and varieties of weak(ened) judicial review, International Journal of Constitutional Law 17(3), July 2019, pp. 904–930.

[15] ACCC/C/2014/122 (Spain), para. 70 subsq.

a number of occasions, the Committee suggested that "the permitted duration of an activity is clearly an operating condition for that activity, and an important one at that. Accordingly, any change to the permitted duration of an activity, be it a reduction or an extension, is a reconsideration or update of that activity's operating conditions": moreover, "except in cases where a change to the permitted duration is for a minimal time …it is appropriate for extensions of duration to be subject to the provisions of article 6".[16] As in the case of an Irish quarry – a "proposed activity" with more limited environmental impacts - "an extension of an activity's duration by five years is by no means minimal."[17] Therefore, a cumulative extension of far more polluting activities of 15 years cannot be minimal.

(b) At first sight, the present case might be thought of involving environment-related decisions, or multiple permits. In the Communicants' view, this is mistaken: the Single Provisional Operating Permit is the unique, self-contained decision necessary and sufficient for the operation of all covered facilities. However, in similar cases, the Committee has found that "some kind of significance test, to be applied at the national level to each such decision-making procedure in question, is the most appropriate way to understand the requirements of the Convention".[18] That being the case, 15 years of consecutive extensions of the Single Provisional Operating Permit pass the test with flying colors.

(c) Finally, the Committee's findings on late, but inconsequential public participation procedures, following decisions that have already been precluded or foreclosed beforehand are also relevant. Just like, say, in the case of the Borssele nuclear plant, the consecutive extensions of the Single Provisional Operation Permit are not considered in the environmental assessment of the permittee facilities, when (and if) the latter do take place.[19] Likewise, just like in the Czech case of the Moschovce plant, there was no opportunity for public participation in any decision-making concerning the Single Production Operating Permit and its 15-year-long extensions. Stated otherwise, where the Single Provisional Operating Permit applies, the subsequent environmental impact assessment procedure ceases to be a permitting process (Picture 2).[20]

C. ON CERTAIN ISSUES RAISED BY THE PARTY CONCERNED

Nevertheless, the Party concerned makes a valiant attempt to circumvent the inevitable application of article 6 to the Single Provisional Operating Permit by maintaining that "environmental operation of the plants…is not assessed"

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16 ACCC/C/2014/104 (Netherlands), para. 71. To the extent that some of the facilities involved are regulated by the IED, and are subject to BAT conclusions, cf., also, ACCC/C/2014/121 (European Union), paras. 106-109.

17 ACCC/C/ 2013/107 (Ireland), paras. 79, 84.

18 ACCC/C/2006/17 (European Community), para. 43; ACCC/C/2014/121 (European Community), para. 101.

19 ACCC/C/2014/104 (Netherlands), para. 58.

20 ACCC/C/2009/41 (Czech Republic), paras. 61-67 and references therein.

before the granting of Single Provisional Operating License, and that "environmental issues are fully covered by the national and European environmental law".[21] When, eventually, all things come together and the environmental impact assessment procedure is initiated, they are suggesting, then those "proposed activities" will be subjected to the demands of article 6.

These claims do not withstand scrutiny. It is plainly wrong to argue that operation permits do not deal with "environmental issues". This is, first, contradicted by the law which regulates the ordinary, administrative operation permits: "operation licenses may impose terms and limitations pertaining to the safe operation of plants, protection of health and life of those working there and …of the environment".[22] But, more importantly, it is contradicted by the Party concerned itself. On the one hand, any disturbance of the operation will have "unpredictable and non-manageable" environmental (inter alia) consequences,[23] while at the same time, the granting of operation permits is linked with "economic criteria" concerning (inter alia) "the efficient use of energy, the implementation of the country's long-term energy planning and the protection of the environment"[24] – all of them, among the most critical "environmental issues" of our time. If anything, one cannot help noticing that the continuous extension of the Single Provisional Operation Permit prohibits long-term energy planning. Indeed, the implicit, and extremely naïve, claim that "operating conditions" can be cleanly distinguished into "environmental" and "non-environmental" ones, while access to justice and public participation should be safeguarded only for the former, is against the letter and the spirit of article 6(10) and 9(2).[25]

It would be more accurate to say that the operation of a power plant is, in itself, an "environmental issue". Energy production has cumulative, synergistic effects, possibly amplified by the "undisturbed" operation of electricity-producing plants: bottom and fly ash piles up; water abstraction for the cooling towers continues unabated; mercury emissions settle in rainwater and waterways; flows downstream of dams are permanently altered; on their return, migratory birds may collide with wind farms; and so forth.[26]

The Response claims that operation permits depend on "economic criteria as well as criteria relating to the security of supply and … the System".[27] But even those criteria have environmental ramifications. To take two examples, the "security of the system" is related to the possibility of environmental damage, while the "applicant's financial interests" affect her capacity to equip the plants with state-of-the-art emission abatement systems. In every case, it is unclear

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21 Response by the Party concerned, pp. 7, 8.

22 Art. 3(6)(b) of law 2244/1993, as officially translated in Annex 3 of the Communication.

23 Response by the Party concerned, p. 7.

24 Response by the Party concerned, p. 7.

25 Cf., in this respect, ACCC/C/2014/122 (Spain), para. 73.

26 E. Massanet et al. (2013). Life-Cycle Assessment of Electric Power Systems. Annu. Rev. Environ. Resour. 2013 (38), pp. 107-136.

27 Response by the Party concerned, p. 7.

why a “temporary regime” has lasted for 15 years; or why such vital priorities (as the security of the system) are served by a “temporary” regime; or why a “temporary” regime supplies a “non-random” basis for the operation of the covered power plants; or, more importantly, why the application of the Convention would “disturb” the operation of any facility. Finally, the “applicants’ financial interests” are not implicated, for the simple reason that PPC S.A. and PPC Renewables S.A. are publicly owned and therefore, they were and still enjoy the generous support of the State, o.

At this point, let us highlight the fact that the Greek parliament has scrupulously documented the reasons behind the Single Provisional Operating Permit in the reports accompanying the relevant statutes. It is a temporal extension, in order for 2 operators to regularize their facilities with properly issued operation permits – that is, by extension, with properly issued environmental permits. In US parlance, it is a “grandfathering” provision. It is particularly disingenuous to claim otherwise, and it is particularly fanciful to claim that this mass of haphazard, ad hoc, opportunistic, byzantine, and temporally limited provisions is a “framework”, in any shape or form.

Finally, the Response concludes that “environmental issues related to the environmental performance of an LCP (Large Combustion Plant)… are guaranteed by the environmental permit ... This legal framework also includes the protection of the rights of the public in environmental matters, including the public's right of access to justice, as enshrined in the Aarhus Convention”.[28] Indeed, according to the Response (and ignoring the fact that the Communication does not refer only to LCPs) the “practice of the Communicants” - that is, the practice of seeking judicial review of environmental permits - demonstrates that all is well.

Unfortunately, nothing could be further from the truth. To begin with, the Communication does not claim that an environmental permit, issued in accordance with the applicable administrative environmental assessment process described both in the Response and the Communication, cannot be challenged. It argues that the Single Provisional Operation Permit cannot be challenged, despite the fact that it falls under 9(2) of the Convention, and should be, accordingly, subject to review of its procedural and substantive legality.

Nevertheless, the Compliance Committee might be interested in “the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”:[29] Therefore, a short description of the scope of judicial review in Greece is in order. As stated above, only enforceable acts of administrative authorities are reviewable. Furthermore, the key element in the Greek system is the indirect and in concreto character of the review: any court can review incidentally, i.e. while hearing a particular case and in the

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28 Response by the Party concerned, p. 10.

29 ACCC/C/2011/58, para. 58.

context and circumstances thereof, the compliance of the statute evoked before it with some higher law – in our case, the Convention or other EU law. What is reviewed is the application of the statute in the particular case at hand. The law may be "disapplied" for the particular case, but remains otherwise fully in force. If the circumstances of its application are different, another court (or even the same court) may still apply it in any other case.[30]

In the circumstances of the present case, this does not offer a solution. First, no enforceable administrative act is required or envisaged for the implementation of the Single Provisional Operating Permit. The environmental permit is certainly not a similar act – since, as the Party concerned claims, "environmental issues" constitute a "separate framework". Ratione temporis, and if, miraculously, a suitable act is located, incidental review is available only after the issuance of the secondary, administrative act. Ratione materiae, an implementing administrative act (a construction permit, say) will typically have a more restricted scope than the Single Provisional Operating Permit, leading to an equally restricted judicial review. A petitioner must keep plugging away ad infinitum, for every single one of the covered installations, while the Single Provisional Operation Permit remains triumphantly in the legal order.

Some troubling aspects of the current Greek EIA law must also be taken into account. Greek EIA law allows the indefinite extension of environmental permits in force whenever an operator submits a renewal request.[31] As a result, with respect to the extension, there is no information, inter alia, on the proposed activity and the nature of pending decisions.[32] Even worse, as we describe in our Update, according to a sweeping 2021 law, the same procedure is applicable whenever a IED permit update takes place due to new or updated BAT conclusions.[33] Obviously, according to the Party concerned, the public must second-guess what the private correspondence between the operator and the permitting authorities involves. This is a regime of secrecy. This is what the Convention intends to abolish. .

D. CONCLUSION

Dear honorable President and members

Before we finish, let us assure you that the Greek constitution – one of the first Constitutions to include a right to the environment (1975) – is perfectly consistent with the Convention. But whoever is whittling away at access to justice, is whittling away at the law itself – be it the Aarhus Convention or the Rio Declaration, the Greek constitution or the Charter of Fundamental Rights, the EIA, Habitats or Seveso Directive, a forest regulation or an environmental

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30 A. Kaidatzis. (2014). Greece's Third Way in Prof. Tushnet's Distinction between Strong-form and Weak-Form Judicial Review, and What we May Learn from It**.** Jus Politicum (2014). Available from: https://bit.ly/30kvlH1 .

31 Communication, para. 30; Response by the Party concerned, pp. 13-14; Update, paras 6,8.

32 Cf. art. 6(2)(a) and (b), 6(9) of the Convention.

33 Update, para. 8, and Annex B.

permit. In our time, the anthropocene, implementation of environmental law is not optional. In our time, environmental rights are not, and should not be, an afterthought or a footnote for no one. Certainly not in Greece, a country with a unique and fragile nature. Thank you for your attention .

PICTURE 2: THE PERMITTING PROCEDURE AT ISSUE IN THE COMMUNICATION

Single Provisional Operating License

Unified License of Operation

granted by statutory law

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allows "undisturbed" continuous operation ("operation permitting")

"Separate framework for operating permitting" (Response)↑

"Environmental issues" (Response)↓

"environmental issues will be assessed by"

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environmental Impact Assessment procedure, incl. public participation

‖

leading to

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environmental permit (AEPO) *or*

IED permit *or*

"decision on whether to permit" *or*

"development consent"

Date of entry into force	Law that granted/extended the SPP and SPOP and other relevant legislation on access to justice	Details
22/12/1999	Law 2773/1999, Article 42(1)	PPC is granted a **SPP** to "maintain the operation" of all the power plants that were either operating or being constructed at the time the law was published (i.e. for 22 plants in 8 lignite power stations; now 16 plants in 7 lignite power stations).
12/09/2001	Law 2941/2001, Article 8(5)	Amendment of Law 2773/1999 Article 42(1). The plants that held the SPP were also granted a **SPOP** until 31/07/2005
19/08/2005	Law 3377/2005, Article 24(1-4) (Annex 11 of Communication)	**Extension** of the SPOP granted by Law 2941/2001, until 31/12/2008. Any **new power plants** that were given production permits after 24/01/2002 are also given a SPOP until 31/12/2008.
17/5/2005	Council Decision 2005/370/EC, Article 1	**Conclusion**, on behalf of the European Community, of Aarhus Convention
13/12/2005	Law 3422/2005, Article first	**Ratification** by law of Aarhus Convention
28/01/2009	Law 3734/2009, Article 33(2) (Annex 12 of Communication)	**Extension** of PPC's SPOP to 31/12/2013
17/2/2012	Directive 2011/92, Article 11	**Access to justice** provision of Directive 2011/92
7/1/2013	Directive 2010/75, Article 25	**Access to justice** provision of Directive 2010/75
31/12/2013	Law 4223/2013, Article 55 (5) (Annex 13 of Communication)	**Extension** of PPC's SPOP to 31/12/2015
24/12/2015	Act of Legislative Nature 24/24-12-2015 National Gazette A 182/24-12-2015, Article 9 (Annex 14 of Communication)	**Extension** of PPC's SPOP to 31/12/2017

15/02/2016	Law 4366/2016, Article First (Annex 15 of Communication)	**Validation** of the Act of Legislative Nature (Emergency Act) 24/24-12-2015 National Gazette A' 182/24-12-2015, Article 9; extension to 31/12/2017 confirmed by ordinary, non-emergency legislation
22/12/2017	Law 4508/2017, Article 31(1-2) (Annex B)	**Extension** of PPC's SPOP to 31/12/2019
3/12/2019	Law 4643/2019, Article 32(1-2) (Annex B)	**Extension** of PPC's SPOP to 31/12/2021