ACCC/C/2020/179 Serbia – Opening Statement on behalf of the Communicants

Dear honourable Chair and Vice Chairs,

Dear honourable members of the Compliance Committee,

Dear members of the Secretariat,

My name is Luka Djordjevic, I am an attorney at law from Belgrade, Serbia, representing CEKOR. I will deliver the opening and final statements on behalf of the Communicants, CEKOR and ClientEarth.

Two lawyers from ClientEarth, Ewa Dabrowska and Selin Esen, are here to support.

We would like to thank the Committee and the Secretariat for the opportunity to participate in this hearing.

Today, we will focus on the Kostolac B3 Power Plant Project in the Republic of Serbia and its non-compliance with the Aarhus Convention's requirements.

As we sit here, a 350 MW coal power plant is about to start operating in Kostolac, a town in the east of Serbia, on the right bank of the Danube, close to the Romanian border. It is built in the immediate vicinity of 4 existing blocks, totaling around 1200 MW of installed capacity. The site is located only a few kilometers away from Deliblato Sands, a protected area identified as a future Natura 2000 site, the largest sandy terrain in Europe, home to many endemic species of rare or endangered plants and animals. In the period since submitting the Communication until today, none of the legal irregularities we have communicated about have been rectified.

For the convenience of the Committee, we have prepared a diagram that presents in a nutshell the timeline (from left to right) of the relevant phase of the permitting procedure under Serbian law. In the diagram, we distinguish the EIA procedure (in green) and the parallel construction permit procedure (in orange). Below that, we show when the construction works for the project commence (in purple).

Following the screening process and determination of scope of the EIA, the project developer submits a draft EIA study, which is published by the public authorities. Public consultation takes place and results in the final version of the EIA study. If the project is assessed to have a transboundary effect, the public consultation shall take place in all relevant states.

Then, the Ministry of Environmental Protection approves the EIA study and it becomes immediately enforceable.

Under Serbian law, the EIA approval proceeding is one instance only. There is no administrative review procedure available, therefore the only legal avenue to challenge

an EIA approval decision is directly before the Administrative Court. This challenge does however not suspend the EIA approval decision.

As we can see on the diagram, generally speaking, the EIA procedure and construction permit procedures overlap significantly. While the EIA procedure is ongoing, the project developer can already request construction permits. There is a common practice of splitting a project into smaller projects and requesting several construction permits.

Under Serbian law for an effective submission of a request for a construction permit, it is sufficient to attach the EIA study to the documentation. On this base a construction permit is pre-issued, however the commencement of works requires the final EIA approval decision. Once the EIA approval decision is issued, the project developer notifies the public authorities, which subsequently issue a certificate confirming that the project developer is allowed to commence the works. The certificate is not an administrative decision and cannot be challenged by the public concerned. Moreover, the public concerned is not a party to the construction permit proceeding, nor is it notified about the issuance of the final construction permit with the certificate.

Having provided an overview of the EIA and construction permitting procedure, let me recall our 3 claims.

As to our **first claim**, the Communicants recall the Republic of Serbia only allowed for public participation when not going ahead with the Kostolac B3 power plant project was already de facto impossible, in violation of Art. 6(4) of the Aarhus Convention.

Art. 6(4) guarantees early public participation when all options are open and effective public participation can take place. This requirement is not fulfilled if the termination of a project has become de facto impossible. The Convention requires the public authority to still be in the information gathering and processing stage and to be open to persuasion by members of the public to change its position or opinion. Taking steps that might have the effect of decreasing the range of available options may breach Art. 6, even though no decision has formally been made. In its findings on communication ACCC/C/2008/24 (Spain), the Committee held that "entering into agreements relevant to the Convention that would foreclose options without providing for public participation may be in conflict with article 6 of the Convention".[1]

For the Kostolac B3 project, the public was notified about the first EIA study in 2013. As the Party concerned correctly noted, CEKOR participated in the following public consultations. Although no transboundary consultation was conducted in Romania, the first EIA approval decision was issued in December 2013. CEKOR challenged this decision before the Administrative Court. In June 2016, the Administrative Court ruled in

[1] ACCC/C/2008/24 (Spain) Findings, para. 119

favor of CEKOR and annulled the first EIA approval decision because it did not refer to the objections raised by CEKOR in the public consultation process.

In February 2017, the second draft EIA study was published, and a public consultation was announced. This time the Romanian public was also consulted.

However, by the time of the public consultations, not going ahead with the project had become a de facto impossibility – all options were no longer open. This was because of a number of agreements locking in the financing for the Kostolac B3 project:

In November 2013, the then-public electricity utility EPS, its subsidiary Te-Ko Kostolac and Chinese construction and engineering company CMEC signed a development contract about the project. This contract required EPS to make an advance payment of around 25% of the project value by July 2015.

The Serbian authorities already signed a loan agreement with the Export -Import Bank of China regarding the project in November 2013. The loan became effective in May 2015. From this point onwards, loan payments were already distributed in instalments.

Entering into these agreements prior to the public consultation process had been completed drastically narrowed down the range of available options to basically one – fulfilling the contractual obligations and pursuing the project.

In its response on page 4, paragraph 5, the Party concerned claimed that “[...] the question of project's impact on the environment and the "openness of all options", including the possibility of not implementing the project at all, may not be asked at every phase of the project life cycle, [...]. Otherwise, the constant possibility for the entire project to be questioned by the interested public would be completely contrary to the principles of legitimacy, legal security, equality of participants in the procedure [...]”.

However, in the present case, as clearly visible from the timeline, not only was there no “constant possibility for the entire project to be questioned at every phase of the project life cycle”, but such an opportunity was not even once effectively provided.

Our **second claim** is based on Art. 6(8) of the Convention which requires that a decision takes due account of the outcome of public participation. At least for two construction permits for Kostolac B3, this requirement was not fulfilled.

To recall, the first EIA approval decision was issued in December 2013 but then overturned based on a court challenge of CEKOR in June 2016. By December 2015, the EIA study had also expired. Therefore, a second EIA procedure was conducted, including public consultations in Serbia in early 2017 and in Romania in August 2017. The second EIA approval decision was issued in September 2017.

However, the Ministry of Construction, Transport and Infrastructure already issued the construction permits for the chimney and water treatment facility of Kostolac B3 in July 2017.

The construction permits were issued without reference to EIA studies on which they had to be based, according to Art. 18 of the EIA Law, making it impossible to determine whether the permits were based on any study at all. Assuming the permits were based on the second study for Kostolac B3, they would be illegal, since the public consultations in Romania were not conducted yet and the study was not final. For these reasons, the permit for the chimney of the Kostolac B3 was challenged in April 2018, by a request to repeat the procedure and annul the permit. As of today, no actions have yet been taken by the Ministry of Construction, Traffic and Infrastructure regarding the request.

While the Party concerned set out correctly that a request for the construction permit may include either the EIA study or the EIA approval decision – the finalization of the construction permit requires an EIA approval decision. Art. 148 (13) of the Law on Planning and Construction prescribes that the procedure for issuing the construction permit is completed with the notification of the commencement of works. According to paragraph 2 of the same article, the EIA approval decision must be submitted with the notification of the commencement of works, showing clearly that the construction permitting process cannot be finalized legally without the final EIA decision. This is illustrated in the diagram in front of you: On the left we show the issuing of the construction permit based on the EIA study but the construction permitting process only becomes final based on the certificate issued by the public authorities following the final EIA decision.

In a similar way, the second EIA approval decision also does not take due account of the outcome of public participation. Following CEKOR's challenge in November 2017, the Administrative Court annulled the second EIA approval decision in June 2021, on the ground that the decisions did not contain the reasons that were decisive when evaluating the evidence, as well as the reasons why the CEKOR's objections were not included, nor how they were answered or taken into account.

Under **our third claim**, we allege non-compliance with the Aarhus Convention's Art. 9(2) and (4) because neither challenging the EIA approval decisions nor the construction permits allows for 'adequate and effective remedies', including 'injunctive relief'.

Under Serbian law, it is possible for environmental NGOs to challenge the final EIA decision for coal-fired power plants. CEKOR has made use of this possibility three times and the administrative court has quashed the EIA decision already twice (in June 2016 and June 2021). A third challenge against the third EIA decision of 2022 is still pending. However, these challenges do not have an automatic suspensive effect and in practice

did not stop the continued construction of the power plant. At the stage when the third EIA decision was issued, at least 70% of the project had been already constructed.

CEKOR has also attempted to challenge the construction permits for the power plant. This is in practice challenging because NGOs cannot be a party to the construction permit proceedings and are therefore not notified of their issuance. For example, in the case of the previously mentioned chimney construction permit, CEKOR was not a party to the proceeding and was not aware of its issuance. When CEKOR learned about the permit in 2018, the prescribed deadline for an ordinary challenge had already passed. The only legal avenue available was an extraordinary measure, a request to repeat the administrative procedure. This request does not suspend the enforceability of the permit.

In May 2019, CEKOR nonetheless succeeded in challenging another construction permit issued in April 2019 for the construction of the turbine, boiler and generator of Kostolac B3 in time, on the basis that it did not include relevant references to the EIA study on which it was based. However, the only legal avenue available for the public concerned was a challenge to the Administrative Court, which did not suspend the challenged decision. The case is still pending.

As pointed out by the Party concerned, the Serbian Law on Administrative Disputes in theory provides for injunctive relief in its Art. 23. A plaintiff can request suspension measures if they demonstrate that the plaintiff itself will suffer irreparable damages, that suspension will not harm the public interest and that suspension would not cause a bigger irreparable damage to the defendant. In practice, environmental NGOs such as CEKOR cannot apply for these suspension measures in EIA decisions or permitting procedures, because a risk of irreparable damage to the environment is not sufficient to satisfy the requirements.

Furthermore, Art. 138a of the Law on Planning and Construction exposes an NGO to potentially prohibitive costs. The provision entitles the defendant “to compensation for damages and lost profits in accordance with the law” if a permit or EIA approval is suspended but in the end the challenge is lost. In this specific case, given the scale of the project, requesting for the suspension of challenged decisions would create an unimaginable financial risk for CEKOR.

Serbian law does therefore not provide for adequate and effective remedies within the meaning of Art. 9(4) of the Aarhus Convention. CEKOR has challenged all EIA approval decisions - two have been annulled, while the third case is pending - yet the Kostolac B3 coal power plant is almost fully operational. Challenging the decisions does not automatically suspend them, nor can CEKOR realistically request suspension measures – in any case, not without risking prohibitive costs.

In conclusion, the Communicants submit that the Republic of Serbia is non-compliant with the Aarhus Convention as:

1. When public participation for the Kostolac B3 project took place, it was de facto already impossible for the project to not go ahead, in violation of Art. 6(4),

2. Construction permits and the EIA decision for the Kostolac B3 project did not take due account of the outcome of public participation, in violation of Art. 6(8),

3. There is no access to justice to challenge EIA decisions nor construction permits for the Kostolac B3 project, providing injunctive relief in the form of suspension measures, in violation of Art. 9(2) and (4).

If the Party concerned does not urgently take action, the Kostolac B3 power plant will begin operations without its environmental impact ever having been sufficiently assessed, without the public being consulted in the legally required way, and without adequate access to justice.

This concludes the opening statement of the Communicants. We remain at your disposal for any questions you may have. Thank you.