

Case no. ACCC/C/2020/179
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

Update on the Facts of the Communication

I. Update on the Facts of the Communication

Further to the Communication submitted to the Aarhus Convention Compliance Committee on 27 January 2020, the Communicants Centar za ekologiju i održivi razvoj ('CEKOR') and ClientEarth would like to provide an update to section 'III. Facts of the communication'.

1. As set out in para. 13 of the Communication, on 28 September 2017, a second environmental impact assessment ('EIA') Study for the planned third unit of the Kostolac B coal fired thermal power plant ('Kostolac B3') was adopted by the Ministry of Environmental Protection of the Republic of Serbia ('the 2017 EIA Decision').¹ On 15 November 2017, CEKOR challenged the 2017 EIA Decision before the Administrative Court of Serbia, within the prescribed deadline. Based on Article 23 of the Serbian Law on Administrative Disputes, this challenge did not suspend the EIA decision in question. CEKOR did not request suspensive measures under Article 23(1) of the Law on Administrative Disputes, for the reasons set out in para. 42-48 of the Communication.
2. Regarding the challenge to the construction permit for the chimney² mentioned in para. 19 of the Communication, since CEKOR had not been recognised as a party to the permitting procedure (in non-compliance with the applicable national law³), the regular administrative appeal had not been available. Therefore, the only available legal avenue was a request to repeat the administrative procedure and annul the decision.⁴ On 3 April 2018, CEKOR submitted the request to repeat the administrative procedure and annul the construction permit for the chimney to the Ministry of Construction, Transport and Infrastructure of the Republic of Serbia (see Annex No. 11).⁵ As an extraordinary appeal, this request does not suspend the construction permit in

¹ Para. 13 of the Communication. Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124/2017-16 of 28.9.2017, approving the second EIA study for the Kostolac B3 project. (Annex 8)

² 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.

³ The public concerned has a right to be included in the processes of deciding on approvals of new facilities (Art. 81/1/3 of the Law on Environmental Protection) and also has a right to challenge all the decisions, while implementing the right to healthy environment, before the relevant administrative body and court (Art. 81a).

⁴ The legal basis for a request to repeat an administrative procedure is set out in Art. 176(1)(5) and 176 (1)(9) of the Law on Administrative Procedure.

⁵ Request by CEKOR to Ministry of Construction, Transport and Infrastructure of 3 April 2018 to repeat the procedure and annul the decision of 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

question. As of the date of submission of this Update, the Ministry of Construction, Transport and Infrastructure did not act on this request.

3. On 14 May 2019, CEKOR challenged the construction permit for the turbine, boiler and generator (mentioned in para. 20 of the Communication⁶) before the Administrative Court within the prescribed deadline (see Annex 12).⁷ CEKOR had not been recognised as a party to the permitting procedure (in non-compliance with the applicable national law). Since there was no administrative appeal available under national law, CEKOR resorted to bringing a challenge before the Administrative Court directly. Based on Article 23 of the Law on Administrative Disputes, this challenge does not suspend the construction permit in question. CEKOR has not requested suspensive measures under Article 23(1) of the Law on Administrative Disputes, for the reasons set out in para. 42-48 of the Communication. As of the date of submission of this Update, no hearing has yet been scheduled.

4. On 23 June 2021, the Administrative Court of Serbia ruled in favor of CEKOR and declared the 2017 EIA Decision unlawful.⁸ The proceedings were returned to the Ministry of Environmental Protection for reconsideration. According to the reasoning of the Administrative Court, the 2017 EIA Decision was unlawful, because it was impossible to determine which of CEKOR's objections to the EIA Study were not adopted and for what reasons. It is also stated that CEKOR's objections to the EIA Study were attached to the case files, but there were no answers to these objections, nor the provisions of substantive legal regulations referred to by the Ministry of Environmental Protection in the explanation of the contested decision. At the latest, with the annulment of the 2017 EIA Decision, the existing construction permits did not have any EIA approval decision as a basis and any construction would not be in compliance with the national law – based on Article 5 of the Law on Environmental Impact Assessment, as set out on page 5 of the Response to the Communication.⁹ As a consequence, the construction works of the Kostolac B3 project, which were reported to have started in November 2017¹⁰, were not in compliance with the applicable national law. According to the national law, as a consequence all

Kostolac plant, including confirmation of delivery (Annex 11). Based on Art. 178(1) of the Law on Administrative Procedure, requests to repeat the procedure can be submitted within 90 days of the date of first knowledge of the reason requiring repetition of the relevant decision. CEKOR challenged the construction permit for the chimney on 3 April 2018, within 90 days of coming to know about the construction permit, and thus within the prescribed deadline.

⁶ 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.

⁷ Submission by CEKOR to Administrative Court of Serbia of 14 May 2019, including confirmation of delivery, challenging the 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 (Annex 12). Based on Art. 18(1) of the Law on Administrative Disputes, challenges before the Administrative Court can be brought within 30 days of the relevant decision. Based on Art. 18(3) of the Law on Administrative Disputes, the party concerned can submit the lawsuit within 60 days of the day of delivery to the party. The construction permit for the turbine, boiler and generator is dated 15 April 2019 (see previous footnote) and CEKOR challenged the construction permit on 14 May 2019, therefore within the prescribed deadline.

⁸ Judgment of the Administrative Court of Serbia III-1 U. no. 17053/17 of 23.6.2021.

⁹ Based on Art. 5 of the Law on Environmental Impact Assessment, the developer of a project for which an impact assessment is mandatory and of a project for which the need for an impact assessment has been established, shall not start implementation and/or construction and realization of the project without the approval of the EIA Study from the competent authority.

¹⁰ Para. 19 of the Communication

actions based on the unlawful EIA Decision should be annulled.¹¹

5. On 28 February 2022, the Ministry of Environmental Protection re-adopted the 2017 EIA Decision on the basis of the same EIA Study ('the 2022 EIA Decision', see Annex No. 13).¹² No public participation was conducted.
6. On 26 April 2022, CEKOR challenged the 2022 EIA Decision before the Administrative Court. The grounds for the challenge included the failure to deliver the decision to the legal representative of CEKOR and the commencement of construction prior to the EIA. Based on Article 23 of the Serbian Law on Administrative Disputes, this challenge does not suspend the EIA decision in question. CEKOR has not requested suspensive measures under Article 23(1) of the Law on Administrative Disputes, for the reasons set out in para. 42-48 of the Communication. As of the date of submission of this Update, no hearing has yet been scheduled.
7. Overall, as of the date of submission of this Update, the cases brought by CEKOR challenging the construction permit for the turbine, boiler and generator (para. 3 of this Update) and the 2022 EIA Decision (para. 6 of this Update) are pending before the Administrative Court. No hearings have been scheduled in these cases. The Ministry of Construction, Transport and Infrastructure has not taken any action about the request made to it regarding the construction permit for the chimney (para. 19 of the Communication and para. 2 of this Update). According to Serbian law, none of the above-mentioned challenges result in the suspension of the challenged decisions. Suspension of an administrative act within administrative court proceedings can only be requested on the basis of Article 23(1) of the Serbian Law on Administrative Disputes. CEKOR could not request suspensive measures due to the reasons set out in para. 42-48 of the Communication.
8. On 24 January 2024, state-owned broadcaster Radio Television of Serbia reported that the Kostolac B3 is in the testing phase.¹³ On 21 February 2024, Serbia Energy News reported that the construction of Kostolac B3 is in the final phase and expected to be completed in the first half of 2024.¹⁴

Please find below an updated table with a timeline and description of all the relevant agreements, decisions and activities known to CEKOR and ClientEarth. The additions compared to the original table contained in para. 24 of the Communication are emphasized in bold.

¹¹ Based on Art. 183(1)(9) of the Law on Administrative Disputes, the second-instance authority or supervisory authority shall, at the request of the party or ex officio, cancel the final decision in whole or in part [...] if, when making the decision, the procedure for giving prior or subsequent consent or the opinion of another body was not properly carried out.

¹² Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124/2017-16 of 28.2.2022, approving the second EIA study for the Kostolac B3 project (Annex 13).

¹³ https://www-rts-rs.translate.google/lat/vesti/ekonomija/5351556/izgradnja-nove-termoelektrane-u-kostolcu-u-završnoj-fazi-povećace-proizvodnju-struje-za-sedam-odsto.html?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=fr&_x_tr_pto=wapp

¹⁴ <https://serbia-energy.eu/serbia-final-phase-of-construction-of-350-mw-tpp-kostolac-b3/>

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
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.
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.
06.05.2014	CEKOR challenged before the Administrative Court the 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.
24.06.2016	Judgment of the Administrative Court of Serbia III- 1 U no. 6832/2014, cancelling the first EIA Decision of 30 December 2013.
25.11.2016	Ministry of Construction, Transport and Infrastructure, Decision no. 351-02-00174/2016-07/ROP-MGSI-17259-CPI-2/2016 of 25 November 2016, permitting the construction of a pier for own needs.
14.02.2017	The second EIA for Kostolac B, Unit 3, is published and public consultations are announced in national newspaper 'Blic'.
09.03.2017	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, permitting the construction of 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 sent 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.
28.09.2017	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.
15.11.2017	CEKOR challenged before the Administrative Court the 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.
03.04.2018	CEKOR challenged before the Ministry of Construction, Transport and Infrastructure the 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.
15.04.2019	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.
14.05.2019	CEKOR challenged before the Administrative Court the 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.
23.06.2021	Judgment of the Administrative Court of Serbia III-1 U. no. 17053/17, cancelling the second EIA Decision of 28 September 2017.
28.02.2022	Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124 / 2017-16, approving the second EIA study for the Kostolac B3 project.
26.04.2022	CEKOR challenged before the Administrative Court the Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124 / 2017-16, approving the second EIA study for the Kostolac B3 project.

II. Supporting documentation

Annex No.	Description
11.	Request by CEKOR to Ministry of Construction, Transport and Infrastructure, including confirmation of delivery, to annul the decision and repeat the procedure of 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 (3 April 2018)
12.	Submission by CEKOR to Administrative Court of Serbia, including confirmation of delivery, challenging the 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 (14 May 2019)
13.	Ministry of Environmental Protection of the Republic of Serbia, Decision No. 353-02-00124 / 2017-16 (28 February 2022) (with English translation)

III. Signature

Natasa Djereg, Director, CEKOR



Subotica, 31.05.2024

Maria Kleis-Walravens, Head of Energy Systems, ClientEarth



Brussels, 31.05.2024