To: **Fiona Marshall**
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
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Dear Ms Marshall,

Subject: Communication to the Aarhus Convention Compliance Committee concerning compliance by Greece in the context of public participation in the preparation of a transitional national plan under the Industrial Emissions Directive.

We would like to express once again our appreciation for the serious consideration given by the Committee to this communication. With reference to the secretariat's letter of 1 November 2019, we would like to make the following observations.

I. PRELIMINARY REMARKS

1. ClientEarth and WWF Greece consider that the issues raised in the Response to the Communication by the 29.5.2019 "Statement by the Hellenic Ministry of Environment and Energy concerning the communication" (hereinafter, the Response) have already been addressed, both in our original 3.8.2017 Communication (esp. §§52-54), as well as in our 6.11.2017 "Reply to request for further information" (esp. §§10-43). However, in the interest of a better application of the Convention in Greece, both ClientEarth and WWF Greece welcome the opportunity to further clarify and elaborate their arguments.

2. As a preliminary matter, it should be highlighted that the Ministry does not challenge admissibility. In their 12.4.2019 "Reply to clarify whether its response of 29 May 2018 challenged admissibility", the Ministry states unambiguously that it does "not challenge the admissibility of the communication directly according to the provisions of paragraph 20 of Decision 1/7 of the Contracting Parties to the Convention." The Ministry then turns to paragraph 21 of Decision I/7, without though altering its position. The Ministry merely states that it considers it "very strange" that the Joint

Ministerial Degree in question (hereinafter, the JMD) has not been challenged in front of the Greek Council of State, while our “allegations for costly and time-consuming procedures are unfortunate”. As a result, the Ministry has not produced any valid legal arguments against the preliminary admissibility of our communication, notwithstanding the alleged “strangeness” or “unfortunateness” of certain of our arguments.

3. The communicants will nonetheless use this opportunity to reply in more detail, as requested by the Committee, to the submissions of the Ministry on pages 7-8 of the Response and, in particular, the second, third and fourth paragraph of page 8. In this part of the Response, the Ministry claims that legal proceedings would have been open to ClientEarth and WWF Greece that were not relied on. The Response refers specifically to two possible legal avenues: an application for annulment of the JMD incorporating the TNP and a form of incidental challenge of the TNP in an environmental permit challenge (second paragraph of page 8). This document considers these two avenues in turn (under sections II and III, below). As will be shown, neither of these avenues are to be considered as relevant “domestic remedies” for the purposes of paragraph 21 of Decision I/7, as opposed to the Ministry’s suggestions in the third paragraph of page 8.

II. APPLICATION FOR ANNULMENT OF THE JMD INCORPORATING THE TNP

4. The Response first refers to the possibility to lodge an action for annulment against the JMD incorporating the TNP. As set out in our 6.11.2017 letter, such a challenge (A) would have had very low chances of success, (B) would have been “unreasonably prolonged” and (C) would have been too costly to be considered “available”, in particular in light of points (A) and (B).

A. THE APPLICATION FOR ANNULEMENT WOULD IN PRACTICE NOT HAVE PROVIDED EFFECTIVE AND SUFFICIENT MEANS OF REDRESS

5. In paragraphs 15-25 of the communicants’ “reply to request for further information” of 6.11.2017, as well as in paragraph 56 of the original communication, several hurdles to a successful action for annulment were identified. Not a single one is refuted or even mentioned in the Ministry’s reply. However, they are important considerations as to whether an avenue should be considered as an available “domestic remedy” for the purposes of paragraph 21 of decision I/7.

B. THE APPLICATION FOR ANNULEMENT WOULD HAVE BEEN AN UNREASONABLY PROLONGED REMEDY

6. Even if an application for annulment was nonetheless considered relevant for the Committee’s considerations, the communicants have also provided substantial evidence that this remedy would have been unreasonably prolonged.

7. However, the Response provides only anecdotal and circumstantial evidence, the gravamen of which is one single decision: the appeal by ClientEarth and WWF Greece for the annulment of the 8.9.2017 “extension and modification” of the Megalopolis power plant environmental permit– a power plant included in the TNP

(Council of State Decision No 1605-6/2019). This appeal was submitted on 9.11.2017, and the decision was published on 3.9.2019 – 663 days (slightly less than 22 months) later.

8. If the Response suggests that ClientEarth or WWF Greece are somehow able to obtain "quick" decisions from the Council of State, the argument strains credulity. Recently (10.10.2019), the Council of State published its decision on an appeal submitted by a group of environmental NGOs (including WWF Greece) on 12.1.2015 – that is, 1732 days (slightly less than 57 months) later (Council of State Decision No 1936/2019). In fact, this case was "similar" to the Megalopolis case, above, in the sense that it also involved interconnected questions of both European (Habitats' Directive) and international (Ramsar Convention) law.

9. In fact, the communicants can easily adduce equally anecdotal and circumstantial evidence suggesting that similar appeals can be extremely time-consuming – to the point of violating applicable international law. For example, the European Court of Human Rights (hereinafter, ECHR) has repeatedly reviewed the length of administrative law proceedings in Greece under article 6§1 of the European Convention of Human Rights. According to its case-law, "on many occasions the Court has examined cases raising questions of duration of administrative proceedings and found a breach of Article 6 § 1 [ECHR]."1

10. More anecdotal evidence can be supplied by recent "just satisfaction" proceedings in front of the Council of State. This is a special remedy introduced in 2012,2 in order to comply with arts. 6§1 and 13 ECHR, as specifically required by the pilot case of Vassilios Athanasiou and others v. Greece.3 Henceforth, the Council of State granted "just satisfaction" compensation in the context of administrative cases decided, indicatively, after 8 years and 6 months (Council of State Decision No

[1] Malliakou and others v. Greece, no 78005/11, §74 (duration of 10 years and 11 months over 3 levels of administrative jurisdiction). The situation around 2010 is described in the "pilot" case of Vassilios Athanasiou and others v. Greece, no 50973/08, §§45-53, and many references therein. See also the violations of art. 6§1 ECHR described in: Fix c. Grèce, no 1001/09, §§34-40 (duration of 5 years and 11 months in front of the Council of State); Eleftherios Kokkinakis – Dilos Kikloforiaki A.T.E. c. Grèce, no 45826/11, §§67-72 (11 years and 10 months over 3 levels of administrative jurisdiction); Kapetanios et autres c. Grèce, no 3453/12, 42941/12 & 9028/13, §§91-96 (22 years over 3 levels of administrative jurisdiction). In another case, which concerned administrative proceedings against a limited duration act, ECHR noted that "[t]he contested act, by its nature, called for a speedy examination of its validity as its duration was for a period of two years, and was therefore liable to expire soon, a fact which the applicant's representative stressed with his two memoranda…" [Frezadou v. Greece, no 2683/12, §§45, 47].

[2] The "just satisfaction" proceedings were introduced in 2012 [arts. 53-59 of law 4055/2012], in order to implement the "pilot" judgment of Vassilios Athanasiou and Others (see above, footnote 1). According to the European Court of Human Rights, the court there "found, first of all, that the recurrent violations of Article 6 § 1 of the Convention in respect of the length of administrative proceedings had been continuing for several years and that this constituted a worrying structural problem capable of undermining public trust in the effectiveness of the judicial system ….In the same case the Court also held that there had been a violation of Article 13 of the Convention because the domestic legal system lacked a remedy by which the applicants could have secured their right to have their case heard within a reasonable time within the meaning of Article 6 § 1 of the Convention …"(references and paragraph numbers omitted) [Techniki Olympiaki v. Greece, no 40547/10, §§32-34, see generally §§12-18, 32-36].

[3] Vassilios Athanasiou and others v. Greece, no 50973/08. See also above, under footnotes 1 and 2.

182/2019) , 7 years and 4 months (Council of State Decision No 919/2019) or 9 years and 3 months (Council of State Decision No 2009/2019) (in all cases, additional days omitted). In one environmental law case, specifically, "just satisfaction" was granted after a delay of 7 years and 11 months (Council of State Decision No 840/2019). In the context of a hypothetical legal action against the JMD, similar delays would be tantamount to a denial of justice.

11. In truth, it is very difficult to explain the "disposition time" of a particular administrative case. Typically, the answer depends on several contextual factors, notably the organization, case-load and staffing of the court in question, the complexity of the case, the workload of the judge-rapporteur and the behaviour of the litigants. Nonetheless, one can speculate that relatively quick disposition of the Megalopolis case, which the Ministry refers to, is related to art. 106(3) TFEU [ex. 86(3) TEC] European Commission decision on the Greek lignite antitrust case: more precisely, the 17.4.2018 Commission decision "establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite" required the "de-investment" of the Megalopolis plant.4 This procedure was closely related with a resolution of legal challenges against the environmental permit that allows the operation of the very same plant. The importance of the issue is underlined by its inclusion in the most recent European Semester report.5

12. Nevertheless, the communicants strongly believe that it would not be constructive for the Aarhus Convention Compliance Committee (hereinafter, ACCC) to focus on "outliers", which give a distorted view of both the time required, and the quality, of judicial proceedings in Greece. Fortunately, there is widely available statistical information. This information originates from the European Commission for the Efficiency of Justice (Commission européenne pour l'efficacité de la justice, hereinafter CEPEJ), under the aegis of the Council of Europe. This information is summarized in §§28-29 of the communicants' 6.11.2017 "reply to request for further information". According to the CEPEJ study quoted there,6 the 2015 average "disposition time" of "administrative law cases" was 964 days. The administrative case would possibly have exceeded this average time, as it would have almost certainly required a preliminary reference to the European Court of Justice.

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[4] European Commission. (17.04.2018). Commission Decision of 17.04.2018 establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite. Case AT.38700 –Greek lignite and electricity markets [C(2018) 2104 final], §2.3.1. Available at: http://bit.ly/2OodA0B

[5] European Commission. (27.2.2019). Country Report Greece 2019. Including an In-Depth Review on the prevention and correction of macroeconomic imbalances. Accompanying the document: 2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011 [SWD (2019) 1007 final]. Available from: http://bit.ly/34ntq14

[6] European Commission, European Commission for the Efficiency of Justice, & Council of Europe. (2017, February 6th). Study on the functioning of judicial systems in the EU member States. Facts and figures from the CEPEJ questionnaires 2010-2012-2013-2014-2015 [CEPEJ (2017) 4 Part1], table 3.2.1.2a (p. 159). Available from: http://bit.ly/37BuvnQ

13. The CEPEJ data are also among the sources of the EU Justice Scoreboard compiled by European Commission. As of 2017, the time required to resolve a first instance administrative case was 735 days: only Italy, Poland, Malta and Cyprus fared worse.7 As of 2015, when the average time needed for first instance administrative proceedings was 964 days: only Poland, Italy and Cyprus fared worse.8

14. The communicants note that the Response does not question, comment or even mention those findings.

15. The communicants believe that the information contained in paras. 12 and 13 above should form the perimeters of the ACCC decision on preliminary admissibility.

16. The Response mentions another possibility, namely that "the applicants can ask the acceleration of discussion date with the submission of application preference". The Party concerned refers to the "request for an expedited proceding" which was also introduced in 2012, in order to comply with the ECHR case. As the ECHR has noted, "where the competent judicial authority notes delays in the proceedings lasting more than twenty-four months after submission of the application, that authority must set down the case for hearing within no more than six months. The Court also notes that hearings can only be postponed once on serious grounds, and must be rescheduled within three months of the new hearing date…" (emphasis added).9 Accordingly, and aside from the fact that such a request is granted on a highly discretionary basis, an application for annulment must be at least two years old, and will be heard (unless postponed) after an additional six months. This possibility does therefore not solve the problem.

17. More generally, it should be emphasized that whether a remedy is to be considered unreasonably prolonged crucially depends on the duration of application of the act in question. Indeed, if the act in question – i.e., the JMD enshrining the Transitional National Plan (from hereon TNP) – was of indefinite duration, then relatively more prolonged judicial review proceedings would perhaps have been adequate.

18. However, in the present case, the JMD was published on 20.9.2015, and expires (based on EU law requirements) on 30.6.2020 (1745 days later). This means that a challenge lodged against the act would have run the risk to be declared devoid of purpose because of a lack of cause of action, if it would have still been ongoing at the time that the TNP expired. In any case, it would have had a negligible impact if a public participation period would have still been carried out a few months before the TNP's expiration on 30.6.2020.

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[7] European Commission. (April 2019). The 2019 EU Justice Scoreboard – Factsheet, figure 8. Available from: http://bit.ly/2R2d7TJ

[8] European Commission. (2017). Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — The 2017 EU Justice Scoreboard [COM(2017) 167], figure 6. Available from: http://bit.ly/2Dl3rLC

[9] The request for an expedited hearing is provided for in art. 33A of presidential decree 18/1989 ("on the codified version of Council of State legislation"), as amended by arts 54 and 56 of law no. 4055/2012). ECHR comments on the procedure at Techniki Olympiaki v. Greece, no 40547/10, §§42-49, available in English here: http://hudoc.echr.coe.int/fre?i=001-152683

19. This sets the present case apart from other proceedings, such as permit challenges, in which a permit may be suspended or not granted in the first place pending the outcome of the judicial proceedings. No such possibility, i.e. no injunctive relief, would have been available in a challenge directed against the TNP. This consideration should be of crucial importance to a determination as to whether a proceeding is to be considered unreasonably prolonged.

20. In light of the foregoing, it is clear that an application for annulment of the JMD approving the TNP would have in any event been unreasonably prolonged, which in itself suffices to disqualify it from consideration under paragraph 21 of decision I/7.

C. COSTS OF THE APPLICATION FOR ANNULMENT

21. Our 6.11.2017 “reply to request for further information” set out in great detail the significant cost for the communicants of an application for annulment (see paras. 36-56). Nonetheless, the Party concerned asserts without any justification that the costs for the “discussion” of the application for annulment would have been almost €1000.

22. The information included in our 6.11.2017 reply substantiates in great detail that the actual, overall costs for lodging such a legal challenge would amount to approximately €4951.58 (see para. 32 and proceeding paragraphs). Moreover, the Party concerned neither clarifies what part of the total legal costs are included in its cost calculation for the “discussion” (hearing) of the case, nor highlights the obvious fact that the costs for the “discussion” are only a small part of the total legal cost.

23. If the Party concerned instead seeks to argue that only the part of the costs that would have to be paid by the communicants are to be considered, there is no legal basis for such an assertion. The Committee has previously made clear, in the context of art. 9(4), that in an assessment whether costs are to be considered prohibitive reference must be made to the costs incurred by the applicant as a whole.10 There is no reason why a different consideration should apply in the context of determining whether a domestic remedy is indeed to be considered “available” to an applicant for the purposes of para. 21 of decision I/7.

24. Finally, it is important to reiterate that the cost exposure must be weighed against the chances of success in litigation. The costs described above, i.e. almost €5000, would have had to be invested in a case that, in light of the hurdles to successfully argue the case (see para. 5, above) and the time that such proceeding was likely to take (see paras. 6-19, above), almost certainly would not had provided a sufficient or effective remedy . Every environmental NGO needs to be prudent in its financial planning, as financial resources, in particular for litigation, are scarce. To embark on litigation with a cost exposure of close to €5000, in a scenario where the chances of obtaining effective and sufficient redress are almost nil, would be reckless financial planning. Both ClientEarth and WWF Greece have in place internal procedures that ensure that no such litigation would be approved.

25. Thus, a cumulative consideration of factors (A)-(C) (paras. 4 to 25) also demonstrates that it would not have been reasonable to require the communicants in this case to rely on an application for annulment of the JMD, as a domestic remedy.

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10 ACCC/C/2012/77 (UK), ECE/ MP.PP/C.1/2015/3, para. 72.

II. INCIDENTAL REVIEW OF THE JMD INCORPORATING THE TNP

26. The Party concerned further submits that the communicant should have challenged the JMD by way of incidental review in a challenge directed at an environmental permit for one of the power plants covered by the TNP. However, such a challenge would have: (A) "obviously not provided an effective and sufficient means of redress"; (B) been "unreasonably prolonged" ; and (C) too costly to be considered viable.

A. THE INCIDENTAL REVIEW IS NOT AN EFFECTIVE AND SUFFICIENT MEANS OF REDRESS

27. The communicants firstly note that certain arguments of the Response contradict themselves or are difficult to follow. For example, it is alleged that "[t]he fact that the national authorities consider that the TNP" (Transitional National Plan) "does not fall under the provisions of Articles 6 and 7 of the Aarhus Convention does not mean that the TNP cannot be appealed at any time in the national courts with an application for its annulment. This application may be made in the context of an action challenging an individual administrative act (environmental permit) based on the TNP." (emphasis added). Aside from the fact that we are unaware of a system of judicial review that allows legal challenges "at any time" (i.e., a system that forgoes time-limits), it is clear that this is not a direct appeal. Moreover, the possibility of legally challenging the TNP this way turns on the existence, the content and the timing of another "individual act" "based" on it: therefore, it cannot reasonably be available "at any time". We will return to this point.

28. Nonetheless, the Response seemingly refers to the concept of "incidental review" of the JMD by occasion of an appeal for annulment of another administrative act "based" on the JMD. As an example, the Response mentions the environmental permit of the Megalopolis plant, against which both communicants submitted an application for annulment on 9.11.2017 (see above, para. 7).

29. The "incidental review" is a well-known concept both in Greek and in European administrative law. Historically, Greece has a system of constitutionality review which is diffuse, a posteriori, repressive, and – for our purposes – concrete and incidental.11 "With its first decision 1/1929, the Greek SAC" (Supreme Administrative Court, i.e. the Council of State) " declared that it is not hindered to review incidentally the constitutionality of statutes, drawing its authority on the constitutional provision that stipulates that courts have the obligation not to enforce a law, the content of which contravenes the Constitution":12 the same incidental constitutionality review is applicable nowadays to all hierarchically superior norms of law, such as EU or international law. According to Pr. A. Kaidatzis, "the key element in the Greek system is the incidental and in concreto character of the review. Any court can review

[11] A. Manitakis. (1988). Fondement et légalité du contrôle juridictionnel des lois en Grèce [in french]. Revue internationale de droit compare 1, 39-55. Available from: http://bit.ly/2Oy4rTf See also: N. Kostoglou. (2015). Grèce [in french]. In: Juges constitutionnels et doctrine - Constitutions et transitions. Annuaire international de justice constitutionnelle 30-2014, pp. 381-400. Available from: http://bit.ly/35OWxKP

[12] ACA Europe (Association of the Councils of State and Supreme Administrative Jurisdictions) & Bundesverwaltunggericht. (2019, May 13th). Seminar organized by the Federal Administrative Court of Germany and ACA-Europe. Functions of and Access to Supreme Administrative Courts. Answers to questionnaire: Greece. Available from: http://aca-europe.eu/seminars/2019_Berlin/Greece.pdf

incidentally, i.e. while hearing a particular case and in the context and circumstances thereof, the constitutionality of the law that is being evoked before it. This means, however, that what is reviewed is not the statute as such, i.e. the statutory provision with all its potential normative contents, the abstract statutory norm. What is reviewed is the application of the statute in the particular case at hand, that is, the specific statutory norm produced by the implementation of the statutory provision in that case –and that case only. Hence, even if a court deems a law unconstitutional in light of the circumstances of its application in the case at hand, the law remains otherwise fully in force. If the circumstances of its application are different, another court or even the same court may still find the law constitutional and apply it in any other case."13 As far as we can ascertain, largely similar concepts exist in France (contrôle juridictionelle à titre incident),14 in the Netherlands,15 in Norway, in Sweden and in Denmark (certainly with significant national peculiarities and subtleties).16 As it will be discussed below, a similar concept also exists in Germany.17

30. However, the reference of the Response to a possible "incidental review" of the JMD is misguided. The concept refers to the scope of the judicial review of a specific administrative act – by way of example, the environmental permit of Megalopolis plant-, and it asserts that this review may extent to underlying, generally binding, legislation. We fail to comprehend in what sense it constitutes an "available domestic remedy" against the JMD in the sense of Decision I/7.

31. Assuming, arguendo, that "incidental review" does constitute a remedy in the sense of Decision I/7, it would not have been an effective and sufficient means of redress.

32. In fact, the ACCC had previously the opportunity to consider an alleged possibility to incidentally challenge a plan/programme in the context of a judicial challenge directed at a subsequent, "downstream" decision in its follow-up on decision V/9h (Germany). In its report to the Meeting of the Parties on this decision in 2017, the Committee stated that such incidental review would not be sufficient if "the elements of the plan or programme that contravene national law relating to the environment may fall outside the scope of review of any related downstream decision."18

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[13] 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 13 (online). Available from: http://bit.ly/33mNnUz

[14] J.-M. Auby. (1971). Les recours juridictionnels contre les actes administratifs spécialement économiques dans le droit des États membres de la Communauté économique. Rapport final. Available from: http://bit.ly/34i7Hrj

[15] J. de Poorter. A Future Perspective on Judicial Review of Generally Binding Regulationsin the Netherlands: Towards a Substantive Three-Step Proportionality Test? In: J. de Poorter, E.H. Ballin, S. Lavrijssen (eds.). (2019). Judicial Review of Administrative Discretion in the Administrative State, 97. The Hague: T.M.C. Asser press.

[16] A. Weber. (2003). Notes sur la justice constitutionnelle comparée : convergences et divergences. Annuaire Internationale de Justice Constitutionnelle XIX, 29-41. Available from: http://bit.ly/2QUXxc7

[17] Grimm D., Wendel M., Reinbacher T. (2019). European Constitutionalism and the German Basic Law. In: Albi A., Bardutzky S. (eds) National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. T.M.C. Asser Press, The Hague.

[18] Report of the Compliance Committee on compliance by Germany with its obligations under the Convention (ECE/MP.PP/2017/40), para. 39.

33. The same conclusion applies in the present context. Firstly, “incidental review” cannot lead to the annulment of the JMD, which would remain in force: the Council of State would have merely “set aside” or “disapplied” the JMD in the case at hand. As a result, the actual grievance of the communicants, namely the failure to carry out a public participation procedure in compliance with the Aarhus Convention prior to the adoption of the TNP, would not have been addressed. To put it otherwise, there would have been no new administrative procedure to adopt a new TNP, triggering a new public participation procedure in this context. Such a decision of the Court would therefore obviously not have provided for effective and sufficient means of redress with regard to the actual claims put forward in the communication.

34. Secondly, as it is obvious from its in concreto character, incidental review of the JMD would have been possible only insofar as it is incorporated in the downstream act – here, the environmental permit of Megalopolis. This might have led for instance to a review of the annual emission limits, as applied to a specific plant based on the TNP, in a challenge directed at a specific environmental permit. However, the issues related to public participation in preparation of the TNP would fall outside the scope of review.

35. Thirdly, even if an applicant was just concerned with the application of the TNP as opposed to the lack of public participation in its preparation, the JMD would have been disapplied only with respect to the environmental permit of one power plant (here, the power plant of Megalopolis); in fact, ClientEarth and WWF Greece would had to initiate separate appeals against the environmental permit of all power plants included in the TNP, when (and if) these were published. This makes access to justice cumbersome and expensive: curiously, the Response evades the fact that the cost of five separate appeals must be factored in, as there are five different power plant (with five environmental permits) in the Greek TNP.

36. Fourthly, such five, individual challenge would still not have had the desired effect of preventing application of the TNP because the plants could have nonetheless continued operation. As explained in detail in our Communication concerning the associated case ACCC/C/2017/148 Greece (§§19-28), all the power plants in question have obtained by special act of Parliament (itself, beyond judicial review), a Single Production Permit and a Single Provisional Operation Permit: as a result, their operation under national law is not strictly dependent on a valid environmental permit. In other words, national law provides for the continuous operation of TNP plants even if their environmental permits is not in force. (The legal issues that consequently arise under the Aarhus Convention are expounded in the associated case ACCC/C/2017/148). Therefore, a successful challenge against an environmental permit would have left those permits untouched.

B. THE “UNREASONABLY PROLONGED” CHARACTER OF “INCIDENTAL REVIEW”

37. Assuming, arguendo, that incidental review is possible and would be considered relevant as a domestic remedy, the resulting proceedings would still be unreasonably prolonged. In fact, the Response does not notice that its arguments concerning “incidental review” end up in a double bind. Accordingly, ClientEarth and WWF Greece (or any other member of the public) are expected to wait until 8.9.2017, when the environmental permit of Megalopolis power plant was published; they are also

expected to seek a judicial review of the permit, including an "incidental review" of the JMD, within 60 days, and wait (on average) around 745 days – or more than 2 years. Therefore, under the most auspicious circumstances, a judgment would have been expected in early 2020, while the TNP expiring on 30.6.2020. Even a small additional delay would have prevented a ruling. The same Kafkaesque proceeding would have had to be repeated for every power plant included in the TNP. This is the quintessence of an "unreasonably prolonged" remedy.

C. THE COSTS OF INCIDENTAL REVIEW

38. The observations regarding costs in paras. 20 to 24 (above) equally apply with regard to this avenue. However, as mentioned in paragraph 26 above, there may have even been five-fold the costs as for the first avenue. It would have therefore in any event not have been reasonable to require the communicants to attempt to use this avenue.

III. SUMMARY AND CONCLUSION ON PARTIAL ADMISSIBILITY

39. In view of these considerations, the communicants firstly consider that a direct review of the JMD would have been an "unreasonably prolonged" domestic remedy and that it would have been, in any event, unreasonable given the low chances of success, duration and costs of the challenges to require the applicant to rely on this avenue. Secondly, the communicants do not consider the possibility of "incidental review" a domestic remedy, or even a means of redress in the sense of Decision I/7. If it were nonetheless considered relevant, it is an "unusually prolonged" domestic remedy, and fails to provide a sufficient and effective means of redress, both due to its limitations and its cost.

Yours sincerely,

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