Communicants' additional submission regarding the admissibility of their communication against the Republic of Albania

1. By its emails dated 20 and 26 March 2019, the Secretariat of the Aarhus Convention Compliance Committee (hereinafter the Committee) requested of the communicants to inform it of any developments regarding the pending judicial proceedings and of any further legal action, if any, they may have taken. Similarly, the Secretariat called upon the communicants to inform it whether they are members of the public or members of any environmental NGO.

2. Starting from the last question addressed by the Secretariat to the communicants, the latter would like to inform the Secretariat that they filed their communication in their capacity as members of the public.

Domestic judicial developments in the communicants' case

Interim request proceedings

3. In October 2018, the Tirana Administrative Appeals Court rendered its decision in the appeal filed by the communicants over the Tirana Administrative First Instance Court's rejection of their request for interim measures.[1] Fully upholding the reasoning adopted by the lower instance court, the Administrative Appeals Court rejected the communicants' appeal and left the first instance court decision in power, noting that on the basis of a letter by the Ministry of Environment the facility in question was not within the ambit of the Aarhus Convention or to Annex I or II of Law 10440/2011 *On Environmental Impact Assessment*; the court also noted that the plaintiffs had not adduced evidence to the effect that the harm to the environment would be irreparable or that the construction work undertaken was without a legal basis. [2]

4. The Administrative Appeals Court decision is in principle amenable to an appeal on points of law before the High Court; nevertheless, such an appeal would have no likelihood of success for the following reasons. First, since the facility in question has been constructed, a further request for suspension of its construction would be devoid of purpose and /or the High Court would indicate to the appellants to wait for the outcome of the judicial proceedings on the merits (see below). Second, under domestic law, appeals on points of law can be filed only on three grounds, namely in cases of conflicting jurisprudence by lower courts, when the decision of the appeals court is in breach of a unifying decision by the High Court or in cases of serious procedural violation that has as a result the annulment of the proceeding in question.[3] None of these grounds obtain in the present case; thus the Administrative Appeals Court decision is fully in line with the (restrictive) line of jurisprudence adopted by domestic courts, it (the decision) does not sit at odds with any unifying decision of the High Court and finally the proceedings have not been vitiated by any procedural error that would render them absolutely invalid. Third, due to the already high number of pending cases and the on-going vetting process that led to the discharge of a number of its members, the High Court has been

[1] See original communication, paragraph 9 *in finem*.

[2] See **Annex 1**, Tirana Administrative Appeals Court decision no. 148/2018, dated 4 October 2018 (excerpts in English and Albanian).

[3] See **Annex 2**, relevant domestic legislation in English and Albanian.

functioning at a reduced rate and has accumulated a considerable backlog of cases.[4] As a result, any appeal on points of law would be reviewed by the High Court after a very long period of time.

Request on the merits

5. In March 2019, the communicants were informed that the judicial panel that would review their appeal on the merits[5] had recused themselves on grounds of conflict of interest. The court clerk refused a request by the communicants' legal representatives to obtain a copy of the statement of recusal but allowed them to inspect it at her office. It transpired that the three judges recused themselves as they had already turned down an appeal with the same subject matter (namely the unlawful construction of the Children's playground) filed by two NGOs. The Administrative Appeal Court's decision in that case has number 4102 and was taken on 15 November 2018; the decision fully endorsed and left in force the first instance court decision (see below). The communicants also requested a copy of the Administrative Appeals Court decision but their request was turned down as they were not parties to the proceedings.

6. As a result of the judges' recusal, the communicants will now have to wait for a new judicial panel to be appointed to review their appeal which, in light of the aforementioned decision of the Administrative Appeals Court, seems to enjoy limited, if non-existent, chances of success. Any subsequent appeal on points of law before the High Court will run across the same obstacles referred to in the previous paragraph.

Outcome of domestic proceedings regarding the Children's Playground initiated by other claimants

7. The communicants managed to obtain a copy of the Administrative First Instance Court decision in the case regarding the Children's Playground filed by the two NGOs, of which one was an environmental one.[6] As it can observed, the Court rejected it essentially on the same grounds it rejected their (the communicants') case, namely on grounds of lack of standing for either NGOs or members of the public to challenge an individual administrative act and that the construction in question did not fall within Annex I or II of the Aarhus Convention and of the domestic piece of legislation transposing it in the Albanian legal order (Law 10440/2011 *On Environmental Impact Assessment*) since it was not listed there.

Conclusion from an overview of selected domestic jurisprudence on environmental matters

8. In the context of their communication, the communicants have presented evidence from two decisions on interim measures (at first instance and appeals level), two decisions on the merits (one in their case and the other in the case brought forward by two NGOs, one of which was an environmental one) and one appeals' court decision (in the case filed by the two NGOs referred to above) that amply demonstrate the highly restrictive and at times formalistic approach adopted by domestic courts when confronted with requests under the Aarhus Convention and the transposing domestic piece of legislation.

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[4] See **Annex 3**, article in English entitled "High Court: 3 Judges and 28,863 Open cases".

[5] See paragraph 11 of the original communication.

[6] See **Annex 4**, Tirana Administrative First Instance Court decision 3782/2016, dated 18 July 2016.

9. **First**, domestic courts require of plaintiffs / claimants, be they members of the public or NGOs, to adduce *specific* and *concrete* harm to their *individual* interests, in order to be granted standing. As a result, it is almost impossible for plaintiffs in a position similar to the communicants to be allowed to challenge an administrative act that is not addressed to them and / or does not affect them *personally* and not just as members of the public. In other words, domestic courts seem to acknowledge that the Aarhus Convention would be applicable in private nuisance proceedings but *not* when the claimant cannot adduce a direct link to one of his personal rights (e.g. his / her right to property). It is also important to highlight that in the parallel case filed by two NGOs, the domestic courts refused to grant standing even to an explicitly environmental NGO. The communicants consider that this restrictive standing interpretation prevented the communicants in the instant case from seizing a court with their complaints regarding **first**, the non-holding of a in -depth consultation regarding the Green Crown of Tirana and a preliminary one for the construction of the Children's Playground, in violation of Article 6 of the Aarhus Convention,[7] and **second**, the failure to allow members of the public to challenge before the domestic courts the construction of said Playground.

10. **Second**, the domestic courts in all instances were uncritically deferential to the various documents submitted in the context of different proceedings by domestic authorities, according to which the Children's Playground did not fall within the scope of Annex I or II of Law 10440/2011. In so holding however, the domestic courts took the state authorities' assertions (to the effect that it such infrastructure works were not explicitly listed in Annex II) at face value and did not critically assess them in order to decide for themselves whether the Children's playground could be considered a "Thematic Park" and thus fall within the scope of Section 12 d) of Annex II of Law 10440/2011 *On Environmental Impact Assessment.*[8] It is important to reiterate at this juncture that the construction of the Children's Playground entailed rather extensive infrastructure work, involving the felling of trees and the extensive pouring of concrete for the landscaping of and construction of playground facilities in an area of 4,000 square meters to be used for leisure activities of children aged 1 to 14,[9] thus amply qualifying as a "Thematic Park".

Tirana, 29 April 2019

Dorian Matlija Theodoros Alexandridis

[7] See original communication, paragraphs 14-15.
[8] See **Annex 4** to the original communication, relevant domestic legislation in English.
[9] See original communication, paragraph 8.