

# Comments from Green Alternative on the compliance review report and the Management Action Plan for the Dariali HPP project

3 February, 2017

## General comments and remarks

The PCM expert reviewer accepts decisions of the Georgian courts and law firms without sufficient discussion of the available information and without independent analysis of the 'holes' and contradictions in the evidence. For example, the Compliance Review lacks sufficient discussion of evidence described in a great level of detail by Green Alternative in the publication "Energy projects and corruption in Georgia"<sup>1</sup> with regards to the permitting timeline of the project, in spite of contradictions between the timelines presented by the EBRD and its Client.

Thus we strongly believe that conclusions guided by the court decisions contradict the purpose of the PCM process. While the question about the independence of the judicial system in Georgia and its ability to challenge political decisions on so called 'strategic' projects is not in the scope of the PCM review, there are critical assessments from the EC about the 'insufficient degree of independence of the judiciary'<sup>2</sup> that the PCM should have taken into consideration. The independence and possible conflict of interest of Georgian law firms that the EBRD relied on has not been given due consideration in the report either. In this situation we believe that the PCM should be commissioning its own legal analysis, if the PCM expert lacks narrow competence in Georgian legal matters, rather than shy away from challenging the conclusions of Georgian courts.

On specific issues of the complaint, below come GAs comments in order as it is presented in draft compliance review report:

### **1. Whether environmental and social impacts were adequately assessed, including whether improper site selection led to the deaths of workers and members of the public as a result of landslides.**

According to the chapter "e. Observations and Conclusions" the PCM expert also recognizes that while the project ESIA considered multiple alternatives it "does not consider a run of the river HPP at any other location". Therefore it is unclear why the

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<sup>1</sup> [http://greenalt.org/wp-content/uploads/2013/12/Energy\\_Projects\\_and\\_Corruption\\_in\\_Georgia.pdf](http://greenalt.org/wp-content/uploads/2013/12/Energy_Projects_and_Corruption_in_Georgia.pdf)

<sup>2</sup> The ENP Country Progress Report 2011 on Georgia: "Georgia's governance also continued to be characterised weak parliamentary oversight and an insufficient degree of independence of the judiciary. "  
([http://eeas.europa.eu/enp/pdf/docs/2012\\_enp\\_pack/georgia\\_memo\\_2011\\_en.pdf](http://eeas.europa.eu/enp/pdf/docs/2012_enp_pack/georgia_memo_2011_en.pdf))

The ENP Country Progress Report 2012 on Georgia: "Concerns persisted about judicial reform. [...] On the basis view to sustained implementation of the ENP Action Plan in 2013, Georgia is invited to: reform the justice system independence of the judiciary" ([https://eeas.europa.eu/enp/pdf/docs/2013\\_enp\\_pack/2013\\_memo\\_georgia\\_en.pdf](https://eeas.europa.eu/enp/pdf/docs/2013_enp_pack/2013_memo_georgia_en.pdf))

The Dariali permitting and court decisions preceded recent progress since the commencement of the EU-Georgia 2012, notably the May 2013 adoption by Georgian Parliament of an amendments to the Law on Courts of Gene

Bank's acceptance of the proposed alternative is sufficient for the PCM expert to find compliance with the Bank's policies.

The Compliance review fails to discuss information presented by Green Alternative about the death of truck drivers in the 2014 disaster, which allegedly was caused by the improper selection of sites for the HPP and the project workers camp. Before project construction the site currently used as a workers camp used to be a parking space for the trucks for overnight and was located in close vicinity of the Larsi border, far away from the convergence point of the Tergi and Devdoraki rivers. Project construction works resulted in moving the truck parking space upstream - in the vicinity of the convergence of these rivers. As a result, the Devdoraki disaster caused deaths of truck drivers staying overnight. If the alternatives in the ESIA were properly assessed, such unfortunate results could have been avoided. "The compliance review fails to analyse this information and to present any counterarguments. Thus it fails to convincingly demonstrate that the EBRD has ensured adequate assessment of the alternatives, of the risks and impacts resulting from the workers' site selection by the client, and thus to conclude that the EBRD does not bear indirect responsibility for the fatalities.

### **3. Whether the EIA studied the impacts of the Project on the Stepantsminda settlement, including the impacts on the Tergi, Kuro and Chkheri rivers.**

We find insufficient both the information disclosed by the EBRD and the discussion in the PCM Compliance Report about specific measures to avoid the risk to Stepantsminda settlement caused by the two mudflow rivers (Chkhere and Khuro). It is still unclear how exactly "detail geomorphological monitoring" including attention to flow and sediment accumulation can solve the problem and what exact measures are determined in the project. If even for the PCM expert it is not entirely clear how the measures defined in the ESIA will reduce the risk of cumulative sedimentation "based on the ability to monitor and control the flow"<sup>3</sup>, how was the Compliance Review conclusion drawn that EBRD complied with its ESP? In view of the insufficient information and the serious safety concerns of project affected people, the Compliance Review should have elaborated more specifically how the safety of the complainants from Stepantsminda is assured by the EBRD and its client.

In a demonstration that the PCM and the EBRD take seriously the matters of safety of local communities and the need for meaningful disclosure and consultations, and to ensure that all stakeholders are satisfied with the proposed measures, **we call to the PCM expert to make a much stronger recommendation with regards to clarification and consultation with Complainants of the risk assessment and the proposed mitigation measures.**

In this regard **we request a revision of the Recommendation 3 and the Management Action 3**, to include more specific commitments **on Who, When, How, and Where is information going to be released and consulted with affected people in Stepantsminda.**

### **4. Whether construction of the HPP occurred in a protected area, namely, Kazbegi National Park**

According to the compliance review report "Expert has concluded that the Bank complied with PR 1.5 and PR 6.8 with respect to the use of protected land. Although land used for the Project was previously within Kazbegi National Park, the land was transferred to Client prior to construction."

It should be noted that neither Client nor the Bank has provided any evidence proving that "the land was designated for protection because of the Project" as it is mentioned in the Bank's response except "in-person meeting between the Client and the Compliance Review Expert in April 2016 in Georgia, and was confirmed by reviewing the Purchase Agreement effecting the transfer of ownership". Unfortunately we have not seen this

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<sup>3</sup> Page 20 of the Compliance Review Report: „Although not entirely clear to the Compliance Review Expert, the quoted passages appear to discount the risk of cumulative sedimentation and other hydrological changes to the Tergi river based on the ability to monitor and control the flow.“

agreement, moreover, as client claims “In exchange, the government designated 300 hectares of other land for protected status. The government selected the land to be changed, which was already government-owned; and the exchange did not involve payment of any compensation by Client to the government”.

In addition the decision to reduce Kazbegi National Park territory was defined by the decree of parliament of Georgia at March 13, 2012 (N 5789-I)<sup>4</sup>. Through Decree Parliament adopts the amendment that instead of 2.64 ha needed for the construction of Dariali HPP, removed the area of 20.3633 ha from the Kazbegi National Park. Therefore the conclusion by the expert that the land was transferred to Client prior to construction is not true as actual construction works have started much earlier in September 2011 (according to ESDD version it started in December 2011, Client version - February 2012) while decision to reduce the park territory was made only in March 2012.

#### **5. Whether the Bank failed to ensure adequate information and stakeholder engagement prior to decision making**

We do not agree with the findings of the PCM expert and the lack of discussion of the evidence provided by Green Alternative about how Georgian legislation as well as the Aarhus Convention have been violated by the Ministry of Environment.

According to the Compliance Review, the Bank complied with PR 10.7 as “the Bank procured an independent legal opinion from a Georgian law firm, which confirmed that the courts of Georgia rejected Complainants’ legal challenge to the Government of Georgia’s issuance of a permit to Client”.

The Compliance Review quotes the relevant provisions of the Aarhus Convention and Georgian law: Article 6(3) of the Aarhus Convention and Article 6 of the Law of Georgia on Environmental Impact Permit. However, the PCM expert did not run the available facts against these provisions. Instead he concluded that “the Compliance Review Expert considers it beyond the scope of a compliance review to reevaluate the legal sufficiency of the Georgian courts’ determination of an issue of domestic Georgian law”.

We believe that this approach to compliance review is flawed and defeats the purpose of the PCM as an independent mechanism that should provide independent expert analysis on policy implementation in EBRD projects.

#### **7. Whether the Bank permitted Dariali Energy to commence construction before it had a construction permit.**

We would like to describe the situation about illegal construction once again. On September 2011 the Mtskheta-Mtianeti Information Center published information about launching the implementation of the Dariali HPP project. The Director of Dariali Energy confirmed that the construction had really been launched. Green Alternative applied to the Ministry of Environmental Protection and demanded to investigate the legality of works ongoing on the project territory as well as to take relevant measures in case of detecting any wrongdoings.<sup>5</sup> In response, Green Alternative was assured that it would receive information about the legality of ongoing works after the planned inspection<sup>6</sup>. Almost a month and a half after the promise was given, Green Alternative applied to the Ministry of Environmental Protection again and requested information about the response measures. The Ministry answered only when Dariali Energy had already obtained the conclusion of ecological expertise necessary for the project implementation.

Besides the Ministry of Environmental Protection, Green Alternative also notified the Ministry of Energy and Natural Resources about illegal construction (because one of its departments was in charge of monitoring environmental issues) and asked the latter to investigate the legality of ongoing construction. A month after notification the organization received an answer, according to which a letter has been sent to the relevant regional

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<sup>4</sup> <https://matsne.gov.ge/ka/document/view/1613975>

<sup>5</sup> Letter 04/06-38 sent by Green Alternative to Minister of Environment Protection Goga Khachidze on September 15, 2011;

<sup>6</sup> Letter 133 of September sent by head of public relations Department of the moE, Ekatherine Bendeliani;

unit (Agency of Natural Resources) of the Ministry for the purpose of taking relevant measures. A month after the response Green Alternative requested information about the implemented measures as in case of the Ministry of Environmental Protection. Finally, two months after the organization received an answer from First Deputy Minister of Energy and Natural Resources, Mariam Valishvili, stating that the company had already obtained all necessary permit documents.

According to the findings of the Compliance Review conclusion “the Bank did not violate its obligation to ensure that projects are designed and operated in compliance with applicable regulatory requirements and good international practice. The Bank obtained adequate assurances that Client did not commence construction prior to issuance of a construction permit”.

Green Alternative does not agree with the finding of the PCM expert for the following reasons.

It would be appreciated if the Compliance Review report provided more detailed information about “an adequate assurances” indicated in the findings as information provided in the report is neither adequate nor proving that the client did not commence construction prior to issuance of a construction permit.

According to the Bank’s response for example 1) it relies on so-called “an independent legal opinion” stating that the legal permitting process has been followed in all aspects of land acquisition and obtaining necessary permits and 2) independent ESDD confirms that the construction works did not commence prior to obtaining necessary permits. Can the Bank provide information about the scope of the legal firm, does it include consultation with other parties (In this case Green Alternative) and revision of its evidences before drawing independent legal opinion to the Bank. On another hand based on which evidences ESDD concluded that the construction works did not commence prior to obtaining necessary permits (Green Alternative has not seen ESDD report on this issue)?

In addition we think that formulation of the concern indicated in the complaint “whether the Bank permitted Dariali Energy to commence construction before it had a construction permit” is not properly set, as we were asking the PCM to assess independently whether the Bank violated its obligation to ensure that all its projects “are designed and operated in compliance with applicable regulatory requirements and good international practice” by approving the project in 2014 as by that time construction had been already launched illegally.

Unfortunately the PCM expert in his observations and conclusions fully considers information provided by the Bank and client as adequate in spite of noting the obvious contradictory information provided by the Bank and client in their responses. Namely, according to the response of client, the date when construction was launched is February 2012, while according to the EBRD - December 2011. In addition, the expert failed to analyse the information provided by the complainants in the complaint as well as during the face-to-face meetings where Green Alternative provided detailed information connected with the court cases as well as the whole process regarding the Dariali HPP (“Energy Projects and Corruption” – “2.2.5 Court proceedings and newly detected wrongdoings“; Page: 20)<sup>7</sup>.

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<sup>7</sup> [http://greenalt.org/wp-content/uploads/2013/12/Energy\\_Projects\\_and\\_Corruption\\_in\\_Georgia.pdf](http://greenalt.org/wp-content/uploads/2013/12/Energy_Projects_and_Corruption_in_Georgia.pdf)