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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

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Standing Committee

44th meeting
Strasbourg, 2-6 December 2024

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Bureau of the Standing Committee

10-12 September 2024
Strasbourg

New Complaint: 2023/01

Alleged habitat destruction due to the construction of the Skavica Hydropower Plant on the Drin River (Albania)

-COMPLAINANT REPORT-

Document prepared by
Earth Law Center – USA & Earth Thrive - UK, on behalf of Opposition to Skavica Dam - OSD (Albania), Group of Rural Activists of Dibra-GARD (Albania), North Green Association (Albania), and GLV Integrimi (Albania)

To: Secretariat of the Bern Convention **Date**: 31 July 2024

From: Earth Law Center – USA & Earth Thrive - UK, on behalf of Opposition to Skavica Dam-OSD (Albania), Group of Rural Activists of Dibra-GARD (Albania), North Green Association (Albania), and GLV Integrimi (Albania)

Re: Complaint n°2023/1 re: the Skavica Hydropower Plant on the Drin River (Albania)

We are providing a few updates to our complaint re: the Skavica Hydropower Plant (HPP) on the Drin River. Please feel free to reach out with any questions or clarifications.

1. <u>Expected Impacts on Biodiversity from the Skavica HPP Project</u>

As of 30 July 2024, the Albanian Power Corporation (KESH) has not re-applied for the ESIA process with the National Environmental Agency (NEA), according to our information. As stated in our January 2024 update, the previous application by KESH, project developer, was not approved by NEA because it failed to meet basic legal criteria. In our assessment, and based on the official case file of NEA, **the reports for the preliminary ESIA submitted by KESH in support of the previous application showcased serious shortcomings** (see our January 2024 update).

Considering the above, **all the highlighted negative impacts of the Skavica HPP, as described in 1) our original complaint, 2) our update of January 2024 and 3) the concerns noted by the Bern Convention meeting of March 2024, remain, as they have still not been addressed**. They relate to the key impacts on the Lynx and the Balkan Lynx Recovery Programme; impacts on large carnivores; impacts on three important western Balkan lakes, two of which are the subject of other case-files (Ohrid and Shkoder); the fact that Drini is a proposed Emerald network site (which the government has never mentioned in relation to this project); impacts on other protected species listed on the Convention's appendices and resolutions; and other harms.

2. <u>Update on the ESIA by KESH as the Developer of the Project</u>

As stated, according to information obtained from NEA, **KESH has not re-applied for the in-depth ESIA procedure**. Given that new reports in support of this new application (to address noted shortcomings so far) are not published, it is not possible to provide information in relation to any new assessment by KESH. Here are additional details highlighting shortcomings of the process:

- In April 2024, KESH confirmed that out of four, only two alternatives are being studied, namely 420 and 442m elevation above sea level. **The options above present the ones with the highest impact on the environment and the communities as the flood zones will be larger than the two other alternatives not considered, pointing out the emphasis that KESH/government has placed on the economic returns rather than project impacts.**
- **Along with the new reports for the ESIA, KESH will also present the re-settlement plan (in the new application) for consultation with the public.**
- **The problem remains that neither the new ESIA draft reports nor the draft re-settlement plan that will be submitted to NEA by KESH, according to our information,** included consultation with the public or interest groups. This means that like Law no. 38/2021, which was approved in Parliament without any prior consultation, these two important reports, if approved, will not have taken into consideration all the possible viewpoints and concerns prior to being finalized as drafts to be submitted to NEA.

3. <u>Constitutional Court Findings</u>

On 3 June 2020, the Ministry of Infrastructure and Energy (MIE), represented by Minister Belinda Balluku, informed the public on the results of a Western Balkans Investment Framework (WBIF)-funded study (commenced in 2017) and ESIA on the Skavica project, committing to an international competition for this project to be carried out in October 2020. Despite this public announcement, on 10 March 2020, an MoU for this project was signed between MIE and Bechtel International Inc., following which, the WBIF project was canceled while MIE drafted a law entitled: "For determining the special procedure for the negotiation and execution of the contract with the company "Bechtel International, inc.", for the design and construction of the Skavica hydropower plant". **The draft law was approved in parliament in March 2021 (law no. 38/2021). In May 2021, a contract for the first phase of the Skavica HPP project was signed between KESH and Bechtel (approved by Council of Minister's Decision-CMD- no. 485/2021).**

On 04/05 May 2023, three NGOs[1] submitted a request to the Constitutional Court to **1)** Repeal as unconstitutional and in violation of the Stabilization and Association Agreement (SAA) of Law no 38/2021, **2)** Repeal of DCM no. 485, dated 30 July 2021 as incompatible with the Constitution of the Republic of Albania and the SAA, and **3)** Suspend the law and the DCM until the decision of the court is in force.

The court decided not to suspend the law and the DCM and decided to accept the request, with case reference no. 6/2023. Parties to the case in the court were the three NGOs, KESH, the Council of Ministers, the Parliament and **Bechtel (which did not participate in this court case).**

A request for an *amicus curiae* from organizations EuroNatur Foundation, CEE Bankwatch Network and RiverWatch, and by the bodies of the Energy Community Treaty, was not accepted. The first court session was on 12 December 2023, and the final one on 1 October 2024.

The claimants asserted that both the law and DCM violate the following:

- **The national identity in relation to national heritage, culture and tradition** as the location is a known historical area, with rich cultural and traditional identity;
- **Flora and fauna which are part of the national riches**;
- **The right to private property and fair compensation;** the expropriation value according to the law (reference price for the area) will be less than 1/10 of what will be lost;
- **The right to private life, in terms of the right to choose residence, work and profession**, causing thousands of farmers to lose their residence and subsistence means;
- **The right to be informed about the state of the environment, as provided by Article 56 of the Constitution, the Aarhus Convention**, and laws on public notification, consultation, and environmental protection;
- **The right to a healthy and ecologically suitable environment**;
- **Freedom of economic activity and free competition in terms of legal security and the principle of equality before the law** as the special law prohibited open competition for this project. The contracting company **has been given exclusive rights and** the Skavica project does not have strategic investment status;
- **The principle of proportionality in interference with human freedoms and rights** as the law is not preceded by any analysis about the scale of the intervention and alternatives;
- **The obligation to accompany the draft law with the report justifying the financial expenses, requested by** Article 82, Point 1, of the Constitution;
- **The contested acts violate the SAA,** in respect of principles of economic freedom, free competition and transparency;

[1] Opposition to Skavica Dam, Association for the protection of properties and the environment in the black Drini river valley and the Albanian Helsinki Committee.

- **Energy Community Treaty, ratified by law no. 9501, dated 3 April 2006**; and
- **Articles 101, 102 and 107 of the Treaty on the Functioning of the Union European** (TFBE) regarding the prohibition of anti-competitive agreements, prohibition of abuse of dominant position by state aid.

The Constitutional Court **declined to review the request with regards to the contract between KESH and Bechtel considering it outside its jurisdiction while the court legitimized the petitioners as ratione personae in the request for the law no. 38/2021**.

The court assessed that the petitioners, at this stage of the project, **did not manage to prove their direct interest** regarding claims for the violation of the right to private property and fair compensation; the right to private life in terms of the right to choose residence, work, and profession; as well as the principle of proportionality in relation to these rights. *In the same way, the petitioners, according to the court, did not manage to determine the violation of the national identity, in the direction of cultural and property heritage, as well as the right to a healthy, ecologically appropriate environment* in view of the international standards accepted by the Albanian state, according to Article 122 of the Constitution. Because many of the claims would materialize during the second phase, the court **did not legitimize the petitioners regarding these claims at this stage**.[2] About the violation of the freedom of economic activity and free competition regarding the principle of proportionality and the principle of equality before the law, **the court assessed that the applicants did not have direct interest (are not economic entities or represent them) and are not legitimized in relation to law no. 38/2021[3].** The court assessed that the three applicants **are legitimized ratione materiae** in terms of claims for violation of the right to be informed about the state of the environment and its protection, guaranteed by Article 56 of the Constitution and the Aarhus Convention.

For the basis of the claim: The court assessed that Article 56 of the Constitution (and subsequently law no. 146/2014 on public consultation), Aarhus Convention, Paris Agreement on Climate Change (both ratified as laws in Albania), the constitutional right for a healthy environment as per Article 59 of the Constitution, EU legislation transposed into Albanian laws (law for the protection of environment etc), Charter of the Fundamental Rights of the European Union etc make it mandatory for the early participation of affected communities in decision making and having access to information in projects that have impact on the environment and have the potential to cause irreparable damages. According to decisions of the Aarhus Convention Compliance Committees ACCC/C/2005/12 and ACCC/C/2004/2, the government of Albania must provide suitable opportunities for public participation in the decision-making process, as well as to adopt a clear framework, transparent and legally stable for the implementation of the provisions of the Convention avoiding confusion and misunderstandings. **The court assessed that despite the obligation to inform the public since the early phases of the law no. 38/2021, and the fact that this is mandatory before the results of studies relevant to the project are known**, the parties such as KESH, parliament and the Council of Ministers did not provide evidence of this early consultation process (Article 4 of Law No. 146/2014, the obligation to inform the people on the state of the environment derives directly from Article 56 of the Constitution, as well as from Articles 6 and 8 of Aarhus Convention, which expressly provide for the state's obligation to guarantee effective public participation since the initial stages of the preparation of acts and projects by state authorities). In summary of the analysis, **the Court assessed that the claim of the petitioners for violating the right to be informed about the state of the environment and its protection is correct**.

Despite the above assessment, **the court decided that the violation is repairable during the first phase of the project;** thus, the Court decided not to repeal law no. 38/2021 and issued a decision: 1) Establishing the violation of the right to information about the state of the environment and its protection,

[2] Four judges voted in favor of legitimizing the NGOs for these claims while 5 voted against thus the NGOs were not legitimized by a simple majority vote of the judges.
[3] Five judges voted against legitimizing court review of this claim, two voted in favor and two others voted in favor of only legitimizing the Albanian Helsinki Committee for this claim.

guaranteed by Article 56 of the Constitution, in the approval procedures of law no. 38/2021; 2) Ordering the public authorities to repair the found violation and to guarantee the right to information during the first phase of the implementation of law no. 38/2021; and 3) The obligation to take into account the results of the information process for the environmental protection, as far as possible, in accordance with Article 8 of the Aarhus Convention.

Our findings in relation to this court decision and the obligation of the authorities to repair this violation during the current first phase of the project (refer to above decision):

- Following the decision of the court, one of the NGOs that is part of the Bern Convention complaint case file on Skavica HPP[4] sent a request to KESH on 2 April 2024, to have a meeting to discuss the Skavica Project, proposing April 23 as a tentative date for this meeting. On 11 April 2024, KESH responded, declining the meeting, stating as usual, that meetings with civil society actors are being planned and that the NGO would be notified about a future date/time. No such notification has been received since then.
- On 19 April 2024, most of the Dibra municipality council members (district to be mostly affected by the Skavica HPP), requested a special meeting of the council to discuss about the project, asking for the participation of the Mayor and KESH (as well as other central government authorities) to present new information about this project and its impact in the area. This meeting was refused even though the request of more than ⅓ of the members makes it mandatory to hold this meeting according to the law on local government.
- On 24 Apr 2024, the Opposition to Skavica Dam NGO also sent an official request to the Dibra council to join in this previously requested meeting dedicated to Skavica HPP and its impacts in Dibra district. The Council Administration did not respond to the request however, the head of the District Council, in one of the meetings held, stated verbally that the NGO in question should instead go to the parliament for this project, not the municipality council.
- Despite repeated requests and the boycott by the councilors of two subsequent regular council meetings (leading to the failure to hold them as they constituted the majority of members), the Council Administration and the Mayor refused to organize this meeting, while there was no reaction from KESH or other authorities. To date, this meeting has not been held. Link to one of the meetings boycotted: https://shorturl.at/L5T8z
- **In our assessment so far**, **there are no changes to the approaches and attitudes of the authorities,** which according to the decision of the Constitutional Court, must repair the violation of the right to prior information during this phase of the Skavica HPP. We can affirm that the practice of decision making behind closed doors which has been noted since the beginning of this project, continues.

4. <u>Dibra Municipality Council Members Sign Resolution Against the Skavica HPP Project</u>

On 22 May 2024, with protocol number 1865, a circular decision in the form of a resolution against the Skavica HPP project was submitted to Diber Municipality. The resolution was signed by 16 out of 31 Dibra district council members (which is the parliament of the district), calling for an end to this project as being, in their view, in direct violation of the vital interest of the community represented by them (as 10 out of 15 administrative units would be flooded). The members call for an end to this project, protection of nature and Black Drini River, the interest of the community, recommending instead to use alternate resources which are recommended for Albania to produce needed electricity to avoid overdependence on hydropower sources. They also call on authorities to inform and consult the public during decision making processes. You may find the translated version of the resolution at these links: 1) https://shorturl.at/T71go; 2) https://shorturl.at/6N5iM.

[4] Opposition to Skavica Dam NGO.

5. <u>Conclusion</u>

Given important developments so far, confirming our concern for the continuity of the lack of prior consultation, and in view of the fact that KESH has not re-applied for an in depth new ESIA process, **we would like to request Bern Convention to keep the case file on stand-by,** with all our original and subsequent complaints standing, until a new update is provided (pending KESH application or any other important development).