



To: David Bohigian, Acting President and CEO
Ryan Brennan, Vice President, Office of Investment Policy
William Kennedy, Office of Accountability Director

From: Kosovo Civil Society Consortium for Sustainable Development

Subject: **Legal violations and pending legal challenges regarding the Kosova e Re Power Plant**

We are writing to you regarding your expressed interest to provide a loan to ContourGlobal for building the Kosova e Re Power Plant (KRPP) lignite-fired power plant in Kosovo.

This project would be an economic, social and environmental disaster for our country. We will write in the coming weeks to explain these concerns in more detail, and to show why this project is not consistent with OPIC's policy commitments. For now, we are writing to explain how the KRPP is in violation of Kosovo's environmental law and its international commitments under European Energy Community Treaty, and to update you on the legal challenges we have initiated to redress these violations.

As a brief introduction, we are members and founders of the Kosovo Civil Society Consortium for Sustainable Development (KOSID). KOSID has, for the last 13 years, been the platform for offering solutions and advocating for sustainable development in Kosovo. For most of this time, our primary focus has been to convince the Government of Kosovo and potential funders such as the World Bank to drop support for the KRPP project.

Project Background

Numerous studies have shown that the KRPP would be socially, environmentally, and financially unsustainable and would harm Kosovo and its people. Coupled with existing coal-based generation capacities, the KRPP project would hamper the future of energy development based on European Union standards and therefore would damage Kosovo's aspirations to become an EU member. KOSID, in partnership with globally-renowned universities and experts, has offered the Kosovo government an alternative plan for how to diversify the energy mix, meet EU and Paris Agreement targets and prevent Kosovo from being locked into a coal-based energy system.¹ Private-sector investors have also offered an alternative plan based on renewables and battery storage. Recognizing that these alternatives would be more cost-effective than the proposed lignite plant, the World Bank has ended consideration of the project.²

¹https://kosid.org/file/repository/Kammen_RAEI_Sustainable_Energy_Options_for_Kosovo_20_May_2012.pdf?fbclid=IwAR07UOhveHKstzSjCE4SpwxLkathIzPrnT8IxnlldB6vHSwzPyqh_V2sj9k

² <https://www.climatechangenews.com/2018/10/10/world-bank-dumps-support-last-coal-plant/>



Violations of Kosovo's Environmental Law and Treaty Obligations

As you know, OPIC is prohibited by its *Environmental and Social Policy Statement* from supporting any project that does not comply with the host country's environmental and social laws, regulations and standards.³ This includes the host country's international legal obligations,⁴ and laws, regulations and standards related to public consultation and disclosure of information.⁵

The KRPP project should not be eligible for OPIC support because it is out of compliance with Kosovo's laws and international legal obligations in a number of critical respects.

1. The Ministry of Environment and Spatial Planning (Ministry) violated Kosovo law when it issued an Environmental Consent for this project, because the required Environmental Impact Assessment had not been made available for public debate.

Under Kosovo law, no project that is “likely to have significant effects on the environment” may receive permits or begin construction until it has received a written “Environmental Consent” from the Ministry.⁶ All thermal power plants over 50MW are subject to this requirement.⁷ The Ministry may not consider issuing an Environmental Consent to such projects until a comprehensive Environmental Impact Assessment (EIA) has been produced,⁸ and a Report summarizing its main conclusions and recommendations has been made publicly available and “subject to public debate.”⁹ The Ministry must then “review the remarks and opinions which emerged in the public debate” and take this information into consideration in reaching the decision on the environmental consent.¹⁰

The Ministry completely failed to follow these requirements. It issued an Environmental Consent to ContourGlobal on December 21, 2018, even though an EIA Report had not been made publicly available or “subject to public debate.”¹¹ In fact, no member of the public saw the EIA Report until mid-February 2019—two months after the Environmental Consent was issued—when we demanded a copy from the Ministry pursuant to a Freedom of Information request. Even today, the Ministry still has not made it available to the broader public.

³ ESPS, at Annex B, para 13; paras. 3.6, 4.2, 4.7, 4.11.

⁴ ESPS, at paras. 4.2, 4.7.

⁵ ESPS, at Annex B, para 13; para. 5.15.

⁶ *Kosovo Law No. 03/L-214* Arts. 7.1, 7.5

⁷ *Id.*, Annex I, para. 18.

⁸ *Id.*, Article 7.4.

⁹ *Id.*, Article 20.1.

¹⁰ *Id.*, Articles 21.1, 22.1.

¹¹ ContourGlobal held a public consultation in Obiliq on November 22, but the EIA Report was not available or discussed at that meeting.



We have filed suit against the Ministry to vindicate the public’s right to review and comment on the EIA Report. The suit argues that the Ministry acted outside of its statutory authority when it issued an Environmental Consent to ContourGlobal without considering public inputs in its decision, or even subjecting the EIA Report to public debate. Kosovo law is clear: without going through the proper procedures for receiving public comments on the EIA, ContourGlobal cannot legally obtain construction or other permits for the KRPP, or begin to execute the project.

2. The Ministry also violated Kosovo’s obligations under the European Energy Community Treaty when it failed to afford the public an opportunity to comment on the EIA Report.

Kosovo is a Contracting Party to the European Energy Community, an international organisation that brings together the European Union and its neighbors to create an integrated pan-European energy market. The Energy Community extends the EU’s internal energy market rules and principles to Contracting Parties on the basis of a legally binding Treaty framework.

As a Contracting Party, Kosovo has committed to implement *Directive 2011/92/EU* on the assessment of the effects of certain public and private projects on the environment (EIA Directive).¹² The EIA Directive establishes minimum information disclosure and public consultation requirements for projects that are likely to have significant effects on the environment. Specifically, it requires that the public be afforded (1) access to critical information early in the environmental decision-making process, and (2) “early and effective opportunities to participate in the environmental decision-making procedures...and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.”¹³

As described above, the Ministry did not meet these obligations. Its failure to publicly disseminate the EIA Report, solicit comments on the report in a public forum, and address those comments in its consideration of the Environmental Consent ran afoul of Kosovo’s commitments under the Energy Community Treaty. The public did not have an opportunity to express comments and opinions on the EIA before the Ministry gave the environmental consent.

We have filed a complaint with the Energy Community, asking the Secretariat to review the Ministry’s compliance with its commitments under the Energy Community Treaty. We are seeking the annulment of the environmental consent for the KRPP.

¹² Treaty Establishing Energy Community, Art. 12, Annex II; available at <https://energy-community.org/legal/treaty.html>

¹³ Directive 2011/92/EU, Art. 6; available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0092&from=RO>



3. The Power Purchase Agreement between the Government and ContourGlobal violates the Energy Community’s prohibition on state aid.

The Energy Community Treaty prohibits Parties from providing “any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources.”¹⁴

After an initial review of the contractual framework KRPP, the Secretariat of the Energy Community found that the subsidies provided by the Government in the power purchase agreement were so lavish as to constitute state aid.¹⁵

The Secretariat found that the power purchase agreement allocates project risks “entirely in favor of ContourGlobal.” It shields ContourGlobal from the risks associated with operating a power plant, including:

commercial risks such as the production risk (including investment and variable costs), the market risk (risk of end-user demand and price fluctuations), the operational risk (imbalance risk and scheduling), regulatory and tax risks (use of system fees and other fees and taxes, including any future carbon costs), credit risk (counterparty risk and margining), etc.

The Secretariat noted that by transferring these risks to the Government, the agreement would raise costs for suppliers and customers or result in “direct and continuous subsidies by the Government...” The Secretariat also concluded that these subsidies “could not have been achieved under market circumstances” and would ensure that “ContourGlobal enjoys a guaranteed and risk-free profit.”

The Secretariat is continuing to engage with the Government on these violations, and is also investigating other potential state aid violations regarding exemptions from taxes and customs duties, state guarantees, and the transfer/lease of land below market price.

4. The procurement process in which ContourGlobal was awarded the contract to build the plant was unlawful under the Kosovo Public Procurement Law.

At the time contract to build the plant was awarded, Kosovo law required that a minimum of two bidders must tender bids for a bid to be legally accepted. Kosovo Law no. 04/L-042 on Public Procurement provides, “If during the conduct of a procurement activity, less than two (2) responsive tenders or, where applicable, requests to participate are received; the contracting authority shall cancel the procurement activity.”¹⁶ After a long and untransparent process, in

¹⁴ Treaty Establishing Energy Community, Art. 18(1)(c).

¹⁵ <https://energy-community.org/news/Energy-Community-News/2018/06/14.html>

¹⁶ Kosovo Law no. 04/L-042, Art. 32, para. 4



December 2014, only ContourGlobal submitted a bid for the project. Under Kosovo law, this bid should not have been accepted.

5. Construction of the KRPP will prevent Kosovo from meeting its renewable energy commitments to the Energy Community.

Kosovo is bound by the Energy Community Treaty to reach 25 percent of its total final energy consumption from renewable energy sources by 2020.¹⁷ It has nearly met that target, but only due to the revision of biomass consumption for heating by household customers. Kosovo has done very little to advance the installation of renewable energy.¹⁸ Within the next year, the Energy Community is expected to adopt renewable energy targets for 2030, in line with the EU's targets, and a new 500 MW coal plant will make it extremely difficult – if not impossible – for Kosovo to meet them.

Conclusion

In light of the significant legal violations outlined above, the KRPP should not be considered eligible or appropriate for OPIC support.

We would welcome the opportunity to discuss these issues further. You can contact us on e-mail jeta@birn.eu.com, skype jetaxharra, or telephone +383 44 135 209.

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¹⁷ Article 2, of Treaty establishing Energy Community - 1. The task of the Energy Community shall be to organise the relations between the Parties and create a legal and economic framework in relation to Network Energy, as defined in paragraph 2...;

Decision of the Ministerial Council of the Energy Community, D/2012/04/MC-EnC: Decision on the implementation of Directive 2009/28/EC and amending Article 20 of the Energy Community Treaty: Article 1- Each Contracting Party shall implement Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

Article 2 - Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2009/28/EC, as adapted by the present Decision, by 1 January 2014; www.energy-community.org

¹⁸ Energy Community Implementation Report 2018 <https://www.energy-community.org/implementation/IR2018.html>