



## Memorandums of Understanding and Agreements Concluded for Implementation of Energy Projects in Georgia

### Legal Analysis



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## Resume

One of the priorities of Georgia's national policy today is maximum utilization of its energy potential. Georgian Government conducts intensive campaign to encourage investments in hydro-energy projects. More than 20 memorandums of understanding and/or agreements have been concluded by now between Georgian government and Georgian or foreign companies (consortiums) on the construction of small and medium-size hydropower plants; some of them have already been commenced, and some are being planned.

The memorandums of understanding (MoU) and agreements on energy projects naturally spark public interest as to the legal status of these documents and the impacts the energy projects implemented under MoUs and agreements may have on the economic, social and natural environment of the country.

In the first part of the report legal framework for concluding MoUs on energy projects between the Government of Georgia and the investors is briefly reviewed; Namely, *Resolution of the Government of Georgia # 107 of 18 April 2008 on Approval of the national programme "Renewable energy 2008" – regulation for construction of new renewable energy sources in Georgia* is analyzed, since this legal act defines special rules for concluding MoUs for the construction of power plants. In the second part 15 MoUs and two agreements between the government of Georgia and different companies on implementation of energy projects are analyzed. The analysis of resolution #107, as well as MoUs and agreements allowed making following conclusions:

1. Georgia's budget will enjoy no immediate and direct economic benefit as a result of energy projects implemented under the MoUs and agreements; Nevertheless, certain indirect benefits (basically economic) should still be expected.
2. As a result of compulsory sales of electricity at Georgian energy market in winter season, energy stability of the country during most problematic period of the year will be secured (allegedly this will not affect electricity tariffs positively).
3. Increased investments in energy sector will support, *inter alia*, financial stability of the country, since certain part of the investment funds will be directed into the state budget in the form of taxes and fees. State budget will benefit from further sales of electricity (mainly in the form of charges for electricity). Although, given the fact that most of generated electricity is determined for export, and pursuant to Georgian Tax Code, export of electricity is taxed at a zero rate (i.e. in fact is not taxed), the budget shall not expect optimal benefits from the sales of electricity.
4. New investors will come to the country and make significant investments in energy sector. It should be mentioned herewith that financial system will benefit less, if foreign companies implement their projects through their affiliates and representations (without involvement of enterprises registered in Georgia). In this case the funds received from sales of electricity (sold not only abroad, but also inside Georgia), will finally leave Georgia.
5. There will be new jobs, but since there are no guarantees of employing locals, it is quite expectable that foreign specialists and cheap labor of foreign origin (sometimes more experienced as well) are employed, thus promoting labor migration instead of employment of local manpower (in its turn this will have adverse effect on already grave social situation in the country).
6. Companies, active in different sectors will benefit from participation in energy projects, which may promote economic development in general. However, since there is no clause on priority involvement of local companies in project implementation, it can be assumed with high probability, that mainly foreign companies will participate in project activities, and investor companies will purchase goods and services under the project mainly abroad (from foreign companies). Hence, benefits of local business will be minimal. Besides, vast amount of investment funds will be spent out of the country thus minimizing positive impact of investments.
7. New energy facilities will be built, which will probably promote the country's energy independence, but since there is no clause on compulsory introduction of new technologies, investor companies, due to low price, may choose outdated technologies, which contain more technical, as well as environmental risks and, in long-term perspective, may turn out even losing.
8. In all probability, supporting infrastructure will develop, but implementation of energy projects may have adverse impact on local population's interest since there is not a clause on considering local communities' interests, social and cultural issues in general. Conflict situations and human rights violation may be the result of the above activities.

9. Interest and demands to hydro and other natural resources will increase, but since there is no clause on transparency of project related information and public participation in decision-making process, there is a probability, that, due to classification of project related information, public representatives will not be able to properly exercise their rights, guaranteed by the Georgian Constitution, Georgian legislation and international treaties. Given the nature of the projects, public participation in decision-making and public monitoring in project implementation are especially important.

10. There is high probability that energy projects induced environmental degradation process becomes more intensive since environmental legislation in force is too weak, equally as the national institution responsible for environmental protection (in terms of both, power and resources).

11. Implementation of energy projects requires land, which is often in private ownership or used by communities (pastures and hayfields). Given the fact, that there is no policy in Georgia developed to address development induced involuntary resettlement and binding standards, as well as responsible agencies in this sector, the probability is high that implementation of energy projects entails violation of human rights, especially those related to land tenure.

Regrettably, the MoUs and agreements reviewed in this report emphasize the importance of timely implementation of the project, disregarding, with few exceptions, social and environmental aspects. Moreover, it seems that even economic aspects are not sufficiently explored and adequately addressed by the Georgian government. Such an approach to project implementation contains unbalanced environmental, economic and social risks that may lead to significant negative results in short-term, as well as mid-term and long-term perspectives.

## Introduction

One of the priorities of Georgia's national policy today is maximum utilization of its energy potential. Georgian Government conducts intensive campaign to encourage investments in hydro-energy projects. More than 20 Memorandums of Understanding (hereinafter – MoU/MoUs) and/or agreements have been concluded by now between Georgian government and Georgian or foreign companies (consortiums) on the construction of small and medium-size hydropower plants (hereinafter – HPP/HPPs); some of them have already been commenced, and some are being planned.

According to the advocates of the above policy the investments in hydro-energy will help to reduce electricity imports and allow Georgia to increase export to neighboring countries. Besides, it will contribute to the achievement of energy independence and increase state revenues. The implementing companies, in order to enlist the support of local population, often stress the benefits of the projects, such as job creation and contribution to the development of local economy. However, there are groups, criticizing these projects and highlighting some of the risks associated with the investments, such as the loss of housing and land, limited access to local infrastructure and natural resources, environmental degradation, etc.

MoUs and agreements between the State and the investor, along with national (and international) law determine the terms of investment projects, as well as the ways the risks, costs and benefits are distributed. The rules (procedures) of signing MoUs and agreements determine, to a large extent, the quality of responsiveness to public opinion and accountability of decision-makers.

Needless to say that the analysis of MoUs and agreements cannot replace an empirical assessment of the economic, social and environmental impacts of their implementation (well negotiated MoUs/agreements may be poorly implemented and bring disappointing results; conversely, positive results may be achieved in the absence of any MoU or agreement); and still, the quality of MoUs/agreements is critical to achieving effective results.

In the first part of the report legal framework for concluding MoUs on energy projects between the Government of Georgia and the investors is briefly reviewed; in the second part 15 MoUs and two agreements between the Georgian government and different companies on implementation of energy projects are analyzed; in the final, third part of the report some observations are made on potential economic, social and environmental implications of energy projects implemented under the MoUs and agreements.

## 1. Legal framework for concluding MoUs between the Government of Georgia and the investors on implementation of energy projects

### 1.1 *The concept of MoU and its legal basis*

The word “memorandum” is of Latin origin (*memorandum est*, or *memoro* – “to be remembered”) and is used in different areas including diplomacy, trade, public policies, etc. In the law “memorandum” is sometimes used also in the meaning of “agreement”. Public institutions in Georgia often call “memorandum” some types of documents used in diplomacy, as well as in interagency relations. There are cases when certain types of agreements are called “memorandum”.

None of the Georgian laws gives the definition of “memorandum”. However, transactions of memorandum type are referred to in some laws and regulations of Georgia. The only law, where the MoU with Georgian government regarding construction of power stations is mentioned, is the Law on State Property of 21 July 2010 (#3512-rs). Namely paragraph 5 of Article 20 of the law provides, that *“the persons who are transmitted real estate assets through privatization under the MoUs on the construction of power plants, are not required unconditional and non-withdrawable bank guarantee/deposit”*. This article, in fact, establishes special incentives for companies that have signed relevant MoUs with the Georgian government on privatization for construction of power plants.

With regard to power station projects Georgian government has signed MoUs with different companies. In essence these are administrative contracts. According to General Administrative Code of Georgia, administrative contract is *“a civil contract concluded between an administrative agency and a natural or legal person or another administrative agency”*.

Georgian civil law does not recognize MoU as a type of transaction (contract). However, Civil Code of Georgia, in general, does not rule out transactions (contracts) that are not directly provided in the law, if they do not contradict to statutory requirements.

According to civil law of Georgia, the regulations laid down for civil transactions (agreements) are applicable to administrative contracts. Respectively, drawing up administrative contracts in the form of MoUs in general is not prohibited by the Georgian legislation.

The only statutory act establishing special regulations with regard to MoUs with the Georgian government on construction of power stations and giving explanation to “memorandum” is **Resolution of the Government of Georgia # 107 of 18 April 2008 on Approval of the national programme “Renewable energy 2008” – regulation for construction of new renewable energy sources in Georgia** (hereinafter – resolution #107).

### ***1.2 Resolution of the Government of Georgia #107 of 18 April 2008***

Though resolution #107 is not a law, it is a statutory act, meaning that it is valid throughout Georgia and is legally binding.

There are two documents approved under the resolution #107: (1) the national programme “Renewable Energy 2008” – the regulation for construction of new renewable energy sources in Georgia, and (2) a standard form of application to be submitted to Ministry of Energy of Georgia by a person/party who is interested in building, operating and ownership of power stations included in the list of potential renewable energy sources.

The resolution establishes overall legal basis for the Georgian government to draw up MoUs within the framework of “Renewable energy 2008” programme. Pursuant to resolution #107, in order to facilitate construction of new renewable energy sources in Georgia, the programme provides the terms for drawing up MoU between the Government of Georgia, Electricity System Commercial Operator LLC (hereinafter - ESCO) and appropriate party in case interest is expressed to construct power station. It is further specified in the document that *“the MoU is a cooperation agreement between the parties”*.

Resolution #107 charges Ministry of Energy with drawing up draft MoU regarding power stations to be available on its official website ([www.minenergy.gov.ge](http://www.minenergy.gov.ge)), which shall be binding for an applicant. Resolution #107 also sets terms for building, operating and ownership of power stations, to be included in MoUs drawn up on the basis of Resolution #107.

Draft MoU (hereinafter - model MoU) for power stations under Resolution #107 is indeed available on Ministry of Energy’s website. Part of the MoUs on implementation of energy projects have already been signed based on this document.

### ***1.3 Main objectives and legal basis for the programme approved under resolution #107***

In order to clearly identify the objectives of the programme approved under resolution #107, the legal framework for the adoption of the resolution #107 need to be considered.

Pursuant Article 12 of the Law of Georgia on Statutory Acts, *“the resolution of the Government of Georgia shall be adopted under Georgian Constitution, laws and presidential statutory acts and to fulfill their implementation. It is necessary to indicate under which statutory act and for the fulfillment of which statutory act it was adopted”*. Resolution #107 does not specify for the fulfillment of which statutory act it was adopted, though the act is indicated under which it was adopted.

Resolution #107 states that the Georgian government approved *National programme “Renewable energy 2008” - regulation on construction of new renewable energy sources in Georgia* under paragraphs (e), (h) and (i) of article 5 of the Law of Georgia on the Structure, Plenary Powers and Operation Rules of the Government of Georgia. According to the indicated paragraphs, the Government of Georgia, under the power granted by the Constitution of Georgia:

*“(e) Approves national programmes in social, economic, cultural and other sectors and ensures their implementation;...*

- (h) Provides a single economic space in the country, ensures freedom of economic activity, development of a competitive and stable investment environment;*
- (i) Manages state property”.*

The indicated clauses of the law referred in the resolution are of a very general nature and it is difficult to find correlation between them and the provisions of the approved programme and regrettably does not allow for identification of its specific objectives; nevertheless, it is possible to make some conclusions in this regard.

In particular, pursuant to paragraphs (m), (n), (p) and (r) of article 5 of the Law of Georgia on the Structure, Plenary Powers and Operation Rules of the Government of Georgia, the government, alongside with other issues, should ensure: the citizens' social protection, reduction of unemployment, environmental and natural resources' protection, sustainable management of natural resources and other topical issues; The programme would certainly have benefited if all these issues were taken into account in the development of the programme. However, paragraphs (m), (n), (p) and (r) of article 5 of the Law of Georgia on the Structure, Plenary Powers and Operation Rules of the Government of Georgia are not referred to in the legal grounds for adoption of resolution #107. Neither the programme approved by resolution #107, nor the model MoU contain a word about defeating unemployment, introduction of new technologies, public access to information and participation in the decision-making, protection of social rights, environmental protection and sustainable use of natural resources.

The above leads to the conclusion that environmental protection, new technologies, transparency, employment of locals and social issues in general are not included in the objectives and priorities of the programme approved by resolution #107. The country would have benefitted from implementation of the programme, provided proper integration of these issues in the design and implementation (including the process of concluding the MoUs) of the above programme, meaning better management of natural resources, which is direct responsibility of the State (among them, the government) as provided in paragraph 4 of article 37 of the Constitution of Georgia.

The analysis of the programme approved by the resolution #107 and the model MoU allows identifying its possible objectives and priorities. According to the resolution, the national programme “Renewable Energy 2008” - regulation on construction of new renewable energy sources in Georgia (hereinafter “regulation” or “programme”) aims at “*supporting construction of new renewable energy sources in Georgia through attraction of investments*”. For better understanding of the declared objective paragraph 12 of the regulation approved under resolution #107 shall be analyzed.

According to paragraph 12 of the regulation approved under resolution #107, the Georgian government shall decide whom to give the preference in case there are two and more equally acceptable applications for the construction of one and the same power station. For such cases, according to the above mentioned paragraph, the priority should be given to the party, who offers:

- “(a) Shorter period of construction and commissioning of the power station;*
- (b) Higher amount of bank guarantee per megawatt for the construction of the power station”.*

Provided, that bank guarantee itself is to ensure that all pledges under the MoU are met in due time (i.e. meet the terms) it can be concluded that **the main objective of the programme is not just construction of new renewable energy sources, but construction in the shortest possible time. Besides, the programme aims at attraction maximum amount of investment in Georgia's energy sector, which, according to the authors of the programme, should have positive impact on economic sector in general.**

Although resolution #107 declares construction of energy projects the only objective of the regulation for construction of renewable energy sources, still it cannot be regarded as an end in itself of such governmental projects. The more so that, according to the resolution #107, the programme is not limited in terms of period of construction and it also provides for certain commitments of implementing companies after the construction is finished.

The programme, approved under resolution #107, equally as the model MoU, **obliges the project companies to sell the generated electricity during winter months only for domestic consumption during ten years from the commencement of the operation. This, probably, should be considered one of the main benefits deriving from this programme for Georgia's energy system**, since uninterrupted supply of additional electricity to Georgia's energy market during winter months will support significantly the stability of country's energy system in mid- and long-term perspective.

**Resolution #107 does not apply to all MoUs and agreements signed by Georgian government regarding the construction of power stations.** Accordingly, the regulation approved under resolution #107 shall not be applied to all of them. Resolution #107 has no retroactive effect and of course the regulation under the resolution #107 does not apply to previously signed MoUs.

Besides, taking into account the restrictions provided for in paragraphs 23 and 23<sup>2</sup> of the regulation, it can be concluded that the regulation does not apply to:

- (a) Power stations with a capacity of less than 1 MW;
- (b) Power stations with a capacity of 100 MW and more;
- (c) Cascade of power stations with a total capacity of 100 MW and more;
- (d) Power stations with a capacity of less than 100 MW, which are not included in the list of potential sources of renewable energy.

Besides, the government also has the right not to apply resolution #107 to certain parties. In particular, paragraph 24 of the regulation approved under resolution #107 provides: *“If the interested party(s) denies to sign a guaranteed purchase agreement to be concluded in advance with Electricity System Commercial Operator (ESCO) and is (are) a qualified enterprise or the main shareholder(s) (and/or a person directly or indirectly connected) of such enterprise and the total capacity of the power plant does not exceed 125% of its own consumption, in such case by the decision of the Government of Georgia the above mentioned rule is not affective”.*

It is also noteworthy, that according to paragraph 23<sup>2</sup>, Georgian government is authorized to hold direct negotiations in some cases and conclude an agreement with a company on project implementation.

Given the said circumstances it is not surprising that **only part of the MoUs signed with the Georgian government were developed on the basis of regulation approved under resolution #107.** Obviously, persons, whom resolution #107 does not apply to, do not need to conclude the form of MoU under resolution #107. **Still, most of the MoUs concluded by the government on construction of power stations contain the conditions set forth in the model MoU (though there are some with dramatically different conditions).** Given the above, the analysis of the model MoU might give some idea of the fairly large part of MoUs on the construction of power stations.

#### **1.4 The model MoU**

The model MoU was developed by the Ministry of Energy in compliance with the requirements of resolution #107. Model MoU itself has not been approved under any statutory act, but each specific draft MoU (including the ones developed on the basis of the model MoU), are reviewed and approved by the government by its decrees (which are non-regulatory legal acts).

According to resolution #107, it is allowed to introduce amendments to the model MoU with the consent of the government. **However, it is difficult to track the amendments, since they are not made available to public at the ministry’s website.** Respectively, the contents of only the model MoU, available on the Ministry’s website can be assessed (for the purposes of this study, the model MoU of 1 January 2012 available at Ministry of Energy and Natural Resources’ website was analyzed).

**The model MoU, in essence, is a tripartite agreement** (however, the amendments to paragraph 2 of the regulation, approved under resolution #107 allow for bilateral MoUs too):

- One party to the model MoU is **the Government of Georgia, represented by Minister of Energy** (model MoU still contains the old title of Minister of Energy and Natural Resources which is “Minister of Energy”);
- Second party to the model MoU is the Energy System Commercial Operator JSC (ESCO) (to date the mentioned entity is not a joint-stock company, it is a limited liability company, which is not reflected in model MoU);
- Third party to the model MoU is a **Company**, i.e. a person willing to invest in appropriate project. Company in the model MoU is used in singular, but since resolution #107 contains no limitations with regard to the number of investors, participation of several companies in the capacity of third party can be considered admissible.

As mentioned above, one of the invariable parties to the model MoU is always the government. **All MoUs (including the model MoU) and agreements reviewed in this study, are concluded in the name of the Government of Georgia, however, it is not specified which law governs the government at the signing of MoUs.**

The government carries out its activities basically through adopting appropriate legal acts (resolutions and decrees). The Law of Georgia on the Structure, Plenary Powers and Operation Rules of the Government of Georgia also indicates that *“Government of Georgia, under the authority vested by the President of Georgia, signs international agreements”* (paragraph (s) of article 5 of the law). As for MoUs and agreements in question (which unambiguously are not international agreements), **neither the Constitution of Georgia, nor the Law of Georgia on the Structure, Plenary Powers and Operation Rules of the Government of Georgia have any provisions for the government to sign the transactions of this type.** Given the fact, that some of the commitments of the government under the model MoU may lead to conflict of interests, implementation of such projects and programmes by the Georgian government, as well as basic commitments under MoUs need more substantial legal foundation.

**Article one of the model MoU** defines its objective, which is too general and is usually included unchanged in specific MoUs. According to article 1 of the model MoU, *“The MoU aims at cooperation between the parties in order to develop major conditions of an agreement and set the terms of business relations”.*

The word “objective” usually implies something, planned for the future. Pursuant to article 327 of Civil Code of Georgia a contract may give rise *“to the obligation to conclude a future contract”*. Such contracts are called *“preliminary contracts”*. The two sides of the agreement, Company and ESCO, according to model MoU in fact have an obligation with regard to drawing up future agreements on electricity purchase. However, keeping in mind, that two major parties to the model MoU (the government and company), already within the framework of model MoU, agree on all major conditions of cooperation, the model MoU cannot be considered a preliminary contract in their regard. The model MoU as it looks now is a tripartite agreement on cooperation between the parties for implementation of specific energy projects.

**Article 2 of the model MoU** defines its purview. Pursuant to this article, the parties agree, *inter alia*, on such details as (a) the location of the facility, (b) installed capacity, (c) investment amount and the expected timing of its return, (d) timing for receiving the permit, starting the construction and putting into operation, and (e) annual power generation output.

**Article 3 of the model MoU** sets out the rights and obligations of the parties. The largest part of this article refers to company’s obligations and the government’s rights. Obligations of the government are set out only in article 3.10.

Company’s obligations (including that of obligatory submission of the bank guarantee and ten years obligatory supply of electricity only within Georgia in winter period) are fully compliant with the provisions of resolution #107. Besides, there are several items worth mentioning with regard to article 3:

1. According to paragraphs (a) and (b) of article 3.6 of the model MoU, company shall provide feasibility study (technical, economic and legal issues) and submit the results to the government. **The model MoU does not envisage possible abandonment of the project by the company on the basis of the results of such a study.** The model MoU does not provide for obligatory environmental and social impact assessment with a view of taking into account its results in the implementation of the project<sup>1</sup>.
2. Article 3 of the model MoU gives a lot of attention to the bank guarantee, to be presented by a company; it should be mentioned, though, that **the bank guarantee backs only the commitments, which a company assumes with regard to construction and putting into operation of power station. Bank guarantee does not back the commitments, which envisage ten years sales of electricity only within Georgia during winter season.**
3. According to paragraph 3.8 of the model MoU, when the initial owner of the land plot is the State or local government body, a company is obliged to return the land plot under project implementation to its initial owner without any compensation in case if Georgian government terminates the MoU due to violation of deadlines by the company. **The article does not specify in what state the property shall be returned to the initial owner. Since the model MoU does not stipulate returning of the property in rightfully and substantively flawless state, it**

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<sup>1</sup> It should be mentioned that only two MoUs reviewed in this study provide for feasibility study and environmental and social impact assessment and taking final decision proceeding from the results of these assessments. Those are: MoU between the Government of Georgia, Kolin Construction, Tourism, Industry and Trading Co INC, Energotrans Ltd and ESCO; and MoU between Government of Georgia, Optimum Enerji Uretim A.S, Energotrans Ltd and ESCO.

**may be concluded, that this provision contains unbalanced risks.** In particular, the property under return, for the moment of return may be encumbered with third party's rights e.g. securing loans for the construction, or other encumbrance of rights of third parties – the MoU does not set limits for the company in terms of the use of property received under project implementation. These risks, as well as possible risk of the company's insolvency, are not properly reflected in the model MoU.

The model MoU does not provide for the restoration of the environment to its initial state prior to the return of land plot. This makes environmental risks somewhat unbalanced. **Besides, this contradicts to the *Restitution Principle*, which implies that environment degraded as a result of certain activities must be restored as close to its original state, as possible.** Restitution Principle is one of the basic principles of environmental protection in Georgia, as provided in paragraph (j) of article 5 of the Law on Environmental Protection and disregarding this principle may be harmful not only to the environment, but also to the State budget (since ultimately the measures to avoid and/or correct adverse impact or environmental damage will be financed from the budget).

It should be mentioned herein, that **the model MoU does not provide for bank guarantee, insurance or any other mechanism for securing compensation of possible damage to the environment and/or third parties**, while such risks exist, given the nature of the projects under implementation.

**The model MoU does not raise the issue of the real estate, built or financed by the company on the land plot transferred to it under the project**, in the case if the land shall be returned to its initial owner. Ignoring this issue increases the company's risks, as well as the risks of arising disputable situations in general<sup>2</sup>.

4. The model **MoU does not provide for any obligations with regard to employment of local population, as well as priority involvement of local companies in project implementation**<sup>3</sup>.

5. Quite serious potential risks for the company are implied in paragraphs 3.6 and 3.8 of the model MoU; here the rights of the government are stipulated, with regard to allowing (activation) the bank guarantee, termination of the agreement and return of previously transferred land plot, as well as deprivation of the right to continue activity (project), in case of violation of appropriate deadlines by the company. These risks are somewhat balanced by paragraph 3.12 of the model MoU, which provides, that *“paragraphs 3.6 and 3.8 are void when noncompliance of the company to its pledges is caused by force-majeure or unlawful activities of the government or one of its agencies”*. Still, paragraph 3.12 does not fully rule out possible risks, since there may be still other causes, beyond the company's control, for nonobservance of deadlines. In particular, **possible increase of implementation cost of the project due to some legislative changes (including the ones initiated by the government) leading to failure of the company to meet its obligations are not taken into account. There is no detailed itemization of rules of action in case of force majeure and the probability of termination of the contract due to force majeure is not provided for**<sup>4</sup>.

6. Article 3.10 of the model MoU splits obligations of Georgian government into two clauses:

(a) *“The government, within its competence, shall provide assistance to the company in obtaining appropriate documents and information required for implementation of the project”*. This article does not specify the documents and information at issue, as well as deadlines of their provision. In this case it may be assumed that public information and documentation are at issue (since there are certain legislative limitations with regard to confidential information). But the law requires the administrative authorities issuing public information freely. Hence, inclusion of this clause in contractual obligations would hardly add to the benefits of the company.

(b) *“The government, in the prescribed manner and within the limits of its mandate, will make every effort to assist the company in implementation of the project. These efforts may be associated with the transfer of relevant permits, licenses and necessary land”*. **The commitment of the government to assist in transferring permits and licenses creates certain conflict of interests both to the government and its subordinate bodies, whose immediate competence is issuance of these permits and licenses.** As for the commitment of transferring the land plot, **the model MoU (as well as resolution #107) does not specify the conditions and the price to be paid for the land transferred to the company.**

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<sup>2</sup> In contrast with the model MoU, this issue is duly provided for in some of the MoUs and agreements signed by the government.

<sup>3</sup> Only one of MoUs duly provides for the company's obligations to employ 75% of local population. It is the MoU signed between the Government of Georgia and Nuro Energy Production and Marketing Inc., Korea Electric Power Corporation and SK Engineering and Construction Co.

<sup>4</sup> These issues are more or less reflected in most of MoUs and agreements reviewed in this study.

Theoretically, the land for construction of power station may be transferred under the ownership right or other rights (such as right to construction) but in practice it is usually transfer of ownership through privatization. Georgian government in fact provides assistance to respective companies and even adopts acts of statutory character<sup>5</sup> in certain cases.

7. Article 3.11 deals with ESCO obligations and obliges it to sign contract with the company on compulsory power purchase in winter period during 10 years after the power station is put in operation. This article, to some extent, ensures implementation of long-term liabilities of the company and aims to balance the long-term risks of the company. One of the main objectives of the agreement between ESCO and the company must be safeguarding stability of electricity sales price in winter period, which, with high probability, is within the interests of all parties.

**According to article 4 of the model MoU** the company will incur all costs associated with the project. **Model MoU does not provide for reimbursement to the company in case of termination of MoU. Model MoU contains no provisions on compensation of damages.** Presumably, the issue, if necessary will be governed by the Georgian law<sup>6</sup>.

**Article 5 of model MoU** establishes terms and conditions of early termination of MoU. The model MoU does not specify the term of its validity. **Taking into account the requirements of resolution #107, this shall not be less than 10 years after putting the project in operation** (for proper fulfillment of company's 10-years obligation related to mandatory sales of electricity for domestic use in Georgia).

As for early termination of model MoU, article 5 provides that it is possible as per article 3.6, however, article 3.6 deals only with bank guarantee, and says nothing regarding early termination of MoU. Presumably an error has crept here – there should be a link to articles 3.8 and 3.9 instead of 3.6. Another fact deserves mentioning here. **It is that the model MoU does not provide for possible early termination of MoU by the company.** Presumably, the issue, if necessary will be governed by Georgian law.

**Article 6 of the model MoU** deals with changes and amendments, while **article 7** - with official notifications. These articles are similar in most of MoUs reviewed, though some of them envisage special procedure for initiation and implementation of the changes, which is not reflected in the model MoU.

**Article 8 of the model MoU** deals with applicable law and dispute resolution issues. According to the model MoU, this issue is governed by the Georgian legislation and the same is provided in all MoUs signed by Georgian government.

**As for dispute resolution, the model MoU provides that this should take place at general courts of Georgia under Georgian legislation. Given recent years' courts statistics, there is very low probability that private company wins administrative lawsuit against the government. This contains major risks for the company (companies) in the event of dispute.** That must be the reason why most of the MoUs concluded with the government provide for dispute resolution at international arbitration.

**Article 9 of the model MoU** deals with copies and MoU language. It provides that MoUs are drafted in Georgian and English languages, two copies of each. It is somewhat unusual, that an agreement (and MoU in essence is a sort of an agreement) of three parties is made only in two copies. The model MoU does not make it clear who will obtain the signed original, and who will not.

Also unclear is why MoU is drafted in English, alongside with Georgian. If we look into the statistics, absolute majority of MoUs under resolution #107 are concluded with companies registered in Georgia.

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<sup>5</sup> For instance, the governmental resolution #218 of 24 May 2011 approved joint proposal of the Ministry of Energy and Natural Resources of Georgia and "Georgian Investment Group Energy" Ltd, and on the basis of MoU with the government, 22660.00 m<sup>2</sup> land plot, selected on the territory of Chkhorotsku municipality for the construction of the first Khobi-2 power station, was expelled from State Forest Fund in order to dispose of it in accordance with the law.

<sup>6</sup> Some of the MoUs provide both for compensation of investment costs, as well as damages in case of termination of MoU due to the Georgian government.

## ***1.5 Transparency and public access to information***

Transparency of the processes and public access to information, presumably, is not among the priorities of resolution #107, though the regulation provides for ensuring publication of part of the information at certain stage. For instance, paragraph 9 of the regulation *“the applications filed with the Ministry of Energy shall be registered and not later than two days after their registration, the information shall be made available on the official website (www.minenergy.gov.ge). Pursuant to paragraph 20 of regulation, “after concluding the MoU, the information about the MoU shall be posted on the Ministry of Energy’s website (www.minenergy.gov.ge)”*. Regrettably these provisions are not enough for safeguarding due transparency of the projects.

As for the model MoU itself, there is no provision in it with regard to either publicity of information or its confidentiality<sup>7</sup>. However, pursuant to General Administrative Code of Georgia companies have the right to require from appropriate administrative bodies that their information (or part of it) is declared a commercial secret. It would be helpful to make certain provisions in the model MoU for such cases in order that transparency of information is ensured, which is not done in this case. Although, the parties to the model MoU have some commitments with regard to assisting each other in presenting or acquiring the information, this does not properly ensure public access to information.

It should be mentioned in this context that transparency principles were not observed in the process of developing the programme approved under resolution #107 and the model MoU, which due to the circumstances described below, is violation of the rights of the public:

National programme “Renewable Energy 2008 – regulation on construction of new renewable energy sources in Georgia, which is approved under resolution #107, no doubt implies environmental protection issue, since its implementation will affect the state of environment in Georgia. Georgia as a party to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter - Aarhus Convention), on the basis of article 7 (and with regard to the provisions of article 8) of Aarhus Convention is obliged to ensure due participation of the public in development of this programme within open and fair procedure. Public participation should have been ensured, at least in accordance paragraphs 3, 4 and 8 of article 6 of Aarhus Convention, which was not done.

Neither was public participation ensured when preparing government resolution on amendments to resolution #107. By 1 January 2012, changes were introduced seven times in resolution #107 (and the programme, approved under this resolution), some of which are quite significant. Out the significant changes worth mentioning are those limiting the scope of the resolution (paragraphs 23 and 23<sup>2</sup> of regulation); companies - parties to the MoU were allowed to withdraw from the contract on guaranteed electricity purchase with ESCO (paragraph 2 of regulation) and in some cases it was allowed to reduce the sum of bank guarantee (paragraph 7<sup>1</sup> of regulation).

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<sup>7</sup> There is special article on confidentiality of information in some of the MoUs.

## 2. MoUs and Agreements between the Government of Georgia and the Investors regarding Implementation of Energy Projects

Ministry of Energy and Natural Resources publishes on its official web-page the list of ongoing energy projects that is being updated periodically<sup>8</sup>. In November 2011 Green Alternative requested from the Ministry MoUs and Agreements signed by Georgian government regarding implementation of energy projects as of 16 November 2011.

Ministry of Energy and Natural Resources provided Green Alternative with copies of all, except one requested document (MoU between Georgian Government, Clean Energy Invest A.S. and “Acharistskali” Ltd.), which, according to the Ministry was considered commercial secret. In May 2012 Green Alternative again requested Ministry of Energy and Natural Resources, this time – a copy of the Order No. 136 of 5 August 2011 of the Minister of Energy and Natural Resources, which classified the said MoU as a commercial secret; the organization also requested a copy of only the part of the MoU, containing public information. From the Ministry’s response it became clear that an “implementation agreement”, not the MoU was signed with Clean Energy Invest A.S. and “Acharistskali” Ltd. Besides, in compliance with the Minister’s Order, *“the whole implementation agreement (all its paragraphs) is considered commercial secret”*<sup>9</sup>.

In November 2012, after 2012 parliamentary elections and appointment of a new cabinet of ministers, Green Alternative again applied to the Ministry of Energy and Natural Resources. Green Alternative requested to investigate legitimacy of classification of the agreement; in case existence of commercially sensitive information is confirmed, Green Alternative requested to separate information containing commercial secret from the public information and send a copy of the public parts of the agreement. In response to the request, in December 2012 Ministry of Energy and Natural Resources finally provided Green Alternative with the public parts of the agreement (agreement without parts containing commercial secret)<sup>10</sup>. This agreement is not reviewed in this report as far as it was provided when the study was essentially completed.

In the table below MoUs and agreements provided by the Ministry of Energy and Natural Resources in response to Green Alternative’s request are listed and the basic features are described<sup>11</sup>. These MoUs and agreements are reviewed in the subsequent subchapters. As it is clear from the chart the majority of MoUs and agreements are made in Georgian or Georgian-English (bilingual), however some were made only in English. According to Ministry of Energy and Natural Resources, these documents were executed only in English and ministry does not possess the Georgian versions. The dates of signing MoUs and agreements are clear in all cases except one – MoU between the Georgian Government and Energo-Aragvi Ltd on construction of Aragvi HPP. From the MoUs and agreements listed in the table below only one was made for the construction of wind power plant; all the rest were made for the construction of HPPs. It is clear from the table that a large part of MoUs and agreements are bilateral, while the rest are either trilateral, quadrilateral or in some cases even involve five parties (Energo Trans Ltd, ESCO, Georgian State Electro System Ltd and/or JSC Sakrusenergo are represented as parties to MoUs and agreements apart from the government and company/companies). The majority of the HPPs listed in the table at different times were included in *the list of potential renewable energy sources* approved by 23 April 2008 order #46 of Minister of Energy of Georgia. In some cases it is not absolutely clear when HPP was included and/or removed from the list (only tentative dates can be indicated); this is presumably due to incompleteness of the information provided by the ministry to Green Alternative. As to the list of potential renewable energy sources, it is noteworthy to mention that it includes only HPPs; wind power plants had never been indicated in the list.

<sup>8</sup> Visit: <http://www.menr.gov.ge/4473>

<sup>9</sup> In accordance with Order # 136 of 5 August 2011 of Minister of Energy and Natural Resources “On considering the implementation agreement, signed on 10 June 2011 between Georgian government, Clean Energy Invest A.S and Acharistskali Ltd. a commercial secret”, the document was classified as a commercial secret on the basis of circumstances listed in Clean Energy Invest A.S. letter of 20 July 2011 and Article 27<sup>2</sup> of General Administrative Code of Georgia, sub-point “j” of paragraph 2 of Article 4 of the Statute of Ministry of Energy and Natural Resources, approved by government Resolution #133 of 16 March 2011 and the minutes (item # XXXII) of 26 July 2011 Cabinet meeting. According to the information available at web-site of Ministry of Energy and Natural Resources, the agreement provides for building the following six power stations in Adjara Autonomous Republic: Zomleti HPP – 31.20 MW, Vaio HPP – 40.40 MW, Koromkheti HPP – 21.00 MW, Chorokhi HPP – 36.20 MW, Adjaristskali 1 – 26.46 MW, Adjaristskali 2 HPP – 13.76 MW, Adjaristskali 3 HPP – 6.09 MW.

<sup>10</sup> Build, own and operate agreement relating to conduction of the full technical and economic feasibility study, social and environmental impact assessment, detailed design study, as well as financing construction, testing, commissioning, ownership, operation and maintenance of Adjaristsqali cascade hydro power plants between the Government of Georgia represented by the Ministry of Energy and Natural Resources of Georgia, Clean Energy Invest AS and Adjaristsqali LTD. The agreement was made on 10 June 2011 in Batumi (Georgia), in English. The parties to the agreement: the Government of Georgia, Clean Energy Invest AS, Adjaristsqali Ltd (currently – Adjaristsqali Georgia Ltd, identification number: 404401438), ESCO (only for articles 1.1, 3.3.2 და 8.2.2(c)), Energotrans LLC (only for articles 1.1, 2.2.5 და 8.2.2(c)) and Georgia State Electrosystem LLC (only for articles 1.1 და 8.2.2(c)). As it is clear from the preamble of the agreement, in April 2010 Clean Energy Invest AS won in the Expression of Interest for construction of Zomleti, Vaio, Choromkheti and Chorokhi HPPs on Adjaristsqali river. In November 2010 Clean Energy Invest AS expressed interest to merge Adjaristsqali 1, Adjaristsqali 2 and Adjaristsqali 3 HPPs as one power plant named Dandallo and to join it with Adjaristsqali Hydro Power Plants project. Thus, agreement was concluded for the construction of Adjaristsqali HPP cascade which includes following HPPs: Zomleti, Vaio, Choromkheti and Chorokhi HPPs (with the installed capacity 128.8 MW) and Adjaristskali 1, Adjaristskali 2 and Adjaristskali 3 HPPs (with the installed capacity 46.3 MW). Total installed capacity of the cascade is approximately 175 MW.

<sup>11</sup> Copies of the listed MoUs and agreements are available at Green Alternative web-site: [www.greenalt.org](http://www.greenalt.org)

**Table 1. MoUs and agreements concluded for implementation of energy projects and reviewed in this study**

#	Type of the document & language	Date of signing, place & term of effectiveness of MoU/agreement	Parties	Subject	Installed capacity/ total installed capacity for HPP cascades (MW)	HPP included / not included in the list of potential renewable energy sources <sup>12</sup>
1	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 28 February, 2008</li> <li>o Tbilisi, Georgia</li> <li>o 10 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Adjar Energy 2007 Ltd</li> </ul>	Kintrishi HPP	7.50	Only Kintrishi HPP included Presumably 13.10.2011 - Presumably 17.01.2012 <sup>13</sup>
				Kobuleti I HPP	13.30	
				Kobuleti II HPP	14.30	
				Kirnati HPP	14.40	
				Khelvachauri HPP	22.40	
Chorokhi I-II HPPs	48.00					
2	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 14 May, 2009</li> <li>o Ozurgeti, Georgia</li> <li>o 10 years from date of commencement of operation</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Bakhvi Hydro Power Ltd</li> </ul>	Bakhvi III HPP	6	Included 27.05.2008 – 10.05.2010
3	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 24 November, 2008</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Caucasus Energy and Infrastructure JSC</li> </ul>	Mtkvari HPP	28	Included 24.06.2008 – Presumably 10.05.2010
4	Memorandum (in Georgian)	<ul style="list-style-type: none"> <li>o Date is unknown<sup>14</sup></li> <li>o Place is unknown</li> <li>o Until full return on investment, but not more than eight years from commencement of HPP operation</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Energo-Aragvi Ltd</li> </ul>	HPP cascade on river Tetri Aragvi, north to village Zemo Mleta	Not indicated	Not included. Memorandum was signed before April 2008 (i.e. before approval of the list)
5	Memorandum of Understanding (Bilingual – Georgian-English)	<ul style="list-style-type: none"> <li>o 15 September, 2009</li> <li>o Tbilisi, Georgia</li> <li>o 15 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Georgian Investment Group Energy LLC</li> </ul>	Khobi HPP-2	25	Both HPPs included 17.05.2008 – Presumably 10.05.2010
				Khobi HPP-3	11	

<sup>12</sup> The list of potential renewable energy sources was approved by the order #46 of 23 April 2008 of Minister of Energy of Georgia. The list was amended at least 30 times from the date of approval until 11 April 2012 (the last amendment available to Green Alternative is dated 10 April 2012). In May 2012, in response to Green Alternative's request, Ministry of Energy and Natural Resources provided the organization with the copies of the order #46 of 23 April 2008 and the amendments. From the information provided by the ministry it can be assumed that in the period of 23 April 2008 – 11 April 2012 there were some other amendments made in the order (which are not available to Green Alternative). It should be noted that the order #46 of 23 April 2008 of Minister of Energy of Georgia can be found neither in the database of the Legislative Herald of Georgia, nor in the database of programme Codex (database of legal acts); similarly, amendments to the list attached to the order are not available in the mentioned databases. The Ministry of Energy and Natural Resources publishes only amendments to the order on its official website, however not all the amendments are made available at the website. As of November 2012, only January, February and April 2012 amendments are available on the website. Visit: <http://www.menr.gov.ge/4473>

<sup>13</sup> Hereinafter, the first date is indicative of the date of inclusion of a power plant in the List of potential renewable energy sources, while second date indicates date of removal of a power plant from the list. The power plant is included and removed from list by the order of the Minister of Energy (and Natural Resources). In some cases, exact date of inclusion and/or removal is not clear (this is presumably due to incompleteness of the information provided by the ministry to Green Alternative).

<sup>14</sup> Date is not indicated. The memorandum was signed by prime-minister Zurab Nogaideli, therefore, it can be presumed that the memorandum was concluded before November 2007.

#	Type of the document & language	Date of signing, place & term of effectiveness of MoU/agreement	Parties	Subject	Installed capacity/ total installed capacity for HPP cascades (MW)	HPP included / not included in the list of potential renewable energy sources <sup>22</sup>
6	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 8 December, 2009</li> <li>o Tbilisi, Georgia</li> <li>o 18 years from the date of entering into force , or until Implementation Agreement enters into force, which comes first</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Nuro Energy Production and Marketing Inc.</li> <li>• Korea Electric Power Corporation</li> <li>• SK Engineering and Construction Co., Ltd</li> </ul>	Jhonet HPP	100	-
				Namakhvani HPP	250	
				Tvishi HPP	100	
7	Memorandum of Understanding (Bilingual – Georgian-English)	<ul style="list-style-type: none"> <li>o 27 July, 2009</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Rusmetali LLC</li> </ul>	Lukhuni 1	10.8	All HPPs included 19.01.2009 – Presumably 10.05.2010
				Lukhuni 2	12	
				Lukhuni 3	7.5	
8	Memorandum of Understanding (Bilingual – Georgian-English)	<ul style="list-style-type: none"> <li>o 28 May, 2009</li> <li>o Ozurgeti, Georgia</li> <li>o 10 years from date of commencement of operation</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Zoti Hydro LLC</li> </ul>	Zoti HPP	36	Not included
				Kvirila HPP	5.20	
9	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 11 June, 2010</li> <li>o Place is unknown</li> <li>o 15 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Ministry of Economic Development of Georgia</li> <li>• ESCO</li> <li>• Georgian Railway Construction Ltd</li> </ul>	Nenskra HPP	Not indicated <sup>18</sup>	-
10	Memorandum of Understanding (in English) <sup>19</sup>	<ul style="list-style-type: none"> <li>o 10 November, 2010</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Kolin Construction, Tourism, Industry and Trading Co, Inc.\</li> <li>• Energo Trans LTD</li> <li>• ESCO</li> </ul>	Nobulevi HPP	25.70	All HPPs included 23.04.2008 – 18.12.2009
				Tskhimra HPP	32.00	
				Erjia HPP	27.00	
				Lechakha HPP	21	

<sup>15</sup> Indicated as Namakhvani cascade.

<sup>16</sup> Indicated as Lukhuni cascade.

<sup>17</sup> Indicated as Zoti cascade.

<sup>18</sup> According to paragraph 3.2 of the MoU, MoU must have an attachment where “recommended (tentative) information about the project” should have been provided. The copy of the MoU provided to Green Alternative did not have any attachment.

<sup>19</sup> According to the Ministry of Energy and Natural Resources (May 2012), the MoU was executed only in English and ministry does not possess the Georgian version of the MoU.

<sup>20</sup> Agreement refers to the cascade on the river Tekkhura consisting of four HPPs in Samegrelo-Zemo Svaneti region.

#	Type of the document & language	Date of signing, place & term of effectiveness of MoU/agreement	Parties	Subject	Installed capacity/ total installed capacity for HPP cascades (MW)	HPP included / not included in the list of potential renewable energy sources <sup>22</sup>
11	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 28 December, 2010</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• ESCO</li> <li>• UNAL INSAAT VE TICARET AS</li> </ul>	Khunevi HPP	11.00	Included 23.04.2008 – Presumably 15.04.2011
12	Memorandum of Understanding (Bilingual – Georgian-English)	<ul style="list-style-type: none"> <li>o 15 February, 2011</li> <li>o Tbilisi, Georgia</li> <li>o 10 years from date of commencement of operation</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Energo-Pro Georgia JSC</li> </ul>	Alpana HPP Sadmeli HPP	71 97	Only Alpana HPP included 23.04.2008 – Presumably 15.04.2011 <sup>21</sup>
13	Memorandum of Understanding (in English) <sup>22</sup>	<ul style="list-style-type: none"> <li>o 19 February, 2011</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Optimum Enerji Uretim A.S.</li> <li>• Energo Trans LTD</li> <li>• ESCO</li> </ul>	Arakali HPP Abuli HPP Akhalkalaki HPP	11 20 15	Arakali and Abuli HPPs included 23.04.2008 – 29.10.2009 All HPPs included 07.04.2010 – Presumably 15.04.2011
14	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 17 May, 2011</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• ESCO</li> <li>• Energia Ltd</li> </ul>	Larsi HPP	20.00	Included Presumably 15.04.2011 – Presumably 20.10.2011
15	Memorandum of Understanding (in Georgian)	<ul style="list-style-type: none"> <li>o 23 May, 2011</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• ESCO</li> <li>• Wind Energy Investment</li> </ul>	Wind power plant near Pharavani Lake	50	Not included (only HPPs are included in the list)

<sup>21</sup> In compliance with the amendment of 17 February 2010 to the order #46 of 23 April 2008 of Minister of Energy of Georgia, the installed capacity of Aplana HPP was increased from 69 MW to 70.6 MW.

<sup>22</sup> According to the Ministry of Energy and Natural Resources (May 2012), the MoU was executed only in English and ministry does not possess the Georgian version of the MoU.

#	Type of the document & language	Date of signing, place & term of effectiveness of MoU/agreement	Parties	Subject	Installed capacity/ total installed capacity for HPP cascades (MW)	HPP included / not included in the list of potential renewable energy sources <sup>22</sup>
16	Agreement (in English) <sup>23</sup>	<ul style="list-style-type: none"> <li>o 28 April, 2011</li> <li>o Vienna, Austria</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Trans Electrica Limitedq (BVI)</li> <li>• Trans Electrica Georgia Ltd</li> <li>• Energo Transi Ltd</li> <li>• ESCO</li> </ul> <p>Subsidiary signatories only for sections 3.1 (d/e) and 4.16:</p> <ul style="list-style-type: none"> <li>• Georgian State Electro System Ltd</li> <li>• JSC Georgian Russian Energo Company (Sakrusenergo)</li> </ul>	Khudoni HPP	702	–
17	Agreement (in English) <sup>24</sup>	<ul style="list-style-type: none"> <li>o 19 May, 2011</li> <li>o Tbilisi, Georgia</li> <li>o 20 years from the date of entering into force</li> </ul>	<ul style="list-style-type: none"> <li>• The Government of Georgia</li> <li>• Dariali Energy Ltd</li> <li>• Energo Transi Ltd</li> <li>• ESCO</li> </ul>	Dariali HPP	109	Included 23.04.2008 – Presumably 15.04.2011 <sup>25</sup>

<sup>23</sup> According to the Ministry of Energy and Natural Resources (May 2012), the agreement was executed only in English and ministry does not possess the Georgian version.

<sup>24</sup> According to the Ministry of Energy and Natural Resources (May 2012), the agreement was executed only in English and ministry does not possess the Georgian version.

<sup>25</sup> In the period when Dariali HPP was included and then removed from the list, the installed capacity of the HPP has been changed twice: first time, in compliance with the order #10 of 17 February 2010 of Minister of Energy, the installed capacity of the HPP was increased from 50 MW to 93 MW; Second time, in compliance with the order #54 of 12 October 2010 of Minister of Energy, the installed capacity was increased from 93 MW to 99.9 MW.

## 2.1 MoU between the Government of Georgia and Adjara Energy 2007 Ltd

<b>Approved by:</b>	Government Order #59 of 20 February 2008 on the MoU to be signed between the Government of Georgia and Adjara Energy 2007 Ltd. The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of entering in force:</b>	28 February 2008
<b>Term of the MoU:</b>	10 years from date of entering in force
<b>Parties to the MoU:</b>	<p>1. Government of Georgia</p> <p>2. Adjara Energy 2007 Ltd</p> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 245591426</li> <li>• Date of registration: 17.04.2007</li> </ul>
<b>About the project/projects:</b>	
<p>The MoU envisaged construction of following seven HPPs in Adjara Autonomous Republic: Kintrishi HPP, Kobuleti I HPP, Kobuleti II HPP, Kirnati HPP, Khelvachauri HPP, Chorokhi I-II HPPs. According to the Georgian media reports, in 2009, Adjara Energy 2007 refused construction of three HPPs, among them Kintrishi HPP<sup>26</sup>, due to proximity of the project sites to the protected areas and environmental concerns.</p> <p>According to the information provided at the web-site of the Ministry of Energy and Natural Resources, on 1 July 2011 MoU was signed again between the Government of Georgia and Adjara Energy 2007 for construction and operation of following three HPPs: Kirnati HPP (34.6 MW), Khelvachauri HPP - 1 ( 36.4 MW) and Khelvachauri HPP - 2 (34.6 MW).</p> <p>It is planned to build the cascade of HPPs in the lower part of Chorokhi River, in the last 21km long section of the river. The project includes construction and operation of three-stage (Kirnati, Khelvachauri 1 and Khelvachauri 2) cascade of run-off type HPPs with a total capacity of 105.7 MW. Chorokhi River water will be used solely for the operation of the first stage HPP (Kirnati HPP), downstream to Muratli HPP (located 6 km away in Turkey), while second and third stage HPPs will use water from Chorokhi River, as well as Adjaristskali River and Machakhelastskali River.</p> <p>The reservoir of Kirnati HPP will be located in the area between villages Kirnati and Maradidi. Chorokhi River floodplain, as well as farming lands (arable lands, meadows and pastures) of Kirnati and Maradidi communities will be inundated as a result of construction of Kirnati HPP. Khelvachauri 1 HPP will be built near village Erge; Chorokhi River and Adjaristskali River floodplains and farming lands (arable lands, meadows and pastures) of Erge, Adjaristskali and Mirveti communities will be inundated in this case too. Only surviving Khertvisi historic bridge pier will be partially flooded. Khelvachauri 2 HPP will be arranged near Makho village. The water will cover Chorokhi river floodplain and agriculture lands of villages Makho and Erge in this case as well.</p> <p><i>Source: Project on construction and operation of hydropower plant cascade on Chorokhi River: Environmental and Social Impact Assessment Report (Adjara Energy 2007, Gamma Consulting, 2011). Association Green Alternative's comments on Kintrishi -2 HPP project' environmental impact assessment report (September 12, 2012).</i></p>	

Although this MoU had been signed before the adoption of Resolution #107, there is much similarity between this MoU and the model MoU. The objective and most of the terms agreed between the parties of the MoU in question are identical to those of the model MoU. Still, there are some essential discrepancies:

1. In contrast with model MoU, this is a bilateral transaction, and ESCO is not a party to it.

Besides, the MoU in question is signed, on behalf of Adjara Energy 2007 Ltd, by the company director Methin Qumushoglu (in registry performance Methin Kumushoglu), whose representative capacity, by the moment of signing the MoU, were limited in accordance with Company Statute of 16 April 2007 (sub-paragraph 2, paragraph 1, article 6) (notarial act No. 1-3521). Pursuant this article, the partners' decision (minutes of the partners' meeting) is needed in order that the director assumes the investment obligations stipulated in MoU. No such decision is mentioned in annexes to MoU (neither can it be found in the materials at our disposal). Signing MoU by the director of Adjara Energy 2007 Ltd without proper decision of the partners may serve as a basis for declaring the MoU void, in case an interested party casts doubt on it.

<sup>26</sup> Later MoU was signed between the Government of Georgia and Hydro Development Company on building, operation and ownership of Kintrishi HPP with 5 MW installed capacity on Kintrishi River.

2. The MoU sets terms and deadlines different from the model MoU regarding selling energy by Adjara Energy 2007 Ltd at Georgian market during winter period.

In contrast with model MoU, the term of compulsory sales of energy at Georgian market is not properly set in this MoU. It will take special calculation on the basis of analysis of different articles to figure out the terms. The MoU entered in force on 28 February 2008 for 10 years. At the same time, newly constructed power stations are intended to be put into operation in 2015. Hence, in contrast with obligations stipulated in model MoU (and Resolution 107), Adjara Energy 2007 Ltd will be under the obligation to sell electricity in Georgia only for 3 years – from 2015 to 2018. It should be mentioned in this context that, as opposed to model MoU (which provides for unambiguous obligation of a company to sell electricity at Georgian market), under article 3.3 of the MoU in question this obligation shall be applied “as necessary” without specifying who, and by which criteria shall identify “necessary”. In contrast with model MoU, this MoU provides for compulsory sales on the territory of Georgia only 40% of electricity generated not for three months, but for six months.

3. Warranty terms also differ from the model MoU – in this MoU, as opposed to the model one, specific figures and terms are indicated. Besides, according to article 3.6 of the model MoU a copy of the bank guarantee shall be attached to MoU; while MoU in question provides that the bank guarantee shall be provided within 14 calendar days after the MoU enters in force.

4. In accordance with MoU in question (article 3.9), as well as the model MoU (article 3.12), if a company fails to meet its obligations due to force majeure, or the activities of the government or any other governmental agency, the MoU provision on bank guarantee shall become invalid. Although, there are some differences here: in accordance with model MoU, limitation of responsibilities in such a case shall refer to its article 3.8, which provides for additional sanctions when contractual terms are violated by a company. The MoU under review does not provide that limitation of responsibilities under article 3.9 shall apply to article 3.5 of the MoU in questions (which is identical to article 3.8 of model MoU). Thus, under the MoU in question Adjara Energy 2007 Ltd’s interests are less protected against the State pressure than the interests of the companies under model MoU in similar cases.

5. In contrast with model MoU (article 2.3), under this MoU (article 5) the parties are not authorized to engage other investors in implementation of the project (“without prior written consent”). The wording of article 5 of the MoU in question is quite vague and ambiguous, but it is clear that it sets forth an interdiction, different from model MoU.

6. In contrast with model MoU, the MoU in question (article 6) reads that the parties have agreed on confidentiality. It is noteworthy that the parties have set no limitation as to which issues should the confidentiality apply to. In order to deem the issue confidential, it is sufficient that a party, while providing the information, states its objective interest in non-disclosure of this information. This provision, potentially, might be applied *inter alia* to environmental information.

7. In contrast with model MoU, this MoU (article 7.2) envisages monitoring by the government of the company’s fulfillment of engagements under the MoU. The same article empowers the Georgian government to unilateral, full or partial, termination of the MoU not only in case of non-fulfillment of obligations by the company (this is stipulated in model MoU too), but also, when found “evident”, that the company will fail to fulfill its engagements. This vague wording does not rule out possible biased interpretation by the government and implies potential risks to the company.

8. In contrast with model MoU, this MoU (article 10) provides that disputes shall be resolved not at Georgian general courts but at Paris Chamber of Commerce.

## 2.2 MoU between the Government of Georgia and Bakhvi Hydro Power Ltd

<b>Approved by:</b>	Government Order #349 of 12 May 2009 on the MoU to be signed between the Government of Georgia and Bakhvi Hydro Power Ltd for building, operation and ownership of Bakhvi 3 HPP. The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	14 May 2009
<b>Term of the MoU:</b>	10 years from date of commencement of operation
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Bakhvi Hydro Power Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205270810</li> <li>• Date of registration: 15.01.2009</li> </ul>
<b>About the project/projects:</b>	
<p>The project envisages construction and operation of run-off type 6.6 MW Bakhvi 3 HPP on Bakhvistskali River in Ozurgeti district (Guria region). The project involves diversion of water from the river through diversion channel and penstock for approximately 4 km long distance.</p> <p>In February 2010, Bakhvi Hydro Power received Conclusion of Ecological Expertise (environmental consent) from the Ministry of Environmental Protection and started construction. In the course of construction, the company apparently decided to increase installed capacity of the HPP from 6.6 to 9.8 MW. For such cases (alteration of technological cycle that results in changes in operation conditions) the Georgian law requires environmental impact assessment to be conducted and Permit for the Impact on Environment to be obtained by the project developer. Hence, the company updated Environmental Impact Assessment study of the project, made it available for public consultation and planned public consultation meeting for the end September 2012. At this moment, it is unknown whether or not the company applied to Ministry of Environmental Protection and if it has obtained environmental consent.</p> <p><i>Source: Conclusion of Ecological Expertise #6 of 20 February 2010 granted by the Ministry of Environmental Protection and Natural Resources for construction and operation of the HPP; Environmental Impact Assessment report of Bakhvi 3 HPP construction project (Bakhvi Hydro Power Ltd, Georgian Hydroenergy Ltd, 2010); Bakhvi 3 HPP, General Explanatory Note, volume 1 (KG Energy Ltd, Georgian Hydro Power, 2012).</i></p>	

In contrast with the model MoU, this is a bilateral transaction, and ESCO is not a party to it. Otherwise terms of this MoU are, basically, identical to those of model MoU.

## 2.3 MoU between the Government of Georgia and Caucasus Energy and Infrastructure JSC

<b>Approved by:</b>	Government Order #625 of 24 September 2008 on the MoU to be signed between the Government of Georgia and Caucasus Energy and Infrastructure JSC for building, operation and ownership of Mtkvari HPP. The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	24 November 2008
<b>Term of the MoU:</b>	20 years from date of entering in force
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Caucasus Energy and Infrastructure JSC Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205209059</li> <li>• Date of registration: 07.06.2007</li> </ul>

<sup>27</sup> It is noteworthy that according to MoU, the installed capacity of HPP is 28 MW, while environmental consent has been obtained for construction and operation of 43 MW HPP; In the later statements by the company the increased the capacity of the HPP is even greater; in the statement on commencement of construction of the headrace tunnel, for instance, the company stated that the installed capacity of HPP is 46.4 MW. Visit: [http://cei.ge/data/file\\_db/news/JSC%20Caucasus%20Energy%20&%20Infrastructure%20Announces%20the%20Commencement%20of%20Tunnel%20Drillin20Works\\_%28GEO%29\\_xp2DiBy753.pdf](http://cei.ge/data/file_db/news/JSC%20Caucasus%20Energy%20&%20Infrastructure%20Announces%20the%20Commencement%20of%20Tunnel%20Drillin20Works_%28GEO%29_xp2DiBy753.pdf)

<p><b>About the project/projects:</b></p> <p>The project implies construction and operation of 43 MW<sup>27</sup> run-off type HPP on Mtkvari River, near Akhaltsikhe city (Samtskhe-Javakheti region). According to Conclusion of Ecological Expertise (environmental consent) issued for construction and operation of the Mtkvari HPP, the length of the diversion tunnel is 9.6 km. At its downstream end, water will enter into the powerhouse, thus bypassing 27 km length section of the river... minimum water flow that can be maintained in the river (on 27 km long section) is 5.8 m<sup>3</sup>/sec which is 10 percent of average annual water flow.</p> <p>The project is being implemented by Mtkvari HPP Ltd (identification number: 205271043, date of registration: 20.01.2009). Caucasus Energy and Infrastructure holds 100 percent shares of the company.</p> <p><i>Source: Conclusion of Ecological Expertise #98 of 3 November 2011 granted by the Ministry of Environmental Protection and Natural Resources for construction and operation of the HPP; the registry of entrepreneurs and non-commercial legal persons of Georgia.</i></p>
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In contrast with the model MoU, this is a bilateral transaction, and ESCO is not a party to it. Otherwise terms of this MoU are, basically, identical to those of model MoU.

## 2.4 MoU between the Government of Georgia and Energo-Aragvi Ltd

<b>Approved by:</b>	Government Order #450 of 22 August 2007 on the MoU to be signed between the Government of Georgia and Energo-Aragvi Ltd. The same order authorizes prime-minister of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	The date is not indicated in the MoU (only year of signing the MoU - 2007) <sup>28</sup> . MoU enters into force on the date of signing it.
<b>Term of the MoU:</b>	Until full return on investment, but not more than eight years from commencement of HPP operation
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Energo-Aragvi Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 204515177</li> <li>• Date of registration: 08.08.2006</li> </ul>
<b>About the project/projects:</b>	<p>The Project implies construction and operation of 7.7 MW HPP on Tetri Aragvi River near Gudauri ski resort (Mtskheta-Mtianeti region). It is also planned to construct another 1.2 MW HPP on the right tributary of Tetri Aragvi River, though final decision is not taken yet by the company. 9.2 MW total installed capacity will be reached in case both HPPs are constructed.</p> <p>In 2009 Energo Aragvi Ltd applied twice to Ministry of Environmental Protection and Natural Resources for obtaining Permit for the Impact on Environment (environmental consent). First time the ministry refused to grant consent to the project (order #i-299 of 1 June 2009 of Minister of Environmental Protection and Natural Resources) due to poor quality Environmental Impact Assessment study submitted by the company; Second time the company applied with revised Environmental Impact Assessment and finally received the consent (December 2009).</p> <p><i>Source: Environmental Impact Assessment report for construction and operation of Gudauri small HPP (Energo Aragvi Ltd, 2009); Conclusion of Ecological Expertise #60 of 29 May 2009; order #i-299 of 1 June 2009 of Minister of Environmental Protection and Natural Resources; Conclusion of Ecological Expertise #104 of 8 December 2009.</i></p>

1. This MoU is not in compliance with model MoU. Dated 2007 it, presumably had been signed before the adoption of Resolution 107. The copy at our disposal is not precisely dated which is a significant shortcoming, not allowing ascertaining time of its entering in force.

2. The document does not stipulate any commitments as for sales of electricity at Georgian energy market (for Georgia's internal needs); on the contrary, under so called "government statements" (paragraph (g), article 2) it is

<sup>28</sup> In the list of ongoing investment projects (available at the website of Ministry of Energy and Natural Resources) 4 September 2007 is indicated as a date of signing MoU. Visit: [http://www.menr.gov.ge/common/get\\_doc.aspx?doc\\_id=7548](http://www.menr.gov.ge/common/get_doc.aspx?doc_id=7548)

stipulated that the company will enjoy the opportunity of a free trade in electricity (i.e. the company is absolutely free to choose the customer).

Besides, under so called “government statements” (paragraph (b), article 2) it is indicated that an agreement shall be signed with ESCO, and the sales price offered by the company shall be reflected in appropriate purchase agreement. Hence, this article proves that the Government should ensure purchasing electricity by ESCO at the price offered by the company-generator of electricity (it is noteworthy that sales of electricity at internal market are not the obligation of the company; accordingly, it may be assumed that this is part of its rights).

3. The Government makes another very strange and general statement under so called “government statements” (paragraph (v), article 2). In particular, the Government states its permanent support to all innovations “*proposed by the company and aimed at improving the facility, introduction of new communications and/or implementation of new, similar investment projects*”. Such an unconditional statement, declaring the Government’s full and open support to a company in its current and future projects, contains not only corruption risks, but also financial risks for the Government. Georgian Government, in the nearest past, already had problems at international arbitrations due to such general and ungrounded statements. This may quite happen in regard with this MoU as well, since the Government commits itself to paying damages in the event of any breach of the MoU (paragraph (e), article 2). According to article 6 of the MoU disputes shall be resolved by a single arbitrator under the regulations of the London International Arbitration Court (place of arbitration is not indicated).

4. Article 8 of the MoU in question stipulates reservations on confidentiality of the information; There are no such provisions in model MoU.

## **2.5 MoU between the Government of Georgia and Georgian Investment Group Energy LLC**

<b>Approved by:</b>	Government Order #666 of 10 September 2009 on the MoU to be signed between the Government of Georgia and Georgian Investment Group Energy LLC for building, operation and ownership of Khobi HPP-2 and Khobi HPP-3.  There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the MoU.  The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	15 September 2009
<b>Term of the MoU:</b>	15 years from date of entering in force
<b>Parties to the MoU:</b>	<ol style="list-style-type: none"> <li>1. Government of Georgia</li> <li>2. Georgian Investment Group Energy LLC</li> </ol> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 205256177</li> <li>• Date of registration: 09.06.2008</li> </ul>
<b>About the project/projects:</b>	
<p>It is planned to construct and operate HPP cascade on Khobistskali River, near Mukhura village, Chkhorotsku municipality, Samegrelo-Zemo Svaneti region. The project involves construction of two run-off type HPPs – Khobi-2 HPP and Khobi-3 HPP. At the first stage it is planned to construct lower, Khobi-2 HPP with the installed capacity of 41.4 MW, while at the second stage Khobi-3 HPP with the installed capacity of 48 MW will be constructed.</p> <p>According to Environmental and Social Impact Assessment report of the Khobi-2 HPP project, the project implies diversion of water flow from the river for around 7 km long distance (through tunnel and penstock). So called ‘sanitary flow’ remained in the river downstream to water intake point will constitute 10 percent of average multiannual flow.</p> <p><i>Source: Project on construction and operation of HPP on Khobistskali River (Chkhorotsku municipality): Environmental and Social Impact Assessment Report (Georgian Investment Group Energia LLC, scientific-research company Gama, 2011).</i></p>	

This is a bilateral transaction, and ESCO is not a party to it. This MoU is almost identical to model MoU, except some minor differences.

1. One essential difference is a clause stipulated in the last sentence of paragraph (a) of article 3.6 stating that in the event of termination of the MoU due to the breach (delay) by the company of the terms of the MoU, entailing restitution of property to the initial owner of the land plot, the company shall have the right to dismantle immovable assets located on this land plot that are created or financed by it, unless otherwise agreed by the parties.

Taking into account the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. It should be noted that a company is not granted similar rights in model MoU.

2. Another difference deserves mentioning – paragraph (g) of article 3.7 provides for responsibility of the Government to present the proposal to the President on the transfer of land ownership to the company. Nothing is said about the price to be paid by the company for privatization.

3. Another essential difference is that the MoU in question does not envisage presentation of bank guarantee to secure fulfillment of its obligations.

4. Given the fact that the MoU entered in force on 15 September 2009, putting into operation is planned for 1 January 2015, and the term of MoU is 15 years after entering in force, it is easy to conclude that the company will carry responsibility for selling electricity at Georgian market not for 10 years, as stipulated, but only for about 7 years, which also is not in conformity with model MoU.

## **2.6 MoU between the Government of Georgia, Nurol Energy Production and Marketing Inc., Korea Electric Power Corporation and SK Engineering and Construction Co. Ltd<sup>29</sup>**

<b>Approved by:</b>	Government Order #901 of 24 November 2009 on the MoU to be signed between the Government of Georgia and Nurol Energy Production and Marketing Inc., Korea Electric Power Corporation and SK Engineering and Construction Co. Ltd on the construction of Namakhvani HPP cascade. The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	8 December 2009
<b>Term of the MoU:</b>	18 years from the date of entering into force, or until Implementation Agreement enters into force, which comes first.
<b>Parties to the MoU:</b>	<ol style="list-style-type: none"> <li>1. Government of Georgia</li> <li>2. The companies listed below, jointly referred as JV Group <ul style="list-style-type: none"> <li>• Nurol Energy Production and Marketing Inc. (Turkish company);</li> <li>• Korea Electric Power Corporation (South Korean company);</li> <li>• SK Engineering and Construction Co. Ltd (South Korean company).</li> </ul> </li> </ol>
<b>About the project/projects:</b>	
<p>The project involves construction of Namakhvani HPPs cascade on Rioni River at the section between currently operating Lajanuri and Gumati HPPs. The project area covers territories of Tsageri, Tskaltubo and Tkubuli municipalities. The cascade consists of three HPPs with dams – Tvishi, Namakhvani and Jhoneti HPPs. The total installed capacity of the cascade is 450 MW: Tvishi HPP with installed capacity of 100 MW, Namakhvani HPP with installed capacity of 250 MW and Jhoneti HPP with installed capacity of 100 MW.</p> <p>Project related concerns: In case project implementation, 924.4 hectares of land will be affected from which 300 hectares are agricultural, while 261.44 hectares are forest lands. Due to microclimate change, unique Tvishi vineyards, as well as Khvamli Protected Area will be directly affected as a result of the project. Loss of natural habitats, forests and river inhabitants, among them those Red Listed species will increase. The project will have direct, as well as indirect impact on 14 villages of the region, 213 families (790 people) will be displaced.</p> <p><i>Source: Environmental and social impact assessment report of Namakhvani HPPs cascade project (Nurol Holding, SK Engineering and Construction, ENCON Environmental Consultancy Co., 2011); Say 'no' to big dams: 10 reasons of why we should oppose big dams (Green Alternative, 2012).</i></p>	

<sup>29</sup> According to information distributed in Georgian media in February 2012, Korean and Turkish companies left the Namakhani HPPs cascade project. According to Deputy Minister of Energy and Natural Resources Mariam Valishvili, the parties to the MoU did not meet the obligations under the MoU and thus project stopped. On 25 January 2012 Ministry of Energy and Natural Resources requested Oil and Gas Corporation of Georgia JSC to establish Namakhvani HPPs Cascade JSC with 100 percent equity participation. On 26 January 2012, the corporation took the decision on establishment of Namakhvani HPPs Cascade JSC. According to the charter of the company, the company's major activity is construction of Namakhvani HPPs cascade.

This MoU differs from model MoU in essence; there is slight similarity, though.

1. The MoU contains elements of a preliminary agreement and stipulates obligations of signing future agreements between the parties provided certain conditions are met. In particular, according to the MoU the parties may conclude so called “implementation agreement”, after entering in force of which the MoU becomes invalid. Whether or not “implementation agreement” is concluded depends on the results of feasibility study (which is one of the objectives of the MoU in question), and on settling other formal, legal and financial issues.

2. Regardless the above, Georgian government assumes much more commitments than provided in model MoU. Especially should be mentioned one, according to which Georgian Government shall assist the company (provided it requests so) “*to obtain financing from potential sources, including international financial institutions*”. This very general wording contains certain financial risks for Georgia, since it does not rule out providing various guarantees to secure the company’s loan(s).

3. Pursuant to article 6.4 of the MoU the parties’ right to mutual claim of compensation is limited. However, it only partly applies to Georgian government, since there is a clause, requiring from Georgian government to pay compensation only in the case stipulated in article 3.2 of the MoU.

The MoU shall be governed by Georgian law; article 395 of the Civil Code of Georgia provides that “*a preliminary agreement of the parties on releasing the obligor from liability for damages in case of intentional breach of an obligation shall not be allowed*”. Respectively, there could be situations when article 6.4 of the MoU comes in conflict with article 395 of Civil Code of Georgia, and, by Georgian law it is the basis for declaring the MoU void. Given the above it can be concluded that despite the limitations provided for in article 6.4, parties to the MoU shall be liable for damage inflicted by deliberate action to the other party.

4. In contrast with model MoU, disputes between the parties to this MoU shall be resolved (article 9) at the arbitration of International Chamber of Commerce, Geneva (Switzerland), which will enable the company to effectively defend its interests in disputes.

5. One of the most interesting liabilities of the Company under paragraph (f) of article 1.1 of the MoU is that the company undertakes “*to recruit 75% of manpower locally, provided the locals meet qualification requirements of the project*”. Regardless the fact that this clause restrains the chances of local population, this commitment is still a serious step forward as compared to model MoU, not containing similar provision. It is important, that the clauses of this article are appropriately reflected in “implementation agreement”, since all construction works are usually performed on the basis of “implementation agreements”. It also needs mentioning, that the company has no liabilities as for employing local population after putting the facility in operation.

## 2.7 MoU between the Government of Georgia and Rusmetali LLC

<b>Approved by:</b>	Government Order #521 of 25 July 2009 on the MoU to be signed between the Government of Georgia and Rusmetali LLC.  There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the MoU.  The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	27 July 2009
<b>Term of the MoU:</b>	20 years from date of entering in force
<b>Parties to the MoU:</b>	<p>1. Government of Georgia</p> <p>2. Rusmetali LLC</p> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 216406306</li> <li>• Date of registration: 21.03.2005</li> </ul>
<b>About the project/projects:</b>	<p>The project envisages construction and operation of a cascade consisting of three run-off type HPPs on Lukhuni River in Ambrolauri Municipality (Likheta community), Racha-Lechkhumi and Kvemo Svaneti regions. The installed capacity of the first HPP will be 10.8 MW (length of headrace tunnel – 10.5 km; to enhance capacity of the HPP water from Lashaturi river will be diverted towards the tunnel); the installed capacity of the second one will be 12 MW (length of headrace tunnel – 5.3 km), the installed capacity of the last one will be 7.5 MW (length of headrace tunnel – 6.7 km). In case of all HPPs, 10 percent of average multiannual flow will remain in the river as a so called ‘sanitary flow’ downstream to water intake point.</p> <p>Source: Conclusion of Ecological Expertise #44 of 21 July 2010 on arrangement of small HPPs cascade on Lukhuni River, issued by the Ministry of Environmental Protection and Natural Resource; Project on construction and operation of small HPPs cascade on Lukhuni River (Ambrolauri municipality): Environmental and social impact assessment report (Rusmetali LLC, Scientific-research company Gama, 2010).</p>

This is a bilateral transaction, and ESCO is not a party to it. This MoU is almost identical to model MoU, except some minor differences.

1. One essential difference is a clause stipulated in the last sentence of paragraph (a) of article 3.6 stating that in the event of termination of the MoU due to the breach (delay) by the company of the terms of the MoU, entailing restitution of property to the initial owner of the land plot, the company shall have the right to dismantle immovable assets located on this land plot that are created or financed by it, unless otherwise agreed by the parties.

Taking into account the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. It should be noted that a company is not granted similar rights in model MoU.

2. Another difference deserves mentioning – paragraph (g) of article 3.7 provides for responsibility of the Government to present the proposal to the President on the transfer of land ownership to the company. Nothing is said about the price to be paid by the company for privatization.

3. Another essential difference is that the MoU in question does not envisage presentation of bank guarantee to secure fulfillment of its obligations.

## 2.8 MoU between the Government of Georgia and Zoti Hydro LLC

<b>Approved by:</b>	Government Order #391 of 28 May 2009 on the MoU to be signed between the Government of Georgia and Zoti Hydro LLC on building, operation and ownership of Zoti HPP cascade  There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the MoU.  The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	28 May 2009
<b>Term of the MoU:</b>	10 years from date of commencement of operation.
<b>Parties to the MoU:</b>	<ol style="list-style-type: none"> <li>1. Government of Georgia</li> <li>2. Zoti Hydro LLC</li> </ol> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 205267815</li> <li>• Date of registration: 25.11.2008</li> </ul>
<b>About the project/projects:</b>	<p>According to Energo-Pro Georgia JSC (Energo-Pro Georgia holds 95% of shares of the company, while 5% of shares belongs to Guria Energy Ltd), the project envisages construction and operation of 41.2 MW HPPs cascade near Zoti village, Chokhatauri district, Guria region. The cascade will consist of two HPPs – Zoti HPP with the installed capacity of 36 MW and Kvirila HPP with the installed capacity of 5.2 MW.</p> <p>The details of the project design, as well as potential environmental and social impacts are not known at this stage.</p> <p><i>Source: website of Energo-Pro Georgia JSC (2012): <a href="http://www.energo-pro.ge/index.php?lang_id=GEO&amp;sec_id=27&amp;info_id=604">http://www.energo-pro.ge/index.php?lang_id= GEO&amp;sec_id=27&amp;info_id=604</a></i></p>

This is a bilateral transaction, and ESCO is not a party to it. This MoU is almost identical to model MoU, except some minor differences.

1. One essential difference is a clause stipulated in the last sentence of paragraph (a) of article 3.6 stating that in the event of termination of the MoU due to the breach (delay) by the company of the terms of the MoU, entailing restitution of property to the initial owner of the land plot, the company shall have the right to dismantle immovable assets located on this land plot that are created or financed by it, unless otherwise agreed by the parties.

Taking into account the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. It should be noted that a company is not granted similar rights in model MoU.

2. Another difference deserves mentioning – paragraph (g) of article 3.7 provides for responsibility of the Government to present the proposal to the President on the transfer of land ownership to the company. Nothing is said about the price to be paid by the company for privatization.

3. Another essential difference is that the MoU in question does not envisage presentation of bank guarantee to secure fulfillment of its obligations.

## 2.9 MoU between the Government of Georgia, Ministry of Economic Development, ESCO and Georgian Railway Construction Ltd

<b>Approved by:</b>	<p>Government Order #647 of 21 May 2010 on the MoU to be signed between the Government of Georgia, Ministry of Economic Development, Electricity System Commercial Operator Ltd and Georgian Railway Construction Ltd<sup>30</sup>.</p> <p>There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the project of construction of a new HPP on Nenskra river.</p> <p>The same order authorizes Minister of Energy of Georgia to sign the MoU.</p>
<b>Date of signing and entering in force:</b>	11 June 2010
<b>Term of the MoU:</b>	15 years from date of entering in force.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Ministry of Economic Development of Georgia
	<p>3. Electricity System Commercial Operator Ltd</p> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 07.08.2006</li> </ul> <p>At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.</p>
	<p>4. Georgian Railway Construction Ltd</p> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 204576887</li> <li>• Date of registration: 15.12.2009</li> </ul>
<b>About the project/projects:</b>	
<p>The project envisages construction and operation of the HPP with the installed capacity of 300 MW in Mestia Municipality, Samegrelo-Zemo Svaneti region. The construction will commence in two stages: at the first stage 210 MW hydropower plant with rockfill dam of 130m height and the reservoir with storage capacity of 200 million cub.m at 10 km distance from Tita village (Chuberi community) will be constructed on the Nenskra river. At the second stage it is planned to divert water from Nakra river to Nenskra river through 11.8 km long diversion channel and thus increase capacity of the plant by additional 90MW.</p> <p>Project related concerns: the project will have a significant negative impact on both Nenskra and Nakra valleys, as well as their ecosystems. 400 hectares of virgin forest will be cleared up in high mountains of Svaneti thus totally changing the local landscape. The reservoirs of Nenskra and Khudoni HPPs will have a cumulative impact on local climate and therefore on human health and agriculture practices. Melting of ice glaciers will be activated in the areas directly affected by the project (due to 2.30C rise in annual average temperature within a radius of 5 km). The project also involves disposal of 330 000 cub.m waste rock at the valley adjacent to the project site and clearance of valley slopes from vegetation.</p> <p><i>Source: Project on construction and operation of HPP on Nenskra River: Environmental and social impact assessment report (Scientific-research company Gama, Nenskra JSC, 2011); Green Alternative's statement on the construction of Nenskra hydropower plant, 23 April, 2012.</i></p>	

This is a quadripartite agreement and differs from model MoU substantially.

1. Though the parties to this MoU declare in general their intention to implement the project, this MoU, in fact aims at feasibility study for the construction of HPP. Feasibility study, according to the MoU, shall be completed by the company in three years (project details are not indicated in the MoU in question).

2. The MoU contains only general clauses regarding possible implementation of the project; in particular the

<sup>30</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

company undertakes to implement the project only when the results of feasibility study reveal that “the project is expedient for the company” and when other prerequisites, listed in Article 3.4, are met (among them a range of agreements, including those with participation of third parties).

3. Term of the MoU is 15 years; feasibility study, according to the MoU, will take three years; at the same time implementation deadlines (including starting, ending and putting into operation) are not set forth in the MoU (the narrative part of the MoU at our disposal says nothing about it, while annexes to the MoU are not available to us).

The above circumstances make efficient monitoring of project implementation impossible (regardless the fact, that article 3.6 of the MoU stipulates the company’s liability to present implementation report to the government every six months).

## **2.10 MoU between the Government of Georgia, Kolin Construction, Tourism, Industry and Trading Co Inc., Energo Trans Ltd and ESCO**

<b>Approved by:</b>	Government Order #1316 of 13 October 2010 on the MoU to be signed between the Government of Georgia, Kolin Construction, Tourism, Industry and Trading Co Inc., Electricity System Commercial Operator Ltd and Energo Trans Ltd <sup>31</sup> .  The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	10 November 2010
<b>Term of the MoU:</b>	20 years from date of entering in force.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Kolin Construction, Tourism, Industry and Trading Co Inc.  3. Energo Trans Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 204991786</li> <li>• Date of registration: 12.09.2002</li> </ul>
	4. Electricity System Commercial Operator Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 07.08.2006</li> </ul> At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.
<b>About the project/projects:</b>  According to MoU, it is planned to construct and operate cascade of four HPPs on Tekhura River in Samegrelo-Zemo Svaneti region. The details of the project(s) design, as well as potential environmental and social impacts are not known at this stage; however, based on the information provided in the MoU, as well as information available at the website of Gross Energy Group Ltd, it can be concluded that: Nobulevi HPP project envisages construction of 25.7 MW run-off type HPP; Tskhimra HPP project – construction of 32 MW HPP (type of the HPP is unknown), Erjia HPP project - construction of 27 MW HPP (type of the HPP is unknown) and Lechakha HPP project - construction of 21 MW HPP (type of the HPP is unknown).  <i>Source: MoU between the Government of Georgia, Kolin Construction, Tourism, Industry and Trading Co Inc., Energo Trans Ltd and ESCO (2010); Website of Gross Energy Group Ltd (2012): <a href="http://gegroupp.org/index.php?m=781">http://gegroupp.org/index.php?m=781</a></i>	

This MoU, as well as model MoU aims at project implementation, though there are essential differences between the two.

<sup>31</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

1. The MoU is a quadripartite transaction, though from the text it can be concluded that the MoU might be joined by another party, since one of the parties to it, namely Kolin Construction, Tourism, Industry and Trading Co Inc intends to implement the project through “Project Company”, specially set up for this purpose. The obligation to set up “Project Company” is stipulated under 2.4 article of the MoU.

2. The exact date of establishment of “Project Company” is not specified in the MoU – according to article 2.4 “Project Company” shall be set up after the MoU is signed and before receiving construction permit. Given the fact, that all the commitments under the MoU shall be fulfilled by “Project Company”, the Company can, without any accountability protract setting-up process delaying that way project implementation. This, presumably, should not be within the Georgian government’s interests.

3. This MoU, like model MoU stipulates selling all generated electricity at Georgian energy market in winter months (during 10 years); however, in this case there is a reservation regarding surplus electricity: under article 3.4 ESCO has priority right to purchase surplus electricity at the same price (electricity price is directly indicated in the MoU). Last sentence of article 3.4 is quite ambiguous and contradicts to the first part of the same article. The last sentence stipulates the Company’s right to sell the generated electricity at its own consideration, as well as export it. In fact, this sentence should apply to surplus electricity thus fully fitting in the whole context; but in its present form the sentence is vague, ambiguous and contains potential risks.

4. Article 3.6 stipulates differentiated penalties for breach of commitments by the company. Such penalties are not envisaged in model MoU (although the provision about bank guarantee in model MoU somehow balances it). In contrast with model MoU, this MoU (article 4) provides for presentation of bank guarantee at prior to construction stage as well as during the construction, and the sum of the guarantee is specified for both cases (the sum for prior to the construction period is USD 2 million, and USD 10 million for the construction period).

Commitments with regard to penalties to be paid by the company should be supported by bank guarantee. Although, total sum of bank guarantees presented by the Company on the basis of the MoU (both initial and the new one, in case the initial one expires) should not exceed 20 million USD (article 3.8).

5. Sub-paragraph (a) of article 3.10 of this MoU stipulates another, different from model MoU condition. According to this provision, in the event the Government terminates the MoU unilaterally, the land plots shall be transferred to the State free. In this case the Company is entitled to dismantle the immovable assets built or financed by the Company on this land, and to take out the property, unless otherwise agreed by the parties.

Taking into account the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. Besides, this contradicts, to certain extent, to the Restitution Principle, which implies that environment degraded by the project should be restored as close to its original state as possible. Restitution Principle, pursuant to article 5, paragraph (i) of Law of Georgia on Protection of the Environment is one of the basic principles of environmental protection.

It should be mentioned herewith that the bank guarantee does not envisage compensation for possible damage to the environment or third parties.

6. In contrast to model MoU, article 3.11(a) of this MoU stipulates specific time limits for national and local government agencies for issuance of public documents and/or information at their hand. Timelines in accordance with this article are 30 calendar days, which exceeds timelines for issuance of public information by Georgian legislation. In fact, the risk of noncompliance to this article is very low and if this still happens, it will entail breach of the MoU as well as violation of General Administrative Code of Georgia.

7. Pursuant to paragraph (d) of article 3.11 of the MoU, the Georgian Government is committed to transferring to the Company the state-owned land and also to assisting in land expropriation if needed. The MoU does not provide for protection of the rights of persons, whose land may become subject to expropriation for the project needs.

8. Under paragraph (f) of article 3.11 the Government has commitments regarding transmission line under construction. This article provides that the Government shall assist the Company in obtaining the possibility to export electricity to Turkey through the transmission line.

9. In contrast with model MoU, article 5.4 of this MoU sets special terms regarding compensation of damages;

the same article establishes certain restrictions. For example, the parties are not obliged to compensate damages for uncollected profit, and maximal compensation sum is limited to 10 million USD (in some cases amount of compensation is limited to 20 million USD).

It is noteworthy that restriction in regard to compensation does not always apply to Georgian Government, since paragraphs (c) and (d) of the same article 5.4 stipulate other, additional compensations to be paid by the Government, for which the limits are not set.

In particular, besides the above mentioned Georgian government, in certain cases is obliged to additionally compensate to the Company the investment expenses if the MoU in question is terminated at the initiative of the Company due to the failure of the government to comply with its obligations (in return the government will receive the property, established and funded from these investments). If the MoU is terminated at the Government's initiative not due to the failure of the Company to comply with its obligations, the Government shall have not only to return the investment sums (in exchange for established and funded property), but also to compensate the losses caused to the company without any restrictions (including uncollected profits). This article sets unequal conditions for Georgian government, since in fact, the Company's responsibility regarding compensation of damages is restricted (does not imply the obligation of payment of uncollected profits and does not exceed the agreed limits), and total amount of compensation to be paid by Georgian Government, provided it terminates the MoU, may reach astronomical figures (considering the project cost, the investment costs and the amount of potential revenue). Besides, the MoU in question does not stipulate possible environmental impact reparation, and in the end, Georgia's budget will have to pay the arrangements to address the harm caused to the environment.

10. In contrast with model MoU, this MoU (article 5.5) provides for preparation of quality environmental and social impact assessment (ESIA) and feasibility studies. According to paragraph (a) of article 5.5, if on the basis of the ESIA and/or the full technical and economic feasibility study the Company considers that the implementation of the project is not possible and/or not feasible for the Company, it can decide at its discretion whether or not to terminate the MoU, and whether or not to notify the government about such decision. The wording of article 5.5 is such, that it enables the Company to terminate the MoU without dispute or responsibility.

11. The Georgian Government's commitments under article 8 of the MoU deserve special mentioning. Under this article the Georgian Government has restricted its own rights to initiate or propose any changes in the law of Georgia or approve or otherwise allow any regulations (including those on discriminatory taxes and similar commitments) which would apply expressly to the project and not similar projects, the Project Company or the Company and not to other persons, any contractors or operators with whom the Project Company or the Company has entered into contractual arrangements in connection with the project and not to other persons. No similar guaranties are stipulated for the companies in model MoU.

12. In contrast with model MoU, this MoU envisages resolution of disputes by arbitral tribunal in Geneva (Switzerland) in accordance with arbitration regulations of International Chamber of Commerce.

### ***2.11 MoU between the Government of Georgia, ESCO and UNAL INSAAT VE TICARET AS***

<b>Approved by:</b>	Government Order #1557 of 8 December 2010 on the MoU to be signed between the Government of Georgia, Electricity System Commercial Operator Ltd and UNAL INSAAT VE TICARET AS on building, operation and ownership of Khunevi HPP <sup>32</sup> .  The same order authorizes Minister of Energy of Georgia to sign the MoU.  The MoU was revoked by the Government Order #632 of 5 April 2012 on the MoU signed between the Government of Georgia, Electricity System Commercial Operator Ltd and UNAL INSAAT VE TICARET AS <sup>33</sup> .
<b>Date of signing and entering in force:</b>	28 December 2010
<b>Term of the MoU:</b>	20 years from date of entering in force.

<sup>32</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

<sup>33</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Electricity System Commercial Operator Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 07.08.2006</li> </ul> At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.
	3. UNAL INSAAT VE TICARET AS (Turkish company)
<b>About the project/projects:</b> According to MoU, the project envisages construction of 11 MW Khunevi HPP on Dzirula River in Imereti region. The details of the project design, as well as potential environmental and social impacts are not known. <i>Source: MoU between the Government of Georgia, ESCO and UNAL INSAAT VE TICARET AS (2010).</i>	

Georgian text of this MoU is in conformity with model MoU. The letter #4359 of 29 November 2010 of the Ministry of Justice of Georgia attached to the MoU makes it clear that some of the articles in English text differed significantly from the Georgian one and needed amendment. Since English text is not available it is not possible to compare both signed versions with a view of checking if discrepancies have been removed.

## 2.12 MoU between the Government of Georgia and Energo-Pro Georgia JSC

<b>Approved by:</b>	Government Order #277 of 8 February 2011 on the construction, operation and ownership of Alpana HPP and Sadmeli HPP <sup>34</sup> . There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the Expression of Interests regarding operation and ownership of Alpana and Sadmeli HPPs. The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	15 February 2011
<b>Term of the MoU:</b>	10 years from date of commencement of operation.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Energo-Pro Georgia JSC Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205169066</li> <li>• Date of registration: 31.07.2006</li> </ul>
<b>About the project/projects:</b> According to MoU, it is planned to construct 71 MW Alpana HPP (Kveda Sairme village) and 97 MW Sadmeli HPP (Sadmeli village) in Ambrolauri municipality, Racha-Lechkhumi and Kvemo-Svaneti region. At this stage, type of the HPPs, as well as potential impacts on natural environment and local communities are not known. The projects are included in the list of ongoing projects available at the website of the Ministry of Energy and Natural Resources. <i>Source: MoU between the Government of Georgia and Energo-Pro Georgia JSC (2011); Website of the Ministry of Energy and Natural Resources (2012): <a href="http://www.menr.gov.ge/4757">http://www.menr.gov.ge/4757</a></i>	

This MoU is a bilateral transaction and ESCO is not a party to it. It is almost identical to model MoU except some differences.

<sup>34</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

1. Paragraph (a) of article 3.11 and paragraph (a) of article 3.12 of the MoU in question might be deemed one of essential differences, providing that the Company is allowed to dismantle the immovable assets which are financed or created by the company on the land plot if the MoU is terminated due to breach by the company of the terms of the MoU and land plot is returned to its initial owner, unless otherwise agreed by the parties. Given the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. It should be noted that a company is not granted similar rights in model MoU.

2. In contrast with model MoU, this MoU stipulates not only compulsory selling of electricity at local market (for Georgia's internal consumption), but also purchasing electricity in certain cases. In particular, articles 3.6 and 3.7 stipulate that if power stations are put in operation with delay, the company commits to buy necessary electricity generated by other hydro power plants and/or power plants working on renewable energy sources at its own expenses before the power station starts operating. At the same time, according to article 3.8 of the MoU in question, the Company commits not to request GNERC (Georgian National Energy and Water Supply Regulatory Commission) raising the existing consumer tariffs if purchases provided under paragraphs 3.6 and 3.7 cause the raise of weighted average tariff and they exceed the limit established by GNERC. Hence, proceeding from the MoU, even if completion of the HPP is delayed both, Georgian energy market and new local electricity generators will gain some benefits.

3. Another essential difference is that this MoU does not stipulate submission of bank guarantee to support the Company's compliance with commitments under the MoU.

### **2.13 MoU between the Government of Georgia, Optimum Enerji Uretim A.S., Energo Trans Ltd and ESCO**

<b>Approved by:</b>	Government Order #1740 of 23 December 2010 on the MoU to be signed between the Government of Georgia, Optimum Enerji Uretim A.S., Electricity System Commercial Operator Ltd and Energo Trans Ltd.  The same order authorizes Minister of Energy of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	19 February 2011
<b>Term of the MoU:</b>	20 years from date of entering in force.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Optimum Enerji Uretim A.S. (Turkish company)
	3. Energo Trans Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 204991786</li> <li>• Date of registration: 07.08.2006</li> </ul>
	4. Electricity System Commercial Operator Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 12.09.2002</li> </ul> <p>At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.</p>

**About the project/projects:**

The project envisages construction and operation of three-stage cascade of HPPs (Arakali HPP – 8.79 MW, Abuli HPP – 22.2 MW and Akhalkalaki HPP – 17.28 MW) with the total installed capacity of 48.27 MW on Paravani River in Ninotsminda and Akhalkalaki municipalities, Samtskhe-Javakheti region.

The project involves diversion of water from rivers through penstocks and headrace tunnels. The length of Arakali HPP diversion system is approximately 13 km; in case of Abuli HPP the diversion system will reach 14 km; as for the Akhalkalaki HPP, this power plant will have two intake facilities and therefore, the project envisages two diversion systems: one - approximately 6km long and another one – 3 km long. Furthermore, to enhance capacity of the HPP, the project involves diversion of water from Kirkhbulakhi River to Paravani River through 630 m long diversion tunnel. In case of all three HPPs, the sanitary (environmental) flow will constitute 15 percent of average multiannual flow.

*Source: Project on construction and operation of HPPs cascade on Paravani River: Environmental and social impact assessment report: version for public consultation (Optimum Energy, Gama Consulting Ltd, 2011.)*

This MoU, as well as model MoU aims at project implementation, though there are many essential differences between them.

1. The MoU is a quadripartite transaction, though from the text it can be concluded that it might be joined by another party, since one of the parties to it, namely Optimum Enerji Uretim A.S. intends to implement the project through “Project Company”, specially set up for this purpose. The obligation to set up “Project Company” is stipulated under 2.4 article of the MoU.

2. The exact date of establishment of “Project Company” is not specified in the MoU – according to article 2.4 “Project Company” shall be set up after the MoU is signed and before receiving construction permit. Given the fact, that all the commitments under the MoU shall be fulfilled by “Project Company”, the Company can, without any accountability protract setting-up process delaying that way project implementation. This, presumably, should not be within the Georgian government’s interests.

3. This MoU, like model MoU stipulates selling all generated electricity at Georgian energy market in winter months (during 10 years); however, in this case there is a reservation regarding surplus electricity: under article 3.4 ESCO has priority right to purchase surplus electricity at the same price (electricity price is directly indicated in the MoU). Last sentence of article 3.4 is quite ambiguous and contradicts to the first part of the same article. The last sentence stipulates the Company’s right to sell the generated electricity at its own consideration, as well as export it. In fact, this sentence should apply to surplus electricity thus fully fitting in the whole context; but in its present form the sentence is vague, ambiguous and contains potential risks.

4. Article 3.6 stipulates differentiated penalties for breach of commitments by the company. Such penalties are not envisaged in model MoU (although the provision about bank guarantee in model MoU somehow balances it). Commitments with regard to paying penalties by the company should be secured by a bank guarantee. Although, total sum of bank guarantees submitted by the Company on the basis of the MoU (both initial and the new one, in case the initial one expires) should not exceed USD 20 million (article 3.8).

It is directly indicated in Article 4 of the MoU that the company has submitted to the Georgian Government bank guarantee in compliance with Resolution 107, which means that terms of guarantee should comply with the requirements of Resolution 107.

5. Sub-paragraph (a) of article 3.10 of this MoU stipulates another, different from model MoU condition. According to this provision, in the event the Government terminates the MoU unilaterally, the land plots shall be transferred to the State free. In this case the Company is entitled to dismantle the immovable assets built or financed by the Company on this land, and to take out the property, unless otherwise agreed by the parties. Given the nature of project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. Besides, this contradicts, to certain extent, to the Restitution Principle, which implies that environment degraded by the project should be restored as close to its original state as possible. Restitution Principle, pursuant to article 5, paragraph (i) of Law of Georgia on Protection of the Environment is one of the basic principles of environmental protection.

It should be mentioned herewith that the bank guarantee does not envisage compensation for possible damage to the environment or third parties.

6. In contrast to model MoU, article 3.11(a) of this MoU stipulates specific time limits for national and local government agencies for issuance of public documents and/or information at their hand. Timelines in accordance with this article are 30 calendar days, which exceeds timelines for issuance of public information by Georgian legislation. In fact, the risk of noncompliance to this article is very low and if this still happens, it will entail breach of the MoU as well as violation of General Administrative Code of Georgia.

7. Pursuant of article 3.11 (d) of the MoU Georgian Government is committed to transferring to the Company not only the state-owned land, but also assisting in land expropriation if necessary. The MoU does not provide for protection of the rights of persons, whose land may become subject to expropriation for the project needs.

8. Under article 3.11 (f) of the Government has commitments regarding transmission line under construction. This article provides that the Government shall assist the Company in obtaining the opportunity to export electricity to Turkey through the transmission line.

9. In contrast with model MoU, article 5.4 of this MoU sets special conditions regarding compensation of damages; the same article establishes certain restrictions. For example, the parties are not obliged to compensate damages for uncollected profits, and amount of maximum compensation is limited to USD 10 million (in some cases amount of compensation is limited to USD 20 million).

It is noteworthy that compensation sum restriction does not always apply to Georgian Government, since paragraphs (c) and (d) of the same article 5.4 stipulate other, additional compensations to be paid by the Government, for which the limits are not set.

In particular, besides the above mentioned, Georgian government in certain cases is obliged to additionally compensate to the Company the investment costs if the MoU in question is terminated at the initiative of the Company due to default and/or breach of the MoU by the government (following such reimbursement by the government to the company, all tangible and/or intangible assets created and/or financed with the investment costs shall be transferred to the ownership of the government). If the MoU is terminated at the Government's initiative and such termination does not result from a default or breach of the MoU by the company, the Government shall be liable to pay the company for the investment costs and all the damage (including for loss of profit) without any limitation. This article sets unequal conditions for Georgian government, since in fact, the Company's responsibility regarding compensation of damages is restricted (does not imply the obligation of payment of loss of profit and does not exceed the agreed limits), and total amount of compensations to be paid by Georgian Government, provided it terminates the MoU, may reach astronomic figures (considering the project cost, the investment costs and the amount of potential revenue). Besides, the MoU in question does not stipulate compensation for environmental damage, and in the end, most likely the Georgia's budget will have to pay the measures to address the harm caused to the environment.

10. In contrast with model MoU, this MoU (article 5.5) provides for preparation of quality environmental and social impact assessment (ESIA) and feasibility studies. According to paragraph (a) of article 5.5, if on the basis of the ESIA and/or the full technical and economic feasibility study the Company considers that the implementation of the project is not possible and/or not feasible for the Company, it can decide at its discretion whether or not to terminate the MoU, and whether or not to notify the government about such decision. The wording of article 5.5 is such, that it enables the Company to terminate the MoU without dispute or responsibility.

11. The Georgian Government's commitments under article 8 of the MoU deserve special mentioning. Under this article the Georgian Government has restricted its own rights to initiate or propose any changes in the law of Georgia or approve or otherwise allow any regulations (including those on discriminatory taxes and similar commitments) which would apply expressly to the project and not similar projects, the Project Company or the Company and not to other persons, any contractors or operators with whom the Project Company or the Company has entered into contractual arrangements in connection with the project and not to other persons. No similar guaranties are stipulated for the companies in model MoU.

12. In contrast with model MoU, this MoU envisages resolution of disputes by arbitral tribunal in Geneva (Switzerland) in accordance with arbitration regulations of International Chamber of Commerce.

## 2.14 MoU between the Government of Georgia, ESCO and Energia Ltd

<b>Approved by:</b>	Government Order #979 of 3 May 2011 on the MoU to be signed between the Government of Georgia, Electricity System Commercial Operator Ltd and Energia Ltd <sup>35</sup> .  The same order authorizes Minister of Energy and Natural Resources of Georgia to sign the MoU.
<b>Date of signing and entering in force:</b>	17 May 2011
<b>Term of the MoU:</b>	20 years from date of entering in force.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Electricity System Commercial Operator Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 12.09.2002</li> </ul> At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.
	3. Energia Ltd  Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 401950037</li> <li>• Date of registration: 08.09.2010</li> </ul>
<b>About the project/projects:</b>  The project envisages construction of 19 MW Larsi HPP on Tergi River in Kazbegi district, near Larsi checkpoint at Georgia-Russia border. The HPP is diversion type; it involves diversion of 90 percent of average multiannual flow through penstock for 1.2 km long distance. The sanitary flow remained in the river on the diversion section will constitute 10 percent of average multiannual flow. As mentioned in the project documents, the cascade of HPPs could be constructed on Tergi River (on the part traversing Georgia) in the future, and Larsi HPP is considered as last stage HPP of the cascade.  Source: Larsi HPP on Tergi River in Kazbegi district: Detailed project design: Environmental Impact Assessment (Tbilstkalgeo, 2011).	

This is a tripartite transaction, and ESCO is one of the parties to it. This MoU is almost identical to model MoU, except some minor differences.

<sup>35</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

## 2.15 MoU between the Government of Georgia, ESCO and Wind Energy Investment

<b>Approved by:</b>	<p>Government Order #1060 of 14 May 2011 on the MoU to be signed between the Government of Georgia, Electricity System Commercial Operator Ltd and Wind Energy Investment<sup>36</sup>.</p> <p>There is a reservation in the Government Order that the rules set force in Resolution # 107 shall not be applied to the Expression of Interests regarding building, operation and ownership of 50 MW wind power plant near Paravani Lake.</p> <p>The same order authorizes Minister of Energy and Natural Resources of Georgia to sign the MoU.</p>
<b>Date of signing and entering in force:</b>	17 May 2011
<b>Term of the MoU:</b>	14 years from date of entering in force.
<b>Parties to the MoU:</b>	<p>1. Government of Georgia</p> <p>2. Electricity System Commercial Operator Ltd</p> <p>Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia:</p> <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 12.09.2002</li> </ul> <p>At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.</p> <p>3. Wind Energy Investment (Czech company)</p>
<b>About the project/projects:</b>	<p>According to MoU, the project envisages construction of 50 MW wind power plant near Paravani Lake in Samtskhe-Javakheti region. The project design, as well as potential environmental and social impacts of the project are unknown at this stage.</p> <p>Source: MoU between the Government of Georgia, ESCO and Wind Energy Investment (2011)</p>

This MoU is almost identical to model MoU, although there are some discrepancies, such as the commitment to present bank guarantee, which is not stipulated in MoU in question.

## 2.16 Agreement between the Government of Georgia, Trans Electrica Limited (BVI), Trans Electrica Georgia Ltd, Energotrans Ltd and ESCO

<b>Approved by:</b>	<p>Government Order #890 of 21 April 2011 on the agreement to be signed between the Government of Georgia, Trans Electrica Limited, Trans Electrica Limited (Georgia), Energo Trans Ltd and Electricity System Commercial Operator Ltd.</p> <p>The same order authorizes Minister of Energy and Natural Resources of Georgia to sign the agreement.</p>
<b>Date of signing and entering in force:</b>	28 April 2011
<b>Term of the MoU:</b>	20 years from date of entering in force.

<sup>36</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts). The Ministry of Energy and Natural Resources provided a copy of the order to Green Alternative upon request.

<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Trans Electrica Limited (BVI) – so called offshore registered company; registered in Tortola, British Virgin Islands, BVI # 1479874, 02.05.2008
	3. Trans Electrica Georgia Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 404857650</li> <li>• Date of registration: 22.03.2010</li> </ul>
	4. Energo Trans Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 204991786</li> <li>• Date of registration: 07.08.2006</li> </ul>
	5. Electricity System Commercial Operator Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 12.09.2002</li> </ul> <p>At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.</p>
<b>About the project/projects:</b>	
<p>The project envisages construction of 702 MW Khudoni HPP with 200.5 m high arch dam (with reservoir volume of 364.5 cub.m) in Mestia municipality, Samegrelo-Zemo Svaneti region.</p> <p>Project related concerns: in case of project implementation, 530 hectares of land will be inundated, among them Jvari-Mestia motorway, farming lands, pastures, forests, cemeteries, church, historic monuments, including medieval Khaishi castle and newly discovered 1st century old archaeological monument, which has not yet been studied. Loss of natural habitats, as well as species will increase, among them those included in the Red List of Georgia. 525 families (1500-2000 people) living in 27 villages of Khaishi community will be displaced as a result of the project.</p> <p><i>Source: Environmental and social impact assessment of Khudoni HPP project, draft (Trans Electrica Limited, 2012); Say 'no' to big dams: 10 reasons of why we should oppose big dams (Green Alternative, 2012).</i></p>	

The agreement under review is not a MoU, though it states, that the MoU signed with Continental Energy Ltd (replaced by Trans Electrica Limited), approved by Georgian Government Resolution of 29 June 2007 (and amendments therein approved by Georgian Government Resolution of 23 December 2009) serves as the basis for signing the agreement.

1. The agreement is a pentilateral transaction, but there are only three, so called “principle parties” to it (Georgian Government, Trans Electrica Georgia Ltd and Trans Electrica Limited), to whom fully apply all clauses of the Agreement. Other parties (ESCO and Energotrans Ltd) assume only so called pre-commitments with regard to future agreements (although, this agreement also envisages quite serious obligations for these parties as well).

2. According to the information from Registry of Entrepreneurs and Non-Commercial Legal Persons of Georgia, Trans Electrica Georgia Ltd (so called Project Company that is intended by the Company to implement the project) has four directors with equally restricted authority (authorities of all four are restricted under Chapter 4 of the Company statute). The statute is not available on the registry’s website; therefore it is not possible to describe nature of the restrictions. Nevertheless, the registry statement does not indicate if any of the four directors has the right to represent the company solely in the transactions with the third parties. Accordingly, it can be assumed that all four directors have to sign the agreements with third parties (provided there is not a document granting additional authorities to signatory person). Besides, it is possible, that chapter 4 of the Statute provides for certain restrictions regarding the right of directors to sign this type of transactions. No document confirming such additional authorities is attached to the Agreement. Neither is there a provision in the text of the agreement to explain why the signature of only one director and not four of them is put under it.

3. Paragraph 3 of the agreement lists a range of conditions to be met to enable the Company/Project Company to comply with its commitments (in other words, if these conditions are not met the Company/Project Company is not obliged to comply with its commitments). These conditions comprise not only the obligations of the parties with respect to each other (including the agreements to be signed in future), but also the agreements with third persons, including the credit agreements to be signed by the Company/Project Company. In fact, compliance of the Company with its commitments depends, to some extent, on third parties who are not a party to the agreement. This fact increases the risks of failing the Company/Project Company to meet its commitments, and these risks are not properly balanced in the agreement (agreements to be signed with the third parties).

4. The agreement stipulates certain penalties (article 4.6) for violation of timelines of performing its basic commitments by the Company (receipt of a permit, construction and putting into commercial operation of HPP). Maximum amount of penalties for these purposes is limited to USD 1.320 thousand which, given the project cost, is a very small sum. Besides, this commitment is not secured by a bank guarantee or any other security. Moreover, the Company's commitments in general (not only with regard to penalties) are not supported at all (neither by a bank guarantee, as is the case with model MoU and other MoUs) which makes the risks unbalanced. At the same time, given the character of the agreement, risks are quite significant since Georgian Government (and other parties to the agreement) have made major commitments to the company.

5. First of all it is the commitment of Georgian Government to submit to the President a proposal on transferring necessary land parcel and all existing assets to the Company for a symbolic price of 1 USD (article 4.12(c)). If this obligation is met, it may turn out that the President transfers multi-million property to an off-shore registered company without any support or direct benefit. The risk is even higher, given the fact that there is no guarantee with respect to implementation of the designed project and the project company has the right (in some cases with the consent of Georgian government) to use the property for supporting its loans (article 11 and paragraph 4.12 (c)). Besides, there is a probability, that the Company uses the project company's share to secure loans from a variety of credit organizations. These risks are not properly balanced in the agreement.

Pursuant to paragraph 4.15 of the agreement, in case of nationalization of the property (received for a symbolic price, as well as any other property), Georgian Government is obliged to compensate the Company with relevant fair market value at that time. This provision contains unbalanced financial and corruption risks.

Risks, related to transferable property are not properly estimated, for instance, for the case of termination of agreement due to force majeure (i.e. for a good reason). Article 15.4 envisages possibility of termination of the agreement in case force majeure events occur; however, the agreement does not envisage returning to the initial owner (the state) property transferred to the Company. At least provisions under paragraph 6.6 could have been applied to such cases; thus, unbalanced risks arise, since agreement does not contain any mechanism for such cases.

Given real price of transferable property and other privileges, a question arises – why shall the property be given to project company for USD 1 and not, for instance, be contributed to authorized capital in place of Company share, the more so that this is the very property, which will be used to ensure the loans (or part of them) for the project. Given the fact, that raising funds for project implementation is liability of the Company/Project Company, as provided in point (a) of paragraph 4.1, it might be in best interests of Georgian government to rule out the possibility of using transferred property for supporting the loans, since this property may turn out to be in the hands of third parties (this may happen before the Company/Project Company meets the commitments set forth in the agreement).

The agreement does not make clear total price of the property, rights (including use of natural resources) and other privileges to be transferred to the Company/Project Company at symbolic price.

6. It is not clear from the agreement what specific profit shall be expected for Georgia out of this agreement. Without such valuation, realistic assessment of potential risks, as well as its economic profitability for Georgia is impossible.

Apart from indirect and general benefits (compulsory sales of electricity at Georgian market in winter months, possible development of certain infrastructure, certain amount of new jobs, new investments, etc.), it can be said that Georgia does not get immediate and direct profit from this agreement (at least it is not evident from the text of the agreement). At the same time Georgian Government assumes considerable commitments and essential risks (including financial, environmental, social etc.) that are not properly secured by adequate guarantees.

7. The agreement says nothing about whether the land transfer will affect legitimate rights of third parties, and accordingly, the agreement has no specific provisions relating to the protection/consideration of the rights of third parties.

There are other risks in the agreement under review that are not properly balanced.

8. For example, in the event of termination of the agreement due to violation of time limits by the Company and the return of real estate to its original owner, the Company/project company, under paragraph 6.6 of the agreement has the right to dismantle immovable assets and to retain ownership of and remove the movable assets located on the land plot that were created or financed by the Company/Project Company, unless otherwise mutually agreed by the “principal parties”. Given nature of the project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. Besides, it might turn out that at the moment of return, other people are entitled to the transferred property (e.g. it is mortgaged under project company’s loan). This will lower its price significantly. The agreement does not envisage such probability, which should be within Georgian Government’s interest.

9. It is not clear from the agreement how to perform the agreement if the President declines the Government’s proposal on selling the property at USD 1, or if any of the third parties indicated in the agreement (not a party to the agreement) fails to sign any of the contracts under the agreement (e.g. due to bankruptcy or any other objective reason).

10. The agreement has provisions putting the Company/Project Company in privileged position. For example, paragraph 4.10 lists events allowing the Company/Project Company to require postponement of its obligations. Most of them could be put in the clause referring to force majeure, which would put all the parties in equal positions; however paragraph 4.10 provides benefits only for the Company/Project Company.

11. Sub-point (b) of paragraph 15.4 sets additional rights for the Company/Project Company in the event of termination of the agreement due to force majeure. To put it mildly, wording is quite ambiguous since the right of termination of the agreement is linked with negative impact of force majeure on the Company’s/Project Company’s commercial positions. Furthermore, the article sets exclusive right for the Company and Project Company while other parties can not enjoy the same rights in similar situations.

12. Commitments of Georgian Government under Article 9 of the Agreement are worth special mentioning. Under this article the Georgian Government has restricted its own rights to initiate or propose any changes in the law of Georgia or approve or otherwise allow any regulations (including those on discriminatory taxes and similar commitments) which would apply expressly to the project and not similar projects, the Project Company or the Company and not to other persons, any contractors or operators with whom the Project Company or the Company has entered into contractual arrangements in connection with the project and not to other persons. The agreement does not stipulate similar guarantees for other companies.

Moreover, whereas article 9 provides for restriction of the Government’s right of initiating laws and regulations of subjective character, paragraph 4.13 provides that any change in law or regulation of Georgia which has material adverse effect on the financial conditions of the Company/Project Company shall be determined as ‘Material Adverse Action’. Any unavoidable additional expenses of the Company/Project Company caused by the Material Adverse Action shall be compensated by increasing the Put Option Price. This provision is valid for 10 years after the commencement of commercial operation of the HPP; this quite long period is enough for the Company/Project Company to fully compensate expenses due to adverse effect of a new law or regulation. Not only other parties to the agreement, but vast majority of companies active in Georgia do not enjoy such privileges.

14. The agreement contains certain restrictions on the rights of Georgian government, which puts the Company/Project Company in a predominant position. Worth mentioning in this regard is article 7 stipulating, that even when the Company/Project Company violates its obligations, Georgian government has no right to immediately terminate the agreement – it shall first apply to the lenders (the party releasing a loan or financing the project) and pass through quite long procedure in order to replace the company-violator with a new company under new conditions.

15. The agreement envisages resolution of disputes by arbitral tribunal in Geneva (Switzerland) in accordance with arbitration regulations of International Chamber of Commerce. This might be deemed a precondition for fair resolution of disputes, however, on the other hand, each paragraph, containing unbalanced risks for Georgian government may turn out to be the cause of significant financial losses to Georgian budget.

## 2.17 Agreement between the Government of Georgia, Dariali Energy Ltd, Energo Trans Ltd and ESCO

<b>Approved by:</b>	Government Order #891 of 21 April 2011 <sup>37</sup> . The same order authorizes Minister of Energy and Natural Resources of Georgia to sign the agreement.
<b>Date of signing and entering in force:</b>	19 May 2011
<b>Term of the MoU:</b>	20 years from date of entering in force.
<b>Parties to the MoU:</b>	1. Government of Georgia
	2. Dariali Energy Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 401953061</li> <li>• Date of registration: 09.12.2010</li> </ul> At present, the company is a joint stock company.
	3. Energo Trans Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 204991786</li> <li>• Date of registration: 07.08.2006</li> </ul>
	4. Electricity System Commercial Operator Ltd Founded on the basis of Georgian legislation and registered legal person. Data in accordance with the registry of entrepreneurs and non-commercial legal persons of Georgia: <ul style="list-style-type: none"> <li>• Identification number: 205170036</li> <li>• Date of registration: 12.09.2002</li> </ul> At present, the company is a joint stock company. The founding partner of Electricity System Commercial Operator JSC is the State, which owns 100% of the shares. All shares with management rights are transferred to the Ministry of Energy and Natural Resources.
<b>About the project/projects:</b>	
<p>The project envisages construction of 110 MW run-off type HPP (leaving 10 percent of average multiannual flow as a sanitary flow on the diversion section) on Tergi River, in Dariali Ravine (Kazbegi municipality), near Georgia-Russia border checkpoint.</p> <p>Project related concerns: The project leaves 8 km long section of Tergi River almost without water as according to the project design, 90 percent of average multiannual flow will be diverted through diversion channel and tunnel to power house. The landscape will radically change on 8 km long section of Dariali Ravine (which is 11 km long only); the area will also lose historically developed cultural-ethnographic and touristic values. The project will have irreversible negative impact on river-dependent species, among them on river trout which is included in the Red List of Georgia and will lead to the extinction of the population. The project will also negatively affect Kazbegi National Park.</p> <p><i>Source: Environmental and social impact assessment report of the project on construction and operation of Dariali HPP (Dariali Energy, 2011); Say 'no' to big dams: 10 reasons of why we should oppose big dams (Green Alternative, 2012).</i></p>	

1. This agreement is not a MoU, but there is a reference in the agreement to Georgian Government Resolution No.549 of 11 March 2011 on the construction of HPP on Tergi River in Mtskheta-Mtianeti region (by which a proposal of Dariali Energy Ltd in Expression of Interests was approved). According to this resolution, Ministry of Energy of Georgia is charged with preparing draft MoU (not the agreement). Presumably, the agreement was signed instead of MoU, but in this case the document title is not important, more important is its contents.

2. The agreement is a quadripartite transaction but there are only two 'Principle Parties' to it (the Government of Georgia and Dariali Energy Ltd) to whom all terms of the agreement fully apply. Other parties (ESCO and Energo-Trans Ltd) assume so called pre-commitments with regard to future agreements (however, they carry quite serious obligations under this agreement as well).

<sup>37</sup> This order can be found neither in the database of the Legislative Herald of Georgia, nor in the electronic database Codex (database of legal acts).

3. The agreement (article 4.6) provides for certain penalties in case the Company violates deadlines of its basic obligations (obtaining permit, construction and putting in commercial operation of Dariali HPP). Maximum amount of penalties in this case is USD 600 thousand but this obligation is not backed by bank guarantee or any other security.

Moreover, the Company obligations in general (not only with regard to penalties) are not properly secured under the Agreement – neither by bank guarantee (as is in model MoU) nor by any other security – which makes the risks unbalanced. At the same time risks proceeding from the agreement are quite serious, given the fact that Georgian government (and other parties to the agreement) has assumed significant responsibilities to the Company.

4. One of the commitments of the Georgian Government under this agreement is to submit to the President a proposal on transfer to the Company of necessary land plot under Dariali HPP (paragraph (b) of article 4.12). Nothing is said in the agreement about privatization price. It is not clearly indicated whether or not the company shall pay appropriate cost for property privatization. This ambiguous wording does not allow for ascertaining all possible risks. It is not mentioned in the agreement whether transfer of the land plot affects legitimate interests of third parties and consequently, there are no specific provisions in the agreement with regard to protection/consideration of third parties' rights.

5. The agreement does not make total cost of the property clear, the rights (including the right to use natural resources) and other privileges to be transferred to the Company and at what price is not clear either. The benefits, to be expected for Georgia are not clear too. Without these assessments it would not be possible to evaluate realistically potential risks and economic profitability for Georgia, provided in the agreement.

Apart from indirect and general benefits (compulsory sales of electricity at Georgian market in winter months, possible development of certain infrastructure, certain amount of jobs, accumulation of new investments in the country, etc.), it can be said that Georgia does not get immediate and direct profit from this agreement (at least it is not evident from the text of the agreement). At the same time the Georgian Government assumes considerable commitments and essential risks (including financial, environmental, social, etc.) that are not properly secured by adequate guarantees.

6. The agreement contains some more risks not properly balanced under the agreement. For instance, in the event of termination of the Agreement due to violation of time limits by the Company and the return of real estate to its original owner, the Company, under paragraph 6.4 of the agreement has the right to dismantle immovable assets and to retain ownership of and remove the movable assets located on the land plot that were created or financed by the Company/Project Company, unless otherwise mutually agreed by the “principal parties”. Given nature of the project, granting such right to a company without requiring restitution of the area to the original state and/or setting environmental obligations, contains significant environmental and economic risks. Besides, it might turn out that at the moment of return, other people are entitled to the transferred property (e.g. it is mortgaged under project company's loan). This will lower its price significantly. The agreement does not envisage such probability, which should be within Georgian Government's interest. Besides, it should also be mentioned that in article 11 of the agreement, by mistake, reference is made to paragraph 4.12 (c) instead of paragraph 4.12 (b).

7. The agreement has provisions putting the Company in privileged position as compared with other parties. For example, paragraph 4.10 contains a list of events allowing the Company requiring postponement of its obligations. Most of them could be put in the clause referring to force majeure and this would put all the parties in equal positions; however, paragraph 4.10 provides benefits only for the Company, not for all parties.

Paragraph 15.4 (b) of the agreement sets additional rights for the Company in the event of breach of the agreement due to force majeure. Wording of this article is quite ambiguous since it is linked with negative impact of force majeure on the Company's commercial positions. At the same time this article sets exclusive right for the Company when other parties cannot enjoy the same rights in similar situations.

8. Commitments of Georgian Government under Article 9 of the Agreement are worth special mentioning. Under this article the Georgian Government has restricted its own rights to initiate or propose any changes in the law of Georgia or approve or otherwise allow any regulations (including those on discriminatory taxes and similar commitments) which would apply expressly to the project and not similar projects, the Company and not to other persons, any contractors or operators with whom the Company has entered into contractual arrangements in connection with the project and not to other persons. The agreement does not stipulate similar guarantees for other companies.

9. The agreement contains certain restrictions on the rights of Georgian government, which puts the Company in a predominant position. Worth mentioning in this regard is article 7 stipulating, that even when the Company violates its obligations, Georgian government has no right to immediately terminate the agreement – it shall first apply to the lenders (the party releasing a loan or financing the project) and pass through quite long procedure in order to replace the company-violator with a new company under new conditions.

10. The agreement envisages resolution of disputes by arbitral tribunal in Geneva (Switzerland) in accordance with arbitration regulations of International Chamber of Commerce. This might be deemed a precondition for fair resolution, however, on the other hand, each paragraph, containing unbalanced risks for Georgian government may turn out to be the cause of significant financial losses to Georgian budget.

### **3. Potential economic, social and environmental implications of energy projects implemented under MoUs and agreements**

The analysis of Resolution #107, model MoU, as well as MoUs and agreements signed by the Government of Georgia on energy projects allows making following conclusions:

1. Georgia's budget will enjoy no immediate and direct economic benefit as a result of energy projects implemented under the MoUs and agreements; Nevertheless, certain indirect benefits (basically economic) should still be expected.
2. As a result of compulsory sales of electricity at Georgian energy market in winter season, energy stability of the country during most problematic period of the year will be secured (allegedly this will not affect electricity tariffs positively).
3. Increased investments in energy sector will support, *inter alia*, financial stability of the country, since certain part of the investment funds will be directed into the state budget in the form of taxes and fees. State budget will benefit from further sales of electricity (mainly in the form of charges for electricity). Although, given the fact that most of generated electricity is determined for export, and pursuant to Georgian Tax Code, export of electricity is taxed at a zero rate (i.e. in fact is not taxed), the budget shall not expect optimal benefits from the sales of electricity.
4. New investors will come to the country and make significant investments in energy sector. It should be mentioned herewith that financial system will benefit less, if foreign companies implement their projects through their affiliates and representations (without involvement of enterprises registered in Georgia). In this case the funds received from sales of electricity (sold not only abroad, but also inside Georgia), will finally leave Georgia.
5. There will be new jobs, but since there are no guarantees of employing locals, it is quite expectable that foreign specialists and cheap labor of foreign origin (sometimes more experienced as well) are employed, thus promoting labor migration instead of employment of local manpower (in its turn this will have adverse effect on already grave social situation in the country).
6. Companies, active in different sectors will benefit from participation in energy projects, which may promote economic development in general. However, since there is no clause on priority involvement of local companies in project implementation, it can be assumed with high probability, that mainly foreign companies will participate in project activities, and investor companies will purchase goods and services under the project mainly abroad (from foreign companies). Hence, benefits of local business will be minimal. Besides, vast amount of investment funds will be spent out of the country thus minimizing positive impact of investments.
7. New energy facilities will be built, which will probably promote the country's energy independence, but since there is no clause on compulsory introduction of new technologies, investor companies, due to low price, may choose outdated technologies, which contain more technical, as well as environmental risks and, in long-term perspective, may turn out even losing.
8. In all probability, supporting infrastructure will develop, but implementation of energy projects may have adverse impact on local population's interest since there is not a clause on considering local communities' interests, social and cultural issues in general. Conflict situations and human rights violation may be the result of the above activities.
9. Interest and demands to hydro and other natural resources will increase, but since there is no clause on transparency of project related information and public participation in decision-making process, there is a probability, that, due to classification of project related information, public representatives will not be able to properly exercise their rights, guaranteed by the Georgian Constitution, Georgian legislation and international treaties. Given the nature of the projects, public participation in decision-making and public monitoring in project implementation are especially important.
10. There is high probability that energy projects induced environmental degradation process becomes more intensive since environmental legislation in force is too weak, equally as the national institution responsible for environmental protection (in terms of both, power and resources).
11. Implementation of energy projects requires land, which is often in private ownership or used by communities (pastures and hayfields). Given the fact, that there is no policy in Georgia developed to address development

induced involuntary resettlement and binding standards, as well as responsible agencies in this sector, the probability is high that implementation of energy projects entails violation of human rights, especially those related to land tenure.

Thus, implementation of energy projects under MoUs and agreements with the Georgian government will in any case affect country's natural, social and cultural environment. These projects may cause significant discomfort to local population in many regions; quite some land plots may be expropriated for project needs; pastures, arable land and forests may decrease causing adverse impact on social welfare of local communities. In order to reduce the risks, more attention in MoUs should be paid to environmental and social issues.

Regrettably, the MoUs and agreements reviewed in this report emphasize the importance of timely implementation of the project, disregarding, with few exceptions, social and environmental aspects. Moreover, it seems that even economic aspects are not sufficiently explored and adequately addressed by the Georgian government.

Such an approach to project implementation contains unbalanced environmental, economic and social risks that may lead to significant negative results in short-term, as well as mid-term and long-term perspectives. Evidently, this should not be in line with the interests of the Georgian government, the investor companies, and by and large, in the interests of the public. Public has the right to participate fully in decision-making on major projects, and the Georgian government must take strong measures to protect and consider public interests.



Association Green Alternative is a non-governmental, non-profit organization founded in 2000. The mission of Green Alternative is to protect the environment, biological and cultural heritage of Georgia through promoting economically sound and socially acceptable alternatives, establishing the principles of environmental and social justice and upholding public access to information and decision-making processes.

We organize our work around six thematic and five cross-cutting areas. Thematic priority areas include: energy – extractive industry – climate change; transport sector and environment; privatization and environment; biodiversity conservation; waste management; water management. Cross-cutting priority areas include: environmental governance; public access to information, decision-making and justice; instruments for environmental management and sustainable development; European Neighbourhood Policy, monitoring of the lending of the international financial institutions and international financial flow in Georgia.

Green Alternative cooperates with non-governmental organizations both inside and outside Georgia. In 2001 Green Alternative, along with other local and international non-governmental organizations, founded a network of observers devoted to monitoring of development of a poverty reduction strategy in Georgia. Since 2002 Green Alternative has been monitoring implementation of the Baku-Tbilisi-Ceyhan oil pipeline project, its compliance with the policies and guidelines of the international financial institutions, the project's impacts on the local population and the environment. Since 2005 the organization has been a member of the Monitoring Coalition of the ENP (European Neighbourhood Policy) Action Plan. In 2006 Green Alternative founded an independent forest monitoring network. Since establishment Green Alternative is a member of CEE Bankwatch Network - one of the strongest networks of environmental NGOs in Central and Eastern Europe. Green Alternative closely cooperates with various international and national organizations and networks working on environmental, social and human rights issues; Green Alternative is a member of the Coalition Transparent Foreign Aid to Georgia founded in 2008. In 2010 Georgian Green Network was established on the initiative of Green Alternative. This is informal association of civil society organizations and experts dedicated to protecting environment, promoting sustainable development and fostering principles of environmental and social justice in Georgia.

In 2004 Green Alternative received the Goldman Environmental Prize as the recognition of organization's incredible work for environmental protection, social justice and equity.

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