



**Summary of the Evaluation of the Terms of Reference and their
implementation
for the Ilisu Dam Project in Turkey
regarding
resettlement, environmental issues, cultural heritage and
riparian countries**

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September 11, 2007

Contents:

1. Introduction	3
1.1 Purpose of review	3
1.2 Summary of main findings	4
1.3 Background: Requirements of relevant World Bank standards	6
2. Evaluation of the ToR on Environmental Issues	8
3. Evaluation of the ToR on resettlement and their implementation	11
4. Evaluation of the ToR on Cultural Heritage	14
5. Evaluation of ToR on water sharing	19

Annex 1- 4

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This evaluation was prepared by the “**Ilisu Campaign**,” which is a network of the following non-governmental organizations:

- Berne Declaration - Erklärung von Bern, Schweiz;
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- ECA-Watch, Austria; Fern, Belgium;
- The Cornerhouse, UK;
- The Kurdish Human Rights Association, London, UK
- The Hasankeyf Initiative, Turkey

Abbreviations:

CoE	Committee of Experts
DSI/SHW	Devlet Su Isleri Genel Mudurlugu, General Directorate of State Hydraulic Works (SHW)
ECAs	Export Credit Agencies
ERG	Exportisikogarantie Switzerland (now SERV: Swiss Export Risk Insurance)
EIAR	Environmental Impact Assessment Report
FAM	Final Assessment Meeting
IFC	International Finance Corporation
MARA	Turkish Ministry of Agriculture
NGOs	Non-Governmental Organizations
OEKB	Oesterreichische Kontrollbank
PAP	Project affected people
PIU	Project Implementation Unit
ToR	Terms of Reference
URAP	Updated Resettlement Action Plan
WB	World Bank

1. Introduction

1.1 Purpose of review

The export credit agencies of Germany (Euler Hermes), Austria (OeKB) and Switzerland (SERV, former ERG)¹ were first approached for export risk guarantees for the Ilisu Dam Project, Southeast Turkey in 2004. A preliminary decision in favor of funding was announced in November 2006, subject to Turkey meeting the conditions laid down in the minutes of the “Final Assessment Meeting” (FAM) in 6 October 2006. The FAM includes approximately 150 conditions called Terms of Reference (ToR),² which were made public after the ECAs final approval of export credit guarantees on 26 and 28 March 2007. The implementing agency DSI (State Hydraulic Works, which is part of the Turkish Ministry of Energy) needed to fulfil a total of 27 ToR by March 2006.

This submission constitutes a response to the published conditions (ToR) and some of their implementation reports regarding environmental aspects, the expropriation and resettlement process, cultural heritage and riparian countries from the non-governmental organizations:

Berne Declaration (Switzerland), ECA-Watch Austria, FERN (Belgium), The Corner House (UK), World Ecology, Economy & Development (WEED, Germany), WWF Austria and ‘The Initiative to Keep Hasankeyf Alive’ (Turkey).

Independent experts who contributed to the analysis of the conditions include:

In Annex 1:

Emails written by Robert Goodland and sent to Judith Neyer of 15 April 2007. Robert Goodland has been the Environmental Advisor to the World Bank for the last 25 years, where he promulgated most of their environmental and social policies. He was elected President of the International Association of Impact Assessment.

In Annex 2:

Statement by Mrs Zeynep Ahunbay, Archeologist, Turkey

In Annex 3: Notes on Ilisu Dam by international law specialists Professors Laurence Boisson de Chazournes, James Crawford, Kate Cook and Philippe Sands

In Annex 4:

Review of ECA Final Terms of Reference for the Ilisu Dam Project by Philip Williams and Associates (PWA)

¹ Hereafter referred to as ‘the ECAs’

² <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69>

1.2 Summary of main findings

(i) Our review of the Ilisu dam project's ToR and their present implementation found the following major points of criticism:

1. ***Project approval process is in breach of World Bank standards***

With the early funding approval of the Ilisu project, at the end of March 2007, the ECAs, respectively the governments of Switzerland, Austria and Germany breached the relevant World Bank standards because the documents ***required by the World Bank did not yet exist and therefore were not approved as fit for final commitment before a final decision was taken.***

There is no Environmental Impact Assessment (EIA), no Resettlement Action Plan and no Cultural Heritage Plan which can be considered in line with international standards. Fundamental baseline data for the drawing up of these plans are still missing. Further, the ToR are not embedded in a legally enforceable contract, which is common practice in international standards. Thus the affected people cannot sue the DSI (the Turkish State Hydraulic Works) for the implementation of the EIA, the RAP and the Cultural Heritage Plan, turning the promises of the ToR into little more than empty promises.

2. ***The ToR are vague, unsubstantiated, contradictory and of a poor scientific quality***

Our review shows that the ToR on environmental issues, resettlement and cultural heritage are too vague and lack clear indicators, and are, therefore, too insubstantial to contribute anything meaningful to the project. Some examples:

- the ToR on environmental issues admit, on the one hand, that basic some data is missing, while, on the other hand, assuming that no serious environmental impact should be anticipated. They do not include indicators or measurable criteria that trigger preventive, mitigation and compensatory measures. Therefore, any further conclusions drawn from other impact assessments are unlikely to have any significant bearing on the project's implementation.
- the ToR do not contain any provisions in case the CoE finds the ToR are not fulfilled.
- no obligation by the ToR on riparian states was placed on Turkey either to *consult* with Iraq and Syria or to *negotiate* with them. Two of the key duties incumbent on states under international customary law have thus been omitted from the ECA conditions.
- The income restoration measures are not realistic and will not generate enough income.
- The fundamental criticisms of the Swiss EAWAG (The Swiss Water-Research- Institute by the Federal Polytechnic Institute, ETH Zürich) and by independent hydrologists Philip Williams and Associates (PWA)³ on the existing EIA have not been taken into account.

3. ***The ToR cannot adequately mitigate the severe impact of the project***

- The ToR do not prevent severe damage from occurring in downstream riparian states.
- The ToR do not ensure reliable income restoration measures for PAP.
- The ToR do not adequately address the cultural heritage issue.

³ Philip Williams & Associates: A REVIEW OF THE HYDROLOGIC AND GEOMORPHIC IMPACTS OF THE PROPOSED ILISU DAM. February 20, 2006. http://www2.weed-online.org/uploads/PWA_Ilisu_Report.pdf

- The ToR do not prevent severe environmental damage and do not guarantee that adequate mitigation measures are taken.
- The ToR do not respect pending cases in Turkish and international courts as well as international law.

4. The project implementation does not comply with the ToR and World Bank standards

Our evaluation of the Implementation Report conducted by the DSI in February 2007 in response to ToR 32 (demanding participatory Implementation Plans) and of those elements of the TOR which were required to have been completed by March 2007 reveal that implementation of the project to date does not conform to the ToR; the DSI continue employing the lower standards of required by Turkish law. Although the ToR require that World Bank standards are used for resettlement, Turkey has been carrying out the first expropriations under existing Turkish law, which does not recognize many of the rights that the World Bank insists upon, to protect affected communities. Villagers report that they have been offered token compensation. Many PAP will only receive loans as income restoration measures, which violates WB standards.

5. Supply of information to the public regarding the project has been disorganised; the necessary documentation has not been forthcoming

The affected people have not yet been informed about the existence and the content of the ToR, however expropriation of several villages has commenced. Further, the publication of the ToR and related documents lacks coherency and transparency. Relevant information is difficult to locate on the various web sites. Finally, deadlines to meeting two thirds of the ToR have passed with no information on their progress being supplied. These unmet conditions include the preparation of essential project implementation documents.

(ii) Demands

- **The final contracts may not be signed and no loans may be allocated until a complete environmental action plan, resettlement action plan and cultural heritage action plan have been produced and approved by the affected people in line with World Bank standards, and an agreement with the neighbouring countries has been reached.**

Other necessary steps include:

1. A legally-binding agreement as part of the loan contract is not enough. Also the EIAR, the RAP and Cultural Heritage Action Plan as well as the ToR must be a part of the legal framework to enable the affected people to legally prosecute for non-compliance.
2. The requirements of the ToR must be improved to bring them up to international best practice (compliance with IFC performance standards, OECD guidelines on involuntary resettlement and World Commission of Dams recommendations).
3. The documents required by the ToR need to be implemented according to the ToR and not based on Turkish laws. The implementation must be approved by the affected people and other stakeholders before the final project is approved by the ECAs.

4. Further, all project documents must be:
 - put on a single web site where documents can be easily found;
 - written in a clear and concise manner so that the process is transparent as required by WB OP 4.1, and translated into English and Turkish of a high standard.
5. The ECAs and the DSI must deliver immediate information as to why the promised deadlines were not met, and new deadlines need to be arranged. The Ilisu Campaign also demands that the general public be given sufficient information regarding the project to ensure that the Turkish government meets these deadlines.
6. The new procedures outlined in the ToR need to be made available to all affected people via a simple, clear and short brochure in Kurdish which includes pictures so the people can take an “active” part in this project.

1.3 Background: Requirements of relevant World Bank standards

The participating ECAs, the building consortium and the Turkish government have committed themselves to ensuring that the Ilisu project meets the World Bank environmental and social Safeguard policies. These require that any Environmental and Cultural Heritage Impact Assessments and Resettlement Plans “conforming to Bank policy” must be passed *prior, not only, to the final commitment, but prior even to the appraisal stage*. For example, the World Bank Operational Manual, *Bank Procedure for Involuntary Resettlement* specifies:

- BP 4.12, Paragraph 8: The borrower submits to the Bank a resettlement plan, a resettlement policy framework, or a process framework that conform with the requirements of OP 4.12, as a condition of appraisal for projects involving involuntary resettlement (see [OP 4.12](#), paras. 17-31).
- Paragraph 10: [...] Appraisal is complete only when the borrower officially transmits to the Bank the final draft resettlement instrument conforming to Bank policy ([OP 4.12](#)).
- Paragraph 22. As a condition of appraisal of projects involving resettlement, the borrower provides the Bank with the relevant draft resettlement instrument which conforms to this policy [...]
- Paragraph 25: A draft resettlement plan that conforms to this policy is a condition of appraisal.

In 2006, the participating ECAs admitted that the Environmental Impact Assessment, the Resettlement Action Plan and the Cultural Heritage Plan of 2005⁴ and their amendments were not fit for final commitment:

“The first intensive investigation by the three export credit agencies (ECAs) during the first half of 2006 came to the conclusion, that considerable gaps remain in the provided studies and

⁴ UEIAR: <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=46>
 URAP: <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=32>

implementation plans. On the basis of these plans World Bank standards would not have been met.”⁵

To bring the project in compliance with World Bank standards, in the Final Assessment Meeting of October 2006, the Turkish Government agreed to the ECAs’ condition to fulfill 150 ToR. These ToR require fundamental baseline data as well as the drawing up of the Environmental Impact Assessment, the Resettlement Action Plan and the Cultural Heritage Action Plan.

⁵ Homepage of AuslandsGeschaeftsAbsicherung der Bundesrepublik Deutschland 27.3.07: „Die erste intensive Prüfung der drei Exportkreditagenturen (ECAs) im ersten Halbjahr 2006 ergab, dass noch erhebliche Lücken in den zunächst vorgelegten Studien und den Umsetzungsplänen bestanden. Weltbankstandards wären auf Basis dieser Pläne bei der Projektumsetzung nicht zu erreichen gewesen“.
http://www.agaportal.de/pages/portal/presse/hintergrund_ilisu.htm

2. Evaluation of the ToR on Environmental Issues

The effects of the Ilisu project on riparian states ecosystems are enormous. About 400 kilometres of the Tigris and its tributaries will be dammed or affected by the flush of the peak wave operation downstream of the dam. The ECAs and the consortium have declared on numerous occasions that the Ilisu project has to be in line with World Bank standards, otherwise no final commitment will be possible. They also made it very clear that the Environmental Impact Assessment would be in compliance with World Bank standards.⁶ The World Bank's safeguard policies require that Impact Assessments "conforming to Bank policy" must be passed prior not only to the final commitment, but prior even to the appraisal stage.⁷

1. *The Ilisu project breaches World Bank environmental safeguards*

- a) To this day, no Environmental Impact Assessment (EIA), that can be regarded in line with international standards, exists, for the Ilisu Dam project. The ToR further reveal that even fundamental baseline data for the drawing up of an EIA is still missing:
"As observed by the ECA's [...], in the field of biodiversity the EIAR is often too superficial in the sense that it uses existing information, and that no actual field data from the project area are available. For this reason, the identified impacts, and especially their importance, are often questionable. In the absence of data from field work, the proposed measures are not specific enough."⁸
- b) The ToR relating to environmental impacts are evidence that **ECAs have given their final financial commitment without citing a satisfactory EIA**. Therefore, the ECAs' financing of the Ilisu Dam Project *remains in violation of the standards* they committed themselves to following.

2. *The ToR are incomplete*

The ToR do not stipulate that a new comprehensive EIA in line with World Bank policies must be provided. They merely require additional studies to be conducted on a number of environmental issues. This process is not only in breach of international standards, but lacks logic:

The purpose of an environmental impact assessment is not to hold up progress but to identify and mitigate potential negative impacts. In order to determine if, and under which conditions, a proposed project can be implemented, an EIA must be developed before project appraisal and finalized in line with international standards prior to final commitments. **To enter into a financing commitment before the relevant impact assessments have been provided defies the very purpose of an EIA: to appraise the environmental and social implications of the proposed project.**

⁶ "Q: Which standards are followed with regard to hydro-electric power plants (and also with Ilisu plant)?

A: [...] With regard to the Environmental Impact Assessment report: The standards of OECD and World Bank are mandatory and will be followed, furthermore the respective Turkish laws."

⁷ World Bank: Environmental Assessment Sourcebook 1999, Chapter One:

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTENVASS/0,,contentMDK:20480588~pagePK:148956~piPK:216618~theSitePK:407988,00.html>

⁸ ToR E-13: <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=59>

3. The 38 environmental ToRs are vague, unsubstantiated, of a poor scientific quality and contradictory

- a) The ToR establish that basic field data needed to assess potential environmental effects is missing. Yet at the same time they predict that no serious consequences for ecosystem and species are expected:

“[...] the EIAR is often too superficial [...] and no actual field data from the project area [is] available. [...] It is evident that that a number of locally or globally rare species will be affected by the project, but that none of these species will actually disappear because of the project”⁹.

If field data is not available, on which scientific basis has it been concluded that no flora and fauna will disappear?

- b) The ToR allow a four year time span to conduct additional studies. This is a scandal because by that time at least fifty percent of the dam will have been constructed. However, no criteria are defined in the ToR to stop the construction in case the EIA discovers that important species will be destroyed or heavy environmental impact may occur. This is in breach of international EIA requirements.

Similarly, it is unclear which findings in the further studies would trigger the mitigating measures, which would be implemented in order to prevent further building. What would occur if one of the studies proved that the consequences would be severe and irreversible?

“In a worst case scenario under extremely dry conditions, the cumulative effect of the flow reduction to 60m³/s, the release of untreated waste water from the City of Cizre and the water demand for irrigation and return irrigation water would generate a potentially high negative impact on the aquatic ecosystem in summer [...]. If dry conditions persist, this situation may extend for two years or more. In this case the fish population in the Bostanci section would diminish and wetlands would be seriously damaged. However, such a situation has not occurred during the last 50 years.”¹⁰

We have just experienced the driest and warmest spring since the recording of meteorological data in Europe and Turkey. The statement that ‘such a situation has not occurred during the last 50 years’ is not an adequate response and makes a mockery of the EIA process.

- c) The fundamental criticisms of the Swiss EAWAG (The Swiss Water-Research- Institute by the Federal Polytechnic Institute, ETH Zürich)¹¹ and by independent hydrologists Philip Williams and Associates (PWA)¹² on the existing EIA have not been taken into account. No data or additional studies about the operational phase of the dam concerning the effects of the peak wave sediment transport or the problems of oxygen depletion and cold water pollution that are foreseen by the ToR.

⁹ ToR E-13: <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=59>

¹⁰ ToR E-12: <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=59>

¹¹ http://www2.weed-online.org/uploads/EAWAG_Ilisu_15%202%2006-fin.pdf

¹² Philip Williams & Associates: A REVIEW OF THE HYDROLOGIC AND GEOMORPHIC IMPACTS OF THE PROPOSED ILISU DAM. February 20, 2006. http://www2.weed-online.org/uploads/PWA_Ilisu_Report.pdf

But even if they had been included as conditions for financing, in order for those studies to have any bearing on the project implementation they would have had to be **provided and their results analyzed *prior* to financial commitment.**

4. *Final conclusion regarding the ToR on environmental issues:*

- In announcing a final financial commitment before an EIA has been passed as being fit for the purpose, the ECAs and their governments have breached relevant international standards, including those of the World Bank Group.
- Because no indicators or measurable criteria that trigger preventive, mitigation or compensatory measures have been included, any conclusions from further impact assessments are unlikely to have any significant bearing on the project's implementation.
- The environmental ToRs are of a poor scientific quality, contradictory and their predictions lack scientific basis and sufficient field data.

3. Evaluation of the ToR on resettlement and their implementation

(See detailed evaluation by Christine Eberlein, Berne Declaration in separate file)

1. *The ToR incorporated important aspects of the World Bank standards on involuntary resettlement. Yet, they are not complete.*

- Several ToR request exact numbers of project affected people (PAP), clear cadastral boundaries, and robust figures for different affected groups;
- People who do not own land, or who had to leave their villages during the civil war, are supposed to receive some compensation; inequality of land ownership are supposed be addressed and measures taken to avoid disadvantage;
- Compensation payments shall be calculated on replacement value and PAP will receive compensation for transaction costs;
- Resettled PAP shall receive improved access to services such as water, energy, and health services at new resettlement sites;
- Several ToR emphasize the importance of participation and consultation of all affected people and the need for income restoration as well as land-to-land resettlement;
- A complete resettlement action plan shall be delivered .

However, the ToR are incomplete and do not conform with the World Bank standards as shown below:

2. *Project's approval process does not meet World Bank standards*

This review found that the Ilisu Hydroelectric Project's ToR "on resettlement" and the overall process still **does not comply with the World Bank standards on involuntary resettlement**. This is of serious concern given that the ToR are supposed to bridge the gap between Turkish law and World Bank standards, in order to bring the project into compliance with World Bank policies.

The ToR and the entire project approval process does not comply with WB OP 4.12 because the Governments of Switzerland, Austria and Germany approved funding for the project **before the fundamental resettlement documents were available**. These documents (although required in the ToR) are still missing. They include:

- A comprehensive Resettlement Action Plan and Resettlement Policy (required under paragraphs 6 and 18 of the ToR) which needs to be backed by a legally enforceable contract outlining the obligations of the government and the project developers, which must be made available for public comment before a final funding commitment; this was not the case.
- A census (Paragraph 14) to identify the persons who will be affected by the project and their living conditions before and after the project. The procedure includes the provisions for meaningful consultations with affected persons and communities, local authorities, and, as appropriate, Non-Governmental Organizations (NGOs), and clarifies its grievance mechanisms.
- Resettlement planning instruments (required under paragraph 19) including early screening, discussion of key issues and the information required to prepare the resettlement components. The view of the persons displaced by civil war was not taken into account as requested.

- The ToR do not demand the execution of the project as a sustainable development project. Therefore the project is not in line with WB OP 4.12/Para 2b.¹³

3. The ToR are incomplete and vague

- a) The ToR incorporate some of the demands of Non-Government Organizations for significant improvements in resettlement conditions. However, the ToR are not precise enough to ensure that World Bank standards are met and they are not backed by a legally enforceable framework. Even when a contract includes “Environmental Default Clause”, the DSI has the ability to use the weaker Turkish laws, because the Minutes of the Assessment Meeting¹⁴ do not specify that non-compliance with the ToR will be penalized. Also, the undertakings outlined in the RAP are not legally enforceable.
- b) Further, the full costs of resettlement activities have not been included in the total costs of the project – although this is mandatory under WB OP 4.12 (paragraph 20)¹⁵. According to the Final Assessment Minutes (FAM) between Turkey and the ECAs, as well as statements on the Ilisu consortium homepage, Turkey will secure and earmark, within the national budget, a separate budget for all aspects of resettlement and income generation. There is no public information whether this has happened. However, we estimate that the resettlement budget will still be insufficient.

4. Project implementation does not comply with the ToR and World Bank standards

- a) The expropriation process has begun even though the project implementation structures are not in place, and the affected people remain uninformed regarding the ToR, their rights and the compensation they are due. So far DSI has not conformed to the ToR or WB OP 4.12 but continues to take advantage of the more flexible Turkish laws. By using Turkish law and not the ToR, the Turkish Government appears to be trying to keep the expropriation and resettlement budget as low as possible, making the project more attractive for investors and reduces the burden on the national budget. International lending and World Bank standards specifically reject and condemn this practice, since significant costs are effectively “externalized” to the affected population who already carry the heavy burden of having to establish new lives.¹⁶
- b) Thus far, the resettlement strategies have offered the villagers only land of poor quality, thus they chose cash compensation even though under World Bank OP 4.12 (6b) and ToR 12, 13 and 18, land of the same value needs to be offered. Further, DSI offered these families extremely poor monetary packages insufficient to rebuild their lives, which do not comply with WB OP 4.1 (paragraphs 6a and b) and do not reflect the replacement value as required in ToR 24. If the DSI continues to base the implementation of the ToR on weaker Turkish laws, Project Affected People (PAPs) will continue to choose cash compensation as government-enforced resettlement is very unattractive under Turkish

¹³ See OP 4.12, Para 2b: “Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits.”

¹⁴ See Minutes of the Final Assessment Meeting of October 2006, between the Export Credit Agencies of Austria, Switzerland and Germany and the Turkish Government

¹⁵ Para 20: “The full costs of resettlement activities necessary to achieve the objectives of the project are included in the total costs of the project.”

¹⁶ WB OP 4.12/Para 2b states: “Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits.”

law. However, there is no ToR or point in the FAM addressing this issue.

- c) Also, the Implementation Report conducted by DSI in February 2007 in response to ToR 32 and our evaluation of those elements of the TOR, which were required to have been completed by March 2007, reveal that implementation of the project to date does not conform to the ToR, and DSI continues to employ the lower standards of Turkish law.
- d) Information on designated resettlement sites is unavailable, in violation of ToR 13. Further, ToR 31 demanding a commitment of the Turkish agricultural ministry to provide land does not explicitly state that resettlement land shall be given at no cost to displaced families. Under Turkish law, PAP need to buy resettlement land and this might be unaffordable for them, if it is not subsidized. Yet, the ToR do not tackle this issue.
- e) The Implementation Resettlement Plan indicates that not all affected people will receive cash compensation, which is in contrast to the requirements of the ToR and World Bank OP 4.12 (paragraph 6b (ii)). Under the Plan, Project Affected People (PAP) without property will only receive loans to rebuild their lives. But loans are not cash compensation. There is even no guarantee that PAP will ever receive the promised loans as banks usually do not lend to people without guarantees – a problem experienced by those resettled by other dam construction projects in Turkey.
- f) The income restoration measures suggested by the DSI, which foresee employment in fishery, caper farming, construction work and, by providing loans, will not generate enough income. The primary problem is that the DSI underestimated the amount time and money necessary to start-up and develop these businesses.
- g) In response to ToR 27, which requires PIU to develop a grievance redress mechanism for all resettlement issues including income restoration and implementation schedules and a monitoring concept, the DSI developed a grievance process. However, the measures suggested are not yet in place, are too complex and will take a long time to set up, further disadvantaging displaced people. Also, the PAP feel they cannot trust the grievance process because claims can only be prosecuted under Turkish law, as the promises of the ToR and the Resettlement Action Plan have no legal base.
- h) Finally, public information available regarding the ToR and the expropriation and resettlement processes have not been clearly stated. The information was hard to find amongst the 14 large documents, and it was difficult to locate on the various web sites. In some documents essential annexes are missing. Even with all this information, it is still unclear how the entire expropriation, resettlement and compensation process will be implemented, nor is it clear how difficult cases will be handled. None of the project documents are in Kurdish, “locking out” locally-affected people from the project’s process. Deadlines to meeting two thirds of the ToR’s conditions have passed with no information on their progress. These unmet conditions included the preparation of essential project implementation documents.

4. Evaluation of the ToR on Cultural Heritage

The minutes of the Final Assessment Meeting (FAM) between the ECAs and the DSI lay down the organizational structure of the cultural heritage committee which has been put in charge of the archaeological work under the PIU Board and list the Terms of Reference (ToR).

14 ToR deal with the preservation of the cultural heritage in the reservoir area. They include the tasks of the PIU (Project Implementation Unit):

- to provide baseline data on the archaeological finds in the affected area;
- to submit a comprehensive Cultural Heritage Action Plan for all archaeological surveys and excavations, including a time schedule, responsible personnel, budgets, etc.;
- to submit a list of involved institutions and their responsibilities and coordinate their work;
- to submit a plan for the investigation and excavation of the mounds and to arrange that experts are available to supervise the archaeological works and to deal with chance finds;
- to carry out ethnographical studies by conducting interviews with the population to ensure that the history of the villages and the stories of the people will not be;
- to develop a concept for the Cultural Park;
- to provide monitoring reports on the surveys and excavations, the rebuilding of monuments in the Cultural Park and the Park's construction and operation.

The Committee of Experts (CoE) on culture is:

- to provide guidance to plan the concept of the Cultural Park and
- to monitor all measures on an annual or semi-annual basis.

The only TOR that had to be fulfilled before the final commitment of the ECAs was C-7 (Legal basis for relocation of monuments):

Main points of concern:

1. ***The FAM and the ToR completely ignore the fact that Hasankeyf has Turkish cultural heritage of the first priority, which cannot be saved by transferring a few monuments and artefacts to a Cultural Precinct.***

The monuments of Hasankeyf form a unit with the landscape and are of importance precisely because they are in this particular setting. The artefacts and monuments would look quite different on the slopes of a dry hill and will lose their cultural importance and integrity.¹⁷ Archaeologists confirm that most of the cultural assets cannot be moved and reconstructed elsewhere. Due to their fragile composition, they might crumble.¹⁸ The great value of this antique town in its entirety has sparked protest against the Ilisu dam project domestically and internationally. All relevant international conventions on cultural heritage emphasise the preservation of cultural values *in situ*.

2. ***The ToR are too vague, incomplete and lack clear indicators***

We found the ToR too vague and incomplete. They lack indicators, leaving actual measures up to the discretion of Turkish officials. E.g. C-7 demands a confirmation by the Turkish

¹⁷ Ahunbay, Prof. Zeynep: Hasankeyf in the Context of Cultural Heritage Preservation in Turkey, 05/2006, http://www.hasankeyfgirisimi.com/en/index-Dateien/Comment_Ilisu_ZeynepAhunbay_Hkeyf_CultHeritage_engl.pdf

¹⁸ Ronayne, Maggie: The Ilisu Dam. A monument to Barbarism. A review of the Environmental Impact Assessment Report Update for the Ilisu Dam in the Kurdish Region of Turkey, 07/2006, p. 131.

government that, monuments will be transferred to the Cultural Park without specifying which ones are to be relocated, although it is clear that the vast majority of monuments will be submerged.

3. The ToR lack compliance with the World Bank safeguard on physical cultural resources OP 4.11

a) The following table shows which WB requirements are not met:

WB requirements OP 4.11	Comparison with ToR
<p>8. When the project is likely to have adverse impacts on physical cultural resources, the borrower identifies appropriate measures for avoiding or mitigating these impacts as part of the EA process. These measures may range from full site protection to selective mitigation, including salvage and documentation, in cases where a portion or all of the physical cultural resources may be lost.</p>	<ul style="list-style-type: none"> • No measures for avoiding the submersion of cultural heritage were taken. Instead, the ECAs accepted that Turkey introduced a new decree to remove its status as a cultural heritage no 1 site. • However, the ToR specify that important monuments shall be saved in an archaeological park and in a museum.
<p>9. As an integral part of the EA process, the borrower develops a physical cultural resources management plan that includes:</p> <ul style="list-style-type: none"> • measures for avoiding or mitigating any adverse impacts on physical cultural resources, • provisions for managing chance finds, • any necessary measures for strengthening institutional capacity, • a monitoring system to track the progress of these activities. • The physical cultural resources management plan is consistent with the country’s overall policy framework and national legislation and takes into account institutional capabilities with regard to physical cultural resources. 	<ul style="list-style-type: none"> • The ToR demand a physical cultural management plan, including time schedules. However it should have been delivered by April 30, 2007 but was not presented. • The measures of the ToR regarding management, institutional capacity e. g. are all too vague and lack indicators. • The monitoring system to track the progress is too vague: PIU is only obliged to provide annual monitoring reports. The frequency of the monitoring by the Committee of Experts is also far too low for supervision to be adequate, be it annually or semi-annually. • The ToR lack indicators for monitoring. The ToR are also too vague to control whether the necessary work for archaeological excavation and preservation has been done efficiently and effectively • The ToR demand a comprehensive budget by April 30, which has not been delivered
<p>11. As part of the public consultations required in the EA process, the consultative process for the physical cultural resources component normally includes relevant project-affected groups, concerned government authorities, and relevant NGOs in documenting the presence and significance of physical cultural resources, assessing potential impacts, and exploring avoidance and mitigation options.</p>	<ul style="list-style-type: none"> • Public consultations on the cultural heritage did not take place and are not even demanded by the ToR.

b) The project approval process is not in compliance with World Bank standards

The project breaches World Bank standards as it did not deliver the requirements of WB OP 4.11 **before project appraisal** and before project funding approval as required by the World Bank. Indeed, the documents missing are so fundamental that, at this point, no one can actually assess whether the project will comply with World Bank standards. It is clear that the appraisal process did not. By approving the guarantees without baseline data, an acceptable Action Plan, etc., the ECAs have neglected the World Bank safeguard policies.

Major documents missing until today are:

- **Fundamental baseline data:**¹⁹ The list of ToRs related to the cultural heritage confirms that the Cultural Heritage Action Plan (CHAP) is largely incomplete because the most fundamental baseline data is still missing and asked for by the ToR.
- **The physical cultural resource plan** (see Para. 9 of table above) is completely missing. It should have been prepared by April 30, 2007, but the deadline passed without further information.
- **No consultative process** for the physical cultural resources on the cultural heritage component took place with NGOs and affected people.
- **A comprehensive budget is still missing.**
As no specific budget has been provided so far, we doubt whether the proposed measures will be executed due to a lack of finance.
- **No realistic time schedule exists.**
Parts of the reservoir area are inaccessible for scientists due to security problems. The time-frame of seven years for construction, conducting surveys, excavations and the relocation of monuments is unrealistic, given the size of the task.

4. Evaluation of ToR C-7: legal information

ToR C-7 demands: "PIU will provide the written confirmation by the Turkish Ministry of Culture or by the relevant authorities that the Ministry or the authorities agree to transport the affected monuments to the new Cultural Park. PIU will prove that the legal basis for the relocation is settled."

World Bank 4.11-3 requirement: "The impact on physical cultural resources resulting from project activities, including mitigating measures, may not contravene either the borrower's national legislation, or its obligations under relevant international environmental treaties and agreements." (OP 4.11-3)

Comments:

Hasankeyf is a category 1 Turkish cultural heritage site and according to the Turkish law on protection of cultural heritage, it must be protected and cannot be flooded. However, on October 27, 2006, the *Official Gazette* published a 'principal decision' by the Turkish Ministry for Culture and Tourism taken on October 4, 2006 (Res. No. 717) which states that cultural monuments are no longer protected "*in case it becomes mandatory to construct the dams within the areas where the immovable cultural heritages and the archaeological protected areas are located*". With this

¹⁹ One point of contention, voiced in 2006 by NGOs and experts, was that the baseline study presented in the CHAP relied on data taken from a survey conducted in the late eighties that covered only one-fifth of the affected territory. No updated baseline data is presented in the current CHAP.

principal decision, the Ministry of Culture also handed the responsibility for the preservation of the immovable and movable cultural heritage of Hasankeyf to the Ministry of Energy and Natural Resources (DSI - State Hydraulic Works).

- **Thus, the Turkish government has attempted to circumvent the provision for the protection of Hasankeyf's cultural artefacts by handing the responsibility for all related decisions to the DSI.**

However, two legal cases against the construction of the dam by various Turkish associations²⁰ are still pending in the courts of Diyarbakir and in the commission of the administrative court in Ankara. A third legal case handed to the European Court of Human Rights by Turkish archaeologists (accepted by ECHR in July 2006) is also still pending. All three cases are challenging the legality of the Ilisu dam on the grounds of Hasankeyf's cultural heritage status under Turkish law, at the time when the Ilisu dam project was conceived.

- **Thus the legality of the relocation of Hasankeyf is pending. By accepting a retroactive change of law ECAs and the DSI are showing little or no respect for Turkish cultural heritage.**

5. Concerns about the monitoring expertise

Significant concerns exist regarding the composition of the Committee of Experts. The archaeologist Prof. Dr. Zeynep Ahunbay stresses (see Annex 4) that the subcommittee on cultural heritage lacks the necessary skills to conduct its tasks because no structural engineer, specialized in masonry construction, nor any experts in architectural conservation and restoration are part of the committee. Yet the subcommittee is to counsel on and supervise all works including the relocation of monuments. Therefore, the monuments' very substance is at risk and may be damaged beyond repair. Experts on the Islamic period or the early Christian period are similarly absent from the CoE and the subcommittee on cultural heritage established under the PIU.

6. Measures for Ethnographic studies are conducted without the participation of affected people

We welcome the requirement of the ToR to conduct **ethnographical studies**. However, the ToR regarding this measure are top-down (only demand interviews) and make no provision for conducting the studies in a manner that involves the affected people. In the light of the ongoing political conflict in the project area, we doubt the displaced Kurds will be ready to convey family stories and lore to officials from the Turkish government. It is, therefore, doubtful that these ethnographical studies will be conducted and published in a comprehensive manner. Contested issues include traces of wars and conflicts, the population suffered throughout the 20th century (Armenian genocide, civil war between Turkish military and the Kurdish guerrillas). The lack of experts on these issues within the subcommittee established under the PIU and the Committee of Experts in charge of supervising the works, reinforce these concerns. A detailed plan of how the ethnographical studies are to be conducted and which issues they are to cover has yet to be produced.

²⁰ One complaint comes from an association of architects, lawyers, electro-engineers and civil engineers in Diyarbakir. The other one was handed in by Kemal Vuraldogan, No. 2003/1063. (Source: court in Diyarbakir).

7. Publication of the ToR and related documents lacks transparency

Finally, the **publication of the ToR and related documents is without transparency and coherence**. As of Aug, 6th, 2007, only ToR C-7 is found under the heading “Cultural Heritage TOR”. All other ToR and additional documents can only be found after an intensive search. Four ToR should have been fulfilled by 30 April 2007, but this deadline has passed without the publication of any new documents or an explanation as to why this has not happened. This makes it almost impossible for the public and independent experts to comment on the ToR.

The archaeologist Prof. Dr. Zeynep Ahunbay states on the FAM:

“The FAM [Final Assessment Meeting] document is the perfect illustration of a hastily prepared implementation program for issues of prime importance, forgetting even to include specialists in Islamic art and archaeology, not to mention the neglected Early Christian age.”

She continues: *“Certainly DSI (State Hydraulic Works) is aware of the impressive works of the past, but its priority is the dam; no sincere effort has been spent on the protection of the historic site. The disregard for the protection and saving of the splendid settlement for the future persists. The whole concept of “protection” has been reduced down to the “relocation of some monuments”, ignoring the conservation experts’ criticism.”*

5. Evaluation of ToR on water sharing

1. *ToR on contracts with riparian states*

Five ToR – three of which had to be fulfilled by Turkey prior to the ECAs approving finance – relate to downstream water flows and riparian states:

a) Conditions to be met by Turkey prior to repayment of loans to ECAs

1. “The PIU [Project Implementation Unit] will ensure that minimal water flow (measured at a suitable point close to the power plant) of 60 m³/s [cubic metres per second] during the impoundment and operation phase is maintained at all times (not only during operation of the turbines). When the responsibility for operating the plant is transferred to EUAS [Elektrik Üretim Anonim Şirketi, a Turkish electricity utility] (or any other entity designated to operate the plant) PIU will ensure, using suitable contracts, treaties or similar, that this obligation is passed on to this entity.”²¹
2. “The PIU will ensure that the time of zero flow during impoundment is kept to a minimum and not more than 3 days. Start of impoundment will not be done in dry season. If start of impoundment is planned during dry season, PIU will install diversion pipe (or other appropriate measures) necessary to keep zero flow to not more than 3 days.”²²

b) Conditions to be met by Turkey prior to approval of finance by ECAs

3. “PIU will provide a comprehensible explanation or an expert’s opinion that (a) the minimal flow of 60 m³/s over a longer period and (b) the phase of zero discharge during impoundment do not have severe downstream impacts on ecosystems and riparians.”²³
4. “A high level official of the Turkish Government (such as DSI General Director) will hand over information and printouts for the Ilisu project to the Iraqi and Syrian embassies in Turkey to be forwarded to counterparts in order for the states to improve their understanding of the project.”²⁴
5. “A high level official of the Turkish Government (such as DSI General Director) shall invite immediately the Iraqi and Syrian counterparts to Turkey (DSI) to give further information on the project if they request”.²⁵

2. *Comments*

Although the ECAs’ conditions require Turkey to *notify* its downstream neighbours about Ilisu and to supply them with the information they request on the project *prior* to approval of ECA funding, no

²¹ ECA Final Terms of Reference – Environmental Issues, E-10, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69>.

²² ECA Final Terms of Reference – Environmental Issues, E-11, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69>.

²³ ECA Final Terms of Reference – Environmental Issues, E-12, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69>.

²⁴ ECA Final Terms of Reference – Riparian States, RS-1, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69RS-1>

²⁵ ECA Final Terms of Reference – Riparian States, RS-2, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69RS-1>

obligation was placed on Turkey either to *consult* with Iraq and Syria or to *negotiate* with them. **Two of the key duties incumbent on states under international customary law have thus been omitted from the ECA conditions.**

In addition, the obligations of Turkey under the Lausanne Treaty do not form part of these conditions, placing the ECAs in breach of their own commitments under the OECD's Recommendation on Common Approaches, which, as noted (see above, p.8), require projects to comply with the laws of the host country.

Moreover, by stipulating a downstream flow rate that has already been **unilaterally** decided by Turkey, the ECAs have effectively undermined the rights of Iraq and Syria to negotiate a higher – but more “equitable and reasonable” – flow rate. From now until the end of the Ilisu project, the downstream flow of the Tigris will be “frozen” in favour of Turkey. Indeed, by binding Turkey *contractually* to the stipulated minimum of 60 m³/sec, the ECAs may be said to have prejudiced future talks between the riparian states in Turkey's favour. The future private sector operator of Ilisu may also use the contract to prevent future negotiations on downstream flow.

The downstream flow conditions are also of concern since they do not require Turkey to ensure a 60 m³/sec flow at the border with Syria, some 65 kilometres downstream of Ilisu, but rather at a “close distance to the power plant”. As such, they represent a weakening of previous commitments by the ECAs to require a “guarantee that, at any time, a minimum amount of water will be discharged **into the lower course of the river Tigris**”,²⁶ a phrase that encompasses the Tigris as a whole. Given that the concern over Ilisu's downstream impacts centres on the role that Ilisu will play in providing water for a second dam at Cizre, the current (reworded) condition is far from reassuring. Even if the condition is rigorously observed, water flow at the border could be reduced significantly once Cizre is operational. According to a review of the ECA conditions by independent hydrologists Philip Williams and Associates (PWA):

“Because of the planned construction of the Cizre Dam, which will act as a regulating afterbay reservoir to Ilisu and as an irrigation diversion structure, there is no guarantee that any minimum flow will be maintained at the border below the Cizre diversion.”²⁷

The PWA report, which is attached at **Annex 2**, also warns:

“The [condition] does not preclude the complete diversion of all summer flows during drought period before they cross the border. Even if a minimum flow of 60 m³/sec was maintained at the border it would result in a significant reduction in summer trans-boundary flows that average approximately 240 m³/sec in [the] July to September period.”²⁸

Although the ECAs have stipulated that Turkey provide evidence that the proposed minimum flow will not impact downstream, the condition is of little comfort. On the ECAs' own admission, the key baseline data necessary to make such an assessment is lacking.²⁹ Studies on existing fish species in the Tigris, for example, have yet to be undertaken. Moreover such studies would

²⁶ “Additional information on an export credit guarantee for the hydroelectric power plant Ilisu”, http://www.agaportal.de/en/portal/presse_ilisu.html, 5 December 2006.

²⁷ Philip Williams and Associates (PWA), Review of the ECA Final Terms of Reference for the Ilisu Dam Project”, 17 April 2007.

²⁸ Philip Williams and Associates (PWA), Review of the ECA Final Terms of Reference for the Ilisu Dam Project”, 17 April 2007.

²⁹ See for example, ECA Final Terms of Reference for environmental conditions, Nos E-13, E-15 and E-16, available from <http://www.ilisu-wasserkraftwerk.com/page.php?modul=HTMLPages&pid=69> RS-1.

not be completed until *after* the ECAs made their final commitment – whilst the opinion required on downstream impacts must be furnished before the ECAs’ decision.

Philip Williams and Associates also point out:

“It is likely that the reduction and alteration in flows caused by implementation of the Ilisu/Cizre project will have substantial adverse water supply, flood hazard, water quality, erosion and ecologic impacts in Syria and Iraq . These impacts have not been considered in formulating the project, designing the reservoir operation or in establishing downstream flows. No mitigation actions are required in the [Final Terms of Reference] in the event that the ‘opinion’ requested . . . confirms these predictions of adverse impacts. Nor is there a commitment to alter the reservoir operation plan developed in the 1980s to reflect new information that establishes downstream water needs.”³⁰

³⁰ Philip Williams and Associates (PWA), Review of the ECA Final Terms of Reference for the Ilisu Dam Project”, 17 April 2007.

Annex 1

E-mail by Judith Neyer, Fern, to Robert Goodland, World Bank advisor, April 26, 2007 regarding the World Bank appraisal process

Answer by Robert Goodland: RbtGoodland@aol.com

Dear Judith

Good to hear from you.

1. Yes, you are quite right. **The project-level ESIA must be ready before appraisal can be started.** Appraisal needs the ESIA, otherwise it would not be possible to appraise the environmental and social implications of the proposed project.
2. Note too that the ESIA must contain an "Environmental Management Plan" (EMP: the term varies slightly) or similar section of the ESIA, which details the preventive, mitigation, compensatory etc measures to be implemented if the project goes ahead, together with their budgets & schedule, and their training/capacity strengthening needs.
3. The appraisal process by the lender or investor focuses on the EMP in order to appraise if the prudentiary measures specified in the EMP are adequate, the budget and timetable are realistic, and that there will be enough trained personnel on hand to conscientiously implement the specifics of the EMP after training, hiring etc.
4. The USA is the biggest shareholder of the WBG. Their Congress felt so strongly that the ESIA needs to be ready in time for appraisal that in 1989 it adopted a specific law, called the Pelosi Amendment, which mandated two key points. First, the ESIA has to be ready 120 days before the project can come to a vote by the Executive Directors of the WBG. (This ensures that it will be ready well before appraisal). Second, the ESIA has to be made public 120 days before Board Vote. (ESIAs were secret before that).
5. Strictly speaking, this ruling applies only to the US vote, but it is now followed widely. The Pelosi amendment applies to the WBG, AfDB, AsDB, IDB and EBRD.

Let me know if you require amplification of the above
Best regards
Robert

Question by Judith Neyer Fern to Robert Goodland

Dear Robert Goodland,

I would like to ask for your assessment regarding a question on the WB environmental and social safeguard policies. My colleague, Nick Hildyard (cc), with whom I work on export credit agencies and environmental standards suggested I contact you.

Two weeks ago, the export credit agencies of Austria, Germany and Switzerland announced their decision to grant export credit guarantees (for an overall amount of 430 Mio Euro) to their domestic corporations' stakes in the Ilisu Dam Project, Southeast Turkey.

Earlier on the three agencies had acknowledged that the project does not meet their minimum standards, namely the 10 safeguard policies of the World Bank. However, as of February 2007, all had issued "in principle" guarantees, subject to Turkey meeting some 150 obligations and conditions, intended to

"guarantee that the planned project . . . will conform to international standards." Approx. 30 of these conditions had to be met before the ECAs give their final approval. The details of the conditions, which relate to resettlement, cultural heritage, flora and fauna studies and downstream flow, have now been made public ([www.http://www.ilisu-wasserkraftwerk.com/page.php?modul=Index&setlang=eng](http://www.ilisu-wasserkraftwerk.com/page.php?modul=Index&setlang=eng)).

The conditions include the collecting and reviewing of baseline data relating to resettlement and environmental impact studies, which suggest that no adequate EIA and Resettlement Plan exist to this day.

My understanding of the WB safeguard policies is that the draft impact assessments (in line with WB policy requirements) need to be produced by the borrower *before* project appraisal and that clearance of these plans needs to be given *prior* to final commitment. Would you kindly confirm if my understanding is correct?

Sincerely,
Judith Neyer

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Annex 2

Prof. Dr. Zeynep AHUNBAY
Istanbul Technical University
Faculty of Architecture
Department of Architecture

05 August 2007

Observations concerning the “Agreed Minutes of the Final Assessment Meeting (FAM) Regarding Ilisu Dam and Hydroelectric Power Plant Project” presented in annex to the “Recent Developments on Ilisu Hydroelectric Power Project”

The document provides information about the establishment, structure and composition of Committee of Experts (CoE) but there are questions about the quality of the teams which will carry out the excavations and the proper supervision of the activities.

The sub-committee for Cultural Heritage has the duty to supervise all works in Hasankeyf and in the Tigris area, as well as techniques that will be used for relocation (Annex 2). The proposed subcommittee is to consist of five experts, yet the listed qualifications and the responsibilities of the experts do not really match with the problems and fields of experience that is required during the preparation and implementation phases. There is no archaeologist specialized in Islamic periods, no demand has been made for a structural engineer specialized in masonry construction and there is no mention of experts in architectural conservation and restoration. Without such experts it is impossible to carry out the supervision of techniques that will be used for relocation.

Capacities of CoE is not worked out carefully to meet the monitoring duties which is defined as: “CoE will monitor all measures, investigations, relocations and rebuilding as well as the construction of the Cultural and Archaeological Park annually or semiannually” in Annex 3 under Cultural Heritage Monitoring. Monitoring function for conservation measures, investigations, relocations and rebuilding will also require experts with conservation skills and structural engineering background rather than archaeology. The frequency of monitoring seems to be quite seldom to exercise full supervision and monitoring as one can easily miss important points in following the measures taken or the mistakes in rebuilding with visits to the site once or twice a year.

Legal basis for relocation is one of the obligations to be filled by DSI (State Hydraulic Works Dept.) prior to ECA’s seeking a final commitment (Annex 4, C7) . The permission for the transfer of monuments in Hasankeyf is not yet granted by the Protection Board in Diyarbakır. What is more important is the fact that the historic city of Hasankeyf is a Grade I archaeological site, currently under protection by the Turkish Law on Cultural Heritage. According to the legal procedure in force, it is a criminal act to damage a listed site. Under these conditions, the DSI has two problems: 1) to provide the legal basis for the relocation of some monuments, 2) to leave a substantial part of the historic town to vanish under the dam lake.

In conclusion, we think that the spirit of “FAM” and its annexes 1-3, regarding the cultural heritage reflect insensitivity towards history and cultural heritage which was visible from the start of the dam project in 1950’s. According to international conventions, any large scale project, (dams, streets, subway tubes) within a historical site must pay due attention and respect to existing monuments, archaeological entities etc. In the case of Hasankeyf, the site under risk is a big and ancient city with many layers and important monuments.

Certainly DSI (State Hydraulic Works) is aware of the impressive works of the past, but its priority is the dam; no sincere effort has been spent for the protection of the historic site. The disregard for the protection and saving of the splendid settlement for the future persists. The whole concept of “protection” has been reduced down to the “relocation of some monuments”, ignoring the conservation experts’ criticism regarding the technical problems related to moving monuments or comments about the negative effects of disrupting the historical buildings from their original natural and built environment, stressing the fact that such interventions will result in the loss of meaning and authenticity of the monuments.

Hasankeyf is a vast archaeological settlement, horizontally and vertically. The fact that most of this historical evidence will be flooded by the lake of Ilisu Dam if the Project is realized is never mentioned in “FAM” and relevant documents. The FAM document is the perfect illustration of a hastily prepared implementation program for issues of prime importance, forgetting even to include specialists in Islamic art and archaeology, not mention the neglected Early Christian age. It seems there is an intention to create an impression of efficiency by a multitude of lists, documents, and by using pretentious terms such as “monitoring”, “stress analysts” etc. so that DSI can convince the people concerned to step into this destructive and problematic adventure.

Note on Ilisu Dam project/South-eastern Anatolia Project (“GAP”)

1. In April 2000 we provided a legal opinion to Friends of the Earth, a copy of which is attached. In that opinion we examined the scope of Turkey’s international legal obligations to notify, consult and negotiate with its downstream neighbours about the project for the proposed Ilisu barrage. These obligations arise under the international law on watercourses and under international environmental law and reflect the principle of “good neighbourliness”, as set out in Article 74 of the United Nations (UN) Charter and in the dictum of the ICJ that the principle of sovereignty embodies “the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states”.¹
2. We understand that there is renewed effort to seek international financial support for the Ilisu barrage, and have been asked by the World Economy, Ecology and Development group (WEED) whether our opinion has materially changed since 2000. It has not. Over the past seven years the rules of international law governing the non-navigational uses of international watercourses have, if anything, been confirmed and strengthened. The draft Articles on State Responsibility have been completed and adopted by the International Law Commission (in 2001), and many of its provisions have since been referred to in case-law as reflecting general international law: see e.g. the recent decision of the International Court in the *Bosnian Genocide* case (26 February 2007) with regard to Article 16 on complicity.
3. We note that Turkey has not signed the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses. This does not mean that Turkey is not bound by those principles set out in the Convention which reflect

¹ *Corfu Channel Case* (UK v Albania), 1949 ICJ Reps 4, 22.

general obligations on all states under customary international law. Of particular importance are: Article 5(1), which provides that “watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner” (emphasis added); Article 7(1), which provides “watercourse states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states”; Article 11, which provides “watercourse states shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse”; and Article 12, which provides that “before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable to notified states to evaluate the possible effects of the planned measures”.

4. These provisions are underpinned by what the ICJ has referred to as the principle of the “perfect equality of all riparian states”, which extends to “the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others”². All States, including Turkey, are under a clear legal obligation to *notify*, *consult* and *negotiate* with other riparian neighbours, whether downstream or upstream States.
5. We have been provided with only limited information, and are therefore not able to express a view on the extent to which Turkey has complied with these obligations. Nevertheless, to avoid difficulties it will be prudent for any financial institution that is considering whether to provide support for the project (including in the form of financial guarantees to those investing in the project) to satisfy

² The principle was invoked by the Permanent Court of International Justice in the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder* See Territorial Jurisdiction of the International Commission of the River Oder, Judgment no. 16, 1929, PCIJ, series A, no.23, page 27.

itself that Turkey has complied with its obligations under the law governing non-navigational uses of international watercourses. In particular, appropriate efforts should be taken to be satisfied that Turkey has provided full information to Syria and Iraq in advance of a decision to proceed, and that Syria and Iraq have been provided with an opportunity to set forth their views and, as necessary, to participate in meaningful and good faith consultations. Such consultations should allow for an exchange of views in which no party has closed its mind as to the concerns of the other.

6. Finally, as expressed in our previous Opinion, the possibility cannot be excluded that a State agency or instrumentality which provides financial support to a project that violates a rule of international law can itself give rise to the international responsibility of the State of which the public body forms a part. This principle is now set forth in Article 16 of the ILC Articles (Aid or assistance in the commission of an internationally wrongful act), which provides:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.”³

7. As we indicated previously, the provision of financial support by an agency of a State could constitute aid or assistance in the commission of an internationally wrongful act, namely the violation of rights of notification, consultation and negotiation of a downstream riparian State.

³ See also the Commentary to the ILC Article 16 on State Responsibility, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. In its Judgment of 26 February 2007 in the Case Concerning the Application of the Convention on the Prevention and Punishment (Bosnia and Herzegovina v. Serbia and Montenegro), the International Court of Justice stated that Article 16 reflected customary international law: Judgment, para. 420.

2 March 2007

Professor Laurence Boisson de Chazournes
(University of Geneva)

Professor James Crawford SC
(University of Cambridge and Matrix Chambers)

Kate Cook, London
(Matrix Chambers)

Professor Philippe Sands QC, London
(University College London and Matrix Chambers)

4/17/07

Mr. Nicholas Hildyard
The Corner House
Station Road
Sturminster Newton
Dorset DT10 1 YJ
United Kingdom

Subject: Review of ECA Final Terms of Reference for the Ilisu Dam Project
PWA Reference #: 06-006

Dear Mr. Hildyard:

As you requested, we have examined the Final Terms of Reference [FTR] for the Ilisu Dam Project, as posted on the project's website as of today (<http://www.ilisu-wasserkraftwerk.com>). You requested our opinion regarding the adequacy of these terms, if enforced, to prevent or mitigate the adverse hydrologic, geomorphic, and water quality impacts we had previously described in our report of February 20th 2006 entitled; "A Review of the Hydrologic and Geomorphic Impacts of the Proposed Ilisu Dam". The subject of our 2006 review was of the design and operation of the Dam and Reservoir as described in the Updated Environmental Impact Assessment Report [UEIAR] of 2005 prepared by IEG. The following summarizes our review of FTR within the context of our previous conclusions.

In our report we had concluded:

3. The UEAIR does not include any specific commitment to maintain a minimum flow level downstream. However, it does recommend an operational policy be adopted to release a minimum monthly average flow of 60 m³/s at the downstream border during operation of the dam [p4-18].

The FTR [E-10] now provides for minimum flow releases from the dam of 60 m³/ sec at all times. However, this flow would be measured at a 'close distance to the power plant' not downstream at the Syrian border 65 km away. Because of the planned construction of the Cizre Dam, which will act as a regulating afterbay reservoir to Ilisu and as an irrigation diversion structure, there is no guarantee that any minimum flow will be maintained at the border below the Cizre diversion.

6. The operation of the Ilisu Dam in combination with diversions from the future downstream Cizre project would probably significantly reduce summer flows in Syria and Iraq below historic levels. It is likely that a significant portion of the recommended minimum flow release from Ilisu of 60 m³/s during dry years would be diverted. It is even possible that with full implementation of the Ilisu/Cizre projects, during drought periods, all the summer flows could be diverted before it crossed the border.

The FTR [E-10] does not preclude the complete diversion of all summer flows during drought period before they cross the border. Even if a minimum flow of 60 m³/sec was maintained at the border it would result in a significant reduction in summer trans-boundary flows that average approximately 240 m³/sec in the July to September period.

9. The UEIAR acknowledges that the peaking power reservoir releases will cause river level fluctuations of up to 7 meters in a few hours destabilizing river banks up to 50 kilometers [Encl.1, p38 and p60].

Until the Cizre regulating reservoir is constructed downstream the peaking power operation will result in flow fluctuations between 60 and 1,400 m³/sec. This would cause stage fluctuations of approximately 7 meters over a few hours.

15. High levels of nutrients from sewage and agricultural runoff will cause eutrophication and anoxic conditions in the reservoir [pEXE-10]. The constructed and planned sewage treatment plants will not significantly reduce these levels [p4-39, p4-42].

Although sewage treatment plants are now required prior to dam operation [E-2] all other measures to address nutrient and pollutant inputs to the reservoir are deferred to later implementation [such as E-7], to further study [such as E-3b], or undefined future mitigation measures [such as E-4b]. Even if present nutrient inflow levels were maintained the reservoir would likely create anoxic and eutrophication conditions adversely affecting downstream water quality.

18. Downstream water supply in Syria and Iraq could be significantly affected by both reduction in summer flows and deterioration in water quality.

The FTR [E-12] makes no provision for any systematic analysis of actual downstream flow needs, instead requires an opinion that flows of 60 m³/sec “do not have severe downstream impacts”. It is likely that the reduction and alteration in flows caused by implementation of the Ilisu/Cizre project will have substantial adverse water supply, flood hazard, water quality, erosion and ecologic impacts in Syria and Iraq, as documented in the UEIAR and our 2006 report. These impacts have not been considered in formulating

Mr. Nicholas Hildyard

4/17/07

Page 3

the project, designing the reservoir operation or in establishing downstream flows. No mitigation actions are required in the FTR in the event that the “opinion” requested in E-12 confirms these predictions of adverse impacts. Nor is there a commitment to alter the reservoir operation plan developed in the 1980’s to reflect new information that establishes downstream water needs [RS-2].

Sincerely,

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