CRITICAL ASPECTS OF CURRENT MINERAL RESOURCES GOVERNANCE IN GEORGIA

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INTRODUCTION

Georgia's territory is diverse in its structure and history of geological development. This determines mineral deposits diversity. Of the numerous deposits identified on the Georgian territory only oil, coal, manganese, nonferrous and rare metals, mining and chemical raw materials, inert materials and some others are of commercial significance. Large deposits of mineral resources not found in Georgia. All minerals here can be found in deposits of small and medium sizes. Pursuant to 2010-2013 National Report on State of Environement solid mineral resources fund of Georgia includes 960 deposits, of which the most important are: metal ores - Chiatura manganese and Madneuli (Bolnisi) complex ores. Almost equally important are zeolite-containing non-metallic mines (Dzegvi, Thedzami, Akhaltsikhe etc.) and construction and facing materials.

Table 1: Mines, registered with mineral resources fund[1]

Types of mineral resources	Established reserves
Metals (ferrous, non-ferrous, noble, rare)	419,965 thousand tons
Solid fuel resources	
Coal	373,934 thousand tons
Peat	47, 644 thousand tons
Facing stones	
Gabbro	7,224 thousand m³
Gabbro-diorite	5,952 thousand m³
Sienite	660 thousand m³
Granite	5,400 thousand m³
Breccia	14,938 thousand m³
Dacite	2,289 thousand m³
Teschenite	6,165 thousand m³
Diabase	10,741 thousand m³
Basalt	45,052 thousand m³
Dolerite	19579 thousand m³
Marble	4,259 thousand m³
Marble-like limestone	78,026 thousand m³
Raw chemical industry materials	
Barite	4,731 thousand m³
acid-fast andesite	12,717 thousand m³
Mirabilite	1,493 thousand m³
Bentonite	6,418 thousand m³
Mineral pigment	437 thousand m³
Talc	2,774 thousand m³
Calcite	27,211 thousand m³
Bergmeal (Diatomite)	7,995 thousand m³
Raw material for ceramic production	
Ceramic clay	2,504 thousand m³
Trachute	945 thousand m³
Gypsum with clay	2,232 thousand tons

Types of mineral resources	Established reserves
Building materials	
Shingle	459221 thousand m³
Sand gravel	658,487 thousand m³
Brick clay	135,207 thousand m³
Chalk	3,962 thousand m³
Furnace limestone	292,173 thousand m³
Gypsum	20,342 thousand m³
Cement clay	64,070 thousand m³
Cement limestone	392,014 thousand m³
"Gadji" (plaster)	14,917 thousand m³
Roof shales	11,796 thousand m³
Light fillers	220,323 thousand m³
Wall stones	4,898 thousand m³
Quartz sand	168,804 thousand m³
Perlite	13,500 thousand m³
Feedstock for metallurgy	
Dolomite	44,904 thousand tons
Refractory clay	91,636 thousand m³
Molding sand	2,300 thousand m³
Spongolite	1,957 thousand m³
Limestone flux	1,700 thousand tons
Stocks of industrial materials	
Casting basalt	9,892 thousand m³
lithographic stone	120 thousand m³
Semiprecious stones	920 tons
Raw materials for agriculture	
Peat	41,880 thousand tons
Zeolite	30,381 thousand tons
Gypsum with clay	3,460 thousand tons

Natural resources, including mineral resources are usually associated with material wellbeing all over the world, and at the same time are linked to some contradictory issues. On the one side it is a source of income and new job-opportunities, and on the other hand may have long-term adverse impact on local population and the environment.

[1] Source: 2010-2013 National Report on State of Environment

Table 2. Basic economic indicators of the mining industry in Georgia[2]

	2011	2012	2013	2014	2015
The number of registered enterprises	967	1070	1174	1245	1301
Turnover, million GEL	313,8	283,8	288,5	357,8	571,5
Production, million GEL	329,1	364,4	325,3	402,2	652,7
Added value, million GEL	167,7	178,6	153,1	172,7	244,9
Intermediate consumption, million GEL	161,4	185,7	172,2	229,6	407,8
Total cost of production and sales, million GEL	267,9	310,5	279,7	350,3	581,3
Overall accrued financial results (profit + loss), million GEL	33,7	-23,2	196	29,5	-3,7
Capital assets	11,3	192,9	183,9	185,0	295,6
Number of employees, persons	5884	7157	6353	7006	8120
The average monthly salary, GEL	838,6	874,5	893,1	902,8	1047,4[3]

Extraction of minerals has a huge impact on the environment. Wide scale mining is usually linked with deforestation over large areas and devastation of the land fertile layers. This changes the landscape significantly and influences biodiversity; pollution of underground and surface water, and soil; change of social environment. The changed social and natural environment impacts local population and often creates conflict situations e.g. where mining activities spread over agricultural areas, or drinking and irrigation water is polluted etc.

According to 2012-2016 National Environmental Action Programme of Georgia, country faces two basic problems linked with the use of mineral resources. These are: existing abandoned mining sites and unsustainable mining practices.

“The abandoned mining sites cause environmental problems as chemicals (for example, arsenic and mercury) contaminate soil and (ground) water. These problems may pose a direct threat to human health in nearby communities or to downstream water users. The responsible owners of these mining sites are often untraceable, leaving the state with an environmental liability that requires costly clean-up. In most cases, the site also poses a threat to the biodiversity and natural resources of the region.

Ongoing extraction practices jeopardize the environment, due to the lack of proper mining practices and adequate policy. The use of old technology, old equipment, open use of chemicals and unprotected mineral waste dumps are some examples of these unsustainable practices, which lead to land degradation, water pollution (freshwater and groundwater) and soil contamination. These practices may also lead to a change of geological conditions, anthropogenic disasters and damaged landscapes long after extraction. The absence of legal requirements for conducting an Environmental Impact Assessment (EIA) for mining activities contributes to unsustainable mining practices. The Technical Report responsible for describing the process for mineral extraction is developed just after the license is issued,

[2] Source: Georgian National Reports 2015 (statistical digest), Tbilisi, 2017 p. 136

[3] According to 2015 data, average monthly salary at big enterprises is 1289,3 GEL, medium-size enterprises - 762,3 GEL, small enterprises - 528,3 GEL. One may assume that high wages at big enterprises are due to averaging disproportionally high salaries of the management and low salaries of the workers. Respectively the statistics does not reflect the real situation in terms of average salaries.

which limits the possibility of the inclusion of environmental concerns at an early stage of designing the mining process."[4]

According to the same Program the following targets have to be reached in order to resolve the above problems:

Target 1. Clean-up of abandoned mining sites. According to the program priority should be given to mining sites that represent a direct threat to human health, either nearby or downstream of polluted streams. Where urgent measures are required, containment of pollution within the premises of the site is of primary concern.

Target 2. Introduction of sustainable practices for existing and new sites "Georgia should develop a framework for the sustainable extraction of mineral resources as a basis for the approval of requests for an extraction license. The management plans shall include the arrangements for sustainable extraction of mineral resources and mines management. And the license conditions shall include mandatory re-cultivation so that the abandoned mines, after the developers leave them, do not continue damaging the environment and human health. Efficient monitoring of mining activities under the existing license is necessary in view of the above"[5]

Actually there are much more and difficult problems in mining sector in Georgia that need to be addressed urgently.

In this report we will review the problems in mineral resources management that we deem are not properly studied and realized by Georgian government, and create significant barriers to proper management of mineral resources and the country's sustainable development. This report does not refer to oil and gas resources because this sector is managed under different model.

LAW OF GEORGIA "ON SUBSOIL"

Georgian legislation on subsoil comprises the Law of Georgia "On Subsoil" and proceeding from it acts of law, regulating study and use of subsoil, all kinds of minerals, natural underground cavities, and relations arising in the process of utilization, storage of waste from mining and manufacturing industries (including removable layers), and from buildings construction and operation. As mentioned above, the use of oil and gas resources is managed under different model and, respectively, governed by different law - law of Georgia "On Oil and Gas".

Law "On Subsoil" was adopted in 1996 and is one of the first laws in environmental sector which is in force to date.

According to the Law of Georgia "On Subsoil"[6] mineral resources located on land, territorial waters, continental shelf and special economic zone of Georgia is Georgia's national wealth

[4] National Environmental Action Programme of Georgia 2012 - 2016
http://www.preventionweb.net/files/28719_neap2.eng.pdf

[5] ibid.

[6] Law of Georgia "On Subsoil", 17 May 1996 https://matsne.gov.ge/ka/document/view/33040

and protected by the state of Georgia". The law establishes the status of minerals - it is state property. Any action, directly or indirectly threatening the state's property right is prohibited. Land ownership does not mean and does not provide for the right to subsoil.

In accordance with Article 3 of the Law, mineral resources located on land, territorial waters, continental shelf and special economic zone of Georgia constitute unified state fund of Subsoil, and management rules shall be approved by Georgian government. Before 2013 amendments to the law[7], the same Article provided that the statute of the state fund of subsoil would be approved by the President of Georgia. Both provisions allow for an assumption that the fund (now unified state fund of subsoil) has some institutional structure with management regulations, to be approved, previously by the President, and now by the government. It should be mentioned that this provision of the law has never been satisfied.

Also, never was satisfied the requirement of Article 4 of the Law, providing that "based on their commercial importance, minerals shall be divided into three groups: of special state importance, state importance and local importance. The rules of establishing the groups and the list shall be approved by Georgian government." It is noteworthy that changes to this article were introduced three times throughout the existence of the law - each time new institution was appointed responsible for grouping minerals and approving appropriate list.

According to the Law on Subsoil public administration of the use of subsoil is carried out through assessment, licensing, monitoring and supervision. Under the law Ministry of Environment and Natural Resources Protection, and its appropriate agencies carry out public administration of subsoil use within their competence.

The Law establishes the agency to carry out state control over subsoil use, this is Department of environmental surveillance - a public institution under the Ministry.

The Law does not establish an agency responsible for subsoil use registration and licensing. The Law of Georgia "On Licenses and Permits", which defines the general rules of issuing licenses, also does not establish a specific agency issuing subsoil use licenses. A public agency, responsible for issuing subsoil use licenses, is established under Georgian Government Resolution # 136 of 12 August 2005 "On approving the regulations on rules and terms of issuing licenses for subsoil use". According to these regulations public institution responsible for issuing license for subsoil use is National Environment Agency - a LPPL at the Ministry of Environment and Natural Resources Protection. And in the cases provided for by government decree "On delegating powers of issuing the license for subsoil use to Ministry of Finance and Economy of Ajar Autonomous Republic" - responsible institutions is Ministry of Finance and Economy of Ajar Autonomous Republic.

Subsoil Law defines: types of subsoil use for which a license / permit is needed; maximum license validity periods, rights and obligations of the subsoil user and the conditions of cancellation of license.

The law "On Subsoil" contains a very controversial, in terms of subsoil information ownership, Article. In particular Article 29 provides that "information about the geological structure of the subsoil, the reserves and resources, mining and processing factor, and

[7] Law of Georgia "On amadments to Law On Subsoil" 25 March, 2015
https://matsne.gov.ge/ka/document/view/1887171

other characteristics and parameters is the property of an entity, at whose expense it is acquired. According to the Law "On Subsoil" "Georgian legislation protects the ownership of the information on mineral resources and geological or other information on subsoil and minerals. Issuing information stored in data warehouse to other legal or natural persons is impermissible without the owner's consent."

Inconsistency of Article 29 of the law "On Subsoil" with Georgian constitution, and the barriers that this provision creates in terms of accessibility of public information, are extensively reviewed in "problems of accessibility of subsoil information" chapter of this report.

Another noteworthy article of the law "On Subsoil" is Article 39 "on rules of construction in the minerals' location area" which provides: "if the construction in mineral's location area (on land owned by subsoil fund) substantially limits or prevents the use of mineral resources, the rules and procedures stipulated by this law, and the law "On Procedures for Deprivation of Property for Urgent Public Needs" shall apply. It should be mentioned that this provision was added to the law under 2005 amendments and changes to it. At the same time appropriate changes were introduced[8] to the law "On Procedures for Deprivation of Property for Urgent Public Needs" and "extraction of minerals" was added to the list of activities, the implementation of which may be considered "urgent public need" and cause the need for expropriation.

2005 changes to the Law "On Subsoil" and the Law "On Procedures for Deprivation of Property for Urgent Public Need" serve to the creation of favorable conditions for mining industry projects. As a result of the above reform mining industry projects were exempt from the obligation to conduct EIA before the start of work and the acquisition of environmental permit (see chapter "mining without Environmental Impact Assessment and public participation").

Conclusions and recommendations

Georgian legislation, governing the subsoil use contains many shortcomings and contradictory provisions. For many years changes and amendments to regulatory acts were introduced thoughtlessly, ignoring the context, and without public participation, which resulted in notable weakness of the law governing this sector of economy. Subsoil-related legal acts require profound changes which shall become subject of public debate. At the same time we think there are issues needing to be addressed urgently due to their topicality and controversial character. In particular:

- restrictions provided for under Article 29 of the law on subsoil concerning the release of subsoil-related information shall be lifted; in particular the following sentence "Issuing information stored in data warehouse to other legal or natural persons is impermissible without the owner's consent".

- the provision under Article 39 of the law "On Subsoil", according to which deprivation of

[8] Law of Georgia "On Amendments to Law On Procedures for Deprivation of Property for Urgent Public Needs", 22 April, 2005 https://matsne.gov.ge/ka/document/view/29428

property is possible for the sake of subsoil use, shall be lifted. Besides, the list of activities that may lead to "urgent public need' of expropriation under the Law of Georgia "On Procedure for Deprivation of Property for Urgent Public Need", shall be revised. In particular "extraction of minerals" shall be removed from the list, because this is commercial activity, aiming, primarily, at making profit and, thus cannot serve to achieving public welfare. When exercising this activity "urgent public need" for expropriation may emerge only in a special case of urgent necessity - in that case, if the activity is to avoid certain negative outcomes to the public and harm reduction.

MINING WITHOUT ENVIRONMENT IMPACT ASSESSMENT AND PUBLIC PARTICIPATION

Mining has a huge impact on the environment. Wide scale mining usually linked with deforestation over large areas and devastation of the land fertile layers. This changes the landscape significantly and influences biodiversity; pollution of underground and surface water, and soil; change of social environment. The changed social and natural environment impacts local population and often creates conflict situations e.g. where mining activities spread over agricultural areas, or drinking and irrigation water is polluted etc. Even in the case of best managed mines there is certain negative impact. However, it is possible to bring this impact to a minimum, if mining companies operate on the best standards. Unfortunately mining companies' liability issue is not always provided by law, or there is weak control over fulfillment of the law requirements, especially when it comes to developing countries. It is very important that local population is informed on what kind of mining activity is carried out, or planned near their place of residence, how does it impact the environment and human health, what obligations the companies have to the population, what legal problems and threats may they face (e.g. related to deprivation of property) etc. There is an instrument to insure all the above and it is Environmental Impact Assessment (EIA).

Rules for issuing licenses for the use of mineral resource

Rules for issuing licenses for the use of mineral resources changed several times in recent 20 years. Most of the changes provided for changing the agency authorized to grant the right of use. Different agencies enjoyed the right of issuing license for the use of minerals in different periods of time - Ministry of Environment and Natural Resources Protection (1996-2008 and 2013 until now), Ministry of Economy and Sustainable Development (2008-2011) and LPPL "Agency for the Protection of Natural Resources" (2011-2012); however these changes did not much effect the terms of the license; neither did it cause any improvement or deterioration in the decision making process. The most important change was the one that followed the adoption of the "Law on licenses and permits" in 2005, according to which the rules for issuing licenses for the use of mineral resource changed dramatically. In particular, it became possible to buy the license for the use of mineral resource at an auction without any additional conditions. Besides, the use of mineral resources, in contrast with previous rules, does not need the EIA.

Regulations that were in force until 2005

Rules for issuing licenses for the use of mineral resource were provided under the Law of Georgia "On Subsoil", according to which the license would be issued on tender basis and at an auction. A person interested in acquiring the license for use of mineral resources would make an application to the Ministry of Environment and Natural Resources Protection indicating: the type of use of natural resources and parameters; the applicant's financial, technical and technological capacities; previous activities, including the list of the countries where it carried out its activities during recent 5 years; general information on the requested area; short geological characteristics and the land owner's preliminary consent to the conditions of use of land for mining. Applications for participation in the tender (subsoil use project) would be considered by interagency council of experts with the Ministry to take the decision on the winner. The declared precondition for winning the tender was: compliance with the terms of tender and the proposal of economically acceptable and feasible technical solutions that would meet the requirements of mineral resources and environment protection. If proposals submitted to the tender equally met the terms of competition, an auction would be held to determine the winner. However, this did not mean that the licensee had the right to use mineral resources. Licensee had to obtain Environmental Permit. Under the law "On Environmental Permits" use of mineral resources (processing of mineral deposits) was included in the list of activities needing environmental permit. The activities related to the study and processing of minerals, by its ecological, social and economic implications was divided into two categories. The first category included the activities that, "in its scale, location and maintenance, could cause significant and irreversible adverse impact on the environment, natural resources and human health" and covered: extraction of mineral resources (except for the activities included in the second category) and enrichment of mineral raw materials; construction of above-ground and underground structures associated with mining and mineral processing; deep drillings, especially for the extraction of thermal waters of deep circulation; collection of excavations and works related to their disposition. The second category involves the activities, which because of size, nature or location are likely to have adverse effects on the health of humans or on the environment of that region, where the activity is proposed to be implemented: Extraction of mineral resources and works for prospecting of minerals; Exploitation of small quarries of building, inert and decorative materials (up to 100 000 tons per year) and prospecting works; Prospecting and drilling of fresh drinking and mineral waters.

It was the developer's responsibility to arrange and perform the Environment Impact Assessment for the planned activity.

The law provided for a three-month period to verify the quality of the EIA report (i.e. for the state ecological examination) and the decision to issue an environmental permit for the activities included in the first category, and two-month period - for activities of the second category. Environmental permits were issued by public administrative proceedings - this method allows the public to participate in the decision-making process. At the time the procedure for public participation was as follows:

Ministry of Environment and Natural Resources Protection, within 10 days after registration of an application for a permit (including the EIA report) was obliged to:

A) Publish in the media information about planned activities, time and venue for public review;

B) Ensure accessibility for the public of the EIA report for the whole period of the discussion;

C) Accept and review the comments in writing within 45 days after the information had been published;

D) Carry out a public review not later than two months after the submission of application.

The above system also allowed that the developer, prior to submitting the application to the Ministry (i.e. prior to initiating the decision-making administrative procedure) would carry out public review to hear the comments on the EIA report.

At a time when the above system was in force 222 licenses were issued, of which only 61 are still valid (55 were revoked, and 106 - expired).

Regulations in force since 2005

As mentioned above, the 2005 law "On Licenses and Permits" dramatically changed the environment protection and natural resources management sector. The very fact of introducing a new terminology acquired some symbolic value - the term "environmental permit" was replaced by "Environment Impact Permit", since the new statutory system increases environmental degradation risks, rather than opportunities for environment protection. And what is most important, as a result of the enactment of the law "On licenses and permits" in 2005 one of the most harmful to the environment and human health activity - extraction of mineral resources (except oil and gas[9]) - does not need Environment Impact Assessment and any counseling with the community concerned. The mining licenses are issued in the auction procedure. Respectively, under the bidding procedure, the license for the use of mineral resources shall be issued on the basis of undertaking obligation to fulfill the established norms and procedures, and proposing the highest prices (however, competition is rarely seen at auctions of this type).

The ground for starting the auction proceedings to sell the license on the use of mineral resource shall be the license applicant's application and the licensor's initiative. In both cases the decision shall be taken by a simple administrative proceeding - this regulation does not provide for public participation in decision making. According to General Administrative Code of Georgia, the ministry is obliged to get involved a person concerned in administrative proceedings only in the case, if this person somehow (this may be only his assumption, or information obtained from personal contacts in the ministry, because the Ministry is neither obliged, nor has a good will to make an announcement on initiating administrative proceedings) learned about the planned administrative proceedings and appealed to the Ministry with a request in writing to participate in the proceedings.

Besides, the Ministry is only obliged to publish the text of the decision. In particular, under 2011 amendments introduced to the Law of Georgia "On Licenses and Permits" Ministry of Environment and Natural Resources Protection is obliged[10] to publish the data on issuing

[9] A national regulation on performing oil and gas operations (2002) provides for the preparation of EIA and its submission for approval to the State Agency for Regulation of Oil and Gas Resources. In addition, the same Act provides for public information and participation, although specific procedures have not been established, limited to generalities.

[10] Law of Georgia "On licenses and Permits", Article 36, Para 5.

of the license, make changes into, and revocation in the official gazette “Sakanonmdeblo Matsnce” (Legislative Messenger) within 10 days from making the decision. However the Ministry fails to comply to this law requirement - “Georgian legislative Messenger” publishes only decisions on exemption from license, and introducing changes to the license.

The foregoing clearly indicates that the government, for unknown reasons, considers it possible to decide on the sale of licenses for mining minerals without assessing possible threats to the environment and human health, and planning activities for their avoidance and / or mitigation. Besides, the government fully liberated itself from duties to ensure public participation in decision making process. Currently, the Ministry’s public relations duties are limited to the publication of information on already made decision within 10 days period.

4 751 licenses for the use of mineral resources were issued under the regulations described in this chapter (i.e. without EIA and public participation in decision making process). For example, in 2006 the license for manganese mining in Chiatura - the most ambitions in terms of its duration and license area - was issued under this regulation. The license is valid until 2046; the license holder has the right to production on 16 430 hectares in Chiatura (license area includes the city of Chiatura) and Sachkhere regions. Also under this regulations 45-year license for coal mining in Tkibuli and Ambrolauri regions was issued in 2007 etc.

Requirements of the Aarhus Convention

It is noteworthy that in the period of both rules the Aarhus Convention[11] “On access to information, public participation in decision-making and access to justice in environmental issues” was in force in Georgia. The Convention provides that public agency shall ensure public participation in decision making on the activities listed in Annex 1[12], and the activities that, in accordance with national law are considered to have the most negative impact on the environment. The Convention establishes the basic principles of public participation, in particular:

- Not only parties concerned but the public concerned shall have the opportunity to participate in decision making;
- Early public participation shall be ensured, when all options are open and effective public participation can take place;
- Reasonable deadlines shall be set for public participation
- The public concerned shall be informed in an adequate, timely and effective manner
- Time-frames sufficient for effective participation should be fixed;
- Draft rules should be published or otherwise made publicly available;
- Procedures for public participation shall allow the public to submit any comments, information, analyses or opinions that it considers relevant to the proposed activity.

[11] In 1998 Georgian Government signed in Aarhus (Denmark) the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters". On 11 April 2000 Georgian Parliament ratified the Convention, and 30 October 2001 the Convention entered into force in Georgia. This means that from that date the requirements of the Convention prevail over national statutory acts.

[12] Among the activities, listed in Annex 1 of Aarhus convention are "quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares"

- The decision making body shall ensure that in the decision due account is taken of the outcome of the public participation.
- When the decision has been taken, the public shall be promptly informed.

It is noteworthy that the Aarhus Convention provides for so called "lower barrier" for public participation in decision making, the parties to the Convention shall endeavor to develop the legislation setting standards higher than those provided for by the Convention. Regrettably, in the case of Georgia, all happened quite the contrary. In 2005 Georgian Parliament passed the law "On Licenses and Permits", according to which environmental protection and management of natural resources, without exception, are regulated by the general rules. Thus, instead of improving the procedures for public participation in decision-making, it was altogether waived.

Steps made to improve the situation

To address the deficiencies in the system of environmental impact assessment and to bring it into line with European legislation and international requirements, different donors have been providing assistance to Georgia since 2002. Several training sessions, work-shops, discussions, training tours to Europe were held with the help of donors; besides, thematic (related to certain activities) tutorials on EIA were developed; in 2005-2006 even the new draft law was designed (which, regrettably, did not reach even the stage of review at interagency council). Regardless all these initiatives, neither executive, nor legislative bodies made any effort to improve virtually destroyed and profane system. Although the failure of this system is recognized at all levels, the rhetoric still is that state regulation of activities and public participation in decision making are an obstacle to investments as they are time-consuming and require physical resources. Thus, "regulation" and "participation" shall be weak, or not exist at all. The issue is particularly topical when it comes to the environment, health and labor protection. One may say, that all the donors' efforts to improve the EIA system are confronted with an obstacle, called absence of political will of the government establish democratic institutions and procedures (though officially declared the opposite).

In the beginning of 2015 Ministry of Environment and Natural Resources Protection made public a new draft statutory act - "Code of Environmental Assessment". The draft provides for a number of significant changes, including mandatory preliminary assessment of the impact of mining on the natural and social environment and public participation in decision-making. Although the project review was carried out not quite perfectly, and outstanding issues on the content remain, the initiative itself is only commendable. Regrettably, the code outcome, as well as the time of project initiation, is still unknown.

Conclusion

Legal analysis of the obligations undertaken by Georgia and the national legislation, as well as the monitoring of the decision making process for issuing licenses for mining operations suggest that the procedure needs fundamental and urgent change. In particular, we believe that mining operations should be subject to Environmental Impact Assessment/ecological expertise, and public participation in the decision making process be ensured.

PROBLEMS ASSOCIATED WITH THE AVAILABILITY OF INFORMATION ON MINERALS

"Everyone shall have the right to receive complete, objective and timely information as to a state of environment"
Article 37, Georgian Constitution, 1995

The 1996 law of Georgia "On Environmental Protection" sets the mechanisms to protect basic human rights provided by the Constitution of Georgia in the scope of environmental protection. Under this law National State of Environment (SoE) Report shall be the basic source to inform the public on the state of environment. Until 2007 the law required from Ministry of Environment and Natural Resources Protection to issue the National State of Environment Report yearly. As a result of 2008 amendments to the law the Ministry shall develop the SoE Report every three years. However, the latest report, approved in 2011, provides information on the state of the environment in 2007-2009. Since then the report, and accordingly the information on the state of environment of the country was never published.

According to the General Administrative Code of Georgia, since 1 September 2013, a public agency shall proactively provide access to public information, i.e. the information of public interest, by posting it on E-resources.

Georgia committed to provide access to maximum environmental information (without request) in 2000 when ratifying the Aarhus Convention "On Access to Information, public participation in Decision-making and Access to Justice in Environmental Matters".

Notwithstanding the foregoing, it is virtually impossible to find any information on mining practices and its impact on the environment. It is noteworthy that information availability problem is not only due to the information shortage, but also due to one of the provisions of the law of Georgia "On Subsoil", according to which "The information on geological structure of subsoil, its reserves and resources, mining and technical terms of subsoil treatment and other properties and parameters is owned by the entity at whose expense the information was obtained". It should be mentioned herewith that Ministry of Environment and Natural Resources protection does no develop information on the state of subsoil and the only source of information in this matter are the reports by subsoil users (prepared at their own expense), which are not publicly available.

Environmental Information

According to the Law of Georgia "On Environment Protection"[13] is recorded information, in any form, in any of the following areas:

- the state of elements of the environment and their interaction (air, water, soil, land and landscape, natural sites, including swamp, coastline and water space, biodiversity and its components, GMOs);

[13] Law of Georgia No. 519 of 10 December 1996. The Aarhus Convention, which is in force in Georgia since 2001, contains similar definition.

- Factors (energy, noise, radiation, discharges, emissions, waste, including radioactive waste, chemicals) which affect or presumably will affect the environment);
- Measures and activities affecting the environment (e.g. policies, legislation, plans, activities, environmental agreements); cost benefit and economic analyses of these measures and activities;
- Reports on implementation of environmental legislation;
- Effects of the environment on conditions of human life and security including contamination of the food chain, living conditions, cultural facilities and related buildings.

All the above contains information which, according to the Law on Environmental Protection, the General Administrative Code of Georgia, the Convention "On Access to Information, public participation in Decision-making and Access to Justice in Environmental Matters", and most importantly the Georgia Constitution, is open and shall be available to the public. In fairness it should be noted that such information in fact is available to the public, if it does not contain commercial, personal or state secret[14] (regrettably only at request, and not proactively). However the only exception to this positive practice is information on such elements of the environment, as the subsoil.

Ministry of Environment and Natural Resources Protection does not issue the information on geological structure, deposits and resources, mining and technical terms of subsoil treatment and other properties and parameters, if this information is not developed by public agencies. The Ministry is guided by article 29 of the law of Georgia "On Subsoil" which provides, that subsoil related information is the property of an entity, at whose expense it is acquired. According to the Law "On Subsoil" "Georgian legislation protects the ownership of the information on mineral resources and geological or other information on subsoil and minerals. It is impermissible issuing information stored in data warehouse to other legal or natural persons without the owner's consent."

In the chapters below we will look at what types of information are subject to restrictions under Article 29 of the law of Georgia "On Subsoil", and, in general, what are the threat contained in the restrictions of this type.

Reports on licenses for subsoil use

The restriction under Article 29 of the Law of Georgia "On Subsoil" creates significant barriers to public in access to information on compliance with the conditions of the license for the use of mineral resources by license holders.

According to the Law "On Licenses and Permits" Ministry of Environment and Natural Resources Protection carries out the user control only by means of verifying compliance with license terms or/and the licensees' regular accountability (a licensee is obliged to report in writing yearly in the period from 1 April to 1 May). Taking into account the frequency and extent of inspections carried out by the Ministry so far (e.g. out of 3124 licenses, only 100

[14] This does not include number of cases where information is believed commercial, private or state secret in violation of the law

scheduled and 17 unscheduled inspections[15] were carried out during 2015). The reports presented by licensees remain basic source of information.

Annual reports by licensees shall contain[16] the information on the following issues: licensed area, the reserves caught in mountain (geological) attribution and resources at the time of issue of the license by fossil types (categories); besides, the data on wells, tunnels and earthworks (number, length), on drain and technological samples and test pits, on the removal of false rocks at the open pit method processing and ditching of opening and preparatory tunnels in underground works; data on the amount of fossil by the beginning of the reporting period, the end of the reporting period and the amount of mined minerals, both core and related; Information about the accumulated and / or temporarily unused minerals in the dumps, and tailings special warehouses and their processing by the beginning and the end of the reporting period; taxes paid for the use of mineral resources including the costs of regulation; and finally, of course the report should contain information on the compliance with specific license terms, and with legal requirements on human health / life protection and avoidance or mitigation of negative impact on the environment while using natural resources.

Ministry of Environment and Natural Resources Protection denied "Green Alternative" in the delivery of "Georgian Manganese" reports on license compliance, based on Article 29 of the Law of Georgia "On subsoil". For the same reason the trial[17] at the suit of Green Alternative to get 2012 license compliance reports by "RMG Gold" Ltd. and "RMG Copper" lasted for 2.5 years. In the end, Green Alternative received this information on the companies' consent,[18] and not because such information should be available to any person concerned.

Minutes and the decisions of meetings of the State Interagency Commission on Mineral Reserves

Starting mining is permissible only within approved stocks limits. Besides, the amount of stocks may need re-approval in the case if: new minerals and new types of accompanying precious components are found after the license issuance; there is difference in the amount of the approved and actual stocks; or terms of fossil use have changed. After finishing processing the approved stocks, mineral stocks and resources shall be written off the government's balance sheet. Both, inclusion and writing off the balance shall be carried out on the bases of reasoned geological report to be developed by a licensee.

An advisory body under the Ministry of Environment and Natural Resources Protection - state interagency commission on mineral reserves - prepares reports on the approval or writing off mineral stocks (except oil and gas).

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[15] Annual report by Ministry of Environment and Natural Resources Protection, 2015, (Geo) https://goo.gl/iGP44r

[16] Decree of Government of Georgia #271 "On approval of technical regulations – On rule of reporting (information report) on compliance with mining license's conditions; rules for preparation plans for mining projects, mine's development technological schemes and mining works development; and statistical monitoring forms (№1-01, 1-02, 1-03 and 1-04)", April 4, 2014 https://matsne.gov.ge/ka/document/view/2312833

[17] "Green Alternative requires from the Ministry of Environment and Natural Resources copies of 2012 geological reports by RMG Gold and RMG Copper" greenalt.org/disputes_complaints/rmg_reports/

[18] By 2015 there was no point for the company to keep 3 years old information secret. Equally, the possession of three years old information was of no value for Green Alternative.

Ministry of Environment and Natural Resources Protection, based on Article 29 of the Law of Georgia "On Subsoil" refused to give out to "Green Alternative" the minutes of the meeting of the collegial administrative agency, and copies of documents, discussed at the meeting. It is noteworthy that pursuant to General Administrative Code of Georgia, meetings of collegial administrative agencies are public; respectively the minutes and the documents discussed therein shall be public. Though there had been no decision to close the meeting, or to designate the documents to be classified, the Ministry decided that the documents requested (including the minutes and the decisions of meetings of the State Interagency Commission on Mineral Reserves) are appropriate licensees' properties. It is noteworthy that this position of the ministry was shared by all three courts - municipal court, court of appeals and Supreme Court[19]. Currently "Green Alternative" has made a claim to the Constitutional Court.

In fact, the activities of State Interagency Commission on Mineral Reserves are completely classified, which excludes the possibility public oversight (let alone the participation in decision making) and poses significant risks of corruption. It is noteworthy that in 2016 a member of this commission was arrested on suspicion of criminal conspiracy with the licensee[20].

Conclusion

It becomes evident from the above that current wording of Article 29 of the Law of Georgia "On Subsoil" is inadmissible. This provision is contrary to the principles, annunciated in Georgian Constitution, Law of Georgia "On Environmental Protection, the Aarhus Convention "On Access to Information, public participation in Decision-making and Access to Justice in Environmental Matters", and the commitments made by the State. And what is the most worrying, that the total classification of information creates grounds for corrupt deals.

On the basis of the foregoing we deem the abolition of paragraph 29 of the law of Georgia "On Subsoil" is an urgent need. Information relating to mineral resources shall be published in the public space and transparency in the decision-making process on minerals ensured.

[19] "Green Alternative requires the minutes and materials of the meeting of State Interagency Commission on Mineral Reserves" http://greenalt.org/disputes_complaints/wiagis_kanoni/

[20] "Ministry official arrested for taking bribes in the amount of $20,000" http://tbl.ge/1sb5

REGULATION OF THE USE OF NATURAL RESOURCES

At the initiative of Georgian Government and the Parliament's consent regulation fee for the use of natural resources was introduced on 17 May 2011. In particular, changes were introduced to the law of Georgia "On the regulation fee", according to which LPPLs regulating oil processing, gas conversion, and/or transportation activities, alongside with independent national regulatory bodies, were granted the right to collect regulation fee from a license holder; and license holders, respectively, became liable to pay the regulation fee. Before the changes, "exercising management and use of natural resources for ensuring the country's sustainable development" was part of the functions of a legal person of public law – Agency for natural resources at Ministry of Energy and Natural Resources. So, in accordance with the changes introduced to the law of Georgia "On regulation fees" Head of LPPL Agency for Natural Resources, on 12 August 2011, issued an Order establishing the rules of payment and the amounts of regulation fee.

At the decision of political forces winning October, 2012 parliamentary elections in Georgia, the functions of state management of natural resources was returned to Ministry of Environment protection. Respectively, natural resources management function was granted to LPPL National Agency for the Environment at the Ministry of Environment and Natural Resources Protection, and oil processing, gas conversion, and/or transportation activities regulation function was granted to LPPL Oil and Gas National Agency at the Ministry of Energy.

What is regulation of the use of natural resources?

Georgian law does not define what activities/actions are implied under "regulation of the use of natural resources". The only source to define the term is the explanatory note, prepared prior to initiating the 17 May 2011 draft law on the changes to the law of Georgia "On the regulation fee". According to the explanatory note the reason for changes to the law was introduction of regulation fee for the use of natural resources, and oil processing, gas conversion, and/or transportation activities, which would enhance the implementation of its functions by legal person of public law, regulating these sectors (such as adoption of legal acts within its own authority, issuing licenses, monitoring, coordination, supervision and control over implementation of the terms of license). This explanation makes it clear that regulation of the use of natural resources does not imply any action/service or a product, it only means the fulfillment by a legal person of public law – Agency for natural resources at Ministry of Energy and Natural Resources – of its public functions, defined under its charter.

Under Georgian Government Resolution[21] of April 25, 2013 LPPL Agency of Natural Resources at Ministry of Energy and Natural Resources of Georgia was transformed to LPPL National Forestry Agency at Ministry of Environment and Natural Resources of Georgia. Under the same Resolution functions of the Agency of Natural Resources was redistributed to several different organizations within their competences (functions): Department of Environmental Supervision of Ministry of Environment and Natural Resources; LPPL Oil and Gas State Agency of Ministry of Energy of Georgia; and two LPPLs of Ministry of Environment and Natural Resources – National Forestry Agency and National Environment Agency.

[21] Resolution No. 93, of April 25, 2013 by the Government of Georgia

It is noteworthy that the functions of the Agency for Natural Resources which, pursuant to the above explanatory note, was regulation of the use of natural resources, split and became responsibility of two different agencies - Department of Environmental Supervision of Ministry of Environment (exercise state control in environmental and use of natural resources sector) and LPPL National Environmental Agency (issuance of licenses for the use of natural resources); however, fees for the use of natural resources will be received by LPPL National Environmental agency at the Ministry of Environment and Natural resources protection.

As a result of the above structural changes National Environment Agency acquired two new functions in its relations with users of natural resources: (1) issuing licenses under the law of Georgia "On licenses and permits" for the use of natural Resources (except for oil and gas) and conducting and coordinating activities in this regard; (2) establishing quotas to license holders for the extraction of natural resources under the existing regulations. Respectively, it would be logical to assume that these are the functions of the Agency meant under the regulation of use of natural resources. So, logically, one may assume that, currently, regulation of the use of natural resources implies just these functions of the agency.

What is "Regulation"?

In contrast with "regulation of the use of natural resources", the meaning of "regulation" is defined by Georgian law. Pursuant to the Law of Georgia "On Independent National Regulatory Authorities" it is the adoption of legal acts, issuance of licenses/permits, monitoring, coordination, supervision and the exertion of control over the fulfillment of licensing/permit terms and conditions by an independent regulatory Authority, within the limits of authority established by applicable law. This definition is word for word the same as in explanatory note prepared prior to initiation of 17 May 2011 draft law on changes to the Law "On Regulation Fee" with a minor difference that the regulation shall be executed by independent national regulatory authorities.

In general the idea and the aim of regulation, under the law of Georgia "On Independent National Regulatory Authorities", is "ensuring the equilibrium of interests of license holders and consumers, efficient price formation and supply in respect to the goods and services in various fields of economy".

Pursuant to the Law of Georgia "On Competition"[22] "regulated areas of economy are the areas, established under the: organic law of Georgia "On Georgian National Bank", laws of Georgia "On the activities of commercial banks", "On Investment funds", "On electronic communications", "On broadcasting" and "On electricity and natural gas"; also the areas of municipal services, where competition and free price formation are limited and are subject to tariff regulation".

As is clear from the above definition, there are no criteria by which to consider the use of natural resources a regulated sphere of economy. It should be mentioned herein, that besides incompatibility of its activities/functions with the theme of regulation, national environment

[22] Law of Georgia "On Competition" No. 6148, 8 May 2012 https://matsne.gov.ge/ka/document/view/1659450?impose=translateEn

agency has no appropriate status to practice regulation. In particular, in compliance with the Law of Georgia "On Independent National Regulatory Authorities" regulation shall be effected by national regulatory authorities, created purposefully to regulate the spheres, designed by the government, and, what is most important, they are independent from any other national agency and there is no state supervisory authority to control their activities. As for National Environment Agency, it is a legal person of public law at the Ministry of Environment and Natural Resources, and the ministry carries out state control over the lawfulness, appropriateness, and effectiveness of its financial and economic activity. Besides, the Ministry is authorized to suspend or cancel the Agency's unlawful decision[23].

Regulation fee

The Law of Georgia "On regulation fee", before introducing 17 May 2011 changes into it provided that the regulation fee is the primary source of the budget of independent regulatory authorities, established by the law "On Independent National Regulatory Authorities" and is immediately related with publicly and independently exercising regulatory functions under the powers assigned by law. Respectively, only two independent regulatory authorities in Georgia had the right to collect regulation fee: National Communications Commission of Georgia and Energy and Water Supply Regulatory National Commission.

After the introduction of 17 May 2011 changes LEPL National Agency of Natural Resources (now Environment National Agency) was allowed to replenish the budget through fees. Likewise the cases with National Regulatory Authorities, the regulation fee should be immediately related with exercising natural resources regulation functions publicly and independently.

Exercising regulatory functions publicly and independently

As mentioned above, National Environmental Agency is tasked with two functions relating to the users of natural resources: (1) issuing licenses under the law of Georgia "On licenses and permits" for the use of natural Resources (except for oil and gas) and conducting and coordinating activities in this regard; (2) establishing quotas to license holders for the extraction of natural resources under the existing regulations. Under the law "On Licenses and Permits" decisions on issuance of user licenses are made under simple administrative proceedings, which does not provide for publicity of the decision-making process. National Environmental Agency does not publish even already made decisions. National Environmental Agency started publishing the data on issuing, changing or cancelling licenses in "Legislative Herald of Georgia" only in October 2016[24], although the law on licenses and permits requires so already since 2005[25]. Publication of information on the decisions made started only after repeated appeals by "Green Alternative". The process of approval of quotas for license holders is also far from publicity. Besides, the Agency is not independent in license issuance process. In accordance with Georgian Government Resolution #136 "On the rules

[23] Order No. 49 by Ministry of Environment and Natural Resources of Georgia of 26 December 2016 "on approval of the regulation of LEPL Environmental Agency"

[24] https://goo.gl/NPsr0C

[25] Article 36 of the Law of Georgia on Licenses and Permits

of terms of issuance of licenses and permits" initial price for the license can be approved by government decree; extension of the license, amendment to, or modification of the terms of the license and the release of a person from a license is possible only on the decision of the government.

Who pays the regulation fee

In compliance with the law "On regulation fee" head of LPPL Agency of Natural Resources under Ministry of Energy and Natural Resources issued an order on 12 August 2011 "on approval of rules of payment of regulation fee and its amounts", which is still in force. It is noteworthy that two changes had been introduced in the Order within two months of its issuance. More than two years passed after reorganization of the Agency of natural resources and the transfer of the right to collect regulation fee to LPPL National Environmental Agency at the Ministry of Environment and Natural Resources. However, National Environmental Agency still follows the Order by the Head of Agency for Natural Resources, according to which LPPL Agency of Natural Resources at the Ministry of Energy and Natural Resources of Georgia is regulating the use of natural resources of Georgia. In accordance with the above Order regulation fee shall be paid by all who use natural resources in accordance with the rules laid down by law; except for the persons who use natural resources for own purposes.

For unknown reason, the amount of regulation fee is set only for the resources listed in the table below. For all other resources (including different types of wood bark, snowdrop bulbs, cyclamen tubers, fir cones, other representatives of fauna and minerals), the regulation is free. The foundations and rules of calculating the fee, as well as the reasons for free regulation of other resources are unknown.

Table 3. Amounts of regulation fees:

№	Natural resource	unit	Price in GEL
1.	Coal	1 ton	0.10
2.	Manganese	1 ton/1% content	0.10
3.	Copper	1 ton	127.5
4.	Lead	1 ton	14.8
5.	Zinc	1 ton	36,0
6.	Gold	1 gr	1.5
7.	Silver	1 gr	0.02
8.	Diatomite	1 ton	3,0
9.	Carbon dioxide (CO2)	1 ton	10
10.	Oil: A.a.) Share of Investor (including compensation oil) A.b.) Share of the State	1 ton	24,19
11.	"Borjomi" mineral water	$1m^3$	3
12.	„Nabeglavi" mineral water	$1m^3$	3
13.	„Sairme" mineral water	$1m^3$	3
14.	Other underground bottling mineral water	$1m^3$	3
15.	Underground bottling fresh water	$1m^3$	2
16.	Underground fresh water (industrial), which is used as basic raw material for production	$1m^3$	2,5

Rules of payment of regulation fees are also interesting. According to the Order the payment for mining shall be paid not later than 15th of the month next to each quarter, in equal parts, depending on the annually developable volumes in accordance with respective mining plan. In case when the volume of the mined minerals exceeds the volumes under respective plans, the regulation fee shall be paid according to actually mined volumes. Holders of license for fishing in the Black Sea shall pay for the full amount of fishable anchovy percentage of the annual quota set by the license, in equal installments twice a year, not later than 31 January and 31 July.

As is clear from the above the state obliges licensees to pay regulation fee not for actually extracted resources but for the planned ones. However, the accounts audit of Environment National Agency held by National Audit Office showed that "monitoring of the payment of regulation fees is also a problem. "In particular, part of the licensees do not have the plans for the development of mineral resources, as is required under respective order of the Head of Agency "On the approval of the rules and terms of issuing licenses for development of mineral resources". This makes it difficult for the Agency to monitor the observance of terms of the license (production volumes and timing) by licensees; and account of incomes related to regulation fee depends on it. Licensees periodically provide the Agency with a letter on the amount of produced mineral resources, but because this information cannot be verified, we were unable to obtain sufficient audit assurance of the completeness of revenue on the balance of agency"[26].

Table 4. Income derived from the regulation of the use of natural resources

Type of resource	total	Of which					
		2011	2012	2013	2014	2015	2016
Carbon dioxide	890053	55873	129 167	147 213	111 564	210090	236 146
Coal	477 919	8 842	133 134	77388	78 542	81 344	98 671
Manganese	8 302 799	352 693	1 462 923	1 501 875	1 418 539	2 083 394	1 483 374
nonferrous metals	31 749 582	2 066 591	6 912 996	3 434 781	5 000 254	6 891 605	7 443 355
Anchovy	5 543 416		762 527	1 377 773	907 069	1 134 173	1 361 875
Water	6 063 806	473 262	906 163	1 258 849	1 129 942	1 160 594	1 134 997
Waste utilization	5 558	3 750	1 808	0	0	0	0
Total	53 033 133	2 961 011	10 308 718	7 797 879	8 645 908	11 561 199	11 758 418

Conformity with Georgian Constitution

Inconsistency of the regulation fee for the use of natural resources with Georgian Constitution was clear to Georgian parliamentarians at the moment of its initiation; still they unanimously voted for the bill in three hearings[27]. It is noteworthy that at all three hearings legal department of the office of Parliament pointed out the unconstitutionality of the bill. In particular, it was noted in its conclusion, that: "Para 1 of Article 1 is a new wording of Article 3 of the Law defining the concept of regulation fee. However, this provision of the

[26] State Audit Office report on National Environmental Agency accounting from January 1, 2014 – till December 31, 2014 http://sao.ge

[27] http://parliament.ge/ge/law/7601/14842

law does not fully explain legal nature of regulation fee and is quite vague. In particular, it is understood that the regulation fee is one of the sources, forming budgets of regulatory authorities and of a legal person of public law, regulating oil processing, gas conversion, and/or transportation activities and the amount of the fee is established under the regulations of these bodies. However, the bill does not explain why, i.e. for the fulfillment of which obligations is it paid. It should be mentioned that when with regard to establishing regulation fee, one should take into account decision #2/1/187-188 of 10 January 2003 of Constitutional Court of Georgia on the case "Airzena" Ltd. vs. Georgia", where the establishment of regulation fees is recognized unconstitutional[28].

The Constitutional Court ruled as follows[29]: "Article 94 of Georgian Constitution provides for only two types of payments - taxes and duties".

Pursuant to Article 5 of Georgian Tax Code According to Article 5 of the Tax Code of Georgia "a tax is a mandatory, unconditional cash payment to the state, which shall be paid by a taxpayer, having a mandatory, non-quid-pro-qwo and gratuitous nature of payment. I.e. in this particular case the fee, as well as the tax, are mandatory payments with the only difference – taxes go to budget, and the fee – to administration accounts. … Regulation fee has some of attributes of duties. According to Article 1 of the law of Georgia "On the foundations of the duties system" "duties are mandatory payments to the budget paid by natural and legal persons in order to receive from the State the right to certain activities or use of activities, also for certain services provided by public bodies". Hence, since the fee is paid for administrative services, it carries some of the duties' attributes with only difference that the fee goes to administration account, and duties – to the State or local budget.

…The court agrees with the opinion of the external expert, prof. Meskhia in that "regulation fee has the attributes of both, taxes and duties, and ultimately "fee" is rather a tax, which the law requires the airlines to pay".

Para 1 of Article 94 of the Constitution of Georgia provides, that "the payment of taxes and duties shall be obligatory in the amount and in accordance with a procedure established by law" and Para 2 of the same Article imperatively provides that "the structure of taxes and duties and the procedure for the introduction thereof shall only be determined by law.

The court finds that the structure and rules of introduction of taxes and duties include the amount of payment, the payer, terms, form of payment and the grounds for these rules. This can be established only by law and the court cannot accept that issues for discussion in Parliament be delegated to executive power".

It should be mentioned hereby that the case before the Constitutional Court referred to regulation of the activities of civil aviation airlines, i.e. the sector, where there is a subject of regulation: theoretically there may be a need to balance the interests of licensees and the customers, to ensure efficient pricing and provision of services and goods… As for the use of natural resources, there is no reason to believe this sphere the state-regulated sector of economy.

[28] http://parliament.ge/ge/law/download_58223/17052011-pdf

[29] Decision №2/1/187-188 of the second college of the Constitional Court of Georgia, 10 January, 2003 https://matsne.gov.ge/ka/document/view/1378395

In 2016 the Constitutional Court considered the constitutionality of the Order by the Head of Agency for Natural Resources" on the rules of payment of regulatory fee and its sizes".

"Madai" Ltd and "Parliastomi 2004" Ltd vs. Georgian Parliament and Head of the Agency for Natural Resources at the Ministry of Environment and Natural Resources Protection

On 24 September 2014 "Madai" Ltd and "Paliastomi 2004" Ltd, helped by Georgian Young Lawyers Assosiation, appealed to the Constitutional Court with a constitutional claim[30] (Registration No. 611). Subject of a dispute on the action was rules of payment of regulation fees and charges for the use of natural Resources. In particular, a fishing license holder in the Black Sea shall pay regulatory fees and charges for the use of fisheries resources not by the volume of the catch, but by the volume permitted under the license. Constitutional Court assessed the extent to which these regulations lead to undue violations of the right to property and the right to free enterprise guaranteed by Articles 21 and 30 of the Constitution of Georgia.

The Constitutional Court considered the essence, function and purpose of a regulatory fee for the use of resources. The Constitutional Court, in its decision, absolutely agree with "Green alternative" opinion[31] about the nature and purpose of a regulatory fee and notes that, regulation of natural resources by Agency for Natural Resources means: 1) issuing the license in accordance with the law of Georgia "on licenses and permits" and conduct and coordination of activities in this matter; 2) Approval of quotas for the extraction of mineral resources, in the prescribed manner, to the license holders. Respectively, setting regulatory fee for the use of natural resources serves to the purpose of implementing these functions publicly and independently.

Besides, Constitutional Court ruled that the disputable Order the law establishes the rules of paying fees for the use of resources, as well as rules for calculating the cost and timing of payments. Whereas Article 94 of Georgian Constitution provides, that the structure of taxes and duties and the procedure for the introduction thereof shall only be determined by law.

Proceeding from the above the Court decided: "because the disputable regulation is established not under the law, but under the by-law, and because it fails to meet the requirements under Para 1 and 2 of Article 94 of Georgian Constitution, and respectively official criterion established under Para 2 Article 21 (regarding permissibility of restriction of the rights only if so established by law), and unreasonably violates the applicant's right to property".

In the end the Court decided[32] to partially allow "Madai" Ltd. and "Paliastomi 2004" Ltd claim and subparagraph "b" of Para 1 of Article 4 of the Order No.1 of 12 August 2011 by the Head

[30] https://goo.gl/Um2nmD

[31] "Regulation Fee for Use of the Natural Resources – Lawfulness and Risks of Corruption", Policy Brief http://greenalt.org/wp-content/uploads/2015/07/Regulation_Policy_Brief_2015_GEO.pdf

[32] Decision №1/3/611 of the first college of the Constituinal Court, 20 September, 2016 https://matsne.gov.ge/ka/document/view/3409987

of LPPL Agency for Natural Resources at the Ministry of Energy and Natural Resources "On establishing rules of payment of regulation fee and its amounts" was ruled unconstitutional in point of Para 1 and 2 of Article 21, and Para 2 of Article 30 of Georgian Constitution.

Attempts to improve the situation

Minister of Environment and Natural Resources Protection submitted a draft law "On the amendments to the law "on Regulation Fee" for the review at Government sitting on 11 January 2017. The draft law had never been published and/or reviewed by the public concerned, as required under the "Convention on access to information, public participation in decision-making and access to justice in environmental issues"[33]. In General, the draft law existence became known only after publishing the information on governmental web-site, stating that the government had approved the draft law and recommended for submission to the Parliament.

According to an explanatory note to the draft law "it was decided to develop the draft law due a Constitutional Court decision on case No. 1/3/611 of 30 September 2016. The offered amendments serve to bringing the legislation into conformity with the Constitutional Court decision. ... the draft law aims to legalize regulatory fee established by Order No. 1 of 12 August 2011 by Head of LPPL Agency for Natural Resources at the Ministry of Energy and Natural Resources. Tariffs will not be changed at this stage so as not to impose additional financial obligations for market players."

According to draft law content of Order by the Head of LPPL Agency for Natural Resources at the Ministry of Energy and Natural Resources "On establishing rules of payment of regulation fee and its amounts" is mechanically transferred to the law. Ministry makes no attempt to somehow remedy the situation and resolve the above problem.

Conclusions and Recommendations

All the above illustrates that regulation fee for the use of natural resources was introduced in 2011 for the only purpose of budget replenishment of LPPL Agency of natural resources under Ministry of Energy and Natural Resources. Moreover, the fee was introduced without offering any additional product or service to a customer; this, in its turn, gives grounds to resource users to consider the fee as a legal way to bribery or, at best, as a "state racket".

Georgian government, when reorganizing LPPL Agency of Natural Resources at the Ministry of Energy and Natural Resources in 2013, and reallocating its functions to the environment department of Ministry of Environment and Natural Resources and LPPL National Forestry Agency and National Environment Agency at the Ministry of Environment and Natural

[33] Article 8: Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken: (a) Time-frames sufficient for effective participation should be fixed; (b) Draft rules should be published or otherwise made publicly available; and (c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible.

Resources, did not properly assess the legitimacy of such way of budget replenishment and the threats therein. It is regrettable, that the Ministry/government is tries to ignore the problem and to conceal it by means of “facade” changes.

As a result we have the situation, when the relations between Ministry of Environment and Natural Resources (supervisory body) and licensees (controlled body) are based on an exchange model, which according to the Constitutional Court Decision No. 2/1/187-188 of 10 January 2003 is “not allowed in international practice and is a source of many violations (including corruption)”.

In view of the above we deem it necessary that Georgian Parliament immediately: (1) abolishes regulation fee for use of natural resources and (2) finds ways of raising the financial resources necessary for Ministry of Environment to carry out the tasks and duties established by law that would not contradict to basic principles of democracy thus avoiding the creation of a situation, favorable for the corruption in a hazardous, in this sense, sphere as is government regulation of the use of natural resources.

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.