

IMPLEMENTATION OF AARHUS CONVENTION IN GEORGIA

Alternative report



Kingdom
of the Netherlands





Researched and published by **Green Alternative**

Endorsed by:

Association of Disabled Women and Mothers of Disabled Children – DEA

Association for Civil Society Development of Georgia

Center for Regional Initiatives “Bright Future”

Union of Teachers “Education and Universe”

Association “Society for Development”

Newspaper “Samkhretis Karibche”

Union “Svaneti Tourism Center”

Journalists’ Independent Union

Young Conservationists Group

Kutaisi Information Center

Association “Bethlehem”

“Meokhi – 2010”

“Stepantsmida”

“Argomedia”

Green Alternative gratefully acknowledges the financial assistance of the European Union and the Embassy of the Kingdom of Netherlands in Georgia.

The content of this publication is the sole responsibility of Green Alternative and can under no circumstances be regarded as reflecting the positions of the European Union and the Embassy of the Kingdom of Netherlands in Georgia.

© Green Alternative, 2011

Authors: Tamar Gurchiani, Kety Gujaraidze

**IMPLEMENTATION OF CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN
DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS
(AARHUS CONVENTION) IN GEORGIA**

Alternative Report

April, 2011

Content

Introduction	3
Article 3. General Provisions	3
Article 3.1 A clear, transparent and consistent framework to implement the Convention	3
Article 3.2 Assistance and guidance to the public in public participation matters.....	4
Article 3.3 Environmental education and awareness raising	5
Article 3.4 Support for environmental non-governmental organizations	5
Article 3.8 Prohibition of penalization for public participation.....	6
Article 4. Access to Environmental Information	7
Article 4.1 Ensuring provision of information and other general issues	7
Article 4.1(a) The interest not having to be stated	8
Article 4.2 Timeliness of Information	8
Article 4.3(a) Information not in public authority's possession	9
Article 4.3(b) Unreasonable or overly general requests.....	9
Article 4.3(c) Confidentiality of administration	9
Article 4.4(d) Commercial Confidentiality	10
Article 4.4(f) Personal data.....	11
Article 4.5 Forwarding requests submitted to the wrong authority	11
Article 4.8 Charges	11
Article 5. Collection and Dissemination of Environmental Information	12
Article 5.1 (a) and (b) Existence and quality of environmental data	12
Article 5.1(c) Environmental emergency information	15
Article 5.2 Information on the type and scope of the available environmental information and practical arrangements for information dissemination	15
Article 5.5 Dissemination of information: strategic and normative materials	15
Article 5.6 Encouraging operators to actively disseminate information	15
Article 5.8 Product information	16
Article 5.9 Pollution release and transfer registers (PRTRs)	16
Article 6. Public Participation in Decisions on Specific Activities	16
Article 6.1 Activities falling under article 6.....	16
Article 6.2 Notification of the public concerned	21
Articles 6.3, 6.4 and 6.5 Time-frames for public participation and the developer's role	21
Article 6.9 Information about the decision	22
Article 6.10 public participation in reconsideration or updating of the decision	23
Article 7. Public Participation Concerning Plans, Programmes and Policies Relating to the Environment	23
Article 8. Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments	24
Article 9. Access to Justice	26
Articles 9.1 and 9.2 Remedies	26
Article 9.3 The Public's right to challenge acts and omissions by private persons and authorities	27
Article 9.4 Timely, adequate, effective, fair, equitable and not prohibitively expensive remedies	29

Introduction

Access to environmental information is minimum prerequisite enabling to hold accountable the public authorities for the decisions they make, as well as to ensure effective public participation in decision-making processes. In 2008 Georgia signed the Council of Europe Convention on Access to Official Documents. Besides, the legislation on Freedom of Information, setting quite high standards with regard to environmental information, has been in force in Georgia for 10 years already. However, the transparency is not yet the determining one in the State practice. Traditional, demand-based practice is never more enough for informed participation of the public in the decisions on environmental matters. Absence of independent courts and the State bureaucracy, which is still influenced by totalitarian rudiments, create additional barriers on the way to implementation of the Convention.

Article 3. General Provisions

Article 3.1 A clear, transparent and consistent framework to implement the Convention

Status of the Convention in the national legislation

In compliance with Article 6.2 of Georgian Constitution “*The legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, shall take precedence over domestic normative acts*”. Alongside with general right to freedom of information, Article 37.5 of the Constitution of Georgia specifically deals with environmental information. This constitutional framework has not changed for recent years¹, thus there are no constitutional barriers to implementation of the Convention.

Although, according to Georgian legislation, international agreements do not need be incorporated, i.e. transposed into the national law, their application is till very difficult. The courts, except for some rare cases, do not regard the Convention directly applicable law (referring to the norms of Convention is not enough; as a minimum, the courts should understand the Convention’s spirit). This is also relevant to administrative bodies that take environmental decisions and perform so called quasi-court functions. Though, as has already been mentioned, the guarantees exist only on the paper and there is zero effect of their practical implementation.

Mechanisms to monitor implementation of the Convention

There is no institution in Georgia to oversee the implementation of international agreements. There is a division of international agreements within public law department of Ministry of Justice, whose function is to: draft projects of international agreements within the Ministry’s competence; prepare legal conclusion on conformity of international agreement with Georgian legislation and the legal consequences of declaring them binding, termination or suspending their action. Still, it can not be regarded as independent supervisory body.

There is Ombudsman’s institute in Georgia but its function is to monitor adherence of all constitutional rights and freedoms and to respond appropriately. There are respective divisions with the Ombudsman’s office to deal with specific issues, such as Child and Woman Rights Center, Tolerance Center, etc., but there is no specific division for environmental issues and they are within the Ombudsman’s overall competence.

¹ 15 October 2010 further changes were introduced to the Constitution of Georgia, including Article 37, but the article has not been changed significantly. It should be noted that draft constitutional changes, presented for public debate did not envisage any changes to Article 37 (paragraphs 4 and 5 of which deal immediately with issues related to sustainable development, safe environment and public access to the environmental information). Only after the adoption it turned out that this article too underwent the changes without any prior discussion.

There is no institution of the Commissioner for Freedom of Information in Georgia, leave alone independent institution for reviewing issues related to access to environmental information. However, the Ombudsman (Public Defender) combines this function. The Ombudsman's function is to reveal the facts of human rights and freedoms violations and to facilitate their restoration. According to organic Law of Georgia on Public Defender, *"the Public Defender of Georgia shall carry out the monitoring of human rights situation in Georgia, also monitor, on the basis of applications or at own initiative, the facts of their violation"*.

In his periodic reports to the Parliament Public Defender covers the issue of difficulties related to freedom of information. Alongside with the Parliament, Public Defender gives recommendations to different public authorities. In case of noncompliance he can issue the protocol of administrative violations. It should be mentioned that regardless efficient work of the Ombudsman's institute, the extent to which its recommendations are complied with, is low due to executive bodies' insufficient work. According to Article 24 of the Law on Public Defender, *"local authority, public officials, on receiving Public Defender's recommendation or proposal, shall consider them and notify in writing Public Defender's office about the decision within 20 days"*.

Thus, the Ombudsman has no specific mandate to monitor the availability of environmental information and so, cannot be considered as rapid and effective response mechanism in this regard.

Changes in sectoral legislation

The Georgian environmental legislation, as well as non-environmental sectoral legislation, has undergone significant changes during last years. As a result, the opportunities for the public to participate in the decision-making related to environment have been limited significantly. The legislative amendments and their consequences are thoroughly discussed in the following chapters.

Article 3.2 Assistance and guidance to the public in public participation matters

According to the General Administrative Code of Georgia adopted in 1999, everyone may gain access to official documents kept by an administrative body, and obtain a copy thereof, unless such documents contain state, professional, commercial, or private secrets. A person has the right to receive information in any form, without specifying the grounds or purposes for requesting the information and within the time-frames defined by applicable legislation. Furthermore, according to the General Administrative Code of Georgia, environmental information shall not be classified.

At the same time, everyone has the right to apply to the judicial system in case of unlawful denial to access to information and demand compensation for damages. Everyone has the right to participate in the sessions of corporate (collegial) public bodies.

Besides the General Administrative Code of Georgia, the Framework Law on Environmental Protection, along with other rights, entitles a citizen *"to have full, impartial and timely information on the state of the environment, where he/she lives or works"* and *"to take part in discussions and making important decisions in the sphere of environmental protection"*. It is essential that these rights recognized by the Framework Law on Environmental Protection, especially participation right, are more weakly safeguarded by specific mechanisms – procedures which will enable to exercise the rights – than it was before 2004-2005, when the government launched its reforms aimed at maximum liberalization and deregulation of economy. For example, before the reforms, the environmental legislation provided for the public participation tools different from those envisaged by the General Administrative Code. Today these procedures do not exist any more; thus, general, standard procedures under General Administrative Code are applied while making environmental decisions.

Georgia does not use a systemic approach to capacity building of civil servants in order to better fulfill the obligations set out in the Aarhus Convention. The initiatives carried out in this direction (as a rule, trainings)

are not consistent, and the results are not sustainable because of frequent structural reforms and staff outflow at public agencies.

As for training of judges in environmental protection and issues set out in the Convention, the situation is extremely difficult here: the High School of Justice is in charge of professional training of judges in Georgia. According to the Law on High School of Justice, along with other subjects, they study administrative law and discipline on human rights and freedoms – these subjects cover the issues of environmental law, though no special attention is paid to it. There were some cases when with the support of Aarhus Center trainings were conducted for the judges on the procedural issues set out in the Aarhus Convention. However, such trainings are obviously insufficient, judging from the judicial practice. At the same time, judges are not trained in the basics of environmental protection and this is clearly reflected in the quality of the decisions on litigation cases.

Article 3.3 Environmental education and awareness raising

According to governmental decree No.84 dated October 18, 2004, national education goals were approved, one of which concerns preservation and protection of natural habitats. This goal envisages that *“adolescents should know in what natural habitat they live, what the harm is which people may cause to the environment by their actions; how to preserve and protect natural habitat”*. Moreover, the Ministry of Education and Science approves the National Education Plan, under which the education process is carried out in secondary schools. According to the current National Education Plan, natural sciences are studied from the initial forms (where it is integrated into other subjects) to the last form. Environmental issues are incorporated into the civil education discipline, which in turn is incorporated into social sciences and is studied at all the three stages of education (primary, basic and average). Certain progress has been observed recently in terms of incorporating environmental disciplines into the curricula of higher educational institutions.

On initiative of the Ministry of Environmental Protection and Natural Resources (frequently in frames of donor-funded programs and/or with the support of Aarhus Center), campaigns aimed at raising awareness are being conducted, though these campaigns are not a part of mid- or even short-term, consistent and goal-oriented formally approved program on raising awareness. The Ministry and the Government have not developed such programs so far. Two basic trends can be identified in awareness raising campaigns: waste management and protected areas. It is important that in the first case attention is focused on the reduction of use of polyethylene bags and correct waste disposal in the cities; while in the second case, the campaign is directed to attracting visitors to protected areas (tourism promotion). Journalists often become the targets of awareness raising campaigns carried out in this field. As a rule, non-governmental organizations take care for raising journalists' awareness in environmental and convention related issues; however, their efforts are obviously insufficient.

Article 3.4 Support for environmental non-governmental organizations

Certain changes were made during last years in terms of supporting Georgian non-governmental organizations. The government constantly talks about simplification of registration procedures for non-governmental organizations and there is a deal of truth in it. Today, any commercial or non-commercial legal entity can undergo registration at the National Agency of Public Registry under the one-window principle. As for the negative novelties following this simplification, registration fee of a non-governmental organization has increased from GEL 60 to GEL 100. If before the amendments, a person could receive a statement from the public registry free of charge, after procedure simplification the price of real estate statement was set at GEL 15. Noteworthy that Georgian legislation does not prohibit any activity without registration. Respectively, the environmental groups can carry out activities, which are not prohibited by law, without any legal status. The scales of their activities do not matter; they may work at both local and national levels.

Non-governmental non-profit organizations enjoy certain tax privileges. In particular, non-governmental organizations are exempted from property tax in case of property received under a grant agreement. Prior to

January 1, 2011 non-governmental organizations were paying a 12% revenue tax; however, from January 1, 2011 this rate increased to 20% becoming equal to a standard treatment.

As far as the funding is concerned, Georgian legislation does not prohibit funding of non-governmental organizations; however, in case of receiving funding from the state budget, the organization will become the so called budgetary organization that envisages certain obligations. Until recently (see below) state-funding of non-governmental organizations was not practiced in Georgia. Non-governmental organizations are extremely cautious about making decisions on such funding, because in Georgia, state funding is definitely associated with the deprivation of independence and impartiality – the state machinery is not yet ready to allocate financial aid for NGO services without demanding their full support in exchange.

The Civil Institutionalism Development Fund was established in June 2009, on the initiative of the President of Georgia. According to the information posted at the Fund's website, *"the core principle of establishing the Civil Institutionalism Development Fund outlines that the Georgian state, alike the well-developed western democracies, undertook the responsibility for promoting civil sector development, supporting civil initiatives and establishing civil institutions in Georgia."* The Fund awards grants relevant to Fund's predefined priorities to non-commercial, non-governmental, community organizations and interest groups. Before 2011 the Fund announced four competitions and funded 212 projects. The Fund issues small grants ranging within GEL 5-10 thousand (approximately USD 3-6 thousand) per project.

Generally, non-governmental environmental organizations are participating in various commissions and boards established by the state. However, the practice of functioning of such commissions and boards is ambiguous: there are some commissions, whose functioning is actually suspended or limited; and there are really functioning commissions, where in some cases the level of NGO participation and influence on decisions is relatively high.

Article 3.8 Prohibition of penalization for public participation

In July 2009 Georgian parliament made amendments to the Law on Conflict of Interests and Corruption in Public Service and introduced the norms of protection of whistleblowers' rights. According to the law, whistleblowing is informing public authority (structural subdivision of the corresponding public institution, which performs the control, audit and performance inspection) which examines the complaints against the public official (exposed) about the infractions of the law or the rules of due conduct of the public employees, which caused harm to public interests or reputation of public institution.

The law shall afford to protection of whistleblowing, which: (a) in essence comes to conformity with reality and is confirmed by the shown evidence; (b) is done honestly and with believe that the whistleblowing will contribute to and suppression of the infractions of law and the rules of due conduct of public officials, protect public and private interests and the protected value outweighs the harm caused by the whistleblowing.

Whistleblowing is not protected under the law, if: (a) the information received from a whistleblower is wrong in essence, which was known or should have been known by the whistleblower; (b) a whistleblower acts for his/her personal profit unless there exists the case where granting special reward is established by the law.

The law also provides for whistleblowers' protection mechanisms. It is impermissible to intimidate, oppress or threat a whistleblower in discriminatory ways; the whistleblower may not be subject to disciplinary of administrative procedures, civil action or prosecution or hold responsible otherwise for the circumstances related to the acts of the whistleblowing until the end of the investigation. It is also forbidden to worsen the conditions of the agreement, license and grant and to release or temporarily release from the job, derangement of legal relationships, until proving the untruthfulness of the information provided by whistleblower. Whistleblowers enjoy the same as witness protection mechanisms, though nobody has tested

the effectiveness of these mechanisms so far. Moreover, this fact was never recorded, which means that these norms are not yet involved.

As for the cases of slander and reimbursement against NGOs, the Law on Freedom of Speech and Expression of 2004 made it practically impossible to initiate such actions. In order to establish the slander, it is necessary that harm occurs to the plaintiff, and the organization has spread not his own consideration (which is protected by absolute privilege), but the information, containing wrong in essence facts. The same year slander (implying criminal charge) was decriminalized, meaning that theoretically, there is no legal pressure instrument against NGOs.

Article 4. Access to Environmental Information

Article 4.1 Ensuring provision of information and other general issues

All public authorities are obliged to immediately register the application requesting information, while decisions on releasing information or refusal to release information should also be registered before its sending or delivery. Unfortunately, all public agencies have different practices and it depends on their technical resources. Regardless of whether a registration book is electronic or not, each correspondence is granted a number and is registered under special rules.

As for subsequent reporting about the mentioned information, each public agency is obliged to report to the Georgian Parliament and President on December 10 of every year about the state of freedom of information.

According to article 49 of the General Administrative Code of Georgia, along with other issues, the report shall contain the following information:

- (a) The number of requests to provide or modify public information submitted to the public authority and the number of decisions on rejecting the request;*
- (b) The number of decisions on release of information or denials, the names of the public servants rendering those decisions and the decisions of corporate (collegial) public agencies to close their sessions;*
- (c) The public databases and the collection, processing, storage, and releasing of personal data by public agencies;*
- (d) The number of violations of the Code by public servants and the cases of imposition of disciplinary penalties upon civil servants.*

Unfortunately, preparation of reports and their submission has a formal nature and in most cases even this requirement of the law is not fulfilled, to say nothing about accurate statistical data or its generalization. There are frequent cases, when public agencies conceal the number of complaints. And the major problem, which serves as an additional stimulus for the mentioned irresponsibility, is that neither the President nor the Parliament² exercise control over the accuracy of such reports. Moreover, nobody knows how many public agencies³ exist in Georgia and which of them are obliged to comply with article 49 of the Code.

As far as the Ministry of Environmental Protection and Natural Resources is concerned, we can cite the reports submitted by the Ministry in 2007 and 2009, which are quite laconic (the 2006-2010 reports contain only four sentences). They actually bypass the issue of administrative complaints, though the Ministry reviewed the administrative complaints submitted by Green Alternative in 2007 and 2009.

² The organizational department of the Parliament's Staff posts at its website only "analysis" of submitted reports, which is mostly limited by aggregation of data given in the reports of public agencies and listing the agencies, who submitted reports timely, with delay or did not submit at all.

³ According to the General Administrative Code of Georgia, a public agency is any state or local self-government body or institution, as well as a person, who exercises public authority in accordance with the law on behalf of a public agency; a legal entity of public law, as well as a legal entity of private law, who receives state funding. Besides the fact that the state cannot provide a database of state-funded legal entities of private law; there is no registry of legal entities of public law at all.

As for the Data Protection Ombudsman, no such office exists in Georgia. Public Defender, in frames of his/her general mandate, pays special attention to the freedom of speech and information.

Article 4.1(a) The interest not having to be stated

Nobody is obliged to state the reasons for requesting the information. Public authority is keeping only the information, representing compulsory requisites of the application for the information. This information is: full name (if it is an organization – name of the organization), address and the signature of an authorized person.

As for identifying the applicant in the event of misuse of information, there exists such theoretical opportunity, but since the issuance of information is preceded by the decision of public authority, any use would be authorized and legitimate. No liability of the applicant occurs when receiving public information as opposed to the case of secret information, when an applicant pledges not to disclose information.

Article 4.2 Timeliness of Information

Although Georgian legislation sets higher standards for the time-frames for releasing information, it does not mean that even one-month time-frame set out in the Convention is complied with. According to the General Administrative Code of Georgia, information shall be released immediately or not later than 10 days; in practice, however, these requirements are met only in special cases. In case of receiving an unjustified refusal on releasing information, at least one-month procedure of administrative proceeding is added to this term. The mentioned procedure envisages proceeding of an administrative complaint, that is absolutely ineffective; this issue is discussed in detail later.

As for the practice of specifying and readdressing the requested information, although the law provides for this mechanism, very few administrative bodies apply it. Moreover, as a rule, such requirements, where an addressee or some other details are obscure, are actually neglected. There were some cases, when a person requesting information has received his letter back (Georgian Young Lawyers Association vs. Ministry of Defense). Recently the Georgian Government used an unusual mechanism of readdressing: Green Alternative applied to the Government of Georgia with a request to provide the copies of about 20 unpublished decrees issued by the Government in March-April 2010. In response, the Government enlisted the agencies having initiated those decrees and recommended Green Alternative to apply to them for the copies of governmental decrees.

It is important that unfortunately a three-day term of justification for refusal to release information is almost never followed in practice. As we have already mentioned, public agencies release information not immediately, but within 10 days or do not release it at all, thus violating the law. An applicant learns about the status of his/her request after expiration of 10 days and according to the established practice, he/she appeals against such decision upon expiration of this term.

Green Alternative has experienced a case when one of the parliamentary committees (Sector Economy and Economic Policy Committee) not only neglected the necessity to notify the organization about the refusal to release information, but simply threw away Green Alternative's application requesting information. Green Alternative was demanding a copy of the report prepared by the Parliament's working group "On the status of privatization of state facilities in the country and the practice of holding auctions."

There were also the cases when administrative authorities applied selective approach to non-governmental organizations: releasing different information on similar requests; denial on releasing the information that was already disclosed to another organization

As for the legal effect of a full disregard (refusal to give an answer), in such case, upon failing to receive an answer within a term of 10 days, an applicant has the right to appeal against such inactivity at a superior manager or superior administrative body. Unfortunately, the legislation does not recognize the alternative rule of taking legal action. An applicant is obliged to exhaust all resources available at a public agency that

does not mean passing through all stages; at least a single appeal is enough. An agency or official considering an appeal has the right to impose a disciplinary liability on a relevant person. Administrative bodies do not consider a request for compensation of damages. Under the law, only court is eligible to consider such requests.

In conclusion, it can be said that theoretically two legal consequences are possible: (1) disciplinary liability, which means the slightest punishment in a form of warning and the gravest one – dismissal; (2) compensation of damage if an applicant substantiated that she/he has suffered property or non-property damage as a result of not receiving information. Out of these two methods, the first has been frequently used by administrative bodies, while judicial bodies have not practiced the second case so far.

Article 4.3(a) Information not in public authority's possession

The issue of procedural access to information as well as the quality of information and simply its absence is quite problematic in Georgia. Georgian non-governmental organizations have frequently experienced the cases, when the information released by administrative bodies is incomprehensive and do not respond to the request. Green Alternative has frequently experienced the cases, when only a part of requested information has been released without any explanations. In such cases an applicant can have two suppositions: 1. Information does exist but it is not released to an applicant; or 2. Information does not exist and an administrative body conceals this fact. In order to find out the reasons an applicant has to apply to the administrative body numerously or to use judicial proceedings (administrative complaint, taking legal action) to receive the requested information. In some cases, which Green Alternative has experienced, it turned out as a result of a long court dispute that the administrative body simply did not have the requested information.

In 2009 Green Alternative has practiced a case, when the organization requested information, which the administrative body should have had, though it did not have it and the information was created in response to the request. The question was about the report on meeting the commitments undertaken by the gold and copper extraction company Madneuli under the privatization agreement concluded in 2005. Green Alternative requested the Ministry of Economic Development a copy of the report. In response to the first request for information, the Ministry responded that the information was the company's commercial secret. Green Alternative tried to explain that the requested information was environmental one and it was impossible to classify it. After the repeated request, Green Alternative received a newly created document from the company that confirmed that the information had not existed before the request and the Ministry's notification that the information represented the company's commercial secret, was an attempt to conceal the absence of such document.

In case public authority does not hold the requested information but should have it, theoretically, it is possible to raise the issue of liability of a person responsible for creation the information, though no such cases have been observed in practice. As a rule, absence of information is justified by scarce budget of the agencies as well as lack of human resources; such argumentation, in turn, limits the opportunities for requesting the creation of information through judicial proceedings.

Article 4.3(b) Unreasonable or overly general requests

Too general and unclear character of the requests is, as a rule, used by public authorities to justify the refusal, though they have the liability to ask for clarification. Only very few public authorities contact the applicants for clarification. Georgian legislation does not provide that this would be the reason for refusing the information. Otherwise such provision would be abused by a public authority.

Article 4.3(c) Confidentiality of administration

The General Administrative Code of Georgia recognizes the concept of executive privilege. This provision envisages the right of an administrative body not to disclose the names of the civil servants participating in the preparation of a decision by an official. Respectively, these persons are protected to boldly express their professional opinion.

As for the materials preceding the decision, according to the existing practice, in the process of preparation of decisions such materials cannot become public (with the exception of draft normative acts); however, after decision-making the entire information related to it shall be public, according to the law.

Article 4.4(d) Commercial Confidentiality

As for the exclusions and the so called public interest test, although the exclusions are clearly determined, the cases of their articulation are quite rare. Administrative bodies almost never substantiate the reasons of refusal. Administrative bodies almost never apply the so-called harm test, envisaging the comparison of the requested information and the harm caused by releasing the information.

It should be noted that the categories of secret information are clearly defined in the General Administrative Code of Georgia. However, for example, Tax Code offers a new category – tax secret. The Law on Official Statistics adopted in late 2009 contains such obscure and ambiguous provisions in respect of confidential information that they are frequently and quite effectively used against those requesting information.

The General Administrative Code defines the following categories of secret information: state, professional, commercial and personal. This law has no advantage over, for example, Tax Code, which is a comparatively new law. Respectively, we should add a concept of tax secret to this list. Unfortunately, we cannot say that the categories of secret information defined in various laws are in harmony with each other; this is basically caused by the fact that the General Administrative Code has no advantage over other laws.

The major problem with secret information is the procedures related to it. Almost all administrative bodies are confident that if the law envisages secrecy of certain information, it can be blindly applied in any case. The Constitutional Court of Georgia explained in the case “Rusudan Tabatadze and Georgian Young Lawyers Association vs. Parliament of Georgia” in 2005 that a harm test should be used in any case and any decision on not releasing information should be preceded by discussion of the issue and substantiation of the decision.

Under the law, when submitting information, a person shall indicate whether it constitutes commercial secret. A public agency shall within 10 ten days categorize the information as commercial secret unless the applicable law requires the information to be open. If after submission of the information by the person, the public agency does not consider it commercial secret, the agency shall make the information open and immediately inform the concerned person thereof. The information shall become open in 15 days after the decision is made, unless the person, who submitted the information, appeals the agency’s decision before expiration of that term.

Green Alternative has experienced numerous cases, when the rule of categorizing the information as commercial has been violated. For years Green Alternative has been monitoring the process of privatization of large polluting facilities, advocating for the transparency of this process and proper compliance to the environmental commitments by the privatized enterprises. Privatization monitoring has showed that most privatization agreements with large polluters are classified through violating the law. In particular, a full text of the agreement is classified under one of the articles of the agreement itself. Administrative bodies explain such classification by the fact that this article represents a decision by the administrative body on categorizing the information as commercial secret. Thus, it appears that the decision of the administrative body on considering the information commercial secret represents a commercial secret of a private company. The attempts by Green Alternative to appeal against such practice of classification proved unsuccessful at any level of judiciary. Moreover, the Supreme Court noted in its ruling, by which it refused to hold a hearing on the merits of the lawsuit to recognize the practice of classification as illegal, that there was no need to consider the complaint and adopt a new decision on the case because this would not help to either development of justice or establishment of unambiguous judicial practice.

One more circumstance is also very important – as a rule, the articles of privatization agreements, which classify full texts of these agreements, also envisage classification of any information related to the deal. Pursuant to this norm, administrative bodies categorize as commercial secret any information kept by the agency anyhow related to the privatized enterprises. For example, in the case related to privatization of Tbilisi, Rustavi and Mtskheta water supply and sewerage systems, administrative bodies consider commercial the information related to water quality and measures on preventing the discharge of sewage water in the rivers without treating it.

It is generally established practice to consider a full text of a document commercial secret, although frequently classified documents contain both environmental information and information about administrative bodies. As a rule, neither does the court meet the request to separate non-commercial information.

Green Alternative has practiced such cases, when the information considered secret by one administrative body, has become public in another administrative body (Public Registry) in the course of a judicial dispute on declassifying this information. Despite it, the defendant administrative body was still considering the document as commercial secret. It should be noted that Georgian legislation does not envisage any procedures for such cases.

Article 4.4(f) Personal data

As for personal data, all the data allowing identifying a person are personal data; although the law (General Administrative Code) recognizes the notion of personal secret. Personal secret are any data that have been made secret at the decision of their owner. Legal persons have no personal data. It should be mentioned that if personal data somehow become public, interest in data protection disappears and they are no more protected.

It should be mentioned that all the above regulations are provided in General Administrative Code. Georgia has not yet adopted the law on personal data (Ministry of Justice is working on it). So the legislation in force provides for only general standards.

Article 4.5 Forwarding requests submitted to the wrong authority

The law obliges a public authority to transfer the request to appropriate authority in case the public authority does not hold the information requested. No deadlines are set for this procedure. Unfortunately, as has been mentioned above, these legal provisions, which are called principles of legal aid, are seldom observed by public authorities.

Article 4.8 Charges

No charge for supplying information is set in Georgia. At the same time Georgian legislation allows setting fees for copying public information. As provided in 10 principles of freedom of information of a human rights organization *Article 19*, the fee for copying the information should not become a barrier to freedom of information. Adopting the Law on Fees for Making a Copy of Public Information in 2005 created such a barrier.

First of all it should be mentioned that the State has no fiscal interest with regard to these fees; its annual amount is so low that cannot be physically reflected in budget revenues. Adoption of the law created difficulties not only to population but also to the State. Initially the law provided for cash payments only to cash boxes of each public authority and making money to the budget. As has been mentioned the fee for making a copy is very low (GEL 0.5 per page, printing on laser printer – GEL 0.10), thus spending state administrative resources for these arrangements turned out to be inadequate. Last year amendments were made to the law and public authorities were given more freedom in developing their own regulations with due regard to their specificities. The law also allowed for clearing as legitimate form of payment. Unfortunately these amendments lightened the work of only public authorities. An individual or an NGO is still obliged to know the preferences of the public authority: cash payment or clearing; obtain information only at presenting

the check of payment; pay additionally for bank services; spend time, because public authorities have the practice of notifying the applicants by so called intermediate letters, where they inform the decision and the fee due.

The law allows no exceptions with regard to the applicant or his/her objectives; however, voluntary character of paying the fee for making a copy sometimes leads to certain exemptions. For instance, a public authority may not charge an individual, but charge legal person or vice versa depending on which of them is acceptable for this authority.

Although the law refers to all public authorities and tariffs are explicitly set, there is a practice of deviation from the law. Good example in this regard is National Agency of Public Registry. This Agency deals with registration of movables and real estate, legal persons and liabilities. The Law on Public Registry sets much higher fees for access to the information processed at the above mentioned agency (for instance, extract on real estate costs GEL 15). Recent years are characterized with tendency of transformation of certain units of public authorities into legal entities of public law. This change, alongside with their independence, implies their ability to receive legal incomes⁴. So called information service (this is how copying public information was called in the initial version of the Law on Public Registry) may become the source of legitimate income at many agencies. The more so, that this “service” implies accelerated and, hence more expensive procedures.

Hence, though copy-making fee is not very high (but not less, either, than market price) the payment system is so inflexible and fiscal effect so low, that it serves one objective only – create a barrier to already fragile transparency in Georgia.

Article 5. Collection and Dissemination of Environmental Information

Article 5.1 (a) and (b) Existence and quality of environmental data

As for public authorities possessing and updating environmental information which is relevant to their functions, the situation here is not very good.

1. First of all it should be mentioned that the functions of public authorities are not always quite clear, leave alone possessing relevant information. This vagueness is mainly due to permanent reforming of environmental governance system since 2004, including institutional changes. These changes were not one-off event – they continue for years; Institutional/functional changes since 2004 to date could be roughly divided into three stages, to be discussed in short below (these functional changes immediately influence possession of information by an agency and hence it is important to discuss them here).

On the first stage (2004-2007) there were changes in three main directions aiming at consolidation of environmental and natural resources management functions within Ministry of Environmental Protection and Natural Resources. For instance, (1) so called “adjacent” state agencies (State Forestry Department, State Department for Protected Areas, State Geology Department, and part of State Land Management Department, etc.) merged with the Ministry of Environmental Protection and Natural Resources; (2) various entities at the Ministry and at new joint agencies were either abolished or reorganized or new units formed. As a result of such changes a new entity was set up within the Ministry in 2005 – Environmental Protection Inspectorate, charged with environmental enforcement and compliance assurance functions. Before setting up the Inspectorate, environmental enforcement functions were carried out by regional offices of the Ministry. (3) Regional offices of the Ministry were enlarged (there are 6 regional offices as opposed to 13 before) and they were deprived of certain environmental and natural resources management functions.

⁴ Article 13 of the Law on Legal Entity of Public Law

Second stage (2007-2010) was more stable. During this period Ministry of Environmental Protection and Natural Resources was responsible for all environmental issues. Though, it shared some of the functions with other public authorities (Ministry of Health, Ministry of Agriculture, Ministry of Economic Development and Ministry of Interior) and/or local authorities. Functions between all these authorities were not always clearly distributed; there were issues, not falling under the management/functions of any agency (e.g. certain aspects of waste management, genetically modified organisms, invasive species, etc.)

During this period important reform took place, which changed distribution of functions in natural resources management sector. In particular, in the beginning of 2008 Ministry of Environmental Protection and Natural Resources was deprived of the functions of licensing the use of natural resources (logging, mining operations, fishing, hunting management, etc.) and this function, together with the function of establishing quotas for the use of natural resources was transferred to Ministry of Economic Development. Ministry of Environmental Protection and Natural Resources holds only the function of agreeing the quotas.

Besides, in July 2010 Ministry of Economic Development changed its name and is called now “Ministry of Economy and Sustainable Development”. Change of the name would, naturally, have entailed change of functions, but to date the only more or less clear function is “preparation of sustainable development strategy and development of supporting national program”.

Third stage of redistribution of functions between public authorities started in February-March 2011 and it mainly referred to delivering part of the functions of Ministry of Environmental Protection and Natural Resources to other agencies⁵. “As a result of reorganization, functions related to the management and use of natural resources were transferred to Ministry of Energy and Natural Resources (legal entity of public law “Forestry Agency”, legal entity of public law seedlings forestry, issues related to regulation of nuclear and radiation activities, management of minerals in geologic environment and functions of spatial information). Functions related to the changing the land status and demarcation of state forest fund were transferred to National Agency of Public Registry - legal entity of public law of Ministry of Justice. And coast-protection functions were entrusted to Ministry of Regional Development and Infrastructure”⁶. This wave of changes also included abolishment of Environmental Protection Inspectorate – a single environmental enforcement body established in 2005. Who and how, if any, will perform the duties of the inspectorate is still unclear.

2. The law does not establish which agency should possess what information. It is meant that environmental information is collected and possessed by Ministry of Environmental Protection and Natural resources but the practice shows that other agencies also possess (should possess) environmental information (especially due to above mentioned functional changes).

There is a statutory act regulating the rules for preparation of National State of Environment Report⁷ that allows identifying administrative bodies, which may possess environmental information. In November 2010 amendments were introduced to this act, partly due to the fact that administrative bodies mentioned in the act had been abolished or new bodies had been set up. It is expected that new changes and amendments will be introduced to this act as a result of institutional changes initiated in February-March 2011, when new functions of national agencies are clearer.

At the same time it should be noted that the above mentioned statutory act envisaged for Ministry of Environmental Protection and Natural Resources to keep dynamic database on the status of environment. This function has been removed from the Ministry as a result of changes of November 2010 (and no other agency has been tasked with it).

⁵ Also name of the Ministry of Environmental Protection and Natural Resources has changed; it is now called “Ministry of Environmental Protection”.

⁶ See website of the Ministry of Environmental Protection: http://moe.gov.ge/index.php?lang_id=GEO&sec_id=40&info_id=1424

⁷ Resolution No.389 of 25 June 1999 by President of Georgia „On the rules of preparation of a national state of the environment report” and amendments thereto of 1 November 2010 (Resolution No.876 of 1 November 2010 by President of Georgia).

As for the information (data) flow between different structural entities of Ministry of Environmental and Natural Resources, structural entities, as a rule, possess database relevant to their functions, but these data are not interconnected. Different entities of the Ministry exchange information on practical needs base; there is no institutionalized system of information flow at the Ministry to date (and has never existed).

As for the information flow between public authorities, it happens only in case it is legal requirement in a specific case; for instance, when one public authority participates in an administrative procedure carried out by another public authority. Another example is above mentioned regulation defining rules for preparation of National State of Environment (SoE) report - this statutory act defines public authorities that should provide specific information to the public authority responsible for drafting the national SoE report.

In July 2009 Parliament of Georgia passed the Law on Setting up a Legal Entity of Public Law – Data Exchange Agency aiming at establishment of data transfer system between different public authorities, setting security standards, etc. So far the Agency has not gone beyond the placement of all existing (already publicly available) governmental electronic data on a single web-page; therefore, at this stage it is difficult judge about data security, quality, character of data transfer, etc.

Unfortunately there is no law on electronic transparency in Georgia; nor is there any relevant provision in General Administrative Code. However, since the same code covers issues on access to information in electronic form, transparency of electronic registries should not be a disputable issue.

As for the charges for the information flow, General Administrative Code of Georgia obliges national authorities to provide mutual legal assistance and commitment to pay for such assistance, when the expenses exceed GEL 50. It should be noted that this obligation do not refer to the cases, when provision of such assistance is legally binding. For example, providing environmental information/data by public authorities to National SoE Report drafting authority should be considered such case. Besides the public authorities' obligation to provide information for drafting National SoE Report, the framework Law on Environmental Protection further adds that the information should be provided free of charge.

In general it should be said, that public authorities do not practice proactive publication of information. Even when requested, they restrain from broad interpretation of the law. As the government mentions it in the National Implementation Report, environmental monitoring reports are available for the public as provided in the Law on Environmental Protection. However, the practice does not always comply with legal provisions. As we have stressed above, such information can not be classified as secret. Moreover, pursuant to another point of Article 42 of General Administrative Code of Georgia, both, monitoring and audit reports fall in this category. Regardless the above mentioned, Georgian legislation does not meet the spirit of the Convention. The Convention does not at all imply that public should obtain the information through long and expensive procedures; their interest should be met through facilitation by public authorities.

Another problem is that the commitment for proactive publication is not met even when immediately provided by law. Public registers issues remain problematic too, though since the adoption of the General Administrative Code all public authorities are obliged to maintain public registers.

According to article 35 of the Code: all public information kept by a public agency shall be entered into the **public register**. Reference to public information shall be entered into the public register within two days after its receipt, creation, processing or publicizing, indicating its title and the date of receipt of the information, the title or name of the physical or legal person, public servant, or public agency, which provided the information or to which it was sent.

Ministry of Environmental Protection and Natural Resources in its National Implementation Report notes that the law provides for public authorities' commitment to keep public registers, though it says nothing on how

this commitment is met by public authorities, including Ministry of Environmental Protection and Natural Resources itself. The thing is that the Ministry has no such register to date. Even after 10 years of enactment of the General Administrative Code, the Ministry is still referring to the absence of a single form for public information registries.

It should be mentioned that should Ministry of Environmental Protection and Natural Resources observe the above norm, it would not have to improvise in *10th December Reports*. For many years the government was explaining the absence of public registers by lack of financial and technical resources. At this stage there is no computerization and network problem at public agencies. As for digitalization of archives, this may indeed need huge resources; however, public agencies may start with keeping register and periodically adding of archive materials.

It is not clear what the government means by mentioning that publication of information is costly. Ministry of Environmental Protection and Natural Resources is supposed to possess all the information provided by the Convention. The Convention is quite flexible and provides that the information can be published or made available any other way. It is hard to believe that publication of the information on Ministry's web-site be related to the expenses, which would justify the failure to meet the obligations defined under the Convention.

Article 5.1(c) Environmental emergency information

According to the Law on Protection of Population and Territories from Natural and Man-made Disasters⁷, the information on emergency situation should contain the data on engineering, radiation, chemical and bacteriological, fire and environmental situations on specific territory as well as the arrangements to protect the territory and population in emergency situation. The same law provides that information on emergency situation is public except for the information, prohibited for dissemination by Georgian legislation. Respective authorities are prohibited withholding the information, its delayed or deliberately distorted dissemination.

Unfortunately there is not much point in this prohibition, because Criminal Code of Georgia does not provide for any respective liability. Criminal liability is envisaged only for concealment or distortion of information on accident at nuclear or radioactive units; also for concealment or distortion of information containing imminent threat to human health or the environment. This implies that concealment of environmental emergency information can be qualified as criminal offence only if it causes extreme, almost irreversible damage.

Article 5.2 Information on the type and scope of the available environmental information and practical arrangements for information dissemination

There is no uniform database of environmental information in Georgia. The Aarhus Center is trying to post environmental information available at various public agencies on its website. At this point, the information posted on the Center's website is incomprehensive, unsystematic and frequently outdated.

Article 5.5 Dissemination of information: strategic and normative materials

The government does not consistently follow the practice of dissemination of reports on environmental normative acts, strategy and policy documents, international agreements and their implementation reports. As we have already mentioned, the major problem is that the government does not pursue the policy of openness and, as a rule, does not disseminate comprehensive and important information without requesting it. Even in case, when it is sufficiently proactive, it is limited by dissemination of outdated, incomprehensive or generalized information. This also concerns the information posted on the website of the Aarhus Center.

Article 5.6 Encouraging operators to actively disseminate information

To date Georgian government has not made any efforts in order to meet the requirements of Article 5.6 of the Convention. Moreover, in March 2011 Georgia annulled the only requirement for eco-labeling of

products, which was provided in 1996 framework Law on Environmental Protection⁸. The same law (article 20) provides for general requirements of environmental audit⁹ and explains that representatives of the public are entitled to request the results of environmental audit. The law provides for very general audit-related norms, and statutory act to specify detailed requirements is not developed and adopted so far (this was one of the requirements of framework Law on Environmental Protection).

Article 5.8 Product information

As already mentioned above, in March 2011 the article on eco-labeling was cancelled in the framework Law on Environmental Protection. At the same time it needs to be mentioned that Georgian legislation provides for general product labeling standards. In the end of 2005 the Law on Safety and Quality of Products was adopted; Article 19 of law sets out general rule for labeling the products; On the basis of this article the regulations approved by Minister of Agriculture “On approval of additional requirements to product labeling” were passed in the end of 2009. These regulations set standard requirements to labeling, such as name of the product, ingredients, nutritional quality, etc. In case product is produced using biotechnologies, the regulations are also obliging operators/distributors of the product to indicate it on the label, if genetically modified components exceed 0.9% of the product’s total weight. It should be mentioned that although the Law on Safety and Quality of Products was adopted in 2005, it is being inactivated just now.

Article 5.9 Pollution release and transfer registers (PRTRs)

Georgian government has not made any significant steps towards implementation of Article 5.9 of the Convention except for the project initiated in 2009¹⁰, mentioned in the National Implementation Report. The project aims at developing a model for pollution release and transfer register. According to official information the project was due in February 2011; it is still early to talk about project results. It is also indicated in the National Implementation Report that the analysis of the possibilities for development of the registry is prepared; regrettably, this analysis is not available to the public.

Article 6. Public Participation in Decisions on Specific Activities

Article 6.1 Activities falling under article 6

Provisions of Article 6 of the Convention apply to decision-making procedures for issuing the Permit for the Impact on Environment (requiring Environmental Impact Assessment (EIA)) and also to two other decision-making procedures that are also described shortly below.

1. Procedure for issuance of a Permit for the Impact on Environment

At this moment there are two statutory acts regulating issuance of a *Permit for the Impact on Environment*:

1. The Law on Licenses and Permits of 24 June 2005 – this is a framework law, listing the types of licenses and permits operating in the country and sets standard rules of decision-making on issuance of licenses and permits. When it comes to Permit for the Impact on Environment the law provides that the decision should be made through *simple administrative proceedings*. It should be mentioned that this procedure (in contrast to *public administrative proceedings*) rules out public participation in decision-making processes.

⁸ Article 19 of the law provided for eco-labeling of products for better guidance of consumers and facilitation of production of environmentally-sound products. The article provided for only general standards to be specified in appropriate statutory act. In 1999 detailed regulations for eco-labeling was approved under the Order by Minister of Environmental Protection and Natural resources. As a result of 11 March 2011 amendments to the Law on Environmental Protection, the article on eco-labeling was removed entailing cancellation of appropriate detailed regulations on eco-labeling.

⁹ The law provides that environmental audit can be carried out at the initiative of the facility owner/operator or the Ministry of Environmental Protection and Natural Resources in extraordinary cases defined by law of Georgia. The costs in such case shall be covered by the Ministry.

¹⁰“Capacity building for development of pollution release and transfer registers and support for strategic approach to international chemicals management in Georgia”; the project is implemented through technical assistance of UNITAR, while financial support is provided by SAICM Quick Start Programme Trust Fund (QSP TF).

2. 13 December 2007 Law on Permit for the Impact on Environment¹¹ - this law contains the list of activities subject to EIA, general requirements to EIA process, conditions for exemption from EIA, timeframe and rules for project developer to ensure public access to information about planned activity, receiving comments and conducting public hearing. This law also sets procedures for the cases, when obtaining construction permit is also necessary to carry out the planned activity; in other words, the law makes a connection between EIA related decision-making procedure and construction permit issuance procedures.

To put light in the situation in this sector the following should be clarified: before the adoption of above mentioned Law on Licenses and Permits, provisions of Article 6 of the Convention applied to decision-making procedure on **Environmental Permit**. In 1997-2005 (before the Law on Licenses and Permits entered in force) the Law on Environmental Permit was in force in Georgia, which provided for the procedure of issuance of Environmental Permit.

Framework Law on Licenses and Permits and subsequent statutory acts dramatically changed EIA related decision-making procedure. It would be impossible to describe all the changes and differences, but below are only some of them:

(a) Name of the permit

Law on Licenses and Permits changed the name of the permit. In particular, before 2005 EIA related procedure was called *Environmental Permit* issuance procedure, while after 2005 it is called *Permit for the Impact on Environment* issuance procedure which, allegedly better describes the essence of the permit.

(b) Activities subject to EIA

The Law on Environmental Permit, which was in force in 1997-2005 contained a comprehensive list of activities subject to EIA procedure. Although the list was not perfect (definitions of the activities needed be more precise, thresholds revised), but it was in conformity with Annex I of Aarhus Convention, moreover it contained even the activities, not listed in the Annex I.

Present Law on Permit for the Impact on Environment (Article 4) also contains comprehensive list of activities subject to EIA, but it is more restricted and does not contain many of those from previous list. In particular, such activities, as for instance, extraction of mineral resources (apart from oil and gas extraction, see below), construction of nuclear reactor and nuclear power plants, agricultural and food production facilities, paper, leather and textile industries, certain types of infrastructural projects, sectoral plans and programs, etc. are not anymore subject to EIA.

As for compliance with Annex I of the Convention, the Law on Permit for the Impact on Environment does not contain the activities, provided in a range of sub-paragraphs of paragraphs 1 and 3, as well as paragraphs 7, 10, 11, 12, 15, 16 and 19 of the Annex I.

Another important difference between pre-2005 and after-2005 systems should be mentioned. Before 2005 the listed activities would go through EIA procedure irrespective of its developer – the public or a private person. After 2005 EIA is applicable to only private projects/activities listed in the law. Public (state-owned) projects are exempt from EIA (article 1 of the Law on Licenses and Permits).

30 June 2006 Law on State Support of the Investments is even further-going in the sense for exemptions. It allows for initiating any activity by the developer without prior EIA procedure, provided he/she meets these legal requirements in future.

¹¹ Before adoption of this law a temporary regulation “on the rules and terms of issuance of Permit for the Impact on Environment” was in force (approved by governmental resolution No. 154 of 1 September 2005). The norms of 2005 temporary regulation and 2007 law are practically identical; in fact the law replaced temporary regulation.

(c) Permitting and public participation

According to legislation in force during 1997-2005, three months timeframe was envisaged for reviewing the quality of the EIA report (conducting state ecological expertise) and taking decision on issuance of Environmental Permit. To date the timeframe for reviewing the EIA report is 20 days.

As for public participation in permit issuance decision-making process, again much difference can be followed between pre-2005 and after-2005 systems.

In 1997-2005 Environmental Permit used to be issued through *public administrative proceedings* – this rule allows for participation of the public in decision-making process. The public participation procedure was as follows:

The permit issuing competent authority (Ministry of Environmental Protection and Natural Resources) was obliged, within 10 days after receipt of application (that included EIA report) for obtaining environmental permit to:

- a. publish in the media the information on proposed activity, as well as place and time of public hearing;
- b. ensure public access to EIA report during whole period of reviewing the application (3 months);
- c. receive and consider written comments within 45 days after publishing the information;
- d. hold public hearing not later than 2 months after the receipt of application.

This system also enabled the developer, before submitting the application to the Ministry (i.e. before initiating administrative procedure), to hold public hearing in order to receive comments on draft EIA report. It is noteworthy that this was the developer's right and not the obligation.

According to current permitting system in Georgia, Permit for the Impact on Environment is issued through *simple administrative proceedings* – these proceedings rule out participation of the public in decision-making process.

At present, Ministry of Environmental and Natural Resources (permitting authority) is neither obliged nor authorized to ensure participation of the public in decision making process. After receipt of application for obtaining Permit for the Impact on Environment the ministry is not obliged to:

- a. publish information on initiating administrative proceedings;
- b. ensure public access to EIA report;
- c. receive and consider written comments (in case representatives of the public somehow learn about administrative proceedings);
- d. hold public hearing;
- e. publish information on the decision.

The above mentioned indicates clearly that the government withdrew from the responsibility for ensuring public participation in decision-making process. In turn, the law is binding for the developer to inform the public about his/her plans and ensure public consultations in the process of drafting EIA report i.e. before administrative proceedings on issuance of permit start. At the same time the Ministry is authorized to issue the permit even when the developer ignores the comments of the public.

Ministry of Environmental Protection and Natural Resources deems that the scheme in force absolutely meets the requirements of Article 6 of the Convention and ensures participation of the public in decision-making process.

To our opinion the developer's informing the public and ensuring participation of public in the discussions on draft EIA report before submitting the application to the competent authority (i.e. before starting administrative proceedings for decision-making) may not be interpreted as "public participation in the decision-making process" because all of these processes lead by developer are not part of administrative proceedings.

Summing up one could say that the legislation in force reduced public participation to utter formality – ensuring publicity "out" of permit issuing competent authority.

2. Other procedures under Article 6 of the Convention

As mentioned above, provisions of Article 6 refer to two decision-making procedures other than decision-making on issuance of Permit for the Impact on Environment: (a) decision-making on oil and gas operations; and (b) forest use licensing.

(a) Decision-making on oil and gas operations

National regulations on oil and gas operations (2002) oblige developer to prepare EIA report and present for approval to State Regulatory Agency of Oil and Gas Resources. The same act envisages possible informing and public participation without specifying appropriate procedures.

According to the Law on Environmental Permit that was in force in 1997-2005 extraction of mineral resources (including oil and gas) was also subject to EIA; but the decision-making process (Environmental Permit issuance procedure), by the same law, was taking place within the Ministry of Environmental Protection and Natural Resources. Thus, there was contradiction between two different statutory acts.

Insofar extraction of mineral resources after 2005 is not in the list of activities subject to EIA (Law on Permit for the Impact on Environment), we can conclude that there is no contradiction between two laws with regard to oil and gas operations.

(b) Forest use licensing procedures

According to article 27 of Georgian Forest Code (1999) forest use and forest management activities were prohibited without forest inventory except under the state of emergency¹². In 1997-2005 forest inventory reports were subject to EIA and environmental permitting procedures. Besides, two Articles (35 and 36) of Forest Code provided for general norms on public access to information and public participation.

As mentioned above, after 2005 the list of activities subject to EIA was significantly cut; forest inventory reports were among those removed from the list. Instead, only in August 2009, at the initiative of and efforts by Green Alternative amendments were introduced into forest management regulatory act¹³. As a result of these amendments, public participation in decision-making on auctioning of forest use licenses became possible (competent authority became obliged to apply *public administrative procedures* during decision-making)¹⁴. The amendments entered into force on 1 January 2010. It is noteworthy that about one and a half month after entry into force another amendment was introduced, which postponed inactivation of this norm to 1 January 2011¹⁵. The norm was in force for only 1.5 month in 2010 and has never been applied in practice. 21 January 2011 another change was introduced into the act postponing its inactivation to 1 January 2012¹⁶.

¹² Article 27 of the Forest Code of Georgia has been canceled as a result of June 2010 amendments and is not in force after 1 August 2010.

¹³ Resolution No.132 of 11 August 2005 by Georgian Government "On approval of rules and terms of forest use licensing".

¹⁴ 19 August 2009 amendments to Resolution No.132 of 11 August 2005 by Georgian Government "On approval of rules and terms of forest use licensing".

¹⁵ 19 February 2010 amendments to Resolution No.132 of 11 August 2005 by Georgian Government "On approval of rules and terms of forest use licensing".

¹⁶ 21 January 2011 amendments to Resolution No.132 of 11 August 2005 by Georgian Government "On approval of rules and terms of forest use licensing".

Alongside with the above processes Articles 35 and 36 of the Forest Code were amended in July 2010 and similar norm ensuring public participation appeared in Forest Code too. It should be kept in mind that in contrast with forest use regulatory act, this norm of the Forest Code is in force since 1 August 2010.

Hence, there are two regulatory acts ensuring public participation in forest use licensing procedure: the Forest Code of Georgia of 1999 (Articles 35 and 36, in force since 1 August 2010) and Georgian Government Resolution No. 132 of 11 August 2005 “On approval of rules and terms of forest use licensing” (article 2 to enter in force 1 January 2012).

3. Other permitting procedures related to EIA process

Where obtaining of construction permit is necessary for carrying out the activities, EIA process is linked to construction permitting process. In such case EIA report, together with other compulsory documents, shall be presented to Ministry of Economic Development (competent authority for construction permitting), which in its turn passes over the EIA report to Ministry of Environmental Protection and Natural Resources for Ecological Expertise (to check quality of the report and prepare the decision). Positive decision of ecological expertise becomes part of the construction permit and its condition; in this case Ministry of Environmental Protection and Natural resources does not issue Permit for the Impact on Environment.

Construction permit, in compliance with Georgian legislation¹⁷, shall be issued in three stages:

I stage – approval of terms of use of land for construction – not more than 30 days;

II stage – agreeing of architectural project, constructive or/and technological schemes – not more than 20 days¹⁸;

III stage – granting construction permit – not more than 10 days.

It should be noted that II and III stages go through *simple administrative proceedings*; as for the first stage – public authority was obliged to take decision through *public administrative proceedings*, meaning publication of the public notice, allocation of 20 days for public to submit written comments and organizing public hearing within 7 days after expiration of term allocated for submission of the written comments.

In September 2010 the legal act setting rules for construction permitting was amended. As a result, the decision on the first stage is also made through *simple administrative proceedings* which, as already mentioned above, rules out public participation in decision-making process. Thus, the whole construction permitting process is now closed for the public.

4. Exemption from EIA

According to the Law on Permit for the Impact on Environment “*activities may be exempted from EIA if national interests require initiation and taking timely decision on the activities*”. From 2005 to date, 22 activities have been exempted from EIA on the basis of this provision of the law. 16 of them referred to construction or rehabilitation of roads and road-related infrastructure, 4 – construction, rehabilitation or reconstruction of certain sections of main gas pipeline. In one case construction of hydropower plant was exempted from EIA and in another - asphalt plant.

All the above decisions on exemption from EIA were taken by the Georgian Government by its resolutions. The cases of EIA exemptions mentioned above might be incomplete, since, regrettably, not all governmental resolutions are being officially published. The reason for selective publication of governmental resolutions is not clear though.

¹⁷ General rules for issuance of construction permit, as well as other permits are set forth in 2005 Law on Licenses and Permits. Specific rules for issuance of construction permit are set forth in Georgian Government Resolution No.57 of 24 March 2009 “On rules and terms of issuing construction permit”. Before adopting this act, the resolution under similar title was in force, which was approved by Georgian Government Resolution No.140 of 11 August 2005.

¹⁸ Conclusion of ecological expertise shall be issued at this stage and the developer is obliged to organize public hearing on draft EIA report before this stage starts.

Article 6.2 Notification of the public concerned

EIA related regulations do not imply the notion of *public concerned*. The Law on Permit for the Impact on Environment contains such notion as “public representatives” when it comes to holding public hearing by the developer on draft EIA. Public participation in the administrative proceedings (i.e. the decision-making process) is not envisaged by the law as said elsewhere; therefore competent authority (Ministry of Environmental Protection and Natural Resources) is not obliged to notify the public.

General Administrative Code gives explanation to “the party concerned” and provides for possible participation of “the party concerned” in the process of passing administrative-legal act by public authority through *simple administrative proceedings*.

According to General Administrative Code the party concerned is “*any physical or legal person, public authority, whom administrative-legal act refers to; also, those whose legal interests are immediately and directly affected by administrative-legal act or by the activities of public authority*”.

According to Article 95 of General Administrative Code, public authority has a right to involve the party concerned in administrative proceedings upon the request of the latter. Green Alternative attempted many times to apply this norm of General Administrative Code to decision-making on issuance of Permit for the Impact on Environment¹⁹. Although Ministry of Environmental Protection and Natural Resources never put in doubt the fact of Green Alternative being the “party concerned”, it could not ensure its participation in administrative proceedings. Due to repeated facts of such an attitude, as well as to demonstrate inefficiency of the existing system and noncompliance with the provisions of Aarhus Convention, in 2009 Green Alternative lodged a complaint with Inspection General of Ministry of Environmental Protection and Natural Resources. The investigation ended in rebuking head of permitting department of the Ministry²⁰. During the investigation the head of permitting department also mentioned inadequacy of timeframes for decision-making and impossibility of informing and participation of the public.²¹ Regardless all the above not a single step has been made to change permitting procedure and to bring it into compliance with Aarhus Convention.

Articles 6.3, 6.4 and 6.5 Time-frames for public participation and the developer’s role

There are no screening and scoping procedures in Georgian legislation and respectively, nor are there relevant public participation procedures at these stages. As mentioned many time before, current system by far does not ensure public participation in decision-making process.

The law imposes responsibility for informing the public and holding public hearing on draft EIA report upon the developer. According to article 6 of the Law on Permit for the Impact on Environment developer is obliged to:

- hold public hearing before submitting EIA report to permitting public authority;
- publish public notice on planned activity in both, central and local printed media;
- receive and review written comments by representatives of the public within 45 days upon publication of the public notice;
- not before 50 days after the publication of public notice and not later, than 60 days hold public hearing on the EIA report.

¹⁹ Since Ministry of Environmental Protection and Natural Resources is not obliged to publish public notice on initiation of administrative proceedings, in certain cases (when it was already known that developer organized the public hearing on draft EIA report) Green Alternative proactively requested involvement in the administrative proceedings, i.e. ahead of the actual start of administrative proceedings.

²⁰ Green Alternative lodged similar complaint with Inspection General of Ministry of Environmental Protection and Natural Resources also in November 2007; then also end of the story was censuring head of the licenses and permits department. Documents related to the case are available at: www.greenalt.org

²¹ see also report No.07-10/423 of 7 May 2009 of Nikoloz Chakhnakhia, head of licenses and permits department of Ministry of Environmental Protection and Natural Resources to Minister Goga Khachidze

The law requires that the public hearing be held in administrative center of local self-governance unit, where the activity is planned to be implemented. The law also specifies that any representative of the public is eligible to attend the hearing. The law does not specify where the EIA report should be available during 45-days period. In practice reports are usually available at Ministry of Environmental Protection and Natural Resources, Aarhus Center and the offices of developers; seldom, they are available at local government offices.

Article 6.9 Information about the decision

Ministry of Environmental Protection and Natural Resources is not obliged to inform public on the decision, whether positive or negative; there is no such practice either. Ministry releases such information upon request only. In case of request the Ministry will release copies of the decision made, conclusion of ecological expertise and the opinions of individual experts.

Here the attention should be drawn on the status of the conclusion of ecological expertise. Ecological expertise is carried out (i.e. the quality of EIA report is reviewed) and the conclusion is prepared by the commission composed of the Ministry staff; the law also allows for inviting "independent experts" when appropriate. On the basis of the commission's conclusion, the Ministry (Licenses and Permits Department) prepares the conclusion of ecological expertise, which basically does not differ from the commission's conclusion (usually the difference is that the first is signed by the chairman of the commission and the latter – by head of Licenses and Permits Department). On the basis of positive conclusion (which may contain conditions) the decision on granting the permit shall be made – the Minister approves the conclusion of ecological expertise by his/her order; that is the Ministry's final decision.

Orders by the Minister do not contain any reasons and considerations on which the decision is based. They are standard and usually contain few sentences: allowing issuance of permit for the impact on environment; the requirement that the permit owner complies with the conditions of the conclusion of ecological expertise; terms for validity of the permit (usually granted for undefined period) and the deadline for appealing against the decision (one month after entering in force).

The law says nothing about the status of the commission's conclusion and/or conclusion of ecological expertise - if they are advisory or binding. It is not clear if these documents are just advisory and the Ministry's final decision can be different from them; or even these documents might differ.

It is also important to take note of the following fact: in the end of 2010 the Law on Permit for the Impact on Environment underwent the changes²² which made it possible to change the conditions of the conclusion of ecological expertise (i.e. change the conditions of the decision made by the Ministry). The law provides for possibility of such changes not at the initiative of the Ministry (competent authority) but at the initiative of the developer. The developer is eligible to apply to the Ministry with the request to revise the conditions; developer must substantiate that compliance to the conditions set forth in the permit would not reduce or mitigate environmental impacts; or prove that changing conditions of the permit would be more efficient in terms of mitigating or avoiding environmental impacts.

For the decision on changing the conditions the Ministry shall set another ad-hoc commission, which presents appropriate recommendations to the Minister. In the event of positive recommendation the Minister will raise the issue with Georgian government. After receiving governmental consent the Minister shall issue appropriate order.

All the above procedure, as well as final decision is absolutely closed for the public.

²² 28 October 2010 amendments to the Law on Permit for the Impact on Environment

Article 6.10 public participation in reconsideration or updating of the decision

As mentioned above, Permit for the Impact on Environment for the activities defined in article 4 of the Law on Permit for the Impact on Environment is issued for undefined period. The same article of the law specifies that replacement of one production technology by another shall be considered new activity, if it causes the change of operation mode. This would require another decision-making procedure. The legislation does not provide for informing and participation of the public in this case either.

Article 7. Public Participation Concerning Plans, Programmes and Policies Relating to the Environment

The Georgian legislation does not give general explanation about what kind of documents the plan, program or policy are and whether they differ from each other by their scope, level of specification or legal status. Nevertheless, there is a certain practice of development of plans and programs in Georgia; though there is less practice of development of policy documents. As a rule, such documents are developed by administrative bodies (as a rule, with the donor support); consultations are often held with the interested agencies and other stakeholders in the process of their preparation and finally they are approved by various statutory acts (for example, by presidential or governmental decrees, or by the acts issued by the heads of different public authorities). Since the legislation does not determine either their place in the planning system or their status, the practice of their adoption/approval/endorsement is different in each particular case (there is a slight difference in environmental planning which is discussed below). At the same time, there are frequent cases, when the document of this type is being developed, but finally it is not officially adopted/approved – **the forest policy document** mentioned in the National Implementation Report serves as an example. The forest policy document is mentioned in the National Implementation Report as an example of the Ministry's efforts to provide public participation, but it says nothing about the fact that Georgia has no such document so far.

Since 2003 Georgia has numerously started to implement forest sector reform as well as to work over the policy and strategy documents related to this sector. The essence and direction of the so called "reform" was changing in accordance with the structural and, what is the worst, staff changes (even at the average state bureaucracy level) carried out in the government. Several projects or concepts on forest sector reform or national forest policy have been elaborated till now, though none of them have been approved officially. It should also be noted that in each particular case a "reform" model was being developed, that was followed by the implementation of its separate elements, institutional and staff changes and only afterwards the work on national forest policy document was beginning. Hence, the quality of public participation in preparing the documents was absolutely unsatisfactory²³ (noteworthy, that in each case the availability of documents and organization of public discussions was made possible only due to a strong pressure from non-governmental organizations).

The National Implementation Report brings the process of development of the **National State of the Environment Report** as the second example of the Ministry's efforts to provide public participation. Special attention should be paid to the fact that by its contents the National State of the Environment Report does not represent policy or program document. Moreover, the 1996 Framework Law on Environmental Protection (article 14) directly says that the National State of the Environment Report is prepared only for the purpose of informing the society. Thus, the Ministry is misleading the readers by bringing this document as an example. As for the issue of public involvement in the process of preparation of national SoE reports, only the first three-year national SoE report preparation process (2007-2009) was notable for transparency of the development process and high public involvement (which, by the way, has not been approved and published

²³ Irakli Macharashvili, Green Alternative, "Analysis of Forest Policy of Georgia," available on the website of Green Alternative: www.greenalt.org

so far); annual reports issued before that, in 2001-2005, were being prepared without any public participation at all.

When it comes to the environmental planning system, it is important to note that the above mentioned 1996 Framework Law on Environmental Protection (article 15) determines the elements of system: sustainable development strategy; national environmental action program; regional, public authority-level and local programs and environmental management plans for the objects of activities. Detailed procedures of public participation in the development and adoption of these documents should have been specified in a specific law on environmental planning; however, Georgia has neither adopted such law, nor is its development planned so far.

Finally, it is essential to focus on yet another important amendment implemented during last years: before February 2006, pursuant to the legislation, the following plans and programs were subject to EIA and public participation procedures: urbanization and spatial planning programs; industry development programs; transport infrastructure development programs; land use schemes for administrative-territorial units (districts); long-term rehabilitation programs for protected areas; plans on the protection and use of water, forest, land, minerals and other natural resources; national, regional and local construction programs for the location of engineering facilities of all types designed to avoid negative consequences of possible natural disasters. According to the 1997 Law on Environmental Permit, it was obligatory to conduct EIA and to make decisions on issuing environmental permits through public participation before such plans and programs were adopted, approved or endorsed by the legislative and executive bodies. As a result of legislative amendments implemented in February 2006, such plans and programs are no more subject to the above mentioned procedures.

Article 8. Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments

There are several categories of normative (statutory) acts in Georgia. In case of **legislative normative acts**, Georgian citizens have the right to directly get involved in the legislative process – according to article 67 of the Constitution of Georgia, no less than 30 000 voters have the right to legislative initiative (other parties entitled to initiate normative acts are: President of Georgia; Government; Member of the Parliament; Parliamentary Committee; Parliamentary Faction; supreme representative bodies of Abkhazia and Adjara Autonomous Republics).

As for the availability of draft legislative normative acts for the public and the public involvement in the legislative processes, the Framework Law on Normative Acts adopted in June 2009 does not envisage such provision at all. The Parliamentary Statute adopted in February 2004 covers several general provisions and obligations concerning this issue. In particular, according to the Statute, the Parliament of Georgia is obliged to publish only those draft laws for general public review in the Legislative Herald of Georgia²⁴, which concern general or partial revision of the Georgian Constitution as well as the state symbols of Georgia. At the same time, the Statute do not determine the forms and timeframes of consultations with the public (the Statute simply note that the Parliament launches parliamentary discussions on such draft laws within one month after their publishing).

The Parliamentary Statute contains one more general norm related to informing the society about draft laws. According to article 148 of the Statute, after the Bureau of the Parliament makes the decision on starting the procedure of discussing a draft law, the legislative body is obliged to post it on its website. It should be noted that the Georgian Parliament does not meet this commitment except for some special cases (and even in

²⁴ An official publication, which has been issued since January 1, 2011 only in an electronic form on the website; a normative act can be considered official (legally valid) after publishing of its full text on the website of the Legislative Herald of Georgia.

these special cases it is difficult to reveal some regularity). In order to fill the information vacuum and to promote the transparency of the lawmaking process, from 2004 to January 1, 2011, Civil Society Institute, a non-governmental organization, through the agreement with the Parliament's Staff, was providing information bulletins on planned legislative initiatives to all interested parties and posting draft legislative acts on the organization's website. The Civil Society Institute has suspended this practice from January 1, 2011 and respectively, now the society lacks the opportunity even to observe the legislative processes. It should also be noted that even when the Civil Society Institute was providing access to draft laws, frequently public involvement in the legislative processes was impossible because of intensive character of legislative amendments.

Due to a legislative vacuum, public access to draft legislative normative acts is extremely limited before their submission to the Parliament in those cases, when the government is the initiator of a draft law (usually, this or that ministry is the author of a draft law). Availability is provided only in special cases, particularly as a result of a pressure from civil society groups. For example, when asked by Green Alternative in February 2007 to inform about the plans of informing the public and holding public consultations concerning up to ten draft laws envisaged by the 2007 lawmaking plan, the Ministry of Environmental Protection and Natural Resources responded²⁵:

“As for the public access to draft laws, this is to inform you that the mentioned draft laws will be posted by the Ministry of Environmental Protection and Natural Resources on its official website in the near future”...

The Ministry did not keep its promise to post draft laws on its website. In respect of public hearings it gave the following explanation in the same letter:

“At this point the Ministry of Environmental Protection and Natural Resources has no plans to hold public hearings on draft laws. Let us inform you in this regard that while preparing the draft laws the Ministry of Environmental Protection and Natural Resources guides itself by the Law on Normative Acts, which provides for exact rules about what procedures should be followed while preparing a draft law and submitting it to the legislative body, and this law does not recognize “the concept of public hearings.”

In the absence of legal requirements, generally, the public authorities, including the Ministry of Environmental Protection and Natural Resources, do not show their willingness to inform and involve the public while developing draft legislative normative acts.

In October 2009 overwhelmingly important amendments were made to the Georgian legislation concerning the rule of adoption of **normative administrative-legal acts**²⁶. This amendment has actually eliminated the opportunities of public to be informed and to participate in the process of preparation of normative administrative-legal acts by administrative bodies thus distancing itself from the requirements of article 8 of the Aarhus Convention. In particular, those provisions of General Administrative Code were abolished, which were providing public participation in adopting the normative administrative-legal acts by administrative bodies through applying *public administrative proceedings*²⁷. At the same time, the obligation about the use of *public administrative proceedings* was determined only in respect of a normative act of a corporate (collegial) public body.

Human rights groups, as well as Green Alternative, gave a sharply negative assessment to the mentioned amendments trying to convince the lawmakers that along with violating the norms of international law, such

²⁵ Letter No.03-01-14/525 dated February 28, 2007 sent by the Deputy Minister of Environmental Protection and Natural Resources to Green Alternative.

²⁶ An act issued by an authorized administrative body pursuant to an applicable legislative act which comprises general rule of conduct of permanent or temporary and multiple usage (the General Administrative Code of Georgia, article 2).

²⁷ Chapter 15 (Administrative proceedings related to the issuance of a normative-administrative act) of the General Administrative Code was removed. Unfortunately, the requirements of this chapter (before its removal) were rarely used in practice by administrative bodies.

amendments were a serious setback on the way of development of democratic institutions and procedures in the country. Unfortunately, the Parliament did not give due consideration to the NGO arguments.

It should be noted that in December 2010 National Implementation Report of the Aarhus Convention, the Ministry of Environmental Protection and Natural Resources not only ignored the above mentioned amendments, but it lied when it said that:

“Public administrative proceedings are also used for issuing normative documents by the executive authorities (chapter 9 of the General Administrative Code of Georgia). Public involvement in this process is guaranteed by law”.

Article 9. Access to Justice

As we have already mentioned above, pursuant to Georgian legislation, international agreements are directly applicable in Georgia, without incorporating them into the national legislation. Georgian courts have applied the Aarhus Convention only upon the request of plaintiff non-governmental organizations. Judges do not have proper qualification and training to apply the mentioned convention assertively. The courts guide themselves by Administrative Procedural Code and Civil Procedural Code, which envisage the principles of disposition and competitiveness of the parties. This, first of all, means that the court can not go beyond the limits of the plaintiff's requirement, though it has the right to invalidate the decision of an administrative body.

Articles 9.1 and 9.2 Remedies

According to the present formulation of article 2.5 of the General Administrative Code, *“the court shall not accept a complaint against an administrative body, if the plaintiff did not use the possibility of single filing of an administrative complaint in compliance with the General Administrative Code”*. It means that any person in Georgia is obliged to submit an administrative complaint to the administrative body before taking legal action. This amendment was made in December 2007 despite a huge resistance from the civil society. This legislative amendment has significantly complicated the situation for citizens or non-governmental organizations, because prior to this amendment everybody had the right to make a choice: either to take legal action or use a mechanism of internal appeal (file an administrative complaint). Citizens even had a certain motivation to use this latter mechanism – exemption from duties. As a result of these amendments, citizens lost two things: freedom of choice and a perspective of being exempted from duties.

It is interesting that the initiators of such amendments cited the need of such changes “to revive” administrative bodies. This might not have been a bad idea, though, not a single governmental branch had even tried to ensure that administrative bodies were equipped with relevant skills. Unfortunately, as the practice has showed, the internal resources in administrative bodies did not prove ready for it. And it was caused not only by absence of competent persons, but also by fragile bureaucracy, absence of checks and balances, strict centralized style of decision-making and other problems, which we have already mentioned above.

Unfortunately, it can be said boldly that introduction of a compulsory mechanism of administrative complaint has created an additional barrier. The timeframes for dispute resolution on access to information has increased by two months, because a person can appeal against the decision within one month after receiving the refusal (of course, he/she can file a complaint on the next day, though a full term is one month), while an administrative body has one month and, in case of difficult cases, two months to review the case.

It is also disputable how impartially the case might be discussed in the same administrative body, when there are no developed internal resources for it. Initiation of amendments without proper assessment of capacities is not a rare occasion in Georgia, but this is just a very particular example, when it brings only harm. And this harm, first and foremost, is expressed in hampering the development of the practice, while citizens and non-

governmental organizations are deprived of the right to have access to fair court granted by the Constitution of Georgia.

As for the legislative explanation of a phrase “NGOs *promoting environmental protection and meeting any requirements under national law*”, Georgian legislation grants the same procedural rights to all organizations. However, at the stage of considering eligibility of the complaint, the court pays attention to the organization’s declared goals and activities. The organization, which files a lawsuit against an administrative body, is obliged to convince the court that the disputed decision or action causes a direct and immediate harm to it. As we have already mentioned, the procedural legislation is neutral and this requirement must be observed in any dispute. Use of the Aarhus Convention is very effective just at the stage of eligibility since it provides for the access to justice regardless of whether the plaintiff has suffered a direct and immediate harm or not.

Still, Green Alternative has experienced some judicial cases, when while discussing the administrative cases in the courts of general jurisdiction, at the eligibility stage, defendants filed a motion on recognizing Green Alternative as an ineligible plaintiff (because the defendants claimed that Green Alternative had not suffered a direct and immediate harm). Luckily, in all such cases the court rejected similar motions citing the requirements of the Aarhus Convention.

Unlike the courts of general jurisdiction, in February 2007 the Constitutional Court of Georgia did not accept Green Alternative’s constitutional lawsuit citing that the constitutional rights of Green Alternative had not been violated directly.

In its constitutional lawsuit Green Alternative was demanding the court to rule unconstitutional two norms of the 2005 Law on Licenses and Permits. According to one disputable norm, license holder is entitled to divide, lease or sell the license for use of natural resources. Green Alternative claimed that this norm was in contravention of paragraph 5 of article 37 of the Georgian Constitution, since public was not given the opportunity to be informed and to participate in the decision-making on full or partial transfer of the right of use of natural resources to the other person. The second disputable norm was related to general rules of permitting (including environmental permit) – the disputable norm envisaged taking decision on permitting under a *simple administrative proceedings*, which does not provide for timely and adequate access of public to information and public participation in the decision-making process. Green Alternative was claiming that only *public administrative proceedings* provided for public participation. Green Alternative asserted that the both norms were in contravention of paragraph 5 of article 37 of the Georgian Constitution and the requirements of the Aarhus Convention.

As we have already mentioned above, the Constitutional Court rejected Green Alternative’s lawsuit at the eligibility stage. It should be noted that in its ruling, while discussing the eligibility of the lawsuit, the Constitutional Court interpreted paragraph 5 of article 37 of the Georgian Constitution²⁸, saying that “*proceeding from the content of paragraph 5 of article 37 of the Constitution, it does not envisage the right of participation in the decision-making process. To receive information about a certain issue does not automatically mean the necessary participation in solving this issue*”.

Article 9.3 The Public’s right to challenge acts and omissions by private persons and authorities

Issues related to taking legal action are regulated by the national legislation adopted by the Parliament of Georgia; particularly, they are subject to the following laws: General Administrative Code of Georgia, Administrative Procedural Code and Civil Procedural Code of Georgia. A citizen and an organization have the right to file a lawsuit to the court, as well as to file an application or complaint to an administrative body or in cases envisaged by the Criminal Code of Georgia, to the law enforcement agencies or environmental

²⁸ “A person shall have the right to receive full, impartial and timely information as to a state of his/her working and living environment” – 2007 formulation of paragraph 5 of article 37 of the Georgian Constitution. “Everyone shall have the right to duly receive full and impartial information on the state of the environment” – January 1, 2011 formulation of paragraph 5 of article 37 of the Georgian Constitution.

administrative bodies with law enforcement function.

A citizen and an organization, both have the right to appeal to the administrative body and the court in case of restriction of the right of access to information or participation in the session of the public institution.

A person (organization) submitting an administrative complaint/lawsuit to the administrative body or to the court, has the right to demand suspension of the administrative act. In the course of proceeding an administrative complaint, administrative-legal act shall not be suspended in cases where: (a) it may result in increase of costs of the state/local self-government or executive bodies; (b) it is an administrative-legal act of police adopted with regard to protection of public order; (c) it is issued during the state of emergency or martial law on the basis of the relevant law; (d) delayed execution may cause material damage or significant threat to public order or security.

With regard to court, individual administrative-legal act shall not be suspended in cases where: (a) payment of national or local taxes, collection fees or other kind of payments are concerned; (b) delayed execution may cause material damage or significant threat to public order or security; (c) it is issued during the state of emergency or martial law on the basis of the relevant law; (d) administrative body has made a written well-grounded decision on immediate execution due to urgency; (e) individual administrative-legal act is executed or it is an enforceable act and its suspension may harm legal right or interest of the other person; (f) it is considered by the law.

Notwithstanding the aforementioned circumstances, on the basis of the party's request, the court may suspend individual administrative-legal act fully or partially if there is a well-grounded doubt concerning the legality of the individual administrative act or if its immediate execution may cause essential harm to the party or may restrict protection of its legal right or interest. The party may file a motion on suspension of the act before submitting a lawsuit. In cases where the suspended individual administrative-legal act has already been executed, the court may annul the decision made in relation to execution of the individual administrative-legal act.

Green Alternative experienced a case, when the organization demanded suspension of the disputed act before hearing of the administrative complaint; however, this demand was rejected. The complaint concerned the 2008 Act of the Ministry of Economic Development about auctioning of licenses for forest use on certain territories. Green Alternative appealed against the Ministry's act to the Government of Georgia (demanded annulment of the act) and asked suspension of the disputed act before hearing of the administrative complaint. Reaction of the Georgian Government was quite interesting; the Government asked the defendant, Ministry of Economic Development to discuss the issue of suspension of the act issued by the Ministry itself. Obviously, the Ministry did not consider suspension of the act reasonable. Interestingly, hearing of the administrative complaint in relation to annulment of act on auctioning licenses was conducted after the auction had already been held and the decision on granting the licenses on forest use had already been made. Therefore, administrative dispute (regardless of the decision taken) made no sense. Later, Green Alternative appealed the decisions about granting the licenses on forest use (ministerial decrees) through the administrative and judicial proceedings.

As to the public representative's right to challenge decisions of public authorities or a private person contravening the national environmental legislation, this is the picture thereof: if the public representative regards that environmental legislation was violated, he/she can:

1. Apply to the environmental authority, which is obliged to verify the authenticity of the received information and if it is correct, to file a lawsuit against the violator. Where the environmental authority is inactive, the public representative may apply to the prosecutor's office.

2. Apply to the superior body with administrative complaint and then bring a case to the court, in cases where the law is violated by the administrative body. The Aarhus Convention is directly applicable in Georgia; therefore, the public representative has right not to justify his/her interest to the case and directly indicate to the right granted by article 9.3 of the Convention.

Green Alternative has experienced two cases during last years, when the organization appealed the facts of violation of environmental legislation by public authorities, initially through administrative and later, through court proceedings. In both cases, the organization was appealing the facts of restriction of public right to participate in the decision-making processes as well as the facts of violation of environmental legislation by administrative bodies²⁹. Referring to article 9.3 of the Aarhus Convention, in none of the cases Green Alternative justified its direct interest to the referred cases. In both cases, at the eligibility stage, defendants asked the administrative body/court to reject Green Alternative's complaint/suit claiming that the organization could not act as a plaintiff as it was not directly harmed. However, after referring to the Aarhus Convention and its article 9.3 by Green Alternative, neither the administrative bodies nor the court took defendant's demand into consideration and recognized the complaints/lawsuits as eligible. In the first case, court hearing under administrative and judicial proceedings lasted almost two years (2007-2009) and finally, none of the claims of Green Alternative were satisfied. In the other case, Green Alternative appealed the case under administrative rule in October 2008 and currently, the organization is still in the process of court dispute. It should be noted that in the first case, Green Alternative presented the conclusion of Public Defender of Georgia³⁰ on the case, although the court did not take it into account.

Article 9.4 Timely, adequate, effective, fair, equitable and not prohibitively expensive remedies

In accordance with the amendment made to the Law of Georgia on Public Service in June 2009, general rules of conduct on releasing and using public information were developed and added to the law. On the basis of the current revision of the law (article 73 (3)):

- 1. The head of the institution shall be obliged to ensure availability of public information and smooth functioning of the mechanism of releasing such information.*
- 2. Civil servant shall never spread suspicious, ungrounded and/or false information.*
- 3. Civil servant shall be obliged to release public information in cases considered by the Georgian legislation and shall always observe the rules and requirements established at his/her workplace.*
- 4. In cases where restriction of public disclosure of information is in the authority of civil servant, she/he shall guide by the criteria defined by the legislation of Georgia. In case of need, she/he shall immediately raise the issue of restricting public disclosure of information following the rules established under the legislation.*
- 5. Civil servant shall take all relevant measures to ensure confidentiality of information (confidential information of state importance, information related to the reputation of civil service, information received at work and any other information enlisted in the relevant code of conduct). This rule shall also apply after leaving the job.*

Obviously, the referred norm does not mean presumption of transparency in the civil service at all. On the contrary, it is directed to making the information confidential and not transparent. Unfortunately, if we are talking about ethic responsibility of civil servants in relation to releasing public information, it will be difficult to argue anything by these norms.

Generally, with regard to the issue of liability, Criminal Code of Georgia regards concealment of information as a crime; however, there has not been a single case when civil servant was punished for that. According to

²⁹ Green Alternative was appealing decision of administrative bodies about granting the forest use licenses on certain territories. In its suits/complaints, the Green Alternative pointed to restriction of right of public to participate in the decision-making, violation of requirements of the licensing legislation (Green Alternative claimed that in the course of auction, exact quantity of obtainable resources was not identified and respectively, the initial auction price was incorrectly calculated) and infringement of environmental legislation ("Biodiversity Protection Strategy and Action Plan of Georgia", Law on Environmental Protection, Law on Red List and Red Book of Georgia).

³⁰ On the basis of application submitted by Green Alternative, Public Defender studied the issue of legality of forest use licensing and decided that Green Alternative's demands were fair and concluded that preference shall be given to public interest as compared to private interest and disputed acts shall be annulled.

article 153 of the Criminal Code of Georgia, illegal restriction of right of freedom of speech and/or right to receive or disseminate information which resulted in serious harm or which was committed by using work privileges shall be punished by imposing a penalty or correctional work for one year or restriction of freedom up to two years, deprivation of right to work or occupation for up to three years or without it.

With regard to other kind of liability, as it was already mentioned, Public Defender of Georgia has authority to draw up a protocol on administrative infringement of law, although this instrument is not used without Public Defender's participation. The most important and realistic form of liability is the disciplinary liability about which the judicial system had no unanimous position for years. The Court regarded that it had no authority to review such issue and it was an internal issue that should have been addressed by the administrative body. The court still shares this position; however, the majority of administrative bodies do not use this instrument at all. For example, in the case "Georgian Young Lawyers' Association vs. the Ministry of Environmental Protection and Natural Resources", the ministry actually neglected the issue of disciplinary liability. Even though, there are some precedents³¹ when civil servants were punished, such practice is not systematic. One of the reasons being, competences of staff of the administrative bodies are not clearly separated and defined. The person who is responsible for disclosure of public information mainly does this as dictated by his/her superior. But when it comes to liability, only the person responsible for disclosure of public information is held liable.

Article 47 of the General Administrative Code of Georgia considers compensation of damage in cases when a person was refused to receive information illicitly. Unfortunately, there had not been a single case of payment of such compensation in Georgia, one of the reasons being, procedural faults: when the court refers to compensation of losses, it is guiding with general standards of the Civil Code. The damage can be material and moral. To prove the fact of damage, not-receiving the information is not enough, there shall be some other subjective and objective circumstances too. The court does not guide with so called *benefit of the doubt* principle because civil procedures provide more equality of parties, which among others is proved by the fact that court fee being proportional to the harm claimed by the person. These circumstances affect the desire to claim compensation of damage at all and because there is no practice, the judicial system is not motivated to develop this instrument.

System of courts of general jurisdiction consists of district courts, two Courts of Appeals and Supreme Court. Courts are specialized only in administrative, civil and criminal boards. There are no court subdivisions oriented to environmental issues in Georgia; neither there are specialized judges. As we have already mentioned, the court can directly apply the Aarhus Convention in practice, however, applying it does not only mean its citation. Unfortunately, the court is not ready to acknowledge the spirit of this Convention and to articulate it in its decisions.

In relation to the court fee, the legislation does not recognize any exceptions and court proceedings are quite expensive. It is of note that minimal living wage in Georgia is GEL 150 and by unofficial statistics, population below the poverty line constitute up to 75%. Any person or organization willing to file a lawsuit has to pay minimum GEL 100 and maximum GEL 8 thousand³². Under current practice, a person filing a lawsuit related to access to environmental information has to pay GEL 100. Amount of court fee is too high for ordinary citizen or civil society group to pay and this negatively affects the development of court practice.

³¹ For instance, in May, 2009, on the basis of administrative suit of Green Alternative, department of licenses and permits under the Ministry of Environment Protection and Natural Resources applied measures of disciplinary responsibility against their two employees who failed to deliver information to Green Alternative on time and to involve the organization in the administrative proceeding related to issuing permits.

³² The maximum threshold of the court fees for legal entities has changed several times during last years; for instance it was 5 thousand till July 2006 (that time Green Alternative was charged to pay GEL 3100 fee by the district court; the Supreme Court in the same case ordered Green Alternative to pay almost the highest possible sum – GEL 4960), in July 2006 it has dramatically increased up to GEL 50 thousand (about USD 30 thousand), after civil society pressure it has decreased to GEL 15 thousand in July 2007 and now it is GEL 8 thousand.

With regard to the transparency of courts themselves, since 2006 all kinds of photo-video-TV footage have been banned during court hearings in Georgia. Only audio recording is permitted and that is after some specific rules are satisfied. A few months ago, almost all courts of Georgia, which were applied by non-governmental organizations or journalists with the request of information, gave standard response to all applications:

“For searching materials requested by you, we have to systematize cases and process archive, which requires much time. Court administration office is rather busy with fulfilling its authorities granted by Georgian legislation and meeting its objectives; therefore, at this stage, the Court does not regard it of extreme necessity to allocate and mobilize main resources of the administrative personnel for the requested purpose”.

The aforementioned response shows that the court does not take it as its primary obligation to disclose public information it holds. Besides, the court acts in a very coordinated manner, because all applicants received one and the same response in different regions of Georgia including the Court of Appeals and the Supreme Court. Naturally, the question arises, how a court can follow the convention requirements, if it fails to pursue transparency policy itself.



Association Green Alternative

27/29 Paliashvili St., 0179 Tbilisi, Georgia
Tel: (995 32) 29 27 73, Fax: (995 32) 22 38 74
greenalt@greenalt.org
www.greenalt.org

