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This policy brief is intended for public policy makers and practitioners; it will also be useful for those groups and individuals seeking to influence the policymaking processes.

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Agreement against the Environment

Review of the Law of Georgia of March 20, 2012 on Making Amendments to Some Legislative Acts of Georgia

Author: Merab Barbakadze
Environmental Law Expert

Summary

On March 20, 2012 the Parliament of Georgia adopted the Law on Making Amendments to Some Legislative Acts of Georgia. The law allows for concluding an agreement of unlimited duration between an interested party and the Ministry of Energy and Natural Resources of Georgia, which, in exchange for paying compensation in favor of the state, will exempt the interested person from liability for the violations committed in the sphere of environmental protection and natural resources. At the same time, a signatory interested person will be released from any obligation, fines and/or compensation for damage, as well as from the obligation to pay fee for use natural resource. The law also bans inspection of the activities of an interested person by enforcement authorities.

The policy brief reviews the provisions of the law, their compliance with the key principles and approaches of environmental protection and sustainable development recognized internationally, including in Georgia; it also identifies threats posed by the enactment of the law to the environment and human health.

Based on the analysis, the author concludes that the law contradicts the Constitution of Georgia, as well as Georgia's international commitments, the principles strengthened by international and national environmental legislation and contains important risks of environmental, corrupt, economic, social and political nature. In the author's opinion, the law belongs to a number of those rarest legislative acts, which, in its current form, is fundamentally incompatible even with the idea of environmental protection and therefore, it is unacceptable for the society of the 21st century.



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1. Context and importance of the issue

On March 5, 2012, on initiative of the Georgian Government, a draft law prepared by the Ministry of Energy and Natural Resources of Georgia 'On Making Amendments to Some Legislative Acts of Georgia' (hereinafter "the draft law") was submitted to the Parliament of Georgia.

The draft law envisaged amendments to the Laws of Georgia on Environmental Protection and on Enforcement Proceedings, as well as to the Code of Administrative Offences of Georgia and the Criminal Code of Georgia¹. According to the legislative amendments, any interested person is entitled to enter into an agreement with the Ministry of Energy and Natural Resources of Georgia, under which any of its actions committed in the area of environmental protection and use of natural resources within the period envisaged by the agreement will be considered lawful.

The civil society organizations learnt about the planned legislative amendments after Aarhus Centre² reported about it on March 14. Aarhus Center also reported that committee hearings would be held in the near future³.

The draft law triggered concerns among the civil society organizations; in their opinion, the legislative amendments were unacceptable in terms of economic and sustainable development; they neglected the principles of social and environmental justice, created a high risk of corrupt deals and would definitely lead to environmental degradation. Despite all these risks, on March 20, 2012 the Parliament of Georgia adopted the draft law hastily⁴, without any public participation.

The state agencies officially responded to the concerns of civil society organizations and interested citizens only after the Parliament adopted the draft law.

- On March 21, 2012, four hours before the planned meeting, the Ministry of Environmental Protection invited all interested persons to the Ministry through social network and its own website "to talk about the issue and provide accurate information on it". The meeting essentially yielded no results – the Minister tried to convince the audience that the draft law applied only to past (already committed)

violations and that it was impossible to save Georgian enterprises without this draft law. The arguments cited by the Minister proved unconvincing for the majority of participants.

- On March 23, 2012 the Ministry of Energy and Natural Resources posted an explanation on its website, accusing the non-governmental organizations of misinterpreting the already adopted draft law⁵. Furthermore, in its explanation the Ministry did not provide any arguments or statistics, which would have proved the urgency of adopting the law, the correctness of regulatory mechanism offered by the draft law or would have allayed the concerns of civil society organizations.

On March 22, 2012 the non-governmental organizations gathered in frames of the third working group of National Platform of Eastern Partnership⁶. They focused on the inadmissibility of endorsement of the draft law and planned joint actions.

On March 23, 2012 civil society organizations held a rally outside the presidential residence, during which the protesters called on the President to veto the draft law; an appeal with the same request was submitted to the President on the same day. Despite civil resistance, the President signed the draft law; thus, the Law of Georgia on Making Amendments to Some Legislative Acts of Georgia (hereinafter "the law") came into effect on March 30, 2012⁷.

The provisions of the law, their compliance with the key principles and approaches of environmental protection and sustainable development recognized internationally, including in Georgia are discussed in the following chapters; the major threats posed by the enactment of the law to the environment and human health are also outlined below.

2. Apparent reasons for enactment of the law

Logically, the explanatory note of the draft law should provide information over the reasons for enactment of the law; though the explanatory note explains such reasons as follows:

"Under the submitted draft, an agreement shall be concluded between the Ministry of Energy and Natural Resources of Georgia and an interested person in the sphere of environmental protection and use of natural resources. In case of concluding the

1 Finally the amendments to the Criminal Code of Georgia were not made during the parliamentary discussions.

2 See Aarhus Centre Georgia at www.aarhus.ge

3 As it appeared later, by then the Parliament of Georgia had already adopted the draft law with the first hearing.

4 The Parliament adopted the draft law with its first hearing on March 13, 2012 (with a 68-0 vote), with its second hearing on March 16 (with a 65-0 vote) and third and final hearing – on March 20 (with an 89-8 vote). See parliamentary calendar at www.parliament.ge.

5 See the official website of the Ministry of Energy and Natural Resources of Georgia: <http://www.menr.gov.ge/News/2286>

6 National Platform of Eastern Partnership: <http://eapnationalplatform.ge/>

7 See 'Law of Georgia on Making Amendments to Some Legislative Acts of Georgia' (№5916-სს), Georgian Legislative Herald at: https://www.matsne.gov.ge/index.php?option=com_ldmssearch&view=docView&id=1624925

agreement, any action committed by the person in the sphere of environmental protection and use of natural resources within the period envisaged by the agreement will be considered lawful.”

This “argument” indicated in the explanatory note fails to reflect the reason for adopting the law, since its content actually does not contain an explanation about “the reason”. It does not justify the necessity of the draft law or any important problem, solution of which required adoption of such law. It can be said that the draft law’s explanatory note does not contain the substantiation of the reasons for adopting the draft law that naturally triggers doubts in a certain part of the society that a real reason for adopting the law might be covert or open deals between particular businesses and Georgian authorities and that probably indicates at the presence of corruption risks.

It is difficult to ascertain the fact of presence or absence of covert deals; however, it is quite easy to draw parallels between the law and a number of official deals made by the Georgian government.

Memorandums and agreements concluded between the Georgian government and investors on the construction of hydro power plants could be brought as an example; according to these documents, the Georgian government has committed itself to promote the investors as much as possible in implementing these projects, including in obtaining relevant permits and licenses. The implementation of a part of the mentioned projects has already started and there were some cases observed, when the works related to some projects were, at a certain stage, conducted without any permits (for example, a permit (conclusion of ecological expertise) on implementation of the Dariali hydro power plant project was issued about two months after the launch of the construction works and only after the non-governmental organizations actively protested against implementing the project without any permission).

The law will apparently allow the persons implementing the mentioned projects to plan and launch the projects with possible significant negative impact on the environment without any permits, licenses and public participation in the decision-making process, while the consequences of their illegal actions committed in the sphere of environmental protection and use of natural resources will later be legalized on the basis of the agreement envisaged by the law.

According to the law, the agreement with interested parties is concluded by the Ministry of Energy and Natural Resources of Georgia, by decision of the Prime Minister of Georgia (the decisions related to implementation of the projects on new hydro power plants have been made by the Georgian Prime Minister and the majority of them has been signed

just by the Minister of Energy and Natural Resources, on behalf of the Georgian Government). Taking these circumstances into consideration, we can conclude that because of the law, Georgian Government (including Georgian Prime Minister and Minister of Energy and Natural Resources) will face a conflict of interests. It can be said with a great probability that on the basis of memorandums and agreements signed with the Georgian Government, the investors implementing energy development projects, in case of willingness, will definitely be able to conclude the agreements envisaged by the law, because the Georgian Government (in this particular case the Prime Minister and Minister of Energy and Natural Resources), because of conflict of interests, will not be able to refuse to sign the agreement envisaged by the law with those persons (the law does not envisage any particular ground for the refusal of the Ministry of Energy and Natural Resources to sign the agreement). Hence, these projects can be implemented with violation of Georgian legislation, because the investor will already have a well-grounded expectation (based on the memorandum/agreement signed with the Georgian Government) that an agreement envisaged by the law will certainly be concluded with him under which his illegal actions will be considered lawful.

It should also be noted in this context that the law does not grant any function to the Ministry of Environmental Protection. Against the background of recent changes, especially those institutional changes carried out in February-March 2011, it does not seem strange; however, it should be emphasized that by further downscaling the role of the Ministry of Environmental Protection, the law harms the existing national system of environmental management and further reduces its effectiveness. Actually, the state agency, which under the Law of Georgia on Environmental Protection, is responsible for defining and implementing the national policy in environmental protection, as well as for the management of environmental protection and other major environmental issues, actually does not participate in decision-making on such agreements, which may have a significant negative impact on the environment and human health.

From this point of view, the Agency of Protected Areas under the Ministry of Environmental Protection is the only exception, as all the issues related to protected areas should be agreed just with this agency⁸. The presence of this norm in the law also confirms that the agreements envisaged by the law can be concluded, including with regard to illegal actions committed in respect of protected areas. It can be said with great probability that in this case, this may concern at least the Kolkheti National Park,

8 The initial version of the draft law (which was submitted by the Georgian government to the Parliament) did not envisage this norm and it was added during the parliamentary discussions.

as the construction of a new half-million city of Lazika is planned on this particular and/or adjacent territory.

3. Financial justification of the law

The explanatory note of the law should also provide information on the financial consequences of putting the law into effect. However, the limited and scarce information provided in the explanatory note confirms that the Georgian Government has not really calculated and analyzed its possible negative financial consequences.

The law does not clarify what kind of criteria should be used and how the compensations envisaged by the agreement should be calculated. These circumstances make the law absolutely unjustified from financial point of view that increases not only environmental and economic risks, but also the risk of corrupt nature.

For example, since under the agreement on the construction of Khudoni HPP signed between the Georgian government and the investor, a multi-million property necessary for the construction of HPP was transferred to the investor at a symbolic price of USD 1, it can be assumed that the same investor will not pay any significant amount under the agreement envisaged by the law. As a result, the environmental damage caused by the investor's possible illegal actions (as well as all the costs of remediation measures) will finally have to be paid by the Georgian state budget, i.e. by each Georgian citizen.

If we take into consideration the scales of all those mega-projects announced by the Georgian government and their possible negative impacts on the environment, it can be presumed that as a result of putting the law into effect, a significant damage will be caused to the Georgian budget and Georgian environment in a long-term perspective. Apparently, it will be impossible to compensate for this damage by the funds to be paid under the agreement envisaged by the law, because their amount may finally appear much lower compared to those incomes, which the state budget might receive even in a form of fines imposed for violations and compensation for damages (this means that even in a short-term perspective, the law will be unprofitable for the state budget from financial point of view).

4. Term, actions and persons, whom the law may apply to

The law does not specify the term of validity of the law. The agreements concluded under the law may apply to the illegal actions committed both before and after adopting the law.

The law specifies that based on the agreement, the interested person shall be granted certain privileges "over the period of the agreement," that is not defined by the law itself and should be specified individually, in each particular case, by the Ministry of Energy and Natural Resources of Georgia, on the basis of the decision by Georgian Prime Minister.

The law does not explicitly define that granting the status of the so called "agreement period" may only apply to the period of time before signing the agreement. According to the current formulation, the contents of the law does not rule out the probability that the status of "agreement period" may be granted to the period of time after signing the agreement and apply to the illegal actions committed after signing the agreement.

In their public statements, officials were ruling out the probability of such odious interpretation of the law and that can only be welcomed. Despite it, the law is quite obscure and ambiguous from this point of view. If the author of the law really does not plan to declare the violations to be committed in future as lawful, it should have been reflected in the law explicitly. To avoid this ambiguity, the law might have included a note stipulating that the agreement signed under the law should not apply to the violations committed by the signatory party after signing the agreement.

According to the law, any interested person (both physical and legal persons) has the right to apply to the Ministry with a request to conclude an agreement.

The law does not define the criteria under which the request of an interested person for concluding an agreement should either be satisfied or not. This circumstance triggers certain doubts about the principle of equality before the law and increases the risks of corrupt deals.

Noteworthy that the law does not fully rule out the possibility of imposing responsibility on the interested person, party to the agreement, for the violations committed during the period of validity of the agreement. According to the law, it is considered admissible only in case of termination of the agreement.

For such cases the law stipulates that from the day of signing the agreement within the period envisaged by the agreement the flow of the statute of limitations established by the law concerning civil and/or administrative responsibility of a person, obligations, taxes, fines and/or compensation for damages in respect to the state and/or local self-government bodies for the acts committed/carried out in the sphere of environmental protection and natural resources shall be considered suspended. This norm will allow the state and/or local self-government bodies, in case of termination of the agreement, to raise relevant requirements of the agreement to the

person regardless of how long the agreement was valid, because the term of validity of the agreement will not be taken into consideration while calculating the statute of limitations.

The above mentioned proves that according to the law, a violator, who concludes an agreement, in some cases, will only achieve postponement of liability through the term of validity of the agreement, and not unconditional “amnesty”. On the other hand, it should also be noted that the agreement is concluded for an indefinite period and the law actually provides no possibility for appealing against it (except of those cases, when it has been signed by an unauthorized person). The agreement can be abolished only in case of violating the terms of agreement by the interested person, party to the agreement. Violation can be expressed in incomplete and improper payment of the amount envisaged by the agreement, as well as non-fulfillment of other obligations, if they are envisaged by the agreement.

5. Possible influence of the law on the issue of imposing criminal liability

During the second parliamentary hearing an article was withdrawn from the draft law, envisaging releasing a person from criminal liability on the basis of an agreement. Despite it, it does not rule out the possibility of avoiding criminal liability in some cases, through concluding an agreement envisaged by the law, since the law does not directly and clearly indicate that this law does not apply to the acts, which can be qualified as criminal offences.

For example, article 306 of the Criminal Code of Georgia stipulates: “Implementation of the activity without Permit for the Impact on Environment, when such action is committed after imposing administrative sanction shall be punishable by fine or by corrective labor for up to a two-year term or by imprisonment for up to three years in length”.

Owing to the agreement concluded under the law, if an administrative fine is not imposed on a person upon committing such act for the first time, in case of committing similar violation repeatedly, it will be impossible to impose criminal liability envisaged by article 306 of the Criminal Code (because according to article 306 of the code, it is allowable only after imposing an administrative fine). Accordingly, in case of concluding an agreement envisaged by the law a person may indirectly avoid criminal liability.

From this point of view, the law needs to be studied further with the participation of criminal law experts.

6. Compliance of the law with Georgian legislation

The law contains many such provisions, which to a certain extent contradict the current legislation of Georgia, including the provisions of the Law of Georgia on Environmental Protection, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter – Aarhus Convention) and a number of the norms of the Georgian Constitution.

Compliance with the Law of Georgia on Environmental Protection

As an example, the compliance of the law with the key environmental principles defined by the Law of Georgia on Environmental Protection is discussed below. The law contradicts:

(a) The Risk Mitigation principle - according to which in the course of planning and implementing the activity, the subject of activity (person) is obliged to take appropriate measures in order to reduce or prevent all adverse effects on the environment and human health. In this case, the law enables the subject of activity to completely neglect the requirements for avoiding similar risks and in case of concluding an agreement its illegal actions will still be considered lawful;

(b) Sustainability principle - envisaging such use of the environment and natural resources, when no danger is posed to public development and the environment and natural resources are protected against irreversible qualitative and quantitative changes. The law allows the subject of activity to neglect the principle of sustainability while using the resources and in case of concluding an agreement these illegal actions will still be considered lawful;

(c) Priority principle - according to which the action, which is likely to have adverse effects on the environment and human health may be replaced by other, less risky action (even if this is more expensive). Priority is given to the latter, if its cost does not exceed the expenses for compensating the ecological damage caused by the less expensive action. In this case, the law does not envisage using of the Priority principle while making a decision on concluding an agreement. According to the law, in case of signing an agreement, any action carried out by the subject of activity through neglecting the Priority principle will be considered lawful and it will be no surprise if under such conditions business people, who are oriented to gaining more profit with less expenses, will not refrain from using methods harmful to environment while performing their activities;

(d) Principle of the Use of Nature, Requiring Payment- according to which the subject of activity is obliged to pay for the use of land, water, forest, flora, fauna and subsoil resources. According to the law, a signatory interested person is released from any obligations, including from the obligation to pay a fee for the use of natural resources, that directly contradicts the principle of use of nature, requiring payment;

(e) Polluter Pays principle - according to which the subject of activity, as well as other physical person or legal entity is obliged to compensate for damage to the environment. In this particular case, the law directly releases the signatory party from this obligation;

(f) Biological Diversity Preservation principle - according to which the activity must not lead to the irreversible degradation of biological diversity. In this case the law provides for the possibility of declaring the illegal action committed through violating this principle as lawful and enables the signatory person to avoid responsibility for its illegal actions;

(g) Waste Minimization principle - according to which in performing the activity, priority is given to such technology, which provides the minimization of waste. In the cases envisaged by the law, the signatory parties are not considered violators even for the activities launched illegally; thus, it can be said with great probability that a part of them may perform their activities without any licenses and permits that rules out the use of the principle of waste minimization with respect to them;

(i) Recycling principle - according to which in performing the activity priority is given to such materials, substances and chemical compounds, which may be reused, reprocessed, decomposed or degraded biologically without damaging the environment. There is a minimal probability that the signatory parties will use this principle in the process of their activities, since the law enables them to bypass this;

(j) Restitution principle - according to which the environment degraded as a result of performing the activity, must be restored in a form, which must be as close to its initial state as possible (restitution in integrum). The law releases the signatory person from similar obligations that contradicts the restitution principle and can cause significant damage to both the environment and the state budget as this latter will ultimately have to finance the mentioned measures;

(k) Environmental Impact Assessment principle - according to which, in the course of planning and designing the activity, the subject of the activity is, under the established order, obliged to take into consideration and evaluate the possible impacts on

the environment, which may be caused by the activity. The law actually rules out respecting and using this principle by the signatory person, as based on the agreement any activity planned and conducted without any licenses and permits, as well as without any environmental impact assessment can be considered lawful. Moreover, there is a doubt that one of the key goals of adopting the law was to promote hasty implementation of planned large infrastructure and energy projects through bypassing environmental impact assessment, permitting and licensing procedures, environmental technical regulations and norms;

(l) Principle of Public Participation in the Decision-Making Process – which provides public participation in taking important decisions, related to carrying out the activity. If the activity was launched with violation, without licenses, permits and environmental impact assessment, and was still declared as lawful based on the agreement (as provided by the law), the principle of public participation in the decision making process will naturally fail to be observed;

(m) Access to Information principle - according to which the information on the state of the environment is transparent and available to the public. The law allows the signatory persons to implement their activities illegally, without licenses, permits and environmental impact assessment and then “legalize” the results on the basis of the agreement. Naturally, in this situation the environmental information related to illegal activities will be unavailable not only to the public, but also to the public agencies; thus, in the process of conducting the activity the principle of availability of information will not be observed.

Essentially, the law contradicts all the key environmental principles established by the Law on Environmental Protection. Since these principles represent the basis of the Georgian environmental legislation and the environmental management instruments strengthened by this legislation, potentially the law may contradict a number of Georgian laws. In order to reveal the cases of particular collisions, it is essential to conduct an additional study. In this case, for the purpose of correct assessment of the results of collision between the laws, it can be said generally that according to paragraph 8, article 7 of the Law of Georgia on Statutory Acts, in case of collision of statutory acts with similar legal force, preference shall be given to the later statutory act; thus, in this particular case, the present law will prevail over the laws acting before its endorsement.

It should also be noted that the key environmental principles established by the Law on Environmental Protection were developed on the basis of the principles of the Rio Declaration on Environment and Development adopted in 1992 and reflect the requirements of this declaration. Accordingly, when

we talk about the incompliance with the key environmental principles established by the Law on Environmental Protection, it means that in this case the law does not comply with some principles of the Rio Declaration on Environment and Development either. The 1992 Rio Declaration on Environment and Development is not a binding document, though the principles of this declaration are the basis of modern international environmental law and in case of incompliance of the law with these principles, it can be said with great probability that the law contradicts any international environmental agreement to which Georgia is a party.

Similarly, it can be said that the law does not comply with a number of EU environmental directives, though Georgia has committed itself to harmonize its legislation with them. The issue may become the subject of additional detailed study. However, it is quite clear already now that the law, for example, fully contradicts a number of major directives, such as: Council Directive 90/313/EEC on the freedom of access to information on the environment; 85/337/EEC and 97/11/EC on the assessment of the effects of certain public and private projects on the environment (environmental impact assessment directive).

The above mentioned incompliance with internationally recognized norms will definitely have an influence on the progress of ongoing negotiations between Georgia and the European Union on the Associated Agreement and Deep and Comprehensive Free Trade Agreement; it will significantly hamper the fulfillment of obligations undertaken by Georgia under EU-Georgia Action Plan of European Neighborhood Policy.

Compliance with the Aarhus Convention

According to paragraph 5 of article 7 of the Law of Georgia on Statutory Acts, the international treaties and agreements of Georgia, if they do not contradict the Georgian constitution and constitutional law, have prevalence over internal statutory acts. Respectively, in case of the law contradicts the international treaties and agreements of Georgia, preference will be given to the provisions of international treaties and agreements.

The issue of compliance of the law with Georgia's international agreements and treaties needs further detailed study, but as an example, we can discuss the compliance of the law with one of Georgia's international treaties, particularly the Aarhus Convention.

The law contradicts the requirements of part 1 of article 3 of the Aarhus Convention, as it clearly does not promote the establishment of a clear, transparent and consistent framework to implement the

provisions of this Convention, though Georgia has committed itself to fulfill this provision.

The law allows for the probability that on the basis of the agreement and in exchange for payment of a relevant compensation, any activity performed without permits, licenses and public participation will be considered lawful by the state. As a result, a number of activities can be implemented without legal regulation, while their consequences will be "legalized" only at a later stage. It contradicts the principle of transparency, because in such case public representatives will have no opportunity to exercise their right on access to information. Accordingly, the law also comes into collision with the requirements of article 4 of the Aarhus Convention, which secures the right on access to environmental information by the public.

The law to a certain extent also contradicts the requirements of part 1 of article 5 of the Aarhus Convention. In case of concluding the agreements envisaged by the law, public authorities will lack any opportunity to conduct complete monitoring of the activities carried out within the period of the agreement and fully and comprehensively assess the impact of the mentioned activity on the environment, since, according to the law, "it is inadmissible to inspect the activities carried out by a person in the sphere of environmental protection and use of natural resources within the period envisaged by the agreement." Under part 1 of article 5 of the Aarhus Convention, Georgia has committed itself to provide that public authorities possess and update environmental information which is relevant to their functions. To say the least of it, prohibition of inspection by the law does not promote the fulfillment of international obligations undertaken by Georgia. Moreover, according to the law, the Ministry of Environmental Protection of Georgia (i.e. the key administrative body, which is responsible for a number of environmental issues, including for the implementation of national environmental policy, state environmental management, issuing environmental consents, etc.) does not take any part in the process of concluding an agreement. Respectively, the Ministry will lack a possibility to possess and update information, which is relevant to its functions, as well as to those activities, concerning which the agreement may be concluded, as envisaged by the law. The Ministry of Environmental Protection will not be able to obtain duly and impartial information either in the period of illegal implementation of the mentioned activities or at the stage of concluding an agreement, because according to the law, this Ministry will not be involved in the process of making decisions on concluding the agreements. The law does not even envisage informing the Ministry of Environment Protection over these issues (except of the issues related to the protected areas, which, as it was already mentioned above, must be agreed with the Agency of Protected

Areas), that contradicts the requirements of article 5 of the Aarhus Convention.

The law also contradicts the requirements of article 6 of the Aarhus Convention, according to which the public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner.

In the cases envisaged by the law, a decision on concluding an agreement with an interested person can be considered a major formal decision made by administrative bodies, related to the activities carried out with violations in the sphere of environmental protection and use of natural resources, because the decision on considering illegal activities as lawful is equivalent to issuing a permit on performing such activities.

Since the decision on concluding an agreement can be made after launching illegal activities (i.e. at a later stage), it will be impossible to ensure comprehensive public participation in the decision-making process (especially as the law does not provide any special requirements concerning the publicity of the process and compulsory provision of public participation). As a result, public representatives will not be able to completely, duly and effectively exercise the rights granted by article 6 of the Aarhus Convention, since even if they are given an opportunity to participate in the process of making decisions on concluding an agreement, it will be already impossible to change a number of important issues related to the activities.

It should also be noted that the requirements of article 8 of the Aarhus Convention were already violated while developing the draft law, because the author of the draft law, the Ministry of Energy and Natural Resources, did not enable public representatives to participate in the process of developing the draft law in frames of article 8 of the Aarhus Convention (the explanatory note of the draft law directly indicates that only governmental institutions participated in its development. It also notes that the draft law was orally approved by experts from various state institutions. Actually, not a single expert and no written document confirms that this draft law was really approved by any expert working for the state institution).

The law contradicts the requirements of article 9 of the Aarhus Convention, as it restricts the right of public representatives on access to justice. In particular, under the law, not only public representatives will not be able to fully get involved in the process of making decisions on concluding an agreement, but their right to appealing against this decision will be directly restricted (according to the law, it is possible to appeal against the agreement

only in case, if it has been signed by an unauthorized person).

Compliance with the Constitution of Georgia

The law contradicts a number of articles of the Georgian Constitution, in particular:

(a) The law contradicts part 3 of article 37 of the Georgian Constitution, according to which: "3. Everyone shall have the right to live in healthy environment and enjoy natural and cultural environment. Everyone shall be obliged to care for natural and cultural environment".

According to the law, in the period of the agreement, any action committed by a signatory person in the sphere of environmental protection and use of natural resources is considered lawful regardless of its essence. Hence, the law directly contradicts the mentioned requirement of the Constitution, since according to the law, it is not anymore deemed compulsory for a signatory person to take care of natural and cultural environment!

(b) The law also contradicts part 4 of article 37 of the Georgian Constitution, according to which: "4. With the view of ensuring safe environment, in accordance with ecological and economic interests of society, with due regard to the interests of the current and future generations the state shall guarantee the protection of environment and the rational use of nature".

Environmental protection and rational use of natural resources, as well as ensuring safe environment for human health is the constitutional obligation of the state and at the same time, only the state is able to properly fulfill these obligations.

According to the law, the state has actually disclaimed the responsibility for environmental protection and rational use of natural resources, as well as for ensuring safe environment for human health in accordance with ecological interests, replacing it by payment of compensation that actually contradicts the requirements of the above mentioned article of the Constitution.

The fact of bypassing its constitutional obligations by the state is confirmed by the fact that the law actually rules out the possibility of identification by the competent authorities of violations committed within the period of the agreement, since according to the law, "it is inadmissible to inspect the activities carried out by a person in the sphere of environmental protection and use of natural resources within the period envisaged by the agreement". Without carrying out relevant inspection, it is unclear how the state can guarantee the fulfillment of its constitutional obligations concerning environmental protection and rational use of natural resources. This circumstance

significantly increases the risks of environmental pollution and further deterioration of its quality, thus reiterating the unconstitutional nature of the law.

(c) The law contradicts part 5 of article 37 of the Georgian Constitution, according to which: "5. A person shall have the right to receive complete, objective and timely information as to a state of his/her working and living environment".

The law allows a violator to perform an activity without environmental impact assessment and other legal procedures, and ultimately "to legalize" the results of this activity based on the agreement concluded with the Ministry of Energy and Natural Resources. In this case, public representatives will not have any possibility to receive complete, objective and timely information about the state of environment, because the decision-making process related to this activity will actually be out of legal space and it will not be transparent, including in terms of access to environmental information.

(d) The law also contradicts article 14 of the Georgian Constitution, according to which everyone is equal before law. Selective imposition of liability for one and the same type of violation, based on who will be able to conclude an agreement and pay compensation and who will not, is absolutely inadmissible.

The law does not provide any criteria concerning when an agreement can be concluded with an interested person and when cannot. At the same time, according to the law, the Ministry of Energy and Natural Resources "is not obliged to justify its refusal" for concluding an agreement. Taking this into consideration, it can be assumed that a decision on concluding an agreement will be made based on a subjective judgment (because the law does not specify objective criteria necessary for it), that not only creates corruption risks, but also comes into collision with the principle of equality secured by article 14 of the Georgian Constitution.

(e) The law contradicts part 2 of article 30 of the Georgian Constitution. The law puts entrepreneurs operating in Georgia under unequal conditions and it can be said that compared to law-abiding entrepreneurs, it offers preferential treatment to those enterprises, which violate the legal requirements existing in the sphere of environmental protection and natural resources. In this case, the enterprise, which was performing its activity in compliance with the law and for this purpose was making investments in the measures to meet the legal requirements, may appear uncompetitive against those enterprises, which did not defray the necessary environmental costs and based on the agreement, in exchange for a small payment, legalized illegal actions. It comes into collision with part 2 of article 30 of the Georgian Constitution, which binds the state to promote the

development of free entrepreneurial activities and competition.

(f) The law contradicts part 1 of article 42 of the Georgian Constitution, according to which, everyone has the right "to apply to a court for the protection of his/her rights and freedoms". According to the law, "it is possible to appeal against the agreement only in case, if it has been signed by an unauthorized person." This provision restricts the possibility by the third parties (including public representatives) to appeal against the agreement, even if the agreement contradicts the requirements of legislation.

According to the law, the law does not apply to the obligations and responsibilities of an interested person, party to the agreement, towards physical persons and legal entities of private law. However, this clause does not envisage all possible cases, when the legal rights of the third parties may be violated by the agreement. In such cases, because of restrictions set by the law on appealing against the agreement, they may face certain problems concerning access to justice.

For instance, restriction on appealing against the agreement may become an obstacle in terms of access to justice for "the public concerned" under part 5 of article 2 of the Aarhus Convention, including for environmental non-governmental organizations (or non-entrepreneur (non-commercial) legal entities, who promote environmental protection by their activities).

The members of the public envisaged by part 5 of article 2 of the Aarhus Convention are anyway considered the public concerned and according to article 9 of the Aarhus Convention, they have a full right to challenge the agreements envisaged by the law, since each of this agreement, because of its specific content, will be linked with violation of Georgian environmental legislation (otherwise, there would be no need to conclude an agreement). Moreover, it can be asserted with great probability that the right of public representatives to participate in the decision-making on concluding agreements will not be guaranteed in line with the requirements of the Aarhus Convention, since the law does not set any precondition for this. If public concerned has no opportunity to apply to court due to the restrictions set by the law, it will come into collision with article 9 of the Aarhus Convention and the requirements of part 1 of article 42 of the Georgian Constitution. In case of such collision, preference must be given to the Georgian Constitution and the requirements of the Aarhus Convention; it should be noted however that this condition does not change an unconstitutional nature of the restrictions set by the law on appealing against the agreements.

(g) The law contradicts article 44 of the Georgian Constitution, as it allows the possibility that a certain

circle of persons shall not be obliged to observe the requirements of the legislation of Georgia, while the actions committed by them may be considered lawful in exchange for an amount paid on the basis of the agreement. Such approach instead of strengthening will harm the process of ensuring the rule of law in Georgia.

principles strengthened by international and national environmental legislation and contains important risks of environmental, corrupt, economic, social and political nature.

Afterward

Analysis of the law allows to conclude that probably this is the rarest piece of legislation in the history of Georgian law, which, in its current form, is fundamentally incompatible even with the idea of environmental protection and therefore, it is unacceptable for the society of the 21st century.

Based on the above mentioned, we can conclude that the law contradicts the Constitution of Georgia, as well as Georgia's international commitments, the

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27/29 Paliashvili St.
0179 Tbilisi, Georgia
Tel: (995 32) 229 27 73
Fax: (995 32) 222 38 74
greenalt@greenalt.org
www.greenalt.org