

Abstract
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**A Thesis submitted in partial fulfillment of the requirements of the Nottingham Trent
University for the degree of Doctor of Philosophy**

**The Implementation of Procedural Environmental Rights: the BTC case study on the
Implementation of Procedural Environmental Rights**

This PhD dissertation includes a case study on the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project and aims to examine questions related to the implementation and exercise of procedural environmental rights. The BTC Pipeline was constructed to transport oil from Azerbaijan, through Georgia, to Turkey.

More specifically, this dissertation aims to examine: the obligations of state with regard to the implementation of procedural environmental rights under the Aarhus Convention; the requirements of private sector borrowers under the Equator Principles regarding the disclosure of information and public consultation; the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection.

This PhD dissertation seeks to make an original contribution to knowledge through the drawing up of conclusions on the: 1) legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and the domestic normative acts of Georgia; 2) non-implementation by Georgia of procedural environmental rights under the Aarhus Convention in the context of the BTC project; violation by Georgia of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR in the BTC project context; non-compliance by the BTC Co. with the requirements of the Equator Principles; 3) presence of links between the existence and proper functioning of democracy and the effective exercise of the Aarhus Convention rights; 4) existence of links between the enjoyment of the ECHR rights and the effective exercise of the Aarhus Convention rights; 5) existence of links between the implementation of the Aarhus Convention rights and those of the ECHR. The study seeks also to make an original contribution to knowledge by reaching conclusions as to how to redress the shortcoming of the revised Equator Principles and how to improve the implementation of the Equator Principles on behalf of the “Equator” banks.

**THE IMPLEMENTATION OF PROCEDURAL
ENVIRONMENTAL RIGHTS: THE BTC CASE
STUDY ON THE IMPLEMENTATION OF
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July 2011

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Chapter One: Introduction

1.1 Objectives and Structure of the Study

1.1.1 Objectives of the Study

This PhD dissertation includes a case study on the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project and aims to examine questions related to the implementation and exercise of procedural environmental rights. It also aims to examine the requirements of business entities with regard to the disclosure of information and public consultation under the Equator Principles.

The initial part of the study aims to examine: (a) the extent of state obligations with regard to the implementation of the rights of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters under the Aarhus Convention; (b) the requirements of private sector borrowers under the Equator Principles regarding the disclosure of information and public consultation; (c) the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection.

The BTC Pipeline was constructed to transport oil from Azerbaijan, through Georgia, to Turkey. A detailed analysis suggest that the BTC pipeline project within Georgia has been a controversial project in terms of (a) the implementation and exercise of procedural environmental rights under the Aarhus Convention, and (b) the fulfillment by the BTC Co. of its requirements regarding the disclosure of information and public consultation.

The case study part aims to (a) analyse the legal regime of the BTC project in the light of the obligation of Georgia regarding the implementation of procedural environmental rights and the requirements of the BTC Co. regarding the disclosure of information and public consultation and; (b) analyse two formal litigation processes against the Georgian authorities on the BTC project and two complaints to the CAO concerning the activities of the BTC Co., in order to determine violations of procedural environmental rights by Georgia under the Aarhus

Convention and the domestic normative acts of Georgia, and the non-fulfillment by the BTC Co. of its requirements regarding the disclosure of information and public consultation under the Equator Principles and the BTC project agreements; (c) examine whether the existence and proper functioning of a democracy can be the necessary pre-requisite for the effective exercise of the rights of access to environmental information and participation in environmental decision-making granted under the Aarhus Convention. Based on the case study, the dissertation also aims to find links a) between the violation of the rights to freedom of expression and to freedom of assembly under the ECHR and hindrance to the exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention; b) between the non-implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention and violations of the right to respect for private and home life and the right to property under the ECHR.

This PhD dissertation seeks to make an original contribution to knowledge through the drawing up of conclusions on the: 1) legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and the domestic normative acts of Georgia; 2) non-implementation by Georgia of procedural environmental rights under the Aarhus Convention and the domestic normative acts of Georgia in the context of the BTC project; violation by Georgia of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR in the BTC project context; non-compliance by the BTC Co. with the requirements of the Equator Principles and the BTC project agreements regarding the disclosure of information and public consultation; 3) presence of links between the existence and proper functioning of democracy and the effective exercise of the Aarhus Convention rights; 4) existence of links between the enjoyment of the ECHR rights and the effective exercise of the Aarhus Convention rights; 5) existence of links between the implementation of the Aarhus Convention rights and those of the ECHR. The study seeks also to make an original contribution to knowledge by reaching conclusions as to how to redress the shortcoming of the revised Equator Principles and how to improve the implementation of the Equator Principles on behalf of the “Equator” banks.

1.1.2 Structure of the Study

1.1.2.1 Initial Part

Chapter One: Introduction is an introduction to the research. Section 1 describes the objectives and structure of the PhD dissertation. Section 2 discusses the methodology and ethical aspects of the study. Section 3 introduces the notion of procedural environmental rights and clarifies some terminology used in the literature to denote procedural environmental rights. Section 4 analyses the environmental impact assessment (EIA) procedure and the obligation of states within the EIA procedure with regard to procedural environmental rights. Section 5 discusses “hard law” and “soft law” and describes some “hard law” and “soft law” sources containing obligations of states concerning procedural environmental rights. It also describes some “soft law” sources that contain requirements of business entities with regard to disclosure of information and public consultation. Section 6 introduces the links between the ECHR and environmental protection while section 7 introduces the links between the Aarhus Convention and democracy.

Chapter Two: Implementation of Procedural Environmental Rights under the Aarhus Convention examines questions related to the implementation of procedural environmental rights under the Aarhus Convention. Section 1 is an introduction to the chapter. Section 2 provides an introduction to the Aarhus Convention. Section 3 examines access to environmental information under the Aarhus Convention, namely the right of members of the public, upon request, to gain access to environmental information held by public authorities and the duties of public authorities, without request from members of the public, to collect and disseminate environmental information. Section 4 examines public participation in environmental decision-making under the Convention, more specifically the right to participate in decision-making by public authorities on whether to permit specific activities. Section 5 examines access to justice in environmental matters under the Aarhus Convention, namely the right to have access to judicial and other review procedures in order to challenge violations of the rights of access to environmental information and participation in environmental decision-making. Section 6 contains conclusions.

Chapter Three: Requirements under the Equator Principles regarding Disclosure of Information and Public Consultation examines the requirements of private sector borrowers under the Equator Principles, concerning the disclosure of information and public consultation. Section 1 contains an introduction to the chapter. Section 2 provides an introduction to the Equator Principles. Section 3 provides an outline of the original version of the Equator Principles of 2003, which was revised in 2006. Section 4 examines the Equator Principles as the first test for the BTC project. Section 5 examines the requirements of the Equator Principles of 2003 for borrowers regarding the disclosure of information and public consultation under Principle 5. The section also contains examination of the requirements regarding the disclosure of information and public consultation within the framework of the EA procedure under the IFC Environmental Assessment OP 4.01 (1998). Section 6 contains the conclusions.

Chapter Four: European Convention on Human Rights and Environmental Protection examines the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection. Section 1 is an introduction to the chapter. Section 2 provides an introduction to the ECHR and the European Court of Human Rights (ECtHR). Then it introduces the conceptual links between the ECHR and environmental protection. Section 3 examines the right to private and home life under Article 8 of the Convention and its potential to protect individuals against environmental harm. Section 4 examines the right to property under Article 1 of Protocol No. 1 in the light of protection against environmental harm. Section 5 examines freedom of expression under Article 10 and its relevance for environmental protection. Section 6 examines the right to freedom of assembly under Article 11 and links it to environmental protection. Section 7 contains conclusions.

1.1.2.2 Case Study Part

Chapter Five: Legal Regime of the BTC Project Regulating the Implementation of Procedural Environmental Rights by Georgia and Disclosure of Information and Public Consultation by the BTC Co. analyses the obligation of Georgia in the BTC project context regarding the implementation of procedural environmental rights and the requirements of the BTC Co. regarding the disclosure of information and

public consultation. Section 1 is an introduction to the chapter. Section 2 makes a general introduction to the BTC project within Georgia and stresses its political and economic implications. Section 3 analyses the legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and domestic normative acts of Georgia in order to solve possible tensions among them. Section 4 starts with an analysis of the legal regime of the BTC project in the light of the obligation of Georgia regarding the implementation of procedural environmental rights. Section 4 proceeds with an analysis of the legal regime of the BTC project in the light of the legal requirements of the BTC Co. regarding the disclosure of information and public consultation. Section 5 summarises the main themes of the chapter and draws conclusions.

Chapter Six: Four Formally Adjudicated Complaints analyses two formal litigation processes against the Georgian authorities and two complaints to the CAO concerning the activities of the BTC Co. Section 1 contains an introduction to the chapter. Section 2 analyses litigation initiated by Green Alternative. Namely it deals with a) a formal litigation process initiated by Green Alternative in the Tbilisi Regional Court against the Georgian authorities, concerning Environmental Permit No. 0011, on the construction and operation of the BTC pipeline project by the BTC Co. and b) a formal litigation process initiated by Green Alternative in the Tbilisi Regional Court against the Ministry of Environmental Protection and Natural Resources, concerning Environmental Permit No. 0122, on storage of waste and the operation of a waste incinerator by the BTC Co.'s contractor the SPJV. Section 2 draws conclusions on the non-implementation of procedural environmental rights by Georgia under the Aarhus Convention and domestic normative acts of Georgia. It also draws conclusions on the effectiveness of the legal remedy. Section 3 analyses two complaints to the CAO. The section deals with a complaint to the CAO by the residents of the 18th and 19th subdistricts of the town of Rustavi. Then it deals with a complaint to the CAO regarding the village of Dgvari. Section 3 draws conclusions on the non-implementation of procedural environmental rights by Georgia under the Aarhus Convention and domestic normative acts of Georgia, violations of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR, and the non-fulfillment by the BTC Co. of its requirements regarding disclosure of information and public consultation under the Equator Principles and the BTC project agreements. Section 3 also examines the effectiveness of the CAO mechanism in the BTC project context. Section 4 draws general conclusions.

Chapter Seven: Existence and Proper Functioning of Democracy as a Pre-requisite for the Effective Exercise of the Rights of Access to Environmental Information and Participation in Environmental Decision-making under the Aarhus Convention examines links between the existence and proper functioning of democracy and the effective exercise of the rights under the Aarhus Convention. Section 1 is an introduction to the chapter. Section 2 identifies claims indicating the deficiencies of Georgian democracy. Then the section makes a distinction between normative and descriptive accounts of democracy and examines the literature on normative accounts of democracy. Then there follows descriptive accounts of democracy in Georgia. Then the section examines whether the deficiencies of Georgian democracy could hinder, in the context of formally adjudicated complaints, the exercise of the rights of access to environmental information and participation in environmental decision-making as granted under the Aarhus Convention. Section 3 draws conclusions on the existence and proper functioning of democracy as being the necessary pre-requisite for the effective exercise of the rights of access to environmental information and participation in environmental decision-making, as granted under the Aarhus Convention.

Chapter Eight: Conclusions contains the final conclusions on the research questions of the study and sets out in detail the original contribution to knowledge. Sections 1 and 2 summarise the conclusions drawn in chapters 2-7. Based on the case study, section 2 also draws conclusions on the a) existence of links between the enjoyment of the ECHR rights and the effective exercise of the Aarhus Convention rights; b) existence of links between the implementation of the Aarhus Convention rights and those of the ECHR. It also reaches conclusions as to how to redress the shortcoming of the revised Equator Principles and how to improve the implementation of the Equator Principles on behalf of the “Equator” banks.

1.2 Methodology and Ethical Aspects of the Study

1.2.1 Methodology of the Study

This PhD, which includes a case study on the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project within Georgia, is essentially doctrinal. The thesis is based upon the

reading and interpretation of documents – both legal sources and commentary. The case study includes some interviews as an adjunct, in order to illustrate the points being made in the doctrinal part of the thesis.

The case study part of the PhD aims to examine the actual operation of the Aarhus Convention, the Equator Principles, and the ECHR in the context of the BTC project in Georgia. The Aarhus Convention contains the most detailed and extensive provisions with respect to procedural environmental rights at the international level. Considering that Georgia is party to the Aarhus Convention and that under the Constitution of Georgia, treaties to which Georgia is party, take precedence over the domestic normative acts, the decision was made to examine in the BTC case study the implementation and exercise of procedural environmental rights under the Aarhus Convention. The BTC project was the first major test of the Equator Principles and therefore the decision was made to examine the Equator Principles in the BTC case study. The ECHR is considered at European level as to be the most developed human rights instrument. Considering that Georgia is party to the ECHR and that under the Constitution of Georgia, treaties to which Georgia is party to, take precedence over the domestic normative acts, the decision was made to examine in the BTC case study the ECHR.

The methodology for this PhD is legal doctrinal scholarship based on the reading and interpretation of primary sources, secondary sources, and on discussion concerning “hard law” and “soft law”.¹ The reading and interpretation of primary sources mainly covers the Aarhus Convention and the case law of the Aarhus Convention Compliance Committee; the European Convention on Human Rights and its case law; the Equator Principles; the IFC Safeguard Policies; the BTC project agreements; Georgian domestic legislation; legal cases in the Georgian courts; decisions of the Georgian courts; complaints to the CAO; assessment reports of the CAO; the monitoring reports of the BTC project prepared by the Ministry of Environmental Protection and Natural Resources of Georgia; and commentary on primary sources such as books and articles. This PhD dissertation also examines NGO reports, memos, official correspondence, newspaper articles etc.

¹ For the difference between the “hard law” and “soft law” see analysis in Chapter One, section 1.5.

The method applied in the dissertation, including its case study, comprises interpretative reading, attempts to co-ordinate disparate bodies of law and to develop a systematically coherent conceptual structure from the legal source materials. The methodology applied also comprises a drawing out of the practical consequences of the legal provision upon assertable rights and effective obligations, and an account of the possible and actual gaps between the declared normative system and actual practice. All the above fall within legal doctrinal scholarship, some jurisprudential aspects of legal thoughts and those vibrant multi-disciplinary approaches to law.

More specifically, the methodology for the initial part of the thesis is legal doctrinal scholarship aimed at the identification, interpretation, and harmonization of the legal corpus. The method is interpretative, descriptive primarily, but the discourse touches on issues of values, particularly when identifying the correct interpretative approach.

More specifically, the methodology for the case study part of the thesis is also legal doctrinal scholarship. In the case study the approach is interpretative since the analysis is carried out through reading and commenting on the material read. The methodology applied comprises an attempt to move beyond mere formalism and to give an account of the operation of the law in practice i.e. law in action. It is comparative law, legal realism, socio-legal, law and development, law and politics etc. The case study through reference to secondary works of legal scholarship and political science, identifies the conditions that would either aid or hinder the exercise of the right recognized by the Aarhus Convention. It also identifies benefits to be hoped from the successful operation of the Aarhus Convention.

The case study includes some interviews as an adjunct, in order to illustrate the points being made in the doctrinal part of the thesis.² The interview questions were prepared before the interviews and were asked to a self-selected group of interested parties. They are interviews with involved parties in an attempt to uncover the actual operation of the formal laws in the context of Georgia. By means of interviews the researcher collected primary data, i.e. data that had never been collected before and was not in the public domain. The interview questions aimed at collecting opinions of various actors that had never been published.

² See Appendix I “Interviews” of the thesis.

The interviews concerned the research questions. By means of interviews the researcher collected additional and more detailed information, rather than that available in existing primary and secondary sources, on two formal litigation processes against the government of Georgia regarding the BTC project and two complaints to the CAO concerning the activities of the BTC Co. Primary data collected by the interviews assisted the research to draw conclusions on (a) non-implementation of procedural environmental rights under the Aarhus Convention and the domestic normative acts of Georgia in the BTC project context by Georgia; (b) non-compliance by the BTC Co. with the requirements under the Equator Principles and the BTC project agreements regarding the disclosure of information and public consultation, and therefore a breach by the “Equator” banks of the Equator Principles; (c) existence of links between the proper functioning of democracy and the effective exercise of the Aarhus Convention rights; (d) existence of links between the enjoyment of the ECHR rights and the effective exercise of the Aarhus Convention rights; (e) existence of links between the implementation of the Aarhus Convention rights and the ECHR rights.

By means of interviews, the researcher sought the views of various actors; however these views cannot be regarded as objective, impartial and comprehensive. Data collected as a result of interviews cannot be used as reliable data to prove or disprove a theory or hypothesis set out in the doctrinal part of the study. The interviews do not aim to generate original empirical data. The thesis does not produce empirically reliable data as a result of the interviews. It should be noted that interviews are not a traditional element of the discipline of law. The thesis relies primarily on existing sources and political science. Therefore this thesis is not an empirical research project.

Five respondents were selected and interviewed: a representative of an NGO, a judge, a former employee of the Ministry of Environmental Protection and Natural Resources of Georgia, a citizen of Rustavi, and a resident of the village of Dgvari. The decision to select respondents from the groups mentioned was determined by the following considerations. Several NGOs were actively involved in monitoring the BTC project. There are court decisions on the issues of the implementation of procedural environmental rights. The Ministry of Environmental Protection of Georgia is the primary government body with responsibility for the

implementation of procedural environmental rights in the BTC project context. Individual citizens residing in the town of Rustavi and in the village of Dgvari claimed non-fulfillment by the BTC Co. of its requirements regarding the disclosure of information and public consultation.

In January 2008 I travelled to the village of Dgvari. I walked in the streets of the village to find the centre. There I found some men. I approached them and told them that I was interested in interviewing somebody about the BTC project. One man brought me to his neighbour who consented to be interviewed. The interview took place in the yard of the house. Several NGOs were actively involved in monitoring the BTC project. I made the decision to select for my interview a representative from one of these NGOs. I found the email addresses on the web site of that organization and sent emails to three people those were actively involved in the BTC project issues, as known to me from various sources that were analyzed by me. One person expressed interest in the interview. I invited that person to a café for lunch the next day and there the interview took place. In summer 2005 I was in Georgia and established contacts as a PhD student with several employees of the Ministry of Environment of Georgia in order to obtain copies of documents for my thesis. In December 2007 I decided to contact one of those persons by mail to make enquiries regarding a possible interview. That person wrote back explaining that he no longer worked there. However he agreed to an interview and we met in a café for lunch and interview. In December 2007 I travelled to an area of the 18th and 19th subdistricts of Rustavi. I enquired from local people whether they had knowledge of someone who was involved in the campaign against the route of the Pipeline. A women told me that her neighbour was involved. She made a call on a mobile phone and it appeared that that person was interested. I met her in the yard of the house and conducted an interview. A formal litigation process had gone through many instances of the judiciary and many judges had dealt with it. I decided to find a respondent among these judges. I made calls in courts and was asking to speak to certain judges. Mainly secretaries were my contact persons. I received a call from one judge, who appeared to be interested in scholarly research. That judge asked for details and gave consent. We arranged a meeting during lunchtime in a café where the interview took place.

1.2.2 Ethical Aspects of the Study

It should be noted that in 2007 I applied to the College Research Ethics Committee (CREC) and requested an ethical clearance for my project. On 12 December, 2007 CREC approved my application.

All the primary and secondary source material that I used for my research are in the public domain i.e. they are made public online or upon request and thus no ethical issues can arise. Court decisions and the monitoring reports of the BTC project prepared by the Ministry of Environmental Protection and Natural Resources of Georgia are public according to Georgian legislation: however they are not available online due to limited financial resources. It should be noted that in Georgia, only decisions of the Supreme Court of Georgia are published and placed online. During my stay in Georgia, in August and September 2005, I made use of my contacts in the judiciary and collected copies of all court decisions that had been made by that time in the BTC project context, including court decisions on procedural environmental rights. During that stay, I met several representatives of the Ministry of Environmental Protection and Natural Resources of Georgia and received all the monitoring reports of the BTC project prepared by the Ministry of Environmental Protection and Natural Resources of Georgia. All complaints to the CAO and assessment reports of the CAO are available online, as are the NGO reports. As for memos, some of the memos of the Ministry of Environmental protection were requested by NGOs and made public. Most of the official correspondence between NGOs and the Georgian government, between NGOs and the BTC Co. and some official correspondence between the BTC Co. and the Georgian government have been made available online by NGOs. It should be noted that I used only publicly available official correspondence and memos. I also met key local NGOs dealing with the BTC project and collected copies of legal cases filed in the Georgian courts claiming violation of procedural environmental rights in the BTC context. It should be noted that legal cases claiming violation of procedural environmental rights in the context of the BTC project were lodged only by the NGO Green Alternative. Copies of these legal cases were made public by this NGO.

Data collected from interviews was confidential and anonymous. Participants' responses were audio recorded. The tapes of participants' interviews were

transcribed. Computer files of transcripts were kept in my personal laptop which has a password regime. Transcripts were immediately and fully anonymised and pseudonymised to protect the confidentiality of participants. Any information that could identify participants' personality or his/her organisation was removed from the transcripts. My laptop was kept in my office at the Ministry of Foreign Affairs, which is not a shared office and which has extra security. Audio recorded tapes were kept at my home in a locked and secure place. When the collected data was analysed and the research completed, all confidential data – transcripts, audio recordings and contact details of research participants - were destroyed. No confidential or personal data were retained.

No identifying information, such as facts or other specific experience, is included in my thesis. Legal cases had undergone the various Court instances and at each several judges were involved, therefore the judge respondent could not be readily identified. Different tiers of the Ministry of Environmental Protection of Georgia and different officials of the Ministry have dealt with the implementation of procedural environmental rights in the BTC context, and therefore, here again individuals could not be readily identified. It should be noted that the complaints to the CAO were either made collectively by communities as a whole or confidentiality of complainants were kept by the CAO. As for the representative of an NGO, several NGOs have been actively campaigning in the BTC project context and therefore it would be very hard to identify a specific NGO and even more so a definite individual.

I provided respondents with a participant information sheet to read.³ In cases when he/she decided to take part after reading it, he/she was asked to read and sign a consent form.⁴ I had two copies of the consent form, to be signed and dated by the respondent and countersigned and dated by me. One copy was retained by the respondent, together with the information sheet, and one copy was kept by me. This secured informed consent and avoidance of deception. Interview questions did not intrude upon the privacy of participants.

In the winter 2007-2008 I conducted interviews. During this period I was the Director of the International Legal Department at the Ministry of Foreign Affairs

³ See Appendix II "Participant Information Sheet" of the thesis.

⁴ See Appendix III "Consent Form" of the thesis.

of Georgia and this could give rise to some ethical concerns. Potentially, a person in such a position at the Ministry of Foreign Affairs could use his personal contacts to get access to such documents that would be inaccessible to an ordinary research student, and to get access to such respondents who would be inaccessible to an ordinary research student. On the other hand, it could be argued that this position might restrict me reaching conclusions sharply criticizing the government.

Therefore I would like to state that for my research I used only materials that are publicly available online or upon request. For accessing respondents from NGOs, the judiciary and the Ministry of Environment, I used those contacts which were established by me in the summer of 2005 before taking up my position at the Foreign Ministry and after transferring to PhD in the summer of 2006. I accessed individual citizens, but my position at the Foreign Office cannot be seen as an advantage for gaining access to ordinary villagers or town residents. I think these individual persons were not intimidated by my status in the Foreign Office, because these are people who made public complaints and were protesting in the streets to get the attention of the public authorities. For the purpose of interviewing, I travelled to their places of residence.

As for accessing a respondent from the Ministry of Environment, I would like to state that I did not exert any influence in any way to get his/her consent for participation. As a diplomat, I had no potential institutional leverage on the Ministry of Environmental Protection. The Ministry of Foreign Affairs is not a governmental body which can control or check the activity of the Ministry of Environment. The relationship between the two ministries can be characterized as being of a horizontal nature, as opposed to a vertical one. Different tiers of the Ministry of Environmental Protection and different officials of the Ministry at different stages have dealt with the implementation of procedural environmental rights in the BTC context, and therefore it cannot be claimed that I had to target one or two particular individuals for my interviews. This of course diminishes the theoretical possibility of a need to exert influence on a certain official in order to obtain consent. It should also be taken into consideration that a respondent from the Ministry of Environmental Protection was a former employee and not a current official at the time of the interview.

I would like to state that possible criticism of the government is not incompatible with my position at the Foreign Ministry. My research can be of great benefit to the government of Georgia. I can state that the government of Georgia is open to academic criticism. In 2006, the Ministry of Justice of Georgia edited and published 15 articles on European human rights standards and their influence on Georgian legislation, and I am the author of one. The criterion for the acceptance of an article for publication was a critical evaluation of existing practice in Georgia with regard to European human rights standards.

It should be noted here that section 6.2 of *Chapter Six: Four Formally Adjudicated Complaints* deals with a formal litigation process initiated against the Georgian authorities by Green Alternative in the Tbilisi Regional Court. According to the second part of the lawsuit, the Ministry of Foreign Affairs of Georgia and the Parliament of Georgia violated provisions of the Law of Georgia on International Treaties by not ensuring the publication of the Intergovernmental Agreement on the BTC project (IGA) and its appendices. In terms of my objectivity, it is noteworthy that in the years 1998-2003, before leaving for the UK for my PhD research, I was working at the International Law Department of the Ministry of Foreign Affairs of Georgia as a career diplomat. The International Law Department was responsible for the issue of the publication of the IGA under its internal regulations. However, during 1998-2003 I was working for the Division of Human Rights and for the Council of Europe of the International Law Department and that sub-unit was not dealing with the issue of publication of bilateral and multilateral treaties. I think that these circumstances should not pose a significant risk to the objectivity of the research in that part of the thesis.

I would like to state that any potential harm to the reputation of any individual or organisation - which is not considered a significant risk anyway - is addressed through the consent and confidentiality procedures set out.

1.3 Procedural Environmental Rights and Use of Terminology

1.3.1 Notion of Procedural Environmental Rights

The notion of procedural environmental rights or of procedural rights in environmental matters denotes access to environmental information, public

participation in environmental decision-making and access to justice in environmental matters.⁵ For example, under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters⁶ i.e. the so called Aarhus Convention, the notion of procedural environmental rights has the following meaning: (a) access to environmental information divided into two parts: “passive” access to information and “active” access to information. “Passive” access to information implies the right of members of the public upon request to gain access to environmental information held by public authorities. “Active” access to information denotes the obligation of public authorities, without request from members of the public, to collect and disseminate environmental information; (b) public participation in environmental decision-making denotes the right to participate in (i) decision-making on specific activities with a potentially significant effect on the environment, (ii) the preparation of plans, programmes and policies relating to the environment, and (iii) the preparation of laws and rules by public authorities that may have a significant effect on the environment; (c) access to justice in environmental matters denotes the right to have access to judicial and other review procedures in order to challenge violations of the rights of access to environmental information and participation in environmental decision-making.

1.3.2 Different Terminology on Procedural Environmental Rights

It should be noted that in the environmental law literature the concepts of “public participation”, “participatory rights”, “procedural rights” or “environmental rights” may have the same meaning as the notion of “procedural environmental rights”.

⁵ Déjeant-Pons, M. “Human Rights to environmental procedural rights” in Déjeant-Pons, M. and Pallemmaerts, M. *Human rights and the environment* (Strasbourg: Council of Europe Publishing, 2002), pp. 24-46; Stookes, P. *A Practical Approach to Environmental Law* (Oxford: Oxford University Press, 2005), p. 33; Douglas-Scott, S. “Environmental Rights In The European Union – Participatory Democracy Or Democratic Deficit?” in Boyle, A. E. and Anderson, M. R. (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996), pp. 112-122; Pallemmaerts, M. “The human right to a healthy environment as a substantive right” in Déjeant-Pons, M. and Pallemmaerts, M. *op cit.*, (2002), p. 18; Hayward, T. *Constitutional Environmental Rights* (Oxford: Oxford University Press, 2005), pp. 177-181; Bell, D. R. “Liberal Environmental Citizenship” in Dobson, A. and Sáiz, Á. V. (eds.) *Citizenship, Environment, Economy* (Oxon: Routledge, 2006), p. 31.

⁶ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Treaty Series No.24 (2005) Cm6586. The Convention was adopted in Aarhus, Denmark, on 25 June, 1998 within the United Nations Economic Commission for Europe (UNECE).

1.3.2.1 “Public Participation”

“Public participation” may denote basic political participation through periodic elections or unofficial participation such as public demonstrations and protests; however this term may be used, in the context of environmental law, to denote the three following elements: access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.⁷ It has been argued that, increasingly, “public participation is recognized as a right of individuals and communities to participate in decisions that affect their lives, including the right to know and the right to review.”⁸

1.3.2.2 “Participatory Rights”

The phrase “participatory rights” may imply the right to political participation, for example Article 21⁹ of the Universal Declaration on Human Rights, Article 25¹⁰ of the International Covenant on Civil and Political Rights, Article 23¹¹ (right to

⁷ Holder, J. and Lee, M. *Environmental Protection, Law and Policy: Texts and Materials* (Cambridge: Cambridge University Press, 2007), pp. 85-86; Bell, S. and McGillvray, D. *Environmental Law* (Oxford: Oxford University Press, 2008), p. 293.

⁸ Saladin, C. “Public Participation in the Era of Globalization” in Picolotti, R. and Taillant, J. D. (eds), *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona, 2003), p. 57.

⁹ According to Article 21, “1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right of equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” *Universal Declaration of Human Rights* (1948). For commentary of article 21, see Eide, A. et al (eds.), *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992), pp. 299-314.

¹⁰ According to Article 25, “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country”. *International Covenant on Civil and Political Rights* (1966). For commentary of article 25, see Joseph, S. Schultz J. and Castan, M. *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004), Chapter 22 Rights of Political Participation – Article 25, pp. 650-678; Nowak, M. *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: Engel, 1993), pp. 435-457; Steiner, H. “Political Participation as a Human Right” (1988), 1 *Harv. Y’bk Int. L.* 77, 78.

¹¹ According to Article 23, “1. Every citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and (c) to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.” *American Convention on Human Rights* (1969).

participate in government) of the American Convention on Human Rights, or Protocol No 1, Article 3 (right to free elections)¹² of the European Convention on Human Rights.¹³ However, in environmental law, the term “participatory rights” may be used to denote the rights of access to information, public participation in decision-making and access to justice in environmental matters.¹⁴

1.3.2.3 “Procedural Rights”

In international human rights law, “procedural rights” is used to denote human right norms authorizing procedures for seeking compliance with or redress of violations of a human right treaty.¹⁵ For example, Article 6 (Right to a fair trial) of the European Convention on Human Rights is a procedural human right.¹⁶ Other examples of procedural human rights are Protocol No. 7 of the European Convention on Human Rights¹⁷, Article 6 (Right to recognition as a person before

¹² According to Article 3, Protocol No. 1, “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature”. *European Convention on Human Rights* (1950). For commentary of Article 3, Protocol No. 1 see Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), Chapter 19 Free Elections by Secret Ballot (Article 3 of Protocol No. 1), Revised by Schokkenbroek, J. pp. 911-935; Ovey, C. and White, R. C.A. *Jacobs & White European Convention on Human Rights* (Oxford: Oxford University Press, 2002), Chapter 17 The Right to Free Elections, pp. 331-338; Mowbray, A. *Cases and Materials on the European Convention on Human Rights* (London: Butterworths, 2001), Chapter 18 First Protocol Article 3: Right to free elections, pp. 709-721.

¹³ Fox, G. H. “The Right to Political Participation in International Law” in Fox G. H. and Roth, B. R. (eds.) *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), pp. 48-90; Ebbeson, J. “Public Participation” in Bodansky, D. Brunnée, J. and Hey, E. (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), p. 687; Kofele-Kale, N. “Participatory Rights in Africa: A Brief Overview of an Emerging Regional Custom” (2008), available at <http://works.bepress.com/ndiva_kofele_kale/1>, [accessed on 6th May, 2009].

¹⁴ Birnie, P. Boyle, A. and Redgwell, C. *International Law & the Environment* (Oxford: Oxford University Press, 2009), pp. 288-298; Bell, S. and McGillvray, D. *op cit.*, (2008), p. 148; Macrory, R. and Turner, S. “Participatory Rights, Transboundary Environmental Governance and EC Law” (2002) 39 *Common Market Law Review* pp. 489-522; Obradovic, D. “EC rules on public participation in environmental decision-making operating at the European and national levels” (2007), *European Law Review*, 32 (6), p. 829; Mitchell, K. “Decision Upholds Citizens’ Participatory Rights under the Environmental Bill of Rights”, the Canadian Environmental Law Association (CELA), available at <<http://www.cela.ca/article/adams-mine/decision-upholds-citizens%E2%80%99-participatory-rights-under-environmental-bill-rights>>, [accessed on 8th May, 2009].

¹⁵ Condé, H. V. *A Handbook of International Human Rights Terminology* (the University of Nebraska Press, 1999), p. 113.

¹⁶ Ward, T. “Human rights update: right to a fair trial and substantive rights” (2001), 145 (26), *Solicitors Journal*, 621-622; Skilbeck, R. “Article 6 – procedural not substantive right – cannot challenge “reasonable man” test” (2002), Dec, *Human Rights*, 234; Cooper, J. “Procedural due process, human rights and the added value of the right to a fair trial” (2006) 11 (1), *Judicial Review*, 78-91.

¹⁷ It includes the following rights: Article 1 (Procedural safeguards relating to expulsion of aliens), Article 2 (Right of appeal in criminal matters), Article 3 (Compensation for wrongful conviction) etc.

the law), 10 (Right to a fair trial), Article 11 (Presumption of innocence) of the Universal Declaration on Human Rights, and Article 14 (Rights to a fair trial) and Article 16 (Right to recognition as a person before the law) of the International Covenant on civil and Political Rights.¹⁸ It should be noted that the phrase “procedural rights” may be used to denote the three procedural environmental rights.¹⁹

1.3.2.4 “Environmental Rights”

The phrase “environmental rights” may be used to mean the right to environment.²⁰ Thus, “environmental rights” may denote the “the right to an environment of a specified quality, such as “healthy”, “safe”, “secure”, “clean”, or “ecologically sound”.”²¹ The right to environment refers to an entitlement to a certain environmental quality.²² In the adopted documents there are different formulations of a right to environment: “in most instances, the right recognized is a right to a healthy or clean environment or an environment conducive to well-being and higher standards of living, all of which centre on the quality of life of the better-off throughout the world. Some bolder formulations speak of a right to a decent environment encompassing social and cultural aspects that take, *e.g.* into account the suitability of a given environment to an individual or a people according to its social and cultural needs and thus acknowledge the interdependence of all elements of the human environment.”²³

It is of special importance to note that two regional legally binding documents expressly recognize a right to environment: Additional Protocol to the American

¹⁸ Lawson, E. *Encyclopedia of Human Rights* (Washington: Taylor and Francis, 1996), p. 35.

¹⁹ Shelton, D. “The Environmental Jurisprudence of International Human Rights Tribunals” in Piccolotti, R. and Taillant, J. D. (eds), *op cit.*, (2003), p. 3; Sands, P. *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003), p. 118; Déjeant-Pons, M. *op cit.*, (2002), p. 23. Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 302; “Conclusions”, *Meeting of Experts on Human Rights and the Environment*, U.N. High Commissioner for Human Rights, 14-15 January 2002, paragraph 6, available at <<http://www.unhchr.ch/environment/conclusions.html>> [accessed on 15th July 2009].

²⁰ Hayward, T. *op cit.*, (2005); Miller, C. *Environmental Rights: Critical perspectives* (London: Routledge 1998); Deimann, S. and Dyssli, B. (eds.) *Environmental Rights: Law, Litigation and Access to Justice* (London: Cameron May, 1995); Cullet, P. “Definition of an Environmental Right in a Human Rights Context” (1995), *Netherlands Quarterly of Human Rights*; Bell, S. and McGillvray, D. *op cit.*, (2008), p. 73.

²¹ Kiss, A. and Shelton, D. *Guide to International Environmental Law* (Leiden/Boston: Martinus Nijhof Publishers, 2007), p. 238.

²² Pallemarts, M. *op cit.*, (2002), p.19.

²³ Cullet, P. *op cit.*, (1995), p. 29.

Convention on Human Rights in the area of Economic, Social, and Cultural Rights and the African Charter on Human and Peoples' Rights.²⁴ According to Article 11 (1) of Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, "everyone shall have the right to live in a healthy environment and to have access to basic public services."²⁵ And according to Article 24 of the African Charter on Human and Peoples' Rights, "all people shall have the right to a general satisfactory environment favourable to their development".²⁶ In the 1970s, unsuccessful proposals were made to elaborate a protocol to the European Convention on Human Rights recognizing the right to environment.²⁷ It has been argued that "the right to live in a balanced, decent, healthy, satisfactory, sound or secure environment is more often expressed within non-legally binding resolutions and declarations adopted at conferences for environmental co-operation rather than in legally binding international human rights covenants."²⁸ It should be emphasized that there are many constitutions that recognize this right under domestic law, including constitutions of the countries of the UNECE region: for example, Hungary and Slovenia.²⁹

However, the right to environment has not yet become a binding international law with a universal application.³⁰ For example, two U.S. Courts of Appeals made the decision saying that the right to a healthy environment does not constitute part of international law.³¹ It has been argued that the right to environment, together with the right to development³², constitutes the third generation of human rights, that are

²⁴ Pevato, P. M. "A Right to Environment in International Law: Current Status and Future Outlook" in Pevato, P. M. (ed), *International Environmental Law*, Volume I, (Ashgate, 2003), p. 313; Shelton, D. "Human Rights, Environmental Rights, and the Right to Environment" (1991), 28, *Stan. J. Int'l L.* p. 103.

²⁵ *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* (1988)

²⁶ *African Charter on Human and Peoples' Rights* (1981)

²⁷ Pallemarts, M. *op cit.*, (2002), p. 15.

²⁸ Pevato, P. M. *op cit.*, (2003), p. 313.

²⁹ Stec, S. and Casey-Lefkowitz, S. *The Aarhus Convention: An Implementation Guide* (New York and Geneva: United Nations / Economic Commission for Europe, 2000), p. 16. For an overview of such constitutions see *Human Rights and the Environment*, final report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9, (Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities), Annex III.

³⁰ Pallemarts, M. *op cit.*, (2002), p. 12.

³¹ Kravchenko, S. and Bonine, J. E. *Human Rights and the Environment: Cases, Law, and Policy* (Durham: Carolina Academic Press, 2008), p. 23.

³² "As a human right, the "right to development" is substantive human right of groups of individuals to have the freedom, cooperation, methods, and means to develop themselves economically, socially, culturally, and politically as civil society and to achieve the goals of human rights: the fullest possible development of the human personality of every individual in society. It is a "third-generation (human) right" and is commonly referred to in the collective/group sense. Its scope and context are very disputed and many do not even accept it as a human right". See Condé, H. V. *op cit.*, (1999), pp. 35-36.

not part of existing law, but are “emerging”.³³ The third generation rights are called “solidarity” or “group” rights and it has been argued that these rights are not held by individuals but by groups.³⁴ Following the French jurist Vasak, it has become routine to categorize human rights in different “generations”.³⁵ The first generation of human rights consists of civil and political rights and the second generation consists of economic, social and cultural rights. The first two generations of human rights have found reflection in numerous historical legal texts and have gained international recognition by the UN 1948 Universal Declaration of Human Rights, which includes both generations of rights, and by the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights, adopted by the UN.³⁶ These two Covenants entered into force in 1976.³⁷ The first two generation rights are binding under international law.³⁸

It has been argued that the substantive right to environment faces two major challenges: definition and adjudication.³⁹ The meaning of this right is uncertain and is “largely a subjective value judgment”.⁴⁰ It is difficult to define this right with sufficient precision and clarity.⁴¹ The difficulty of defining the right to environment is conditioned by the difficulty of reaching a consensus on a definition of the environment.⁴² Moreover, if such a consensus is reached, the question would remain: “how would jurisdictions be able to protect rights that have such a general scope, and who could claim for the respect of such rights?”⁴³ It is very difficult to identify who is responsible for pollution and to establish causation.⁴⁴ It has been argued that it is questionable whether environmental rights

³³ Brownlie, I. *Principles of Public International Law* (Oxford: Oxford University Press, 2003), pp. 540-41.

³⁴ Kravchenko, S. and Bonine, J. E. *op cit.*, (2008), p. 19.

³⁵ Vasak, “A 30-Year Struggle”, *the UNESCO Courier* (November 1977), p. 29; Tomuschat, C. *Human Rights: Between Idealism and Realism* (Oxford: oxford University Press, 2003), p. 24.

³⁶ Harris, D. J. *Cases and Materials on International Law* (London: Sweet and Maxwell, 1998), p. 636, 647.

³⁷ Brownlie, I. *op cit.*, (2003), p. 539.

³⁸ Tomuschat, C. *op cit.*, (2003), p. 24.

³⁹ Eckersley, R. “Environmental Rights and Democracy” in Keil *et al* (eds.), *Political Ecology: Global and Local* (London: Routledge, 1998), p. 367.

⁴⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 279.

⁴¹ Pathak, R. S. “The human rights system as a conceptual framework for environmental law” in Weiss, E. B. (ed), *Environmental change and international law: new challenges and dimensions* (Tokyo: United Nations University Press, 1992), p. 209.

⁴² Kiss, A. “The Right to the Conservation of the Environment” in Piccolotti, R. and Taillant, J. D. *op cit.*, (2003), p. 32.

⁴³ *Ibid.*

⁴⁴ Eckersley, R. *op cit.*, (1998), p. 367.

are anything more than policy aspirations.⁴⁵ Thus, it can be argued that the issue of the implementation of the right to environment remains unsolved. There are no set standards as to the exact content of this right and neither government nor the judiciary is able to ensure its implementation and enforcement in compliance with the potentially varying wishes and expectations of numerous members of the public. As a contrast, procedural environmental rights can be easily enforced.⁴⁶

Usually human rights documents refer to the right to environment not as a right of individuals which can be enforced in a court of law.⁴⁷ A good example of this is Article 1 (Objective) of the Aarhus Convention. Article 1 of the Aarhus Convention recognizes the right to environment.⁴⁸ It states “[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention”. However, it has been argued that Article 1 does not give rise to immediate legal consequences, since its provisions do not, as such, impose on states any specific obligations beyond those provided in the other provisions of the Convention.⁴⁹ In Article 1 of the Aarhus Convention, the protection of the right to environment is viewed as an objective to which the Convention aims to contribute and not as a substantive obligation.⁵⁰ The Convention is not primarily about the right to a healthy environment, it is about procedural environmental rights.⁵¹ It has been argued, in the context of Article 1 of the Convention, that the “[t]alk of rights in the Aarhus Convention seems to be mainly a substantive claim on participation: the rights are an instrument by which to enhance environmental quality”.⁵²

The UK made the following declaration upon signing and again upon ratifying the Convention: "The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to

⁴⁵ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 73.

⁴⁶ Hayward, T. *op cit.*, (2005), p. 84.

⁴⁷ Verschuuren, J. "Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention" (2004) Vol. 4 *The Yearbook of European Environmental Law* p. 31.

⁴⁸ Pallemmaerts, M. *op cit.*, (2002), pp. 16-17.

⁴⁹ *Ibid.*, p. 18.

⁵⁰ *Ibid.*

⁵¹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 29.

⁵² Holder, J. and Lee, M. *op cit.*, (2007), p. 100.

live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."⁵³ This declaration by the UK was considered necessary due to the legally binding force of the Convention.⁵⁴ It has been argued that there is a growing jurisprudence in the world that gives "right-based content to the previously aspirational goal of a basic right to a healthy environment".⁵⁵ The UK does not recognize the right to environment in domestic law as an enforceable right and it made this declaration in order to avoid misunderstanding regarding the legal effect of the right to a healthy environment under Article 1 of the Convention for the UK.

According to Pallemerts, "[i]t is striking that the fundamental right to live in a healthy environment, at the very moment of its legal recognition [by Article 1], finds itself, as it were, immediately reduced to its mere procedural dimension."⁵⁶ The substantive provisions of the Convention focus on participatory rights.⁵⁷ The Convention establishes a comprehensive framework for the three procedural environmental rights.⁵⁸ Unlike the substantive right to environment, procedural environmental rights do not oblige states to undertake substantive measures for environmental protection.⁵⁹

The seventh preambular paragraph of the Aarhus Convention states that the Parties to the Convention: "[r]ecognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations". And the eighth preambular paragraph states that the Parties to the Convention "[c]onsidering that, to be able to assert this right [to live in an environment adequate to their health and well-being]

⁵³ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Declarations and Reservations*, available at <http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm> [accessed on 23rd April, 2008].

⁵⁴ Jendroska, J. and Stec, S. "The Aarhus Convention: Towards a New Era in Environmental Democracy" (2001), 3 *Env. Liability* 140, p. 141.

⁵⁵ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 16.

⁵⁶ Pallemerts, M. *op cit.*, (2002), p. 18.

⁵⁷ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 292.

⁵⁸ Stookes, P. *op cit.*, (2005), p. 33.

⁵⁹ Hayward, T. *op cit.*, (2005), p. 84.

and observe this duty [to protect and improve the environment for the benefit of present and future generations], citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights". The seventh preambular paragraph is the recognition of the right to environment and of the rights of future generations.⁶⁰ It has been argued that intergenerational equity is very important for sustainable development.⁶¹ The eighth preambular paragraph links the three procedural environmental rights to the right to a healthy environment and indicates that the former is necessary for the achievement of the latter.⁶² It should be noted that a preamble is part of a treaty, but does not give rise to binding obligations.⁶³ Therefore, in terms of immediate legal consequences, the same can be said about the recognition of the right to environment in the preamble of the Convention: it cannot be viewed as a substantive obligation, it can be viewed as an objective which the Convention desires to achieve.

It is noteworthy that the substantive right to environment has been subject to criticism also in terms of environmental ethics: namely it has been argued that the nature of this right can be seen as based on an "anthropocentric" view.⁶⁴ There are two strains in environmentalism – "shallow ecology" and "deep ecology".⁶⁵ "Shallow" ecology is anthropocentric, because it claims that the earth is instrumental to human ends and that humans are "the sole reference point of value".⁶⁶ "Deep ecology" is ecocentric, since it claims that nature has an intrinsic value, in its own right, irrespective of its use value to human beings.⁶⁷ The "anthropocentric" approach has been subject to criticism by ecological theorists, since they believe that such an approach is not comprehensive.⁶⁸

⁶⁰ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), pp. 16-17.

⁶¹ *Ibid.*, p. 17.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 11.

⁶⁴ Redgwell, C. "Life, The Universe And Everything: A Critique of Anthropocentric Rights" in Boyle, A. E. and Anderson, M. R. *op cit.*, (1996), pp. 71-87.

⁶⁵ Heywood, A. *Political Ideologies* (New York: Palgrave Macmillan, 2003), p. 271.

⁶⁶ Pepper, D. *Modern Environmentalism: an introduction* (London: Routledge, 1996), p. 35.

⁶⁷ *Ibid.*, p. 15.

⁶⁸ Gillespie, A. *International Environmental Law, Policy and Ethics* (Oxford: Oxford University Press, 1997), Chapter 1: "Anthropocentrism".

It should be noted that the phrase “environmental rights” may be used in the literature to denote the rights of access to information, public participation in decision-making and access to justice in environmental matters.⁶⁹

1.4 Environmental Impact Assessment (EIA) as a Framework for Procedural Environmental Rights

The environmental impact assessment (EIA)⁷⁰ procedure can serve as an efficient framework for the implementation of procedural environmental rights.

Many countries throughout the world have provisions on EIA: the USA⁷¹, Canada⁷², the member states of the European Union⁷³, Eastern European countries⁷⁴ etc.⁷⁵ There are the numerous documents that are adopted at the interstate level and that require environmental impact assessment of potential environmental impacts, *inter alia*, within the state borders. Examples of such documents are: the EC EIA Directive (as amended) and UNEP - United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment⁷⁶. As for requirements on transboundary EIA, the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, the so called Espoo Convention,⁷⁷ is the most comprehensive regional treaty on the subject.

⁶⁹ Kiss, A. *op cit.*, (2003), p. 40; Stookes, P. *op cit.*, (2005), p. 33; Jendroska, J. and Stec, S. *op cit.*, (2001) p. 148; Annan, K. in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

⁷⁰ It should be noted that often in the relevant literature the term “environmental assessment” is used to denote both “environmental impact assessment (EIA)” and “strategic environmental assessment (SEA)”. Holder, J. *Environmental Assessment: The Regulation of Decision Making* (Oxford: Oxford University Press, 2004), p. 1, footnote 1; Bell, S. and McGillivray, D. *op cit.*, (2008), p. 431. The term “environmental impact assessment” (EIA) is used in the context of projects and the term “strategic environmental impact assessment” (SEA) is used in the context of plans, programmes and policies.

⁷¹ Karkkainen, B. C. in Holder, K. and McGillivray, D. (eds.), *Taking Stock of Environmental Assessment* (Routledge, 2007), Chapter 3.

⁷² Canadian Environmental Assessment Act, SC1992, c37.

⁷³ Kramer, L. in Holder, J. and McGillivray, D. *op cit.*, (2007), Chapter 5.

⁷⁴ Winter, G. (ed), *European Environmental Law: A Comperative Perspective* (Aldershot, 1996) Chapter 5.

⁷⁵ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 166. It should be stressed that there is a significant difference in national laws, for example regarding the public’s rights to gain access to EIA documentation, to comment on the documentation, to the final decision and to appeal against the final decision. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 176, footnote 120. *See also* Orestes R. A. “Comparative Review of Environmental Impact Assessment Laws in Central and Eastern Europe”, USAID Environmental Law Programme (1996).

⁷⁶ Adopted in 1987. Available at <http://www-penelope.drec.unilim.fr/Penelope/library/Libs/Int_nal/unep/unep.htm>, [accessed on 18 October 2008].

⁷⁷ *Convention on Environmental Impact Assessment in a Transboundary Context* (1991).

The EIA is a procedure for ensuring the investigation of and the taking into account of the likely significant environmental effects of new developments before they are allowed to proceed.⁷⁸ The EIA denotes a procedure of gathering environmental information concerning projects and taking it into account when making a decision.⁷⁹ The purpose of environmental impact assessment (EIA) is to supply decision makers with information on potential environmental impact when making a decision on the issue of the authorization of the activity.⁸⁰ The UNECE defined EIA as “an assessment of the impact of a planned activity on the environment”.⁸¹ According to the EC EIA Directive “[t]he environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case . . . the direct and indirect effects of a project on the following factors: human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; the interaction between the factors mentioned in the first, second and third indents”.⁸² The EIA denotes a systematic process of examining the environmental effects of development projects in advance, and its emphasis is on prevention of environmental damage.⁸³ The notion of EIA is rooted in the common sense wisdom that prevention of a problem is better than curing it later.⁸⁴

In the EIA process, screening is the first stage and implies differentiating between projects that require EIA due to potentially significant adverse impacts on the environment.⁸⁵ Screening can be regulated by national EIA laws⁸⁶, for example in

⁷⁸ Department of the Environment, Transport and the Regions (DETR), *Environmental Impact Assessment: a guide to procedures* (Tonbridge: Thomas Telford Publishing, 2000), p. 5, 7.

⁷⁹ Bell S. and McGillvray, D. *op cit.*, (2008), p. 432.

⁸⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), pp. 164-165.

⁸¹ UNECE 1991. *Policies and systems of environmental impact assessment*. Geneva: United Nations.

⁸² Article 3, the EC EIA Directive (as amended) i.e. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (*Official Journal* L 175, 05/07/1985 P. 0040-0048), as amended by Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (*Official Journal* L 053, 14/03/1997 P. 0005), and as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156 25.06.2003 p. 17).

⁸³ Glasson, J. Therivel, R. and Chadwick, A. *Introduction to Environmental Impact Assessment*, (London and New York: Routledge, 2005), p. 4.

⁸⁴ Kozłowski, J.M., “Integrating ecological thinking into the planning process: a comparison of EIA and UET concepts” WZB Paper FS-II-89-404. *Wissenschaftszentrum Berlin fuer Sozialforschung* (1989), p. 6.

⁸⁵ Holder, J. *op cit.*, (2004). pp. 35-36. For example, Article 4 of the EC EIA Directive (as amended), sets out criteria for determining those projects which are likely to have significant effects

the UK an applicant, before submitting a planning application, may request an opinion (termed “screening opinion”) from the local planning authority on the need for EIA.⁸⁷ After a decision has been made to commence the formal EIA procedure, the onus of the developer with regard to the scope of study to be undertaken, must be assessed, and this process is called scoping.⁸⁸ Scoping means the identification of priority topics to be addressed by an environmental statement.⁸⁹ Scoping is carried out in discussions among the project developer, the competent public authority and, ideally, members of the public.⁹⁰ For example, in the UK an applicant may seek “a scoping opinion” from the local planning authority which outlines what are deemed to be the major likely environmental impacts of the development and therefore topics to be focused on in the environmental statement.⁹¹

Once an environmental statement has been prepared and submitted by the developer, there are further procedural steps.⁹² It should be noted that an environmental statement is prepared by the developer and contains details of the major environmental impacts of the project and any mitigating measures.⁹³ Within the EIA procedure, an environmental statement must be made publically available

on the environment. According to paragraph 1, Article 4 of the Directive, annex I contains a list of projects that are likely to have “significant” effects on the environment and therefore should be subject to assessment under the Directive. According to Article 4, paragraphs 2 and 3 of the Directive, annex III sets out criteria to be used when determining whether proposed projects listed in annex II are likely to have “significant” effects on the environment and therefore should be subject to assessment under the Directive. Usually EIA norms prescribe criteria for the determination of projects that should be subject to the assessment procedure: however a space for screening is still left and this can be helpful to the project developers.

⁸⁶ Glasson, J. Therivel, R. and Chadwick, A. *op cit.*, (2005), p. 90.

⁸⁷ Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293), reg. 5 (1). Bell, S. and McGillvray, D. *op cit.*, (2008), p. 454.

⁸⁸ Holder, J. *op cit.*, (2004). p. 38.

⁸⁹ Beanlands, G. “Scoping methods and baseline studies in EIA” in Wathern, P. (ed.), *Environmental Impact Assessment: Theory and Practice* (1990), p. 33.

⁹⁰ Glasson, J. Therivel, R. and Chadwick, A. *op cit.*, (2005), p. 91.

⁹¹ Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293), regs. 10 and 11. Holder, J. *op cit.*, (2004). p. 38. It should be noted that according to Article 5, paragraph 2 of the EC EIA Directive (as amended), “Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer . . . The competent authority shall consult the developer . . . before it gives its opinion”.

⁹² Bell, S. and McGillvray, D. *op cit.*, (2008), p. 461.

⁹³ *Ibid.*, p. 432. For example, according to Article 5, paragraph 3 of the EC EIA Directive (as amended), an environmental statement must include at least: “a description of the project comprising information on the site, design and size of the project; a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; the data required to identify and assess the main effects which the project is likely to have on the environment; an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects; a non-technical summary of the information mentioned in the previous indents”. See also Article 5, paragraph 1 and annex IV of the EC EIA Directive (as amended).

for comments before the decision on the request on development consent is taken - for example, under the EC EIA Directive, the public must be informed about details of the participation procedure, and the environmental statement must be made public to the public concerned. The Directive further states that “[t]he public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures . . . and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken”.⁹⁴ In *Berkley v. Secretary of State for the Environment*, Lord Hoffmann stated “The directly enforceable right of the citizen which is accorded by the Directive [on Environmental Impact Assessment (EIA)]⁹⁵ is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues.”⁹⁶ In this case, the House of Lords emphasized that EIA provides affected members of the public with the right to meaningful public participation in decision-making.⁹⁷ The EIA contains the legal requirement that expert groups, non-expert groups and affected individuals should be allowed to participate.⁹⁸ One of the values of EIA is that it gives the possibility of public participation in environmental decision-making.⁹⁹ Rules providing for opportunities of public participation form a key element of environmental impact assessment.¹⁰⁰ In the EIA procedure, the facilitation of public participation is a substantive obligation and a precondition for granting planning permission.¹⁰¹ It has been argued that public participation constitutes an integral part of EIA.¹⁰² The results of public participation must be taken into account by the competent public authority when making its decision on granting or refusing development

⁹⁴ Article 6, paragraphs 2 and 3, the EC EIA Directive (as amended). It should be noted that Directive 2003/35/EC brought Directive 85/337/EEC into harmony with the requirements of the Aarhus Convention. Bell, S. and McGillvray, D. *op cit.*, (2008), p. 441.

⁹⁵ The EC EIA Directive (as amended).

⁹⁶ *Berkley v. Secretary of State for the Environment, Transport and the Regions and Fulham Football Club* (No.1) [2001] Env LR 16, at [38].

⁹⁷ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 468. *Berkley v. Secretary of State for the Environment, Transport and the Regions and Fulham Football Club* (No.1) [2001] Env LR 16, at [38].

⁹⁸ Holder, J. *op cit.*, (2004), p. 18.

⁹⁹ Birnie, P. Boyle, A. and C. Redgwell, *op cit.*, (2009), p. 165.

¹⁰⁰ Holder, J. *op cit.*, (2004), p. 232.

¹⁰¹ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 312.

¹⁰² Wood, C. “Environmental Assessment” in Miller, C. (ed.), *Planning and Environmental Protection* (2001), p. 151.

consent.¹⁰³ It is noteworthy that requirements under Article 6 of the Aarhus Convention regarding the timing and content of notification, public hearings, the opportunities to submit comments, and procedures for taking public comments into consideration owe much to the rules of the EIA.¹⁰⁴ It should be noted that, for example, under the EC EIA Directive, opportunities for public participation in decision-making is a condition of the legality of the decision. The EC EIA Directive states “. . . members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.”¹⁰⁵

In the framework of the environmental impact assessment procedure, the “assessment” is carried out by the decision maker based on “environmental information” supplied to it.¹⁰⁶ “Environmental information” consists of information from various sources about the environmental effects of development actions and includes: (a) an “environmental statement” prepared by the developer containing details of the major environmental impacts of the project and any mitigating measures; (b) information supplied by the authorities to be consulted¹⁰⁷; and (c) information supplied by members of the public.¹⁰⁸ For example, under the EC EIA Directive, the findings of the “assessment” carried out by the decision maker based on “environmental information”, must be taken into consideration in the development consent procedure.¹⁰⁹ Since EIA is often connected to decisions on whether the proposed activity may proceed, it may be deemed as an integral part of the decision-making process and it should be noted that the findings of the EIA

¹⁰³ For example, Article 8 of the EC EIA Directive (as amended).

¹⁰⁴ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 91, 101.

¹⁰⁵ Article 10a of the EC EIA Directive (as amended).

¹⁰⁶ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 432.

¹⁰⁷ For example, according to the EC EIA Directive (as amended), authorities likely to be concerned by the project on account of their responsibilities in the environmental field are given the possibility to express an opinion on the environmental statement submitted to a competent public authority for development consent. To this end, the authorities to be consulted must be designated by Member States. Article 6, paragraph 1.

¹⁰⁸ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 432. For example, in the UK a grant of permission that does not take into account this environmental information, is void. Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293), reg. 30. Bell, S. and McGillvray, D. *op cit.*, (2008), p. 461.

¹⁰⁹ The EC EIA Directive (as amended), Article 8.

frequently correlate with the decision on the proposed activity.¹¹⁰ It should be stressed that the EIA does not constitute in itself a permitting or authorization procedure, it is only a tool for decision-making.¹¹¹ The EIA is a tool which assists informed decision-making and it does not decide whether a project should go ahead.¹¹² Later decisions are the prerogative of public authorities: they balance the information on potential environmental impact provided by the EIA against economic development and other decisive considerations.¹¹³ The EIA enables the giving of due weight to both environmental and economic or social factors in the process of the consideration of applications.¹¹⁴ The EIA is a procedural mechanism which does not in all cases prevent damaging development.¹¹⁵ The EIA contains a requirement on informing the public of the content of the decision made with respect to the application.¹¹⁶

It has been argued that taking into account international and national developments, some process for EIA has become a general principle of law or even a norm of customary international law.¹¹⁷

1.5. “Hard Law” and “Soft Law” Sources

Generally speaking, in international law the difference between “hard law” and “soft law” is that “hard law” denotes legally binding documents and “soft law” denotes legally non-binding documents.¹¹⁸ In the literature the phrase “positive

¹¹⁰ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 90.

¹¹¹ *Ibid.* The EIA can be distinguished from “ecological expertise” which is a permitting procedure and which sometimes comprises EIA-type elements with public participation. *Ibid.*

¹¹² Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 165.

¹¹³ *Ibid.*

¹¹⁴ Department of the Environment, Transport and the Regions (DETR), *op cit.*, (2000), p. 7.

¹¹⁵ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 431.

¹¹⁶ For example, the EIA procedure under the EC EIA Directive requires informing the public on the content of the decision that is made and any conditions; the main reasons upon which the decision is based, including information concerning public participation; and, where necessary, a description of measures aimed at avoiding, reducing and offsetting the main adverse environmental effects. Article 9.

¹¹⁷ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 434.

¹¹⁸ Shelton, D. (ed) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000); Klabbers, J. “The Redundancy of Soft Law” (1996), 65, *Nordic Journal of International Law*; Shaffer, G. C. and Pollack, M. A. “Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance” (2009), 93, *Minnesota Law Review*; Hillgenberg, H. “A Fresh Look at Soft Law” (1999), *European Journal of International Law*, pp. 499-515; Boyle, A. “Some Reflections on the Relationship of Treaties and Soft Law” (1999), vol. 48 (4), *International and Comparative Law Quarterly*, p. 901; Reinicke, W. and Witte, J. M. “Interdependence, Globalization, and Sovereignty:

law” may be used to refer to international “hard law” documents and the phrase “not positive law” may be used to refer to international “soft law” documents.¹¹⁹

The sources of international law are categorized either as “hard law” or “soft law”.¹²⁰ Article 38 (1) of the Statute of the International Court of Justice (ICJ) should be considered as an authoritative list of the sources of international law.¹²¹ Article 38 (1) lists the following sources of international law (a) international conventions; (b) international custom; (c) general principles of law; (d) judicial decisions and the teachings of publicists, as subsidiary means for determining rules of law.¹²² It lists binding, “hard law” sources of international law.¹²³ It has been argued that “hard law” makes up international law proper.¹²⁴ “Soft law” documents do not constitute law in the sense of Article 38 (1) of the ICJ Statute, but nevertheless they do not lack all authority.¹²⁵ Resolutions of international organizations are not included in the above list of Article 38 (1) of the ICJ Statute,

The Role of Non-binding International Legal Accords” in Shelton, D. (ed) *Commitment and Compliance: the Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), pp. 75-76; Snyder, F. “Soft Law and International Practice in the European Community” in Martin, S. D. (ed), *The Construction of Europe: Essays in Honour of Emile Noel* (Deventer: Kluwer, 1994), pp. 197-198; Guzman, A. T. and Meyer, T. L. “International Soft Law” (2010), 2, 171, *Journal of Legal Analysis*, p. 4; Bell, S. and McGillvray, D. *op cit.*, (2008), p. 139.¹¹⁹ Weeremantry, C.G. *Universalising International Law* (Martinus Nijhoff Publishers, 2004), p. 36; Bedi, R.S. *The Development of Human Rights Law by the Judges of the International Court of Justice* (Oxford: Hart Publishing, 2007), p. 72, 112; Gabriel, H. D. “Universalism and Tradition: the Use of Non-binding Principles in International Commercial Law” in *Liber Memorialis Peter Sarcevic: Universalism, Tradition and the Individual* (Munich: European Law Publisher, 2006), p. 472; Kiss, A. and Shelton, D. “Strict Liability in International Environmental Law” in Ndiaye, T. M. and Wolfrum, R. (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers, 2007), p. 1140; Knop, K. *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2004), p. 82; Wessels, B. *International Insolvency Law* (Kluwer, 2006), Volume X, p. 51; Tarlock, A. D. “Biodiversity and Endangered Species” in Dernbach, J. C. (ed) *Stumbling Towards Sustainability* (Washington: Environmental Law Institute, 2002), p. 312; Tanaka, K. *South West Africa cases* (second Phase), Dissenting Opinion of Judge Tanaka, ICJ Reports 1966, p. 306; Procès-verbal of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 294.

¹²⁰ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 139.

¹²¹ Simma, B. *et al* (eds.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002), pp. 1159-1160; Charlesworth, H. and Chinkin, C. *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000), pp. 63; Malanczuk, P. *Akehurst’s Modern Introduction to International Law* (London: Routledge, 1997), p. 36; Kiss, A. and Shelton, D. *op cit.*, (2007), p. 3.

¹²² *Statute of the International Court of Justice* (1945). It should be noted that judicial decisions and teachings of publicists can be considered as indicative of the interpretation and application of other three categories of sources: international conventions, international custom and general principles of law. Simma, B. *et al* (eds.), *op cit.*, (2002), p. 1160.

¹²³ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 139; Sands, P. *op cit.*, (2003), p. 123; Acer, Y. *The Aegean Maritime Disputes and International Law* (Aldershot: Ashgate Publishing, 2003), p. 111, footnote n. 59.

¹²⁴ Cassese, A. *International Law* (Oxford: Oxford University Press, 2005), p. 196.

¹²⁵ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 34.

may be due to the fact that they are usually not legally binding.¹²⁶ General Assembly resolutions of the UN are major examples of “soft law”.¹²⁷ Often “soft law” emerges from codified documents of international conferences.¹²⁸ In international environmental law, “soft law” documents can be certain declarations, principles, resolutions, recommendations, guidelines, standards, codes of practice and programmes of action.¹²⁹

It has been argued that “soft law” is a kind of paradoxical term since the rules of law are usually deemed to be “hard”, that is compulsory.¹³⁰ It should be noted that “soft law” documents do not constitute *per se* “law” and the term “soft law” is another name for principles *de lege ferenda*.¹³¹ “Soft law” is important and influential, but it cannot be considered as law.¹³² “Soft law” cannot be enforced in courts.¹³³ On the other hand, it can be argued that “soft law” constitutes an integral part of the contemporary international law-making process.¹³⁴

It has been argued that non-binding documents leave time for adopting them progressively while internal economic, political and administrative problems are being solved.¹³⁵ “Soft law” is also a result of the frequent wish of states not to bind themselves legally but to test certain rules some time before they become legally binding.¹³⁶ It has been argued that “soft law” has the following theoretical advantages over binding treaties: “domestic treaty ratification processes can be avoided; it provides an autonomous form of lawmaking for international organizations; it is more easily amended or replaced than treaties; it provides

¹²⁶ Dixon, M. *International law* (London: Blackstone Press Limited, 2000), p. 45.

¹²⁷ Harris, D. J. *op cit.*, (1998), p. 65, footnote n. 71; Birnie, P. Boyle A. and Redgwell, C. *op cit.*, (2009), p. 24.

¹²⁸ Dixon, M. *op cit.*, (2000), p. 48.

¹²⁹ Bell, S. and McGillvray, D. *op cit.*, (2008), pp. 143-144; Kiss, A. and Shelton, D. *op cit.*, (2007), p. 8; Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 34.

¹³⁰ Depuy, P. “Soft law and the international law of the environment” (1991), Vol. 12 *Michigan Journal of International Law*, p. 420.

¹³¹ Birnie, P. and Boyle, A. *International Law & the Environment* (Oxford: Oxford University Press, 2002), p. 17; Dixon, M. *op cit.*, (2000), p. 48. The phrase “*de lege ferenda*” means “A proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force.” Garner, B. A. *et al* (eds.), *Black’s Law Dictionary* (St. Paul: Thomson West, 2004), p. 459.

¹³² Shaw, M. N. *International Law* (Cambridge: Cambridge University Press, 2008), pp. 117-118.

¹³³ Harris, D. J. *op cit.*, (1998), p. 65; Bell, S. and McGillvray, D. *op cit.*, (2008), p. 143.

¹³⁴ Depuy, P. *op cit.*, (1991), p. 420.

¹³⁵ Birnie, P. “The Role of International Law in Solving Certain Environmental Conflicts”, in Carroll, J. E. (ed), *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems* (Cambridge: Cambridge University Press, 1988), p. 101.

¹³⁶ Malanczuk, P. *op cit.*, (1997), p. 54.

immediate evidence of consensus; it is easier to reach agreement on its content because of its non-binding character.”¹³⁷

“Soft law” is a description of values, ideas or proposals that may later become rules of international law.¹³⁸ “Soft law” instruments may act as a step towards the conclusion of treaties.¹³⁹ There is an expectation that such documents will be adhered to within the realm of possibilities.¹⁴⁰ It has been argued that some “soft law” documents “are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics”.¹⁴¹ The significance of “soft law” within the framework of international law development is such that it requires special attention.¹⁴² Some non-legal rules may, nevertheless, have a limited effect in judicial decision-making as supporting arguments, in the process of the interpretation of the law as it stands.¹⁴³ It has been argued that “. . . a lawyer acting in a dispute before an international body of adjudication would fail in his/her duties if he/she did not refer, in support of his/her arguments, to the existing soft law propositions”.¹⁴⁴ “Soft law” has an impact on international relations and it may later become custom: the Universal Declaration on Human Rights (1948) was “soft law” when adopted, but it has become custom to some extent.¹⁴⁵ “Soft law” may well govern the actions of states in certain circumstances.¹⁴⁶ “Soft law” instruments can provide evidence of *opinio juris*.¹⁴⁷ However non-binding rules become law “only by the action of the customary, treaty or other law-making process, which they often precede.”¹⁴⁸ It is undisputed that “soft law” principles can become positive law by adoption in the agreements.¹⁴⁹ It should be noted that some international environmental principles

¹³⁷ Bell, S. and McGillvray, D. *op cit.*, (2008), pp. 144-145.

¹³⁸ Dixon, M. *op cit.*, (2000), p. 48.

¹³⁹ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 145.

¹⁴⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 34.

¹⁴¹ Malanczuk, P. *op cit.*, (1997), p. 54.

¹⁴² Shaw, M. N. *op cit.*, (2008), p. 117; Boyle, A. and Chinkin, C. *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 211.

¹⁴³ Malanczuk, P. *op cit.*, (1997), p. 55.

¹⁴⁴ Tomuschat, C. *op cit.*, (2003), p. 36.

¹⁴⁵ Harris, D. J. *op cit.*, (1998), p. 65, footnote 69.

¹⁴⁶ Dixon, M. and McCorquodale, R. *Cases and Materials on International law* (Oxford: Oxford University Press, 2003), p. 52.

¹⁴⁷ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 34. The phrase “*opinion juris*” means: “The principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice.” Garner, B. A. *et al* (eds.), *op cit.*, (2004), p. 1125.

¹⁴⁸ Dixon, M. *op cit.*, (2000), p. 48.

¹⁴⁹ Gabriel, H. D. *op cit.*, (2006), p. 473.

remain “soft law”.¹⁵⁰ “Soft law” is deemed to be characteristic of international human rights law, international economic law and international environmental law.¹⁵¹ “Soft law” is much used in the rapidly developing international environmental law.¹⁵²

It is noteworthy that “[i]t is also a feature of soft law that it may address non-state actors, including business entities, international organizations, non-governmental organizations and individuals, while treaties rarely impose direct obligations on any entities other than states.”¹⁵³ There are “soft law” documents that are adopted within intergovernmental systems, that are voluntary initiatives and address corporate responsibility: for example, “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” (1977)¹⁵⁴, adopted by the International Labour Organization (ILO)¹⁵⁵; “Guidelines for Multinational Enterprises” (1976)¹⁵⁶, adopted by the Organisation for Economic Co-operation and Development (OECD)¹⁵⁷; and “Global Compact” (2000)¹⁵⁸, adopted by the

¹⁵⁰ Anton, D. Mathew, P. and Morgan, W. *International Law: Cases and Materials* (Oxford: Oxford University Press, 2005), p. 893.

¹⁵¹ Shaw, M. N. *op cit.*, (2008), p. 118; Cassese, A. *op cit.*, (2005), p. 196; Seidl-Hohenveldern, I. *International Economic Law*, (Dordrecht, 1992), p. 42. Malanczuk, P. *op cit.*, (1997), p. 54. Burhenne, W.E. (ed), *International Environmental Soft Law. Collection of Relevant Instruments* (1993).

¹⁵² Birnie, P. and Boyle, A. *op cit.*, (2002), p. 17.

¹⁵³ Shelton, D. “Soft Law” in Armstrong, D. *Routledge Handbook of International Law* (Oxon: Routledge, 2009), p. 70.

¹⁵⁴ “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”, ILO, available at <<http://actrav.ilo.org/actrav-english/telearn/global/ilo/guide/triparti.htm>> [accessed 25nd January, 2011]. According to paragraph 6 of the Declaration, multinational enterprises are recommended to observe it on a voluntary basis.

¹⁵⁵ International Labour Organization (ILO) is one of the specialized agencies of the UN. “Structure of the Organization”, the UN, available at <<http://www.un.org/en/aboutun/structure/index.shtml>> [accessed 25nd January, 2011]. The ILO is “responsible for drawing up and overseeing international labour standards”. “About the ILO”, ILO, available at <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>>, [accessed 25nd January, 2011].

¹⁵⁶ “OECD Guidelines for Multinational Enterprises”, available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> [accessed 25nd January, 2011]. The document constitutes “voluntary principles and standards for responsible business conduct, in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, competition, taxation, and science technology.” *The OECD Guidelines for Multinational Enterprises, Policy Brief*, OECD. 2001, p. 2; According to paragraph 6 of the Guidelines, its observance is voluntary and not legally enforceable.

¹⁵⁷ The Organisation for Economic Co-operation and Development (OECD) was established in 1961, has 34 members and aims to “promote policies that will improve the economic and social well-being of peoples around the world. *About the Organisation for Economic Co-operation and Development (OECD)*, Available at <http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html> [accessed on 15th January, 2001].

¹⁵⁸ “Global Compact”, UN, available at <<http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html>>, [accessed on 15th January, 2001]. Global Compact of the UN is “a strategic policy initiative for business that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption”. “*What is the Global Compact?*”

United Nations.¹⁵⁹ When formally accepted by private entities, those three documents create requirements, though not judicially enforceable, for business entities, *inter alia*, with regard to human rights and environmental protection.

It has been argued that “soft law” developments that promote corporate responsibility for human rights are evident in, *inter alia*, accountability mechanisms for intergovernmental initiatives such as the International Finance Corporation’s (IFC) Performance Standards on Social and Environmental Sustainability.¹⁶⁰ Business entities are required to comply with the IFC Performance Standards on Social and Environmental Sustainability in return for investment funds from the IFC, and client compliance with these standards is subject to review by the Office of the Compliance Advisor/Ombudsmen (CAO) of the IFC.¹⁶¹

However, beyond the intergovernmental system, there are “soft law” documents that can be described as multi-stakeholder standards or self-regulation and that are voluntary initiatives and engage business entities directly: for example, the Voluntary Principles on Security and Human Rights and the Equator Principles.¹⁶²

the UN Global Compact, available at <<http://www.unglobalcompact.org/>> [accessed on 15th January, 2001]; The UN Global Compact is a voluntary initiative. “FAQ”, UN Global Compact, available at <<http://www.unglobalcompact.org/AboutTheGC/faq.html>> [accessed on 15th January, 2001].

¹⁵⁹ Ruggie, G. J. “Business and Human Rights: the Evolving International Agenda” (2007), 101, *American Journal of International Law*, p. 819, 834.

¹⁶⁰ Horrigan, B. *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Cheltenham: Edward Elgar Publishing, 2010), p. 323. The International Finance Corporation (IFC) is member of the World Bank Group, which is one of the specialized agencies of the UN. “Structure of the Organization”, the UN, available at <<http://www.un.org/en/aboutun/structure/index.shtml>> [accessed 25nd January, 2011]. The IFC is the private sector investment arm of the World Bank Group. *International Finance Corporation (IFC), IFC’s Vision, Values, & Purpose* available at <<http://www.ifc.org/ifcext/about.nsf/Content/Mission>>, [accessed on 23 October, 2010]; The IFC’s Performance Standards on Social & Environmental Sustainability aims “to manage social and environmental risks and impacts and to enhance development opportunities in its private sector financing in its member countries eligible for financing”. International Finance Corporation’s Performance Standards on Social & Environmental Sustainability, the IFC, April 30, 2006. p. 1.

¹⁶¹ Ruggie, G. J. *op cit.*, (2007), p. 834. The Office of the Compliance Advisor/Ombudsman (CAO) is the independent recourse mechanism for IFC supported projects. “CAO Mandate”, CAO, available at <<http://www.cao-ombudsman.org/about/whoweare/index.html>>, [accessed on 23 October, 2010].

¹⁶² Ruggie, G. J. *op cit.*, (2007), p. 835; Horrigan, B. *op cit.*, (2010), p. 323. Fransen, L.W. and Kolk, A. “Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards”, (2007), 14, *Organization*, p. 684; De Schutter, O. “Transnational Corporations and Human Rights: An Introduction”, Symposium – “Transnational Corporations and Human Rights”, Global Law Working Paper, New York, (2005), p. 7; “The Voluntary Principles on Security and Human Rights”, available at <http://voluntaryprinciples.org/files/voluntary_principles_english.pdf> [accessed on 23 October, 2010]. The Voluntary Principles were adopted in 2000 “in response to the concerns of governments, extractive companies, and civil society over difficult operating environments that created challenges to both security and human rights.” *The Voluntary Principles*

The banks which voluntarily adopted the Equator Principles require business entities to comply with the Equator Principles in return for obtaining loans from these banks. In modern times some rules of global regulation flow from sources that are not recognized as sources of international law: for example, many rules are produced by private structures.¹⁶³ It has been argued in the context of the Equator Principles that “corporate social responsibility requires a business to go beyond mere compliance with the letter of the law, but it is firmly rooted in the principles of international law, the source of the greater part of the environmental and human rights-related obligations which business is increasingly widely expected to respect and even promote”.¹⁶⁴

It has been argued that it is not correct to leave project developments to the laws and sanctions of developing countries.¹⁶⁵ In most cases countries of the developing world have failed in creating environmental regulations for the prevention of degradation of the environment from large-scale project development.¹⁶⁶ Countries where the construction and the operation of projects take place may not have laws that effectively prevent adverse environmental impacts or may not routinely enforce such laws when they are enacted.¹⁶⁷

It has been argued that “hard law” in the form of treaties or national laws is often ineffective in developing countries, especially against the backdrop of the “race to the bottom”; states are lowering standards or granting environmental or human

on Security and Human Rights”, US Department of State, available at <<http://www.state.gov/drl/lbr/vp/>> [accessed on 23 October, 2010]; In June 2003 ten leading banks of the World adopted the “Equator Principles”, which were revised in 2006. *Leading Banks Announce Adoption of Equator Principles*, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th September, 2010]; “*The “Equator Principles” – An Industry Approach for Financing Institutions in Determining, Assessing and Managing Environmental & Social Risk in Project Financing*”. 2003; “*The “Equator Principles” A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing*”, 2006. The Equator Principles sets out conditions for giving loans to projects by the banks which adopted this document.

¹⁶³ Krisch, N. and Kingsbury, B. “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, 17 *European Journal of International Law* (2006), p. 12.

¹⁶⁴ Forster M, Watchman P. and July C, “The Equator Principles – Towards Sustainable Banking? Part 1” (2005) *Journal of International Banking and Financial Law*, p. 2.

¹⁶⁵ Nwete, B. “Soft Law and Hard Sanctions in Upstream Oil and Gas in Developing Regions – How International Codes, Principles and Protocols Influence National Projects and Developments”, *Centre for Energy, Petroleum & Mineral Law & Policy*, Steve Weston Prize Winning Essay in 2008, p. 11.

¹⁶⁶ Hardenbrook, A. “The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility” (2007) Vol. 40 (1) *Vanderbilt Journal of Transnational Law*, p. 198; Lawrence, R. F. and Thomas, W. L. “The Equator Principles and Project Finance: Sustainability in Practice?” (2004) 19 *Natural Resources and Environment*, p. 22.

¹⁶⁷ *Ibid.*

right waivers in order to attract investment; states are not enforcing laws when the violations take place; corruption and the weakness of the enforcement of laws are making it difficult for host states to sanction international companies whose economic influence are often stronger than that of the host government.¹⁶⁸ Here is one example of a government advertisement for attracting investment: “to attract companies like yours . . . we have felled mountains, razed jungles, filled swamps, moved rivers, relocated towns . . . all to make it easier for your business to do business here”.¹⁶⁹

The “resource curse” problem in most resource rich developing countries, combined with corruption and weak national systems of legal control, led to the call for the development of international “soft law” in the form of environmental and human rights standards, in parallel to “hard law”, for the purpose of addressing the activities of international companies in developing regions.¹⁷⁰ Members of the World Bank Group have established certain environmental and social standards requiring borrowers to ensure some form of environmental and social review, including disclosure of information and public consultation.¹⁷¹ And private institutions have started to set their own standards in the field of the environment in the developing world.¹⁷² The Equator Principles is an example of such a “soft law”; it is based on the World Bank Group’s environmental and social standards and provides for the requirements of private sector borrowers, *inter alia*, with regard to consultation with project affected groups.¹⁷³ It has been argued that the Equator Principles establishes a template for social and environmental standards that developing countries can incorporate into their own laws.¹⁷⁴

1.5.1 “Soft Law” and “Hard Law” Sources of Procedural Environmental Rights

Procedural environmental rights have been proclaimed by numerous environmental “hard law” and “soft law” documents at global and regional level within

¹⁶⁸ Nwete, B. *op cit.*, (2008), pp. 5- 6.

¹⁶⁹ Korten, D. *When Corporations Rule the World* (Connecticut and California: Kumarian Press, 2001), p. 293.

¹⁷⁰ Nwete, B. *op cit.*, (2008), p. 1, 13, 15.

¹⁷¹ Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004) p. 22.

¹⁷² Hardenbrook, A. *op cit.*, (2007) p. 198.

¹⁷³ Nwete, B. *op cit.*, (2008), p. 1, 13, 15.

¹⁷⁴ Williams, J. P. ““International Best Practice” in Mining who decides and how – and how does it impact law development?” (2008) 39 *Geo. J.Int’l L.* p. 699;

intergovernmental systems. At the global level, there are numerous multilateral environmental legally binding documents that contain provisions on procedural environmental rights. At the global level, there is a significant number of environmental “soft law” documents which have proclaimed procedural environmental rights. It is noteworthy that procedural environmental rights are well established within the framework of the European Community (EC) environmental law. In 1998 the legally binding document, the Aarhus Convention, was adopted within the United Nations Economic Commission for Europe (UNECE), and there are numerous environmental “soft law” documents at the European regional level that recognize procedural environmental rights. And developments at the global and European level have influenced many countries and resulted in the gradual recognition of procedural environmental rights at national levels. Procedural environmental rights are well established, since there are detailed provisions on these rights in numerous international “hard law” documents and in national laws of countries, and therefore it can be argued that procedural environmental rights can be effectively enforced by courts.

It can be argued that in particular, the following “soft law” documents have recognized and promoted procedural environmental rights at the global level: the World Charter for Nature, Our Common Future, the Rio Declaration on Environment and Development and Agenda 21.

1.5.1.1 World Charter for Nature (WCN)

The World Charter for Nature was adopted by the General Assembly of the UN in 1982.¹⁷⁵ The charter focuses on the protection of nature as an end in itself and thereby differs from previous instruments that focused on the protection of nature for the benefit of mankind.¹⁷⁶

The charter was one of the first documents to recognize the right of access to information for participation in decision-making, and the right to have access to redress when the environment was damaged.¹⁷⁷ Section 16 states that “[a]ll

¹⁷⁵ Resolution 37/7; Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 51 (A/36/51).

¹⁷⁶ Sands, S. *op cit.*, (2003), p. 45.

¹⁷⁷ *Ibid.*, p. 46, pp. 294-95.

planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements shall be made public by appropriate means in time to permit effective consultation and participation.” According to section 23, “[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation”. The charter is a universal policy statement.¹⁷⁸ The use of “shall” in the charter was just declaratory.¹⁷⁹ It is a General Assembly resolution and comes under the category of “soft law”.¹⁸⁰ This charter constitutes a degree of international convergence on the principal aspects of international environmental law and policy.¹⁸¹ Many of its rules are now reflected in binding international documents.¹⁸²

1.5.1.2 Our Common Future

In 1987, the World Commission on Environment and Development (WCED)¹⁸³ issued *Our Common Future* (the Brundtland Report).¹⁸⁴ This report was adopted by the General Assembly of the UN in the same year.¹⁸⁵ The report emphasised the link between environmental protection and development by elaborating the concept of sustainable development.¹⁸⁶ It has been argued that *Our Common Future* remains a milestone in the UN’s endeavours to deal with the environmental

¹⁷⁸ Malanczuk, P. *op cit.*, (1997), p. 241.

¹⁷⁹ Birnie, P. Boyle, A. and Redgwell, C. *op cit.* (2009), pp. 982-4.

¹⁸⁰ General Assembly resolutions are a major source of “soft law”. Harris, D. J. *op cit.* (1998), p. 65, footnote n. 71.

¹⁸¹ Segger, M. C. and Khalfan, A. *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford: Oxford University Press, 2004), p. 17.

¹⁸² Sands, P. *op cit.*, (2003), p. 45.

¹⁸³ The World Commission on Environment and Development (WCED), chaired by Gro Harlem Brundtland, Prime Minister of Norway, was set up in 1983 by the United Nations. Sands, P. *op cit.*, (2003), p. 50.

¹⁸⁴ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

¹⁸⁵ Sands, P. “Environmental Protection in the Twenty-First Century: Sustainable Development and International Law” in N. J. Vig and R. S. Axelrod (eds.), *the Global Environment: Institutions, Law and Policy* (CQ Press, 1999), p. 125.

¹⁸⁶ Malanczuk, P. *op cit.*, (1997), p. 241. According to the document, the notion of sustainable development means “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

problems of the world.¹⁸⁷ The Brundtland Report was accompanied by a Report of the Experts Group on Environmental Law on Legal Principles for Environmental Protection and Sustainable Development (1986 WCED Legal Principles).¹⁸⁸ It consists of twenty-two articles. Article 6 (Timely information, access and due process) contains certain wording for procedural environmental rights: “[s]tates shall inform all persons in a timely manner of activities which may significantly affect their use of a natural resource or their environment and shall grant the concerned persons access to and due process in administrative and judicial proceedings”. It should be noted that the Brundtland Report, in Annexe I, includes a summary of the 1986 WCED Legal Principles - “Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development adopted by the WCED Expert Group on Environmental Law”.¹⁸⁹ The “Brundtland Report” is a strictly non-legal text¹⁹⁰: it does not have binding force.

1.5.1.3 Rio Declaration on Environment and Development

The United Nations Conference on Environment and Development (UNCED), was held in 1992 in Rio de Janeiro, Brazil.¹⁹¹ This conference was also called the “Earth Summit”.¹⁹² UNCED (the Rio Conference) adopted three non-binding instruments: the Rio Declaration on Environment and Development (the Rio Declaration); Agenda 21; and A Non-Legally binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests.¹⁹³ It was attended by 172 states, including 116 heads of state or government and all together around 10,000

¹⁸⁷ Hunter, D. Salzman, J. and Zaelke, E. (eds.), *International Environmental Law and Policy* (New York: Thomson West, 2007), p. 178.

¹⁸⁸ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 606; P. Sands, *op cit.* (2003), p. 50. This document was reprinted in Munro, R. D. and Lammers, J. G. (eds), *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London: Graham & Trotman/Martinus Nijhoff, 1987).

¹⁸⁹ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), Annexe I. This summary document states that it is not a substitute for the full text of the 1986 WCED Legal Principles. “Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development adopted by the WCED Expert Group on Environmental Law”, p. 1.

¹⁹⁰ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 146.

¹⁹¹ Sands, P. *op cit.*, (2003), p. 52.

¹⁹² Janis, M. W. and Noyes, J. E., *Cases and Commentary on International Law* (St. Paul: Thomson West, 2006) p. 633.

¹⁹³ Sands, P. *op cit.*, (2003), pp. 52-53; Hunter, D. Salzman, J. and Zaelke, E. *op cit.*, (2007), p. 178. UNCED also adopted two treaties: the Framework Convention on Climate Change and the Convention on Biological Diversity. Redgwell, C. “International Environmental Law” in Evans, M. D. (ed.) *International Law* (Oxford: Oxford University Press, 2006), p. 661.

participants.¹⁹⁴ The Rio Declaration on Environment and Development consists of twenty-seven principles on the environment and development.¹⁹⁵ It has been argued that the Rio Declaration is “the most significant universally endorsed statement of general rights and obligations of states affecting the environment.”¹⁹⁶ Principle 10 of the Rio Declaration recognized the importance of three procedural rights at world level.¹⁹⁷ Principle 10, in fact declares that, at the national level, each individual must have access to information concerning the environment, the opportunity to participate in decision-making, and access to judicial and administrative proceedings. Principle 10 states that “[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. Building on the model of human rights, the declaration contributes to the establishment of new procedural rights which may be granted by international law.¹⁹⁸ The Rio Declaration is a “soft law” document and therefore non-binding on states.¹⁹⁹ Its legal significance can only be properly assessed in relation to an examination of pre-existing customary law, and the developments such as state practice²⁰⁰, treaties, and judicial decisions²⁰¹ in the period since Rio.²⁰² It has been argued that principles of the declaration, which regulate different issues on transboundary environmental harm, now are rules of customary international law.²⁰³ But there are doubts whether the content of

¹⁹⁴ Kiss, A. and Shelton, D. *op cit.*, (2007), p. 39.

¹⁹⁵ *Rio Declaration on Environment and Development*, 16 June, 1992. UN Doc. A/CONF.151/26 (vol. 1) (1992).

¹⁹⁶ Birnie, P. and Boyle, A. *op cit.*, (2002), p. 112.

¹⁹⁷ Sands, P. *op cit.*, (2003), p. 118; Déjeant-Pons, M. *op cit.*, (2002), p. 23.

¹⁹⁸ Sands, P. *op cit.*, (2003), p. 118.

¹⁹⁹ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 112; Malanczuk, P. *op cit.*, (1997), p. 247.

²⁰⁰ For example, the national policy of the UK in many areas reflects commitments made at Rio. Bell, S. and McGillvray, D. *op cit.*, (2008), p. 135.

²⁰¹ Some principles of the Rio Declaration have been referred by national and international courts. See Sands, P. *op cit.*, (2003), p. 54. See also *Case Concerning Gabčíkovo-Nagymaros Dam*, ICJ Rep. (1997).

²⁰² Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 112.

²⁰³ Malanczuk, P. *op cit.*, (1997), p. 251. For evidence of *opinio juris* regarding mitigation or prevention of transboundary environmental harm see *Trail Smelter case* (1931-1941), RIAA III 1905; *Affaire du Lac Lanoux case*, RIAA XII 281 (1963); *US v. Canada*, ILM8 (1919), 118.

Principle 10 has the status of a principle of general international law.²⁰⁴ It has been argued that “[t]hese doubts are connected with the complicated issue of to what extent general customary law may be inferred from the development of rules in treaties”.²⁰⁵ The result of the Rio Conference was inclusion of environmental norms in almost all branches of international law.²⁰⁶ It should be noted that Principle 10 has inspired the adoption of the first international convention on procedural environmental rights – the 1998 Aarhus Convention.²⁰⁷ The Rio Conference also resulted in spreading environmental law issues into international human rights and international humanitarian law.²⁰⁸

1.5.1.4 Agenda 21

The United Nations Conference on Environment and Development (UNCED) also adopted Agenda 21.²⁰⁹ This is an action plan consisting of 40 chapters and 800 pages and is aimed at dealing with common environment and development problems in the 21st century.²¹⁰ It calls for a new understanding of the effect of human behaviour on the environment.²¹¹ Agenda 21, calls for “[t]he further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns”.²¹² Agenda 21 also contains language on procedural environmental rights.²¹³ For example, according to Chapter 15.6 (f), governments should “collect, assess and make available relevant and reliable information in a timely manner and in a form suitable for decision-making at all levels, with the full support and participation of local and indigenous people and their communities”. Chapter 23, proclaims that “[o]ne of the fundamental prerequisites for the achievement of

²⁰⁴ Malanczuk, P. *op cit.*, (1997), p. 251.

²⁰⁵ *Ibid.* For discussion of treaties as evidence of customary law see Villiger, M. E. *Customary International Law and Treaties*, (1985).

²⁰⁶ Kiss, A. and Shelton, D. *op cit.*, (2007), p. 42.

²⁰⁷ Sands, P. *op cit.*, (2003), p. 118.

²⁰⁸ Kiss, A. and Shelton, D. *op cit.*, (2007), p. 42.

²⁰⁹ *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1.

²¹⁰ Hunter, D. Salzman, J. and Zaelke, E. (eds.), *op cit.*, (2007), p. 178; Malanczuk, P. *op cit.*, (1997), p. 247; Kiss, A. and Shelton, A. *op cit.*, (2007), p. 40.

²¹¹ United Nations Conference on Environment and Development, *The Global Partnership for Environment and Development: A Guide to Agenda 21* (United Nations, Geneva, April 1992), p. 6.

²¹² Segger, M.C. and Khalfan, A. *op cit.*, (2004), p. 5.

²¹³ Shelton, D. Background Paper No. 1, “*Human Rights and Environmental Issues in Multilateral Treaties Adopted between 1991 and 2001*”, Joint UNEP-OHCHR Expert Seminar on Human Rights and Environment, 14-16 January 2002, Geneva, p. 2. available at <<http://www.unhcr.ch/environment/bp1.html>>, [accessed on 19th October, 2008].

sustainable development is broad public participation in decision-making. . . . Individuals, groups and organizations should have access to information relevant to the environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.” It has been argued that public participation, as provided for in Agenda 21, is a vital element in sustainable development.²¹⁴ According to Chapter 8.18., “Governments and legislators, with the support, where appropriate, of competent international organizations, should establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest.” Agenda 21 calls for establishing judicial and administrative procedures for legal redress of environmental harm.²¹⁵ The language of Agenda 21 is explicitly legally non-binding and this document constitutes “soft law”.²¹⁶ However this document has underpinned national actions²¹⁷ as well as subsequent treaties.²¹⁸

The afore-discussed “soft law” documents have played a significant role in the recognition and promotion of procedural environmental rights at the global level. These documents, due to their nature and significance, have contributed to the establishment at the international level of the idea of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.

“Soft law” documents promoting procedural environmental rights, resulted in a gradual recognition of these rights in legally binding multilateral environmental documents. These “soft law” documents influenced the shaping of international legally binding documents with the provisions of procedural environmental rights and also the shaping of domestic policy and the law of many states, in the field of procedural environmental rights. This actually enabled states to become ready to

²¹⁴ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 302.

²¹⁵ Kiss, A. and Shelton, D. *op cit.*, (2007), p. 41; Shelton, D. Background Paper No. 1, *op cit.*, (2002), p. 3.

²¹⁶ Carter, B. E. and Trimble, P. R. *International Law: Selected Documents and New Developments* (Boston: Little, Brown and Company, 1994), p. 871; Segger, M.C. and Khalfan, A. *op cit.*, (2004), p. 21.

²¹⁷ For example, *Sustainable Development: The UK Strategy* (Cm 2426, 1994) was a response to Agenda 21. Bell, S. and McGillvray, D. *op cit.*, (2008), p. 135.

²¹⁸ Johnson, *The Earth Summit: The United Nations Conference on Environment and Development* (Dordrecht, 1993), p. 127; Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 608.

undertake legally binding obligations, in the form of the Aarhus Convention, containing detailed provisions with respect to access to information, public participation and access to justice in environmental matters. The Convention was preceded by numerous international and regional environmental “soft law”²¹⁹ and “hard law”²²⁰ documents, and EC environmental law documents²²¹ proclaiming procedural environmental rights. These documents were developed over the years until 1998 and played a crucial role in the adoption of the Aarhus Convention.²²² It has been argued that the Aarhus Convention is a landmark treaty which is the

²¹⁹ In addition to the afore-discussed the World Charter for Nature, Our Common Future, the Rio Declaration on Environment and Development and Agenda 21, there are other “soft law” law instruments which recognized and promoted the three procedural environmental rights prior to the adoption of the Aarhus Convention, for example, Programme for the Further Implementation of Agenda 21 (Resolution adopted by the General assembly of the UN, June, 1997, Un Doc. A/RES/S-19/2), paragraph 108; *Human Rights and the Environment*, final report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/9, (Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities), Annexe 1 – “Draft principles on human rights and the environment”, paragraphs 15, 18, 20, 22; Declaration of the Third Ministerial Conference “Environment for Europe”, 1995, paragraphs 42-44; Guidelines on access to environmental information and public participation in environmental decision-making (Third Ministerial Conference “Environment for Europe”), 1995; Recommendation No. R. Env (90) 1 of the Committee of Ministers of the Council of Europe to Member States on the European Conservation Strategy, 1990, articles VII and IX; European Charter on Environment and Health (the First European Conference on Environment and Health of the World Health Organization (WHO)), 1989, article 1; Declaration on anticipatory environmental policies (the meeting of the Environment Committee of the OECD), 1979, paragraph 7; Recommendation No. C (92) 114 on integrated coastal zone management (ICZM) (the Council of the OECD), 1992, section II; Decision-Recommendation No. C (88) 85 concerning provision of information to the public participation in decision-making processes related to the prevention of and response to accidents involving hazardous substances, adopted by the Council of the OECD on 8 July 1988, Appendix, Sections III and IV; etc.

²²⁰ For example, the Framework Convention on Climate Change (1992), article 6; The International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994), articles 10 (2) and 19 (1); Convention on Environmental Impact Assessment in a Transboundary Context (adopted in 1991), articles 3 and 4; Convention on the Transboundary Effects of Industrial Accidents (1992), article 9; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), article 16; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993), articles 14, 15 and 16; Nordic Environmental Protection Convention (1994), article 3; Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992), article 17; Convention for the Protection of the Marine Environment of the North-East Atlantic (1992), article 9; Convention on Co-operation for the Protection and Sustainable Use of the Danube River (1994), article 14; Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1995), article 11; Protocol of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, concerning Specially Protected Areas and Biological Diversity in the Mediterranean (1995), article 19;

²²¹ For example, Council Directive 85/337/EEC 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (it was later amended by Council Directive 97/11/EC of 3 March; and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003), articles 6 and 8; Directive 90/313/EEC of June 1990 on the freedom of access to information on the environment (it was later repealed by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Directive 90/313/EEC); Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (it was later amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003; Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003; and Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003), article 15.

²²² Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 2.

result of the various international efforts aimed at the promotion of procedural environmental rights in environmental instruments.²²³ It can be argued that many efforts have been undertaken by the international community in order to establish procedural environmental rights.

1.5.1.5 The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted at the Fourth Ministerial Conference, “Environment for Europe”, in the Danish city of Aarhus on 25 June, 1998.²²⁴ This Convention is generally called the Aarhus Convention.²²⁵ The Convention contains three “pillars” on (i) access to environmental information; (ii) public participation in environmental decision-making; and (iii) access to justice in environmental matters. It should be stressed that the three pillars are interdependent for the Convention’s full implementation.²²⁶ The Convention was sponsored by the United Nations Economic Commission for Europe (UNECE).²²⁷ At present the Convention is in force with regard to 41 Parties.²²⁸ It should be noted that the Convention has been in force with regard to Georgia since 30 October 2001.²²⁹

The Aarhus Convention is a multilateral treaty which has transformed international “soft law” in the field of procedural environmental rights into “hard law” within

²²³ Kiss, A. *op cit.*, (2003), p. 40.

²²⁴ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 1.

²²⁵ Coppel, P. “Environmental Information: The New Regime” (2005) *Journal of Planning and Environmental Law*, p. 15.

²²⁶ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 5.

²²⁷ Wilsher, D. “Freedom of Environmental Information: Recent Developments and Future Prospects” (2001) Vol. 7, N. 4 *European Public Law*, p. 679.

²²⁸ These Parties are: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Participants*, available at <http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm> [accessed on 8th February, 2009].

²²⁹ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Participants*, available at <http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm> [accessed on 8th February, 2009].

the UNECE region for its contracting parties. It has been argued that the Aarhus Convention is the most detailed and extensive development to date, at the international level, in the field of procedural rights in environmental matters.²³⁰ The Aarhus Convention constitutes an expression of Principle 10 of the Rio Declaration.²³¹ The Convention is the most comprehensive multilateral scheme to bring into effect this principle of the Rio Declaration.²³² It evidenced the development of Principle 10 of the Rio Declaration at an international level.²³³ It has been argued that the relevance of the Aarhus Convention, as a model for the strengthening of Principle 10 of the Rio Declaration in other regions of the world, should be examined.²³⁴

According to Kofi A. Annan²³⁵, the adoption of the Aarhus Convention²³⁶ was a giant step forward in the development of international law in the field of citizens' environmental rights.²³⁶ The Aarhus Convention is "a driving force" behind the intensification of procedural environmental rights in Europe and Central Asia.²³⁷ According to Stookes, "[a]lthough regional in scope [the Aarhus Convention] sets out a comprehensive framework for procedural environmental rights and is a model that is being used in countries throughout the world."²³⁸ It has been argued that despite the regional scope of the Convention, its significance is global.²³⁹ The argument regarding the global significance of the Aarhus Convention can be explained by the following: (a) the United Nations Economic Commission for Europe (UNECE) was created in 1947²⁴⁰ and now affiliates 56 member states "located in the European Union, non-EU Western and Eastern Europe, South-East Europe and Commonwealth of Independent States (CIS) and North America"²⁴¹;

²³⁰ Holder, J. and Lee, M. *op cit.*, (2007), p. 97.

²³¹ Hughes, D. et al., *Environmental Law* (Butterworths, LexisNexis, 2002), p. 157.

²³² Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 291.

²³³ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 294.

²³⁴ K. Annan in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

²³⁵ Former Secretary-General of the United Nations (1997-2006).

²³⁶ K. Annan in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

²³⁷ Wates, J. "The Aarhus Convention: a Driving Force for Environmental Democracy" (2005) Vol. 2 *Journal for European Environmental and Planning Law*, p. 2.

²³⁸ Stookes, P. *op cit.*, (2005), p. 33.

²³⁹ K. Annan in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

²⁴⁰ The UNECE was created in 1947 by the UN Economic and Social Council (ECOSOC). The UNECE is one of five regional commissions of the UN. The other commissions are the Economic and Social Commission for Asia and the Pacific (ESCAP), the Economic Commission for Latin America and the Caribbean (ECLAC), the Economic Commission for Africa (ECA) and the Economic and Social Commission for Western Asia (ESCWA), *United Nations Economic Commission for Europe: Introduction*, available at <<http://www.unece.org/oes/nutshell/introduction.htm>> [accessed on 16th April, 2008].

²⁴¹ *United Nations Economic Commission for Europe: Introduction*, available at <<http://www.unece.org/oes/nutshell/introduction.htm>> [accessed on 16th April, 2009]. These 56

(b) in accordance with the Economic and Social Council (ECOSOC) resolution 36 (IV) of 28 March 1947, the UNECE may admit in a consultative capacity European nations which are not members of the UN, and must invite any member of the UN, not a member of the UNECE, to participate in a consultative capacity if it discusses any issue of concern to that non-member²⁴²; (c) according to Article 17 (Signature) of the Aarhus Convention, the Convention is open for signature by member states of the UNECE as well as states having a consultative status with the UNECE in accordance with paragraphs 8 and 11 of the Economic and Social Council resolution 36 (IV) of 28 March 1947. Thus it can be argued that countries located in the European Union, non-EU Western and Eastern Europe, South-East Europe, the Commonwealth of Independent States (CIS) and North America can become Parties to the Aarhus Convention. Additionally, and more importantly, any member of the UN and even any European nation which is not an UN member, may become Party to the Aarhus Convention. The Convention is open to non-UNECE countries “giving it the potential to serve as a global framework for strengthening citizens’ environmental rights”.²⁴³

1.5.2 “Soft Law” Sources and Requirements of Business Entities Regarding Disclosure of Information and Public Consultation

As already mentioned in this section, there are “soft law” documents adopted within intergovernmental systems that address corporate responsibility of business entities, *inter alia*, for human rights and environmental protection: for example the International Finance Corporation’s (IFC) Performance Standards on Social and

countries are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States and Uzbekistan, *United Nations Economic Commission for Europe, Member countries (Dates of membership of the Economic Commission for Europe)*, available at <http://www.unece.org/oes/member_countries/member_countries.htm> [accessed on 8th February, 2009].

²⁴² See Paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947; see also Paragraphs 8 and 11, *Terms of Reference and Rules of Procedure of the Economic Commission for Europe*, Fourth revised edition, UN, E/ECE/778/Rev.4. p. 2. It should be noted that many NGOs take part in the activities of the UNECE, *United Nations Economic Commission for Europe: Introduction*, available at <<http://www.unece.org/oes/nutshell/introduction.htm>> [accessed on 15th April, 2008].

²⁴³ K. Annan in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

Environmental Sustainability. And beyond the intergovernmental system, there are “soft law” documents that are adopted within the private sector and that address business entities directly, the so called multi-stakeholder standards: for example, the Equator Principles.

Both documents, (IFC) Performance Standards on Social and Environmental Sustainability, more specifically its Performance Standard 1: Social and Environmental Assessment and Management Systems, and the Equator Principles create requirements under certain conditions for business entities, *inter alia*, with regard to disclosure of information and public consultation.

1.5.2.1 The IFC Performance Standard 1: Social and Environmental Assessment and Management Systems

The International Finance Corporation (IFC) is a member of the World Bank Group.²⁴⁴ The World Bank Group is made up of the following five institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID).²⁴⁵ The IFC aims to reduce poverty and improve the lives of people through the private sector.²⁴⁶ The IFC coordinates its work with the other World Bank Group institutions but is financially and legally independent.²⁴⁷ The IFC constitutes “the largest multilateral source of loan and equity financing for private sector projects in the developing world.”²⁴⁸ The IFC lends money to the private sector.²⁴⁹ The IFC is the private

²⁴⁴ International Finance Corporation (IFC), *About IFC*, available at <<http://www.ifc.org/about>> [accessed on 23 October, 2010]. The World Bank Group is one of the specialized agencies of the UN. “*Structure of the Organization*”, the UN, available at <<http://www.un.org/en/aboutun/structure/index.shtml>> [accessed 25nd January, 2011].

²⁴⁵ The World Bank, About US, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>> [accessed on 23 October, 2010].

²⁴⁶ *International Finance Corporation (IFC), IFC at a Glance*, available at <<http://www.ifc.org/ifcext/careers.nsf/Content/IFCataGlance>> [accessed on 15th October, 2010].

²⁴⁷ *IFC Fact Sheet, IFC Policy and Performance Standards on Social & Environmental Sustainability and Policy on Disclosure of Information*, available at <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/\\$FILE/FactSheet.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/$FILE/FactSheet.pdf)>

²⁴⁸ *Main International Financing Institutions – IFIs*, available at <http://rru.worldbank.org/documents/toolkits/highways/5_imple/51/51d1.htm> [accessed on 6th October, 2010].

²⁴⁹ Saladin, C. *op cit.*, (2003), p. 62.

sector investment arm of the World Bank Group.²⁵⁰ The IBRD and IDA together make up the World Bank which should not be confused with the World Bank Group.²⁵¹ The IBRD aims at reducing poverty in the middle-income and creditworthy lower income states through loans, guarantees, advisory services etc and therefore the clients of the IBRD are middle-income and credit-worthy poorer states.²⁵² The IDA aims at reducing poverty in the world's poorer states through interest-free credits and grants.²⁵³ There are the so called "blend" countries which are eligible for a blend of financial assistance from both the IBRD and the IDA and Georgia is among such countries.²⁵⁴

The IFC adopted its Performance Standards on Social and Environmental Sustainability on 30 April, 2006.²⁵⁵ The IFC Performance Standards on Social and Environmental Sustainability contains the following eight performance standards: 1: Social and Environmental Assessment and Management Systems; 2: Labour and Working Conditions; 3: Pollution Prevention and Abatement; 4: Community Health, Safety and Security; 5: Land Acquisition and Involuntary Resettlement; 6:

²⁵⁰ *International Finance Corporation (IFC), IFC's Vision, Values, & Purpose* available at <<http://www.ifc.org/ifcext/about.nsf/Content/Mission>>, [accessed on 23 October, 2010].

²⁵¹ *The World Bank, About US*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> [accessed on 15th December, 2010]; *The World Bank, the International Bank for Reconstruction and Development (IBRD), Background*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21130269~menuPK:3168298~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html>> [accessed on 23 October, 2010].

²⁵² *The World Bank, International Bank for Reconstruction and Development*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html>> [accessed on 12th November, 2010]; *The World Bank, International Bank for Reconstruction and Development, Frequently Asked Questions*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21116492~menuPK:3126966~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html>> [accessed on 14th November, 2010].

²⁵³ *The World Bank, International Development Association (IDA), What is IDA?*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>> [accessed on 14th November, 2010].

²⁵⁴ *The World Bank, International Bank for Reconstruction and Development, Frequently Asked Questions*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21116492~menuPK:3126966~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html>> [accessed on 14th November, 2010]; *The World Bank, International Development Association (IDA), What is IDA?*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>> [accessed on 14th November, 2010]; *The World Bank, Country and Lending Groups*, available at <http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Low_income> [accessed on 12th November, 2010].

²⁵⁵ *International Finance Corporation's Performance Standards on Social & Environmental Sustainability*, the IFC, April 30, 2006.

Biodiversity Conservation and Sustainable Natural Resource Management; 7: Indigenous Peoples; 8: Cultural Heritage. The IFC's Performance Standards on Social & Environmental Sustainability "define clients' role and responsibilities for managing their projects and the requirements for receiving and retaining IFC support . . . [and] include client requirements to disclose information to the public".²⁵⁶

It should be noted that the IFC Performance Standards on Social and Environmental Sustainability, together with the IFC Policy on Social and Environmental Sustainability, replaced the IFC Safeguard Policies, and more specifically, Performance Standard 1: Social and Environmental Assessment and Management replaced the IFC Policy on Environmental Assessment OP4.01 (1998).²⁵⁷

It should be noted that according to the IFC Operational Policy OP 4.01 Environmental Assessment of 1998, in order to obtain a loan from the IFC, a business entity responsible for a project has to carry out an environmental assessment (EA) process and ensure information disclosure and public participation within the framework of the EA process.

According to the IFC Performance Standard 1: Social and Environmental Assessment and Management Systems, which replaced the IFC Operational Policy OP 4.01 Environmental Assessment of 1998, in order to obtain a loan from the IFC, a business entity, depending on the risks and impacts of the project, has to conduct a process of Social and Environmental Assessment for the relevant project in order to consider its potential social and environmental impacts.²⁵⁸ Performance Standard 1 requires clients to ensure the disclosure of information and public

²⁵⁶ *IFC Fact Sheet, IFC Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information*, p. 2, available at <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/\\$FILE/FactSheet.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/$FILE/FactSheet.pdf)> [accessed on 8 January, 2011].

²⁵⁷ IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application, IFC, July 29, 2009, p. 1; *IFC, Archived Policies and Guidelines*, available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/Policies_Archived#EHSPPAH> [accessed on 11th November, 2010]; The International Finance Corporation's New Environmental and Social Requirements: From "Environmental and Social Safeguard Policies" to "Policy and Performance Standards on Social and Environmental Sustainability". 2006, p. 1; Safeguard Policy Review Revisited: Has IFC addressed the recommendations of the CAO Safeguard Policy Review? Compliance Advisor Ombudsman, CAO, p. 28.

²⁵⁸ Performance Standard 1: Social and Environmental Assessment and Management Systems, paragraphs 4, 8.

consultation.²⁵⁹ More specifically, according to paragraph 19 of the Performance Standard 1, “[c]ommunity engagement is an on-going process involving the client’s disclosure of information. When local communities may be affected by risks or adverse impacts from a project, the engagement process will include consultations with them”. It has been noted that the engagement process allows the community’s views to be heard, understood and taken into account in project decisions.²⁶⁰ According to paragraph 20 of the document, “[I]f communities may be affected by risks or adverse impacts from the project, the client will provide such communities with access to information on the purpose, nature and scale of the project, the duration of proposed project activities, and any risks to and potential impacts on such communities. For projects with adverse social or environmental impacts, disclosure should occur early in the Social and Environmental Assessment process and in any event before the project construction commences, and on an ongoing basis”. It has been stressed that information should be made available by the client to different segments of the affected communities and it should be done in a way that is appropriate to the community.²⁶¹ According to paragraph 21, “[i]f affected communities may be subject to risks or adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the affected communities with opportunities to express their views on project risks, impacts, and mitigation measures, and allows the client to, consider and respond to them.” According to paragraph 22, “[f]or projects with significant adverse impacts on affected communities, the consultation process will ensure their free, prior and informed consultation and facilitate their informed participation. Informed participation involves organized and iterative consultation, leading to the client’s incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues”. Consultation implies two-way communication between the client and communities that are affected.²⁶² The IFC makes a decision on the financing of a project after reviewing the process of a Social and Environmental Assessment as regards its

²⁵⁹ The International Finance Corporation’s New Environmental and Social Requirements: From “Environmental and Social Safeguard Policies” to “Policy and Performance Standards on Social and Environmental Sustainability”. 2006, pp. 4-5.

²⁶⁰ Guidance Note 1, Social and Environmental Assessment and Management Systems, July 31, 2007, p. 19.

²⁶¹ *Ibid.*, p. 20.

²⁶² *Ibid.*

compliance with applicable performance standards. This review process is carried out by the IFC according to its Environmental and Social Review Procedure (ESRP).²⁶³

1.5.2.2 The Equator Principles

On 4th June 2003 ten leading banks²⁶⁴ from seven countries adopted the Equator Principles.²⁶⁵ The Equator Principles are a set of policies and procedures developed by banks for assessing, managing and monitoring social and environmental issues in project finance lending.²⁶⁶ It should be noted that the Equator Principles have been also referred to as a “soft law”.²⁶⁷ The adoption of the Equator Principles is voluntary for banks.²⁶⁸ It has been argued that “[i]n adopting the Equator Principles, a bank undertakes to provide loans only to those projects whose sponsors can demonstrate to the satisfaction of the bank their ability and willingness to comply with comprehensive processes aimed at ensuring that projects are developed in a socially responsible manner and according to sound environmental management practices.”²⁶⁹ The banks which adopted this document can be referred to as the Equator Banks or the Equator Principles Financial Institutions (EPFIs).²⁷⁰

²⁶³ *IFC Fact Sheet, IFC Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information*, p. 2, available at <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/\\$FILE/FactSheet.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pr_PolicyReviewFactSheet/$FILE/FactSheet.pdf)> [accessed on 8 January, 2011]; *IFC E&S Review Procedures*, Version 1.01, April 30, 2006.

²⁶⁴ ABN AMRO Bank, N.V., Barclays plc., Citigroup Inc., Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, the Royal Bank of Scotland, WestLB AG, Westpac Banking Corporation. *Leading Banks Announce Adoption of Equator Principles*, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2009].

²⁶⁵ *Leading Banks Announce Adoption of Equator Principles*, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2007];

²⁶⁶ *Ibid.*

²⁶⁷ Williams, J. P. *op cit.*, (2008), p. 697; Watchman, P. Q. Delfino, A. and Addison, J. “EP 2: the revised Equator Principles: why hard-nosed bankers are embracing soft law principles” *Law and Financial Markets Review* 85 (2007); Lee, M. K. “The Uruguay Paper Pulp Mill Dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law” (2006) 7 *Sustainable Development Law and Policy*, p. 72. “*The Equator Principles*”, TransnationalCorporateGovernance.net, available at <<http://transnationalcorporategovernance.net/csr/reporting/ep>> [accessed on 8th September, 2010].

²⁶⁸ *About the Equator Principles, Adopting the Equator Principles*, p. 1. Available at <<http://www.equator-principles.com/abouttheeps.shtml>> [accessed 8 March, 2011].

²⁶⁹ *Leading Banks Announce Adoption of Equator Principles*, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 9th May 2007].

²⁷⁰ Financial Institutions Announce Revision of Equator Principles Underscoring the Global Application of Environmental and Social Risk Management, available at <<http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=4C8478>>

The original 2003 version of the Equator Principles states that the banks which adopted these principles will only provide loans to projects that meet the requirements of its principles, and it spells out the requirements of business entities in nine principles.

According to Principle 2, financiers will provide loans for, if the borrower has completed an environmental assessment (EA). Principle 3 sets out requirements for the content of the EA report. A “note” at the end of Principle 3 states that the EA should address the project’s overall compliance with (a) the World Bank and IFC Pollution Prevention and Abatement Guidelines and (b) applicable IFC Safeguard Policies (including IFC Policy on Environmental Assessment OP4.01 of 1998)) only for those projects located in low and middle income states as categorised by the World Bank. According to Principle 5, financiers will provide loans if the borrower has consulted the project affected groups and if the EA, or its summary, has been made publicly available.

It is noteworthy that in July 2006 the Equator Principles were revised.²⁷¹ It should be noted that the revised Equator Principles, in Principle 3 (Applicable Social and Environmental Standards), which together with Principle 2 (Social and Environmental Assessment) modified Principle 3 of the original Equator Principles of 2003, refers to the IFC Performance Standards, which, as afore noted, replaced the IFC Safeguard Policies.

The revised 2006 version: “The “Equator Principles” A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing”, states in its Principle 5 (Consultation and Disclosure) the following: “For all Category A and, as appropriate, Category B projects located in non-OECD countries, and those located in OECD countries not designed as High-Income, as defined by the World Bank Development Indicators Database, the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their

18E35EAC8C852571A3005A06D7>, [accessed on 8th February, 2011]; Watchman, P. Q. Delfino, A. and Addison, J. *op cit.*, (2007), p. 1.

²⁷¹ *Frequently Asked Questions About the Equator Principles*, p. 1, available at <<http://www.equator-principles.com/faq.shtml>> [accessed on 12th June 2009].

free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns. In order to accomplish this, the Assessment documentation and AP [the Action Plan], or non-technical summaries thereof, will be made available to the public by the borrower for a reasonable minimum period in the relevant local language and in a culturally appropriate manner. The borrower will take account of and document the process and results of the consultation, including any actions agreed resulting from the consultation. For projects with adverse social or environmental impacts, disclosure should occur early in the Assessment process and in any event before the project construction commences, and on an ongoing basis". The "disclaimer" at the end of the principles states that with regard to the internal policies of institutions that voluntarily adopt the Equator Principles, these principles do not give rise to any rights or liability.

It can be concluded that the IFC Performance Standard 1: Social and Environmental Assessment and Management Systems, as well as its predecessor the IFC Operational Policy OP 4.01 Environmental Assessment of 1998, makes clear and quite detailed requirements for business entities, wishing to get IFC financing for the project, to ensure the disclosure of information and public consultation. The client must comply with the requirements of the IFC's Performance Standards and the IFC is committed not to provide loans to those clients that do not comply. The same may be said about both versions of the Equator Principles. A private sector borrower is required by a bank that voluntarily adopted the Equator Principles to ensure the disclosure of information and public consultation in order to be granted a loan. The borrower is required to comply with the Equator Principles and the EPFIs are committed to apply these principles and not to finance projects that do not comply with these principles.

1.6 ECHR and Environmental Protection

The European Convention on Human Rights (ECHR) can be used for environmental protection; the European Court of Human Rights (ECtHR) has interpreted some rights of the ECHR to protect individuals against environmental

harm.²⁷² The case law of the ECHR makes it clear that environmental protection can be extracted from the Convention rights without creating environmental rights.²⁷³ The ECtHR has interpreted the right to respect for private and family life and for home under Article 8 of the ECHR to protect individuals against environmental pollution.²⁷⁴ Environmental harm which has a significant effect on a person's home or private and family life can violate Article 8 of the ECHR.²⁷⁵ It has been argued that environmental effects may also interfere with the right to property under Article 1 of Protocol No. 1 of the ECHR.²⁷⁶ And the right to freedom of expression under Article 10 of the ECHR and the right to peaceful assembly under Article 11 of the ECHR may have an impact on the environmental sphere, if environmental changes are promoted through public protest.²⁷⁷

1.7 Aarhus Convention and Democracy

The Aarhus Convention is a huge step forward for democracy.²⁷⁸ It has been emphasized that the Aarhus Convention is based on the belief that citizen involvement can reinforce democracy.²⁷⁹ According to Annan, the Convention is the most ambitious undertaking ever within the UN in the area of “environmental democracy”.²⁸⁰

The preamble of the Aarhus Convention contains the following: “. . . convinced that the implementation of the Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE)”. The Resolution on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of the Signatories to the Aarhus Convention emphasized that the ratification of the

²⁷² Bell, S. and McGillvray, D. *op cit.*, (2008), p. 72;

²⁷³ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 300.

²⁷⁴ Bell, S. and McGillvray, D. *op cit.* (2008), p. 72; Birnie, P. Boyle, A. and Redgwell, C. *op cit.* (2009), p. 275

²⁷⁵ Kiss, A. and Shelton, D. *International Environmental Law* (USA: Transnational Publisher, 2004), p. 385.

²⁷⁶ Weber, S. “Environmental Information and the European Convention on Human Rights” (1991) Vol. 12 (5) *Human Rights Law Journal*, p. 181.

²⁷⁷ Bell, S. and McGillvray, D. *op cit.* (2008), pp. 72-73.

²⁷⁸ Kravchenko, S. “The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements” *18 Colo. J. Int’l Envtl. L. & Pol’y I* (2007), p. 8.

²⁷⁹ Parliamentary Office of Science and Technology, The United Kingdom Parliament, “Aarhus Convention”, 2006, Postnote, Number 256, p. 1.

²⁸⁰ K. Annan in Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), foreword.

Aarhus Convention would “further the convergence of environmental legislation and strengthen the process of democratization” in the UNECE region.²⁸¹ And the Declaration by the Environmental Ministers of the UNECE states “We regard the Aarhus Convention, which provides recognition for citizens’ rights in relation to the environment, as a significant step forward both for the environment and for democracy.”²⁸²

The Aarhus Convention, focusing as it does on the specific components of “environmental democracy”, has a special status regarding societies that underwent the former socialist regimes.²⁸³ It has been argued that the Aarhus Convention has played a key role in the process of democratization of the former soviet block countries.²⁸⁴ Democracy is still young in Eastern Europe, Cuacusus and Central Asia and these countries do not have traditions and culture of participatory democracy: therefore the significance of the Aarhus Convention for the democratization of these states cannot be overstated.²⁸⁵

In addition to the promotion of electoral democracy, attempts were made by the international community to promote the concept of public participation in environmental decision-making through the adoption of the Aarhus Convention,²⁸⁶ the adoption and the entry into force of the Aarhus Convention was the result of the international effort to broaden public participation between elections.²⁸⁷ It has been argued that public participation in environmental decision-making is essential to the democratic decision-making process.²⁸⁸ For democracy to flourish, citizens must be well informed: citizens require information about their government for the purpose of holding it accountable.²⁸⁹ It has been argued in the context of the Aarhus Convention that “in a democracy, the government holds the public trust and discharges its duties on behalf of the public welfare. Openness in the sphere of

²⁸¹ Resolution on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, ECE/CEP/43/Add.1/Rev.1.

²⁸² ECE/CEP/41, p. 49.

²⁸³ Stec, S. “‘Aarhus Environmental Rights’ in Eastern Europe” (2005) Vol. 5 *The Yearbook of European Environmental Law* pp. 1-2.

²⁸⁴ Kravchenko, S. “Strengthening Implementation of MEAs: the Innovative Aarhus Compliance Mechanism” in Conference Proceedings, Volume I, *Seventh International Conference on Environmental Compliance and Enforcement*, 9-15 April, 2005, Marrakech, Morocco, p. 1.

²⁸⁵ Kravchenko, S. *op cit.*, (2007), p. 8, 48, 49.

²⁸⁶ *Ibid.*, p. 8.

²⁸⁷ Kravchenko, S. *op cit.*, (2005), p. 1.

²⁸⁸ Kuhn, S. “Expanding Public Participation is Essential to Environmental Justice and the Democratic Decisionmaking Process” (1999), 25, *Ecology Law Quarterly*.

²⁸⁹ Churchill, R. R. “Environmental Rights In Existing Human Rights Treaties” in Boyle, A. E. and Anderson, M. R. *op cit.*, (1996), p. 115.

public authority guarantees that the public at large can check the ways in which public authorities discharge their duties. A basic underlying principle that ensures openness is the notion that information held by public authorities is held on behalf of the public.”²⁹⁰ The Aarhus Convention is an instrument for promoting democracy by a) allowing access to information held by public authorities, thereby increasing transparency and accountability of the government and b) providing the possibility to individuals to express their opinions and ensure that decision makers take account of these opinions.²⁹¹

²⁹⁰ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 21.

²⁹¹ Nagy, M.T.*et al*, *Implementing the Aarhus Convention: A User Guide for Officials in the Eastern Europe and Caucasus Region*, (Kiev: EuropeAid 02-0114, 2004), p. 6.

Chapter Two: Implementation of Procedural Environmental Rights under the Aarhus Convention

2.1 Introduction

2.1.1 Relevance of the Aarhus Convention for the BTC Case Study

The BTC case study in *Chapter Six: Four Formally Adjudicated Complaints* analyses two formal litigation processes initiated against the Georgian authorities in the Georgian domestic courts and two complaints to the CAO regarding the activities of the BTC Co.

In 2003, Green Alternative initiated a formal litigation process against the Georgian authorities in the Tbilisi Regional Court and claimed the following: (a) the Georgian authorities did not make public the BTC IGA and its appendix - the HGA, which have the status of a treaty and thus violated Article 5, paragraph 5 of the Aarhus Convention; (b) in the process of decision-making on granting permission to the BTC Co. for the construction of the BTC pipeline, the government of Georgia did not make available information to the public on the proposed BTC project, and did not ensure public participation and thus violated provisions of Articles 4 and 6 of the Aarhus Convention.

In 2004, Green Alternative initiated a formal litigation process against the government of Georgia in the Tbilisi Regional Court and claimed that in the process of decision-making on granting permission to the BTC Co. contractor (SPJV) for the operation of a waste incinerator for the BTC project, the government of Georgia did not make available information to the public on the proposed activity, and did not ensure public participation and thus violated the provisions of Articles 5 and 6 of the Aarhus Convention.

Both formal litigation processes in the Georgian courts were about access to the review procedures and challenged violations of access to environmental information and public participation in environmental decision-making. Therefore,

the question arises whether the Georgian state implemented provisions of access to justice under the Aarhus Convention in those two cases.

A complaint made to the CAO in 2004 concerning sub-districts 18 and 19 of the town of Rustavi related to the activities of the BTC Co. and not to the activities of the government; however it, as well as another document prepared by Green Alternative, mention the fact that residents of these sub-districts several times requested environmental information from governmental bodies and did not receive any reply. This clearly calls for an examination of the issue of the implementation of Article 4 of the Aarhus Convention by the government of Georgia. It is of importance to note, that according to the complaint to the CAO, these residents did not know until the construction started, that the BTC pipeline would pass within 250 metres of their housing blocks and this seem to suggest that the government failed to inform them of this and did not ensure public participation during the decision-making regarding the BTC project. This again calls for an examination of the issue of the implementation of Articles 5 and 6 of the Aarhus Convention by the government of Georgia.

Another complaint made to the CAO in 2004, concerning the village of Dgvari related to the activities of the BTC Co; however it is also informative in terms of possible non-implementation of the Convention by the government of Georgia. According to the complaint, the village is located 1 km away from the pipeline route and the villagers learned of this only after permission for the construction of the BTC pipeline was granted in November 2002. This again calls for an examination of the issue of implementation of Articles 5 and 6 of the Aarhus Convention by the government of Georgia. It should also be stressed that the village is a landslide risk area and this is confirmed by governmental studies.

2.1.2 Scope of the Chapter

This chapter examines the issue related to the implementation of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters under the Aarhus Convention, in order to find answers to the questions in the case study, as to whether these provisions have been implemented in the context of the four formally adjudicated complaints. However it should be noted that not all the provisions of these three

pillars of the Convention are examined in the chapter: only those provisions that have been allegedly and presumably violated in the context of the four formally adjudicated complaints. And it would also be impossible to examine all the provisions of the three pillars of the Convention within one chapter of the thesis. All material in this chapter is a kind of basis which has obvious relevance for *Chapter Seven: Pre-requisites for the Exercise of the Rights of Access to Environmental Information and Public Participation in Environmental Decision-making under the Aarhus Convention*. The material examined in this chapter is also a basis for drawing up conclusions as to whether the rights of access to environmental information and participation in environmental decision-making granted under the Aarhus Convention, when successfully implemented, can benefit the rights under Article 8 and Article 1 of Protocol 1 of the ECHR.

Section 2 provides an introduction to the Aarhus Convention. It starts with an outline of the Aarhus Convention. Then it discusses the ability of the Aarhus Convention to contribute to environmental protection. Then it describes some specifics of the Aarhus Convention as a multilateral environmental treaty: it describes the Convention's "rights-based approach", which is a feature characteristic for international human rights law; and it describes the innovative compliance mechanism of the Aarhus Convention which allows members of the public, for the first time in the field of international environmental law, to bring complaints to the Compliance Committee and allege a state's non-compliance with the Convention. The compliance mechanism of the Convention is an important instrument, since the Compliance Committee deals with the issues of the implementation of the Convention by states and interprets its provisions to specific situations. There is the bulk of the so called "case-law" of the Compliance Committee on the implementation by states of the three procedural environmental rights, and sections 3, 4, and 5 of this chapter make references to the relevant decisions of the Committee.

Section 3 deals with the access to environmental information under the Convention. The first part of the section examines the questions related to the implementation of "passive" access to information, namely it examines the following elements and notions involved in Article 4: access to information "upon request" and "in the form requested" (paragraph 1, subparagraph (b)); environmental information (Article 2, paragraph 3); public authority (Article 2,

paragraph 2); the public (Article 2, paragraph 4); who can request information? (paragraph 1(a)); timescale of responses (paragraph 2); and onward referral of refusals (paragraph 5). Considering the content of the four formally adjudicated complaints, the section omits the discussion of the following elements: refusals (paragraphs 3 and 4) (the following reasoning justifies the non-discussion by *Chapter Two* of the legal regime of refusals under Article 4, paragraphs 3 and 4 of the Aarhus Convention: it should be noted that under Article 4, paragraph 2, public authorities have an obligation to supply, within certain time limits, environmental information upon request, subject to exceptions. Challenges made in the context of sub-districts 18 and 19 of the town of Rustavi claim that information was not supplied to them in response to requests, and even no refusal was notified to them that would explain the reasons for the non-disclosure of information. This suggests that the reason for the non-disclosure of information was not a use of the exception rules, set out in Article 4, paragraphs 3 and 4 of the Convention: the government ignored the request and thus violated Article 4, paragraph 2 requiring disclosure of information within certain time-frames); separation of information (paragraph 6); form, content and time limits of the refusal (paragraph 7); and charges for the disclosure of information (paragraph 8). The second part of the section examines the questions related to the implementation of “active” access to information, namely it examines the following elements and notions involved in Article 5: possession and the updating of environmental information (paragraph 1(b)); mandatory systems (paragraph 1(b)); emergency information (paragraph 1(c)); transparency and effective accessibility of information, meta-information, the practical arrangements (paragraph 2); and dissemination of documents relating to the environment (paragraph 5). Considering the content of the four formally adjudicated complaints, the section omits the discussion of the following elements: electronic databases (paragraph 3); national reports (paragraph 4); encouragement of operators (paragraph 6); making accessible facts, explanatory material, and information on the performance of public functions (paragraph 7); product information (paragraph 8); Pollutant Release and Transfer of Registers - “PRTR” (paragraph 9).

Section 4 deals with public participation in environmental decision-making. It examines questions related to the implementation of the right to participate in environmental decision-making, as provided for by Article 6 of the Convention.

Due to the non-relevance of the contents of Article 7 (Public Participation concerning Plans, Programmes and Policies relating to the Environment) and Article 8 (Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments) of the Convention to the four formally adjudicated complaints of the case study, the decision was made not to examine these articles. Section 4 examines the following elements and notions involved in Article 6: requirement of public participation (paragraph 1); the public concerned (Article 2, paragraph 5); notice on the proposed activity (paragraph 2); reasonable time frames for public participation (paragraph 3); open options and effective public participation (paragraph 4); encouragement of applicants (paragraph 5); disclosure of the relevant information (paragraph 6); submissions by the public (paragraph 7); due account of the outcome of participation (paragraph 8); informing the public on the decisions taken (paragraph 9); reconsiderations or updates (paragraph 10). It omits the discussion of public participation in decisions regarding GMOs (paragraph 11).

Section 5 deals with access to justice in environmental matters under the Convention. It examines questions related to the implementation of access to justice in environmental matters as provided for by Article 9 of the Aarhus Convention. In fact, it examines the following elements and notions involved in Article 9: access to information appeals (paragraph 1); public participation appeals (paragraph 2); and minimum standards of access to justice (paragraph 4). Considering the content of the four formally adjudicated complaints, the section omits the discussion of appeals on general violations of environmental law (paragraph 3) and appropriate assistance mechanisms (paragraph 5).

Section 6 contains conclusions on: the obligations of the executive, legislative and judicial authorities regarding the implementation of the three procedural environmental rights; the interdependence of the implementation of the three procedural environmental rights; and on the special status of NGOs under the Convention.

2.2. Introduction to the Aarhus Convention²⁹²

2.2.1 Outline of the Aarhus Convention

Since 1990, the United Nations Economic Commission for Europe (UNECE) has been working consistently for securing full recognition of procedural environmental rights.²⁹³ In 1991, the UNECE established the “Environment for Europe” process.²⁹⁴ The Aarhus Convention was adopted at the Fourth Ministerial Conference, “Environment for Europe”, in Aarhus (Denmark) on 25 June, 1998 within the framework of the UNECE.²⁹⁵ In Aarhus, the Convention was signed by thirty-five countries,²⁹⁶ all of which are members of the UNECE,²⁹⁷ and the European Community.²⁹⁸ The Convention entered into force on 30 October 2001²⁹⁹, as a result of the deposit of the sixteenth instrument of ratification with the

²⁹² See Appendix IV “The Aarhus Convention” of the thesis.

²⁹³ Déjeant-Pons, M. *op cit.*, (2002), p. 26. The UNECE promotes pan-European (and outside the region) economic integration through policy dialogue, negotiation of international legal instruments, development of regulations, exchange and application of the best practices and its activities cover the following sectors: economic cooperation and integration, energy, environment, housing and land management, trade, transport etc. *United Nations Economic Commission for Europe: Mandate and Role*, available at <http://www.unece.org/oes/nutshell/mandate_role.htm> [accessed on 16th April, 2008].

²⁹⁴ McAllister, S. T. “The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters” (1999) *Colorado Journal of International Environmental Law and Policy*, p. 187.

²⁹⁵ “Environment for Europe Process” - *History of the process: from Dobris to Belgrade*, available at <<http://www.unece.org/env/efe/history%20of%20Efe/fromDobtoBelg.htm>> [accessed on 22nd April, 2008].

²⁹⁶ Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Greece, Iceland, Ireland, Italy, Kazakhstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkmenistan, Ukraine, available at <http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm> [accessed on 12th April, 2008].

²⁹⁷ All thirty-five countries were members of the UNECE by 25th June, 1998. For dates of membership of the UNECE see <http://www.unece.org/oes/member_countries/member_countries.htm>, [accessed on 18th April, 2008].

²⁹⁸ Shelton, D. *op cit.*, (2002), p. 10; Article 17 of the Aarhus Convention permitted the European Community to sign the Convention. In accordance with article 17 (Signature), the Convention was open for signature for a certain period of time by member States of the UNECE, by States having a consultative status with the UNECE and by regional economic integration organizations of member States. The Fourth Ministerial Conference, on 25 June, also adopted the Declaration of the Conference, which appealed to non-signatory states of the newly signed Aarhus Convention to become parties to the Convention, and the Resolution on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which established *inter alia* a Meeting of the Signatories. *Declaration by the Ministers of Environment of the region of the United Nations Economic Commission for Europe (UNECE)*, 25 June, 1998, paragraph 40, available at <<http://www.unece.org/env/efe/wgso/pre-kiev.declar/Aarhus.E..pdf>> [accessed on 25th April, 2008]. For the Resolution see ECE/CEP/43/Add.1/Rev.1.

²⁹⁹ Rodenhoff, V. “The Aarhus Convention and its implications for the “Institution” of the European Community” (2002) *RECIEL* p. 343.

Secretary-General of the United Nations³⁰⁰. As afore noted, at present the Convention is in force with regard to 41 Parties.

The Convention consists of a preamble³⁰¹, 22 articles and two annexes.³⁰² Article 1 (Objective) sets out, in broad terms, the objective of the Convention. Article 2 (Definitions) provides definitions of some of the main terms. Article 3 (General Provisions) sets out general provisions on procedural environmental rights. Articles 4-9 set out the three procedural environmental rights. Articles 10-22 contain final provisions.³⁰³

Articles 4 and 5 of the Aarhus Convention constitute the first pillar of the Convention - access to environmental information. Article 4 (Access to Environmental Information) of the Convention obliges public authorities to make information available in response to a request and article 5 (Collection and Dissemination of Environmental Information) requires collection and dissemination of environmental information, regardless whether requested or not. Article 4 regulates “passive” access to information and article 5 regulates “active” access to information.

³⁰⁰ Wates, J. *op cit.*, (2005), p. 7.

³⁰¹ The preamble of the Convention recalls some “soft law” documents in the field of international environmental law, calls for ensuring sustainable and environmentally sound development, links environmental protection to human rights, recognizes the right to a healthy environment, proclaims three procedural environmental rights – access to information, public participation in decision-making and access to justice in environmental matters, states the benefits of these procedural environmental rights, links the Convention to democracy, etc.

³⁰² Annex I (List of Activities Referred to in Article 6, Paragraph 1 (a)) and Annex II (Arbitration).

³⁰³ Article 10 (Meeting of the Parties) provides for holding regular meetings of the Parties in order to review the implementation of the Convention by Parties, on the basis of regular reporting by the Parties. Article 11 (Right to Vote) regulates voting by the Parties. Article 12 (Secretariat) sets out the functions of the Secretariat of the UNECE with regard to Convention issues. Article 13 (Annexes) states that the annexes to the Convention constitute an integral part of the Convention. Article 14 (Amendments to the Convention) sets out procedure on amendments and regulates the roles of the Executive Secretary of the UNECE and the Depositary on the matter. Article 15 (Review of Compliance) concerns optional arrangements of a non-judicial and consultative nature for reviewing compliance with the Convention. According to Article 15, these arrangements may include the option of considering communications from members of the public on Convention issues. Article 16 (Settlement of Disputes) regulates the settlement of disputes between Parties on the interpretation or application of the Convention. Article 16 additionally provides for submission of the dispute to the International Court of Justice or arbitration in accordance with the procedure set out in annex II (Arbitration). Annex II (Arbitration) sets out rules on the procedure and operation of the arbitral tribunal. According to Article 17 (Signature), the Convention is open for signature by the member-states of the UNECE, states having a consultative status with the UNECE and by regional economic integration organizations constituted by sovereign member States of the UNECE. Article 18 (Depositary) states that the Secretary-General of the UN will act as a Depositary of the Convention. Article 19 (Ratification, Acceptance, Approval and Accession) regulates general rules regarding ratification, acceptance, approval and accession. Article 20 (Entry into Force) governs the rules on the entry into force of the Convention. Article 21 (Withdrawal) gives the possibility to the Parties to withdraw from the Convention under certain conditions. Article 22 (Authentic Texts) states that the original language of the Convention consists of English, French and Russian texts which are all equally authentic.

Articles 6, 7 and 8 of the Convention constitute the second pillar – public participation in environmental decision-making. Article 6 (Public Participation in Decisions on Specific Activities) regulates participation in decisions on whether to permit proposed activities with a potentially significant effect on the environment. It should be noted here that Annex I (List of Activities Referred to in Article 6, paragraph 1 (a)) lists activities e.g. those of the energy sector, production and processing of metals, the mineral industry, the chemical industry, waste management, with regard to which states must apply provisions of Article 6. Article 7 (Public Participation concerning Plans, Programmes and Policies relating to the Environment) regulates public participation in the preparation of plans, programmes and policies relating to the environment by public authorities. Article 8 (Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments) promotes public participation during the preparation by public authorities of executive regulations and other legally binding rules that may have a significant effect on the environment.

Article 9 of the Aarhus Convention constitutes the third pillar of the Convention – access to environmental justice. Article 9 (Access to Justice) requires Parties to the Convention to ensure access to the review procedures to challenge violations of access to information and public participation in environmental decision-making, as provided for under the Convention. The article also requires states to ensure access to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national environmental law.

It should be emphasized that the Convention establishes minimum standards for the three procedural environmental rights and does not prevent Parties from taking measures which go further in the direction of ensuring these procedural environmental rights: the rights secured by the Convention constitute “a floor, not a ceiling”.³⁰⁴ It is noteworthy that the Convention does not require derogation from

³⁰⁴ Wates, J. *op cit.*, (2005), p. 2; Stookes, P. *op cit.*, (2005), p. 33. According to Article 3, paragraph 5 of the Convention, “[t]he provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by the Convention”.

existing procedural environmental rights.³⁰⁵ The Convention requires Parties to ensure that officials and authorities assist and provide guidance to the public in seeking exercise of the three procedural environmental rights.³⁰⁶

Article 3, paragraph 1, contains the general obligation of Parties to take legislative, regulatory and other measures, including proper enforcement measures, in order to create and maintain a clear, transparent and consistent framework for the implementation of the Convention.³⁰⁷ This provision imposes obligation on the legislative, executive and judicial authorities to take appropriate measures for the implementation of procedural environmental rights. Parties are required to develop implementing legislation and executive regulations in order to establish appropriate framework for the implementation of the Convention.³⁰⁸ It should be noted that the “Aarhus Clearing House for Environmental Democracy” has been established by the UNECE which aims to contribute to a more effective implementation of the Convention by Parties through providing information on laws, policies and good practice relevant to all three procedural environmental rights.³⁰⁹

The Convention refers to national legislation in many paragraphs. According to Stec and Casey-Lefkowitz, the phrases “within the framework of national legislation/law”³¹⁰ and “in accordance with national legislation/law”³¹¹ are not defined by the Convention and thus are open to interpretation and the manner of their interpretation has the utmost significance for the implementation of the

³⁰⁵ According to Article 3, paragraph 6, “Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters”.

³⁰⁶ According to Article 3, paragraph 2, “Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters”.

³⁰⁷ According to Article 3, paragraph 1, “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”.

³⁰⁸ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 43.

³⁰⁹ Nagy, M.T, *op cit.*, (2004), p. 8; *Aarhus Clearing House for Environmental Democracy*, Available at <<http://aarhusclearinghouse.unece.org/>> [accessed on 22nd October, 2008]. It should be also noted that in order to promote the implementation of the Aarhus Convention by Parties, the following mechanisms have been established by the UNECE: Task Force on Electronic Tools, Task Force on Access to Justice, Task Force on Public Participation in International Forums, Task Force on Financial Arrangements, Working Group on Genetically Modified Organisms, Working Group on Pollutant Release and Transfer of Registers (PRTR) etc. Nagy, M.T, *op cit.*, (2004), p. 7.

³¹⁰ Article 4, paragraph 1; Article 5, paragraphs 2 and 5; Article 6, paragraph 11; and Article 9, paragraphs 1 and 2.

³¹¹ Article 2, paragraph 4; Article 6, paragraphs 1 (b) and 6 (f).

Convention.³¹² The authors believe that, considering the diversity of opinion regarding the meaning of these phrases during the Convention's negotiations, the best that can be achieved now is to consider the following points concerning their interpretation: i) these particular phrases are flexible instruments that Parties may use for the implementation of obligations under the Convention, taking into account differences in national legal systems (though this flexibility does not allow Parties to introduce or maintain legislation undermining or conflicting with the obligations of the Convention); ii) these phrases allow flexibility not only with regard to the means of implementation, but also with regard to the content of the basic obligations. However the second approach is more problematic since it can result in an uneven implementation of the Convention in different countries; iii) the phrase "within the framework of national legislation/law" can also be interpreted as an instruction to create provisions that would be more detailed than those of the Convention; iv) according to the "flexibility in method" interpretation, "in accordance with national legislation/law" makes a reference to a link with an issue that may already be regulated by a national law.³¹³

2.2.2 Aarhus Convention and Environmental Protection

The adoption of the Aarhus Convention is considered as a step forward for environmental protection since it is based on the belief that citizen involvement can strengthen the protection of the environment.³¹⁴ The Aarhus Convention is an instrument for environmental protection.³¹⁵ The preamble of the Aarhus Convention especially notes the significance of fully integrating environmental considerations in decision-making and emphasizes that through the Aarhus Convention individuals and NGOs can play vital roles in environmental protection. The Aarhus Convention is motivated by the claim that a policy of environmental protection needs input from ordinary citizens as well as from experts.³¹⁶ The

³¹² There are other similar phrases in the Convention: "provided for in/under national law" (Article 4, paragraph 3 (c); Article 4, paragraphs 4 (a) and 4 (f); Article 6, paragraph 1 (c); Article 9, paragraph 2), "meeting any requirements under national law" (Article 2, paragraph 5), "where so required under national law" (Article 6, paragraph 6), "in accordance with the requirements of national law" (Article 9, paragraph 2), "where such a requirement exists under national law" (Article 9, paragraph 2), "where . . . laid down in its national law" (Article 9, paragraph 3), "where . . . is protected by law" (Article 4, paragraph 4 (d)).

³¹³ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 31.

³¹⁴ Parliamentary Office of Science and Technology, The United Kingdom Parliament, "Aarhus Convention", 2006, Postnote, Number 256, p. 1; Kravchenko, S. *op cit.*, (2007), p. 8.

³¹⁵ Nagy, M.T, *op cit.*, (2004), p. 6.

³¹⁶ Rose-Ackerman, S. and Halpap, A. A. "The Aarhus Convention and the Politics of Process", *Paper prepared for the Symposium on Law and Economics of Environmental Policy*, September 5-

general purpose of the Convention is to improve the level of public understanding and participation for the purpose of ensuring improved environmental protection.³¹⁷ It should be noted that members of the public often have a willingness to participate in the process of information gathering and in the discussion of various options for decision-making, both in their own interest and in order to carry out their responsibility towards environmental protection.³¹⁸ The Aarhus Convention rights can enhance “active environmental citizenship”, by making a contribution to public debate, as well as by enabling “environmentally responsible private decisions”.³¹⁹ Environmental protection requires collaborative steps by the government, individuals, non-governmental organizations, and business sector representatives and it has been argued that public involvement in environmental decision-making can benefit each of these groups.³²⁰

2.2.3 “Rights-Based Approach” of the Aarhus Convention

The Aarhus Convention adopts a “rights-based approach”.³²¹ The objective, structure and context of the Convention are “rights-oriented”.³²² The rights of access to information, public participation in decision-making and access to justice in environmental matters are provided for by the Convention.³²³ It grants the public rights and imposes respective obligations on the states: namely it creates rights for “the public” and the “public concerned” and imposes obligations for “Parties” and “public authorities”.³²⁴

The Convention belongs to the field of environmental law. It has been argued that the Aarhus Convention is a new kind of environmental treaty.³²⁵ The Convention is

7, 2001, London, p. 2, available at: <<http://www.cserge.ucl.ac.uk/news.html>> [accessed on 8th May, 2008].

³¹⁷ Wilsher, D. *op cit.*, (2001), p. 679.

³¹⁸ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 85.

³¹⁹ Holder, J. and Lee, M. *op cit.*, (2007), p. 100.

³²⁰ Nagy, M.T, *op cit.*, (2004), p. 42. Public Participation in Making Local Environmental Decisions, the Aarhus Convention Newcastle Workshop, UK, 2000.

³²¹ Wates, J. *op cit.*, (2005), p. 2.

³²² Ebbesson, J. Background Paper No. 5, “*Information, Participation and Access to Justice: the Model of the Aarhus Convention*”, Joint UNEP-OHCHR Expert Seminar on Human Rights and Environment, 14-16 January 2002, Geneva, available at <<http://www.unhcr.ch/environment/bp5.html>>, [accessed on 22nd November 2007].

³²³ Sands, P. *op cit.*, (2003), p. 118.

³²⁴ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000) p. 5.

³²⁵ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 1.

the first multilateral environmental legally binding document imposing on its Parties obligations towards their own citizens, which is a feature characteristic for international human rights law.³²⁶ It has been noted that the Aarhus Convention focuses on the obligations of states to their citizens and to NGOs.³²⁷ Most multilateral environmental treaties contain obligations that states have towards each other, but the Aarhus Convention contains obligations that states have towards the public.³²⁸ It is the most important international innovation in the field.³²⁹ The Convention brings together elements of human rights treaties and environmental treaties in a new manner.³³⁰ It is believed that the Convention will support progress in all European states and encourage them to attain the highest standards and practices in the field of procedural environmental rights.³³¹

2.2.4 Innovative Compliance Mechanism of the Aarhus Convention

Article 15 (Review of Compliance) of the Convention requires the establishment, by the Meeting of the Parties, of optional arrangements of a “non-confrontational, non-judicial and consultative nature”, in order to review compliance with the Convention provisions. Article 15 states that these arrangements must allow “appropriate public involvement” and may allow the consideration of communications on Convention matters from members of the public.

Following this obligation, in October 2002, the first Meeting of the Parties of the Aarhus Convention adopted Decision I/7 and established the Compliance Committee for the reviewing of compliance by the Parties with the Convention obligations.³³² Decision I/7 established a compliance mechanism for the Aarhus

³²⁶ Pallemarts, M. *op cit.*, (2002), p. 18; Koester, V. “The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters (Aarhus Convention) in Ulfstein, G. (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge: Cambridge University Press, 2007), p. 187.

³²⁷ Kravchenko, S. *op cit.*, (2007), p. 2.

³²⁸ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000) p. 1.

³²⁹ Holder, J. and Lee, M. *op cit.*, (2007), p. 86.

³³⁰ Rodenhoff, V. *op cit.*, (2002), p. 343.

³³¹ Jendroska, J. “UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe” (1998) *National Environmental Enforcement Journal* Vol. 13 No. 6, p. 39.

³³² Sands, P. *op cit.*, (2003), p. 209; *Compliance Committee, Aarhus Convention*, available at <<http://www.unece.org/env/pp/ccBackground.htm>>, [accessed on 10th February, 2011]; Decision I/7, Review of Compliance, Report of the First Meeting of the Parties, UNECE, 2002.

Convention.³³³ The Compliance Committee was created to assist in ensuring that Parties comply with the obligations that they undertook by the Aarhus Convention.³³⁴ The Compliance Committee and Meeting of the Parties together constitute the main bodies for the review of compliance of the Convention by Parties.³³⁵ It should be recalled here that Article 10 (Meeting of the Parties) provides for holding regular meetings of the Parties in order, *inter alia*, to review the implementation of the Convention by the Parties, on the basis of regular reporting by the Parties. It has been argued that the compliance mechanism of the Aarhus Convention is a truly innovative one.³³⁶ The Compliance Committee reviews cases of non-compliance.³³⁷ The compliance mechanism of the Aarhus Convention may be triggered in four ways: 1) a Party may make a submission regarding compliance by another Party; 2) a Party may make a submission regarding its own compliance; 3) the secretariat may make a referral to the Compliance Committee; 4) one or more members of the public, including an NGO, may file communications regarding a Party's compliance.³³⁸ Under Decision I/7, provisions dealing with communications from members of the public are more elaborate than those dealing with submission or referrals by the secretariat.³³⁹

In most multilateral environmental treaties, compliance procedures are triggered through submissions by one Party to a treaty against another Party to the same treaty, through submissions of the secretariat, or through submissions by a Party in respect to itself.³⁴⁰ It has been argued that the compliance mechanism of the Aarhus Convention is unique in international environmental law, since it allows, akin to international human rights law, members of the public to allege a Party's

³³³ *Guidance Document on the Aarhus Convention Compliance Mechanism*, UNECE, Geneva, 2010, p. 2.

³³⁴ Kravchenko, S. *op cit.*, (2005) p. 2.

³³⁵ Koester, V. "The Compliance Committee of the Aarhus Convention: An Overview of Procedures and Jurisprudence" in *Environmental Policy and Law* (2007), 37/2-3, p. 83. Koester, V. *op cit.*, (2007), p. 191.

³³⁶ Kravchenko, S. *op cit.*, (2007), p. 3.

³³⁷ Louka, E. *International Environmental Law: Fairness, effectiveness, and World Order* (Cambridge: Cambridge University Press, 2006), p. 135.

³³⁸ Decision I/7, Review of Compliance, Report of the First Meeting of the Parties, UNECE, 2002, paragraphs 15-24; Marshall, F. "Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006" (2006) *International Community Law Review* 8, pp. 128-29; Kravchenko, S. *op cit.*, (2005), p. 3. It should be noted that the Compliance Committee has other tasks as well along with the task of consideration of submissions, referrals and communications: e.g. monitoring and assessing the reporting requirements of the Convention and monitoring of the compliance with the implementation of non-compliance measures. Koester, V. *op cit.*, (2007), p. 196; Decision I/7, Review of Compliance, Report of the First Meeting of the Parties, UNECE, 2002, paragraph 37.

³³⁹ Koester, V. *op cit.*, (2007), 37/2-3, p. 85; Decision I/7, Review of Compliance, Report of the First Meeting of the Parties, UNECE, 2002, paragraphs 15-24.

³⁴⁰ Kravchenko, S. *op cit.*, (2007), pp. 16-17.

non-compliance through a communication to the body that has the mandate to examine the merits of the communication.³⁴¹ It should be noted that the idea of accepting communications from members of the public stems from human rights instruments.³⁴² The Aarhus Convention's compliance mechanism allows members of the public to complain about violations of their procedural environmental rights at an international level, and it provides guidance through the interpretation of the Convention.³⁴³ There is no rule on requiring the exhaustion of local remedies; however "[t]he Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."³⁴⁴ A communication may concern a) a general failure of a Party to take legislative, regulatory or other measures for the implementation of the Convention, as provided for under Article 3, paragraph 1; b) a failure of legislation, regulations or other measures implementing the Convention to meet the demands of obligations of the Convention; c) acts or omissions that show a failure of the public authorities to comply with the Convention or to enforce it.³⁴⁵ It is noteworthy that the Compliance Committee states the following: "[Committee] does not exclude the possibility when determining issues of non-compliance to take into consideration general rules and principles of international law, including international and human rights law".³⁴⁶ However it should be emphasized that the compliance mechanism under the Convention does not constitute a redress procedure for the violation of individual rights: it is designed to improve compliance with the Convention.³⁴⁷

In 2004, the Compliance Committee of the Aarhus Convention received its first communication from a member of the public seeking to review a Party's compliance with the Convention, and this pioneered the triggering of a compliance procedure of a multilateral environmental agreement by a member of the public.³⁴⁸

³⁴¹ Marshall, F. *op cit.*, (2006) p. 123; Pallemarts, M. *op cit.*, (2002), pp. 18-19; *Guidance Document on the Aarhus Convention Compliance Mechanism*, UNECE, Geneva, 2010, p. 2; Koester, V. *op cit.*, (2007), p. 83; Kravchenko, S. *op cit.* (2005), p. 1.

³⁴² Kravchenko, S. *op cit.* (2007), p. 18.

³⁴³ *Ibid.*, p. 34.

³⁴⁴ Sands, P. *op cit.* (2003), p. 209; Decision I/7, Review of Compliance, Report of the First Meeting of the Parties, UNECE, 2002, paragraph 21.

³⁴⁵ *Guidance Document on the Aarhus Convention Compliance Mechanism*, UNECE, Geneva, 2010, p. 34.

³⁴⁶ Report on first meeting, MP.PP/C.1/2003/2, April 2003; Koester, V. *op cit.* (2007), p. 87.

³⁴⁷ *Guidance Document on the Aarhus Convention Compliance Mechanism*, UNECE, Geneva, 2010, p. 31.

³⁴⁸ Marshall, F. *op cit.* (2006), p. 123.

Since 2004, the Compliance Committee has dealt with many issues concerning the practical implementation of the Aarhus Convention and it has interpreted and applied various provisions of the Convention to specific situations.³⁴⁹ The Compliance Committee has found cases of non-compliance by several states and has issued recommendations on changing laws, developing better implementation techniques, or engaging in capacity building and training.³⁵⁰ It should be emphasized that the Compliance Committee cannot issue binding decisions: it can only issue recommendations to the Party concerned on measures to address.³⁵¹ The Compliance Committee is neither a political, nor a judicial body: it is an independent and impartial review body that has a quasi-judicial nature.³⁵²

It should be noted here, that a primary review of the implementation of the Convention by Parties is conferred on the meeting of Parties.³⁵³ More specifically, article 10 (Meeting of the Parties) obliges Parties to hold regular meetings in order to review the implementation of the Convention, on the basis of regular reporting by the Parties. Article 10 gives the possibility to NGOs, qualified in the fields of the Convention, to participate as observers in the meetings of the Parties. Meetings of the Parties can make decisions on measures to bring about full compliance with the Convention: however such decisions on non-compliance have no legally binding force.³⁵⁴ It should be noted that a Meeting of the Parties adopted Decision I/8 in 2002 on Reporting Requirements which recognizes that reporting by Parties will assist in the assessment of compliance with the Convention and therefore would contribute to the work of the Compliance Committee.³⁵⁵ The seventh meeting of the Parties to the Aarhus Convention, which took place from 2nd to 4th May, 2007 in Geneva, adopted the document: Guidance on Reporting Requirements.³⁵⁶

³⁴⁹ Andrusevych, A. Alge, T. and Clements, C. (eds.), *Case Law of the Aarhus Convention Compliance Committee (2004-2008)* (RACSE, Lviv 2008), p. 5.

³⁵⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 248.

³⁵¹ Sands, P. *op cit.*, (2003), p. 209; *Guidance Document on the Aarhus Convention Compliance Mechanism*, UNECE, Geneva, 2010, p. 2.

³⁵² Koester, V. *op cit.*, (2007), p. 204.

³⁵³ Kiss, A. *op cit.*, (2003), p. 43.

³⁵⁴ Koester, V. *op cit.*, (2007), pp. 205-206.

³⁵⁵ *Ibid.*, p. 190; Decision I/8 on Reporting Requirements, Doc. ECE/MP.PP/2002/2Add.9.

³⁵⁶ The UNECE, ECE/MP.PP/WG.1/2007/L.4, 20 February 2007, available at <http://www.unece.org/env/documents/2007/pp/ece_mp_pp_wg_1_2007_L_4_e.pdf>, [n 22nd October, 2007.]

2.3 Access to Environmental Information under the Aarhus Convention

Article 4 (Access to Environmental Information) of the Convention regulates “passive” access to information, while Article 5 (Collection and Dissemination of Environmental Information) regulates “active” access to information. “Passive” access to information and “active” access to information constitute the access-to-information pillar of the Convention.

2.3.1 “Passive” Access to Information

2.3.1.1 Access to Information “upon Request” and “in the Form Requested”

According to Article 4, paragraph 1, Parties to the Convention are obliged to ensure that public authorities, “within the framework of national legislation”, upon request, make environmental information publicly available. Article 4 governs “passive” access to information, by granting members of the public the right, upon request, to access environmental information held by public authorities. “Passive” access to information implies allowable passivity until a member of the public exercises the right to request information.³⁵⁷ Article 4 requires public authorities to take action only when triggered by a communication from the public.³⁵⁸ Article 4 concerns “the right to request information”.³⁵⁹ Reference to “within the framework of national legislation” in Article 4, paragraph 1, means that national legislation should create a system of answering requests in accordance with the Convention.³⁶⁰ This reference also means that Parties have a certain flexibility regarding how they develop procedures for dealing with requests.³⁶¹

Any communication by a member of the public addressed to a public authority requesting environmental information can be considered as a “request” under paragraph 1, article 4.³⁶² It is important to note that the Convention does not indicate the form of the “request”: therefore any request, whether oral or written,

³⁵⁷ Kravchenko, S. and Bonnie, J. E. *op cit.*, (2008), p. 221.

³⁵⁸ Jendroska, J. and Stec, S. *op cit.*, (2001), p.148.

³⁵⁹ Kravchenko, S. and Bonnie, J. E. *op cit.*, (2008), Chapter 6.

³⁶⁰ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 54.

³⁶¹ Nagy, M.T., *op cit.*, (2004), p. 33.

³⁶² Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 54.

that meets the requirements determined by article 4, should be considered as a “request”.³⁶³

According to Article 4, paragraph 1, subject to exceptions under subparagraph (b) of the paragraph, members of the public are entitled to request copies of the actual documents that contain or comprise environmental information. According to paragraph 1 (b), Parties are obliged to ensure that public authorities make information publicly available, in the form requested. Some applicants may prefer to receive information in a specific form, “such as paper, electronic media, videotape, recording, etc.” while some applicants may prefer to view the original documents, and, under subparagraph (b), public authorities are required to satisfy such requests.³⁶⁴ However paragraph 1 (b) (i) and (ii) states exceptions to the rule of “in the form requested”. According to subparagraph (b) (i), the requested information may be made public in another form when it is reasonable for the public authority to do so, in which case reasons for providing it in another form must be indicated. According to subparagraph (b) (ii), a public authority has no obligation to release environmental information in the form requested if the environmental information is already available publicly in another form. “Another form” implies that “the available information is the functional equivalent of the form requested, not a summary”.³⁶⁵

Definitions of the terms “environmental information”, “public authority” and “the public” that are used in Article 4, paragraph 1 are provided in Article 2 (Definitions).

2.3.1.2 Environmental Information

The content of the definition of “environmental information” has crucial significance for the implementation of Article 4 and Article 5 of the Convention by Parties.³⁶⁶

³⁶³ Nagy, M.T., *op cit.*, (2004), p. 33.

³⁶⁴ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 55.

³⁶⁵ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 55.

³⁶⁶ It should be noted that the Convention does not define “environment” or “environmental” and therefore, the meaning of “environmental information”, defined by Article 2, paragraph 3 (Definitions) of the Convention is the closest to the meaning of “environment” and “environmental”.

In the Convention, the definition of “environmental information” is divided into three categories. According to Article 2, paragraph 3 of the Convention “environmental information” means any information in written, visual, aural, electronic or any other material form³⁶⁷ on: (a) the state of elements of the environment (such as air and atmosphere, water, soil, land, landscape, natural sites, biological diversity³⁶⁸ and its components³⁶⁹, including genetically modified organisms³⁷⁰), and the interaction among these elements; (b) factors (such as substances, energy, noise and radiation)³⁷¹ and activities or measures (including administrative measures, environmental agreements, policies, legislation, plans and programmes)³⁷² affecting or are likely to affect the elements of the environment. The subparagraph also includes cost-benefit and other economic analysis and assumptions used in environmental decision-making³⁷³; (c) the state of human health and safety³⁷⁴, conditions of human life³⁷⁵, cultural sites³⁷⁶ and built

³⁶⁷ Paper documents, photographs, illustrations, video and audio recordings and computer files are all examples of information in the material form. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 35.

³⁶⁸ Article 2 of the Convention on Biological Diversity defines the term biological diversity as “. . . the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”. *Convention on Biological Diversity* (1992).

³⁶⁹ Tangible entities identifiable as a specific ecosystem are deemed to be components of biodiversity. A Guide to the Convention on Biological Diversity (IUCN, 1994), p. 16.

³⁷⁰ According to Article 2, paragraph 2 of Council Directive of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (90/220/EEC), genetically modified organism (GMO) “means an organism in which the genetic material has been altered in a way that does not occur naturally by mating and/or natural recombination”. *Official Journal*, L117, pp.15-27.

³⁷¹ These factors can be characterized as physical or natural agents. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 37.

³⁷² It has been argued that for example, information concerning to planning in transport or tourism would be also covered by the definition. *Ibid.*, p. 38.

³⁷³ This is background information that could be very important for the estimation of decisions by third parties. Lee, M. and Abbot, C. “The Usual Suspects? Public Participation Under the Aarhus Convention” (2003) 66 *Modern Law Review* 80, p. 89. By referring to cost-benefit and other economic analysis the Convention emphasizes that the environment exists in a socio-economic context and that environmental decisions are as much about economic assessment e.g. decisions on transport and energy policies. Wilsher, D. *op cit.*, (2001), p. 682.

³⁷⁴ “Human health” may include diseases and health conditions attributable to or caused by changes in environmental conditions and “human safety” may include safety from harmful substances such as chemicals, factors such as radiation or other natural and man-made conditions that affect it through environmental elements. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 38.

³⁷⁵ Conditions of life may include quality of air and water, housing and workplace conditions, various social conditions etc. *Ibid.*

³⁷⁶ Article 1 of the Convention Concerning the Protection of the World Cultural and Natural Heritage defines “cultural sites” as “works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

structures,³⁷⁷ inasmuch as they are or may be affected by the state of the elements of the environment, or through these elements, by the factors, activities or measures mentioned.

The Convention defines “environmental information” very broadly.³⁷⁸ This definition is wider than earlier instruments.³⁷⁹ This definition was applauded by NGOs.³⁸⁰ It has been argued that this definition will make it more difficult to avoid the release of information on irrelevant grounds.³⁸¹ The definition includes “not only environmental quality and emissions data, but also information from decision-making processes and analyses”.³⁸² “Activities or measures” in Article 2, paragraph 3(b) includes decisions on specific activities, such as permits, licenses and permissions.³⁸³ The definition “recognizes the importance of administrative techniques of environmental decision making, allowing a potentially important insight into the rationales for a decision”.³⁸⁴ The lists provided by Article 2, paragraph 3 are non-exhaustive.³⁸⁵ It is noteworthy that the notion of environmental information is found throughout the treaty.³⁸⁶

2.3.1.3 Public Authority

It should be noted that the Convention imposes the main thrust of its obligations on public authorities.³⁸⁷ The Convention is focused on public authorities.³⁸⁸ It can be argued that the meaning of “public authority” under Article 2, paragraph 2, has great significance for the implementation of the Aarhus Convention by Parties.

³⁷⁷ “Built structures” imply man-made constructions e.g. dams, bridges, and small constructions and even covers landscaping or other transformation of the natural environment. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 38.

³⁷⁸ Birnie, P. and Boyle, A. *op cit.*, (2002), p. 263.

³⁷⁹ Sands, P. *op cit.*, (2003), p. 858.

³⁸⁰ Pruzin, D. *Environmental Information: Convention on Public Participation Signed by the European Environmental Ministers, International Environmental Daily* (BNA), June 26, 1998; NGO Conference, NGO Resolution on the Public Participation Convention (last modified in June 22, 1998); McAllister, S. T. *op cit.*, (1999), p. 190.

³⁸¹ Pruzin, D. *op cit.*, (1998); McAllister, S. T. *op cit.*, (1999), p. 191.

³⁸² Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 5.

³⁸³ *Ibid.*, p. 37.

³⁸⁴ Holder, J. and Lee, M. *op cit.*, (2007), p. 102.

³⁸⁵ Wates, J. *op cit.*, (2005), p. 4.

³⁸⁶ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 5.

³⁸⁷ Wates, J. *op cit.*, (2005), p. 3.

³⁸⁸ Holder, J. and Lee, M. *op cit.*, (2007), p. 105.

Article 2, paragraph 2 gives a definition of “public authority”. According to paragraph 2 (a), the definition of “public authority” covers “[g]overnment at national, regional and other level”. All governmental authorities of whatever function, including authorities without environmental responsibilities, and at whatever level, including local or municipal government offices in towns and villages, are covered by subparagraph (a).³⁸⁹ This means that governmental institutions “from all sectors and at all levels” are covered by the subparagraph.³⁹⁰

According to paragraph 2 (b), the definition of “public authority” covers “[n]atural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.” “Public administrative functions” are usually performed by governmental authorities in compliance with national law.³⁹¹ “Functions” implies that the nature of the organ is not significant, but its specific duties and powers play a crucial role.³⁹² In subparagraph (b), references in the environmental field do not mean that the particular person necessarily has to operate in the field of the environment: they are provided as examples of public administrative functions and for the placing of emphasis.³⁹³ This definition covers private bodies that perform the duties of a public administration nature.³⁹⁴ By this definition, environmental regulatory agencies are brought within the sphere of the Aarhus Convention, thus avoiding a gap in the rights to environmental information.³⁹⁵

According to paragraph 2 (c), the definition of “public authority” covers “[a]ny other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b)”. Thus, bodies not part of the state can have obligations under the Convention if they fall under the

³⁸⁹ Brady, K. “New Convention on access to information and public participation in environmental matters” (1998) Vol. 28/2 *Environmental Policy and Law*, p. 3; Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 32; A. Kiss, *op cit.*, (2003), p. 41.

³⁹⁰ Wates, J. *op cit.*, (2005), p. 3.

³⁹¹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 32.

³⁹² Wilsher, D. *op cit.*, (2001), p. 681.

³⁹³ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 32.

³⁹⁴ Wilsher, D. *op cit.*, (2001), p. 681.

³⁹⁵ Holder, J. and Lee, M. *op cit.*, (2007), p. 106.

definition.³⁹⁶ It has been argued that this provision reflects the definition of “emanation of the State” by the European Court of Justice (ECJ).³⁹⁷

According to paragraph 2 (d), the definition of “public authority” covers “[t]he institutions of any regional economic integration organization referred to in Article 17 which is a Party to this Convention”. The European Community (EC) is an example of such an organization and the Convention expressly applies to its institutions.³⁹⁸ The EC is the type of organization described in article 17 and represents the only party to the Aarhus Convention that is not a country.³⁹⁹

The end of paragraph 2 states that “[t]his definition does not include bodies or institutions acting in a judicial or legislative capacity.” However, the eleventh paragraph of the preamble of the Aarhus Convention invites “. . . legislative bodies to implement the principles of this Convention in their proceedings”.⁴⁰⁰

³⁹⁶ Wilsher, D. *op cit.*, (2001), p. 681.

³⁹⁷ Antonelli, A. and Biondi, A. “Implementing the Aarhus Convention: Some Lessons From The Italian Experience” (2003), *Environmental Law Review*, p. 173. The ECJ in *Foster, A. and others v. British Gas Plc* gave the following definition of the “emanation of the state”: “a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond that which result from the normal rules applicable in relations between individuals”. Case C-188/89, [1990], Judgment of the Court of 12 July 1990. - *A. Foster and others v British Gas plc. European Court reports 1990 Page I-03313*. Privatized industries, formerly providing public services fall under this ECJ definition of “emanation of the state”. See “Emanations of the state”, available at <<http://www.euroworld.europa.eu/areas/industrialrelations/dictionary/definitions/emanationsofthestate.htm>>, [accessed on 8th February 2009].

³⁹⁸ Birnie, P. and Boyle, A. *op cit.*, (2002), p. 263.

³⁹⁹ Kremlis, G-S. “*The Aarhus Convention and its Implementation in the European Community*”, Seventh International Conference on Environmental Compliance and Enforcement, 9-15 April 2005, p. 142. The European Community signed the Convention on 25 June 1998, in accordance with Article 17 (Signature) of the Convention and approved it on 17 February 2005, in accordance with Article 19 (Ratification, Acceptance, Approval and Accession) of the Convention. See the document - 2005/370/EC: Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. OJL 124, 17/05/2005 p. 0001-0003; For the dates of signature and approval of the Convention by the EC See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Participants*, available at <http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm> [accessed on 12th April, 2008].

⁴⁰⁰ It should be noted that Article 8 (Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments) obliges Parties to promote public participation in the drafting process by public authorities of executive regulations and legally binding rules that may significantly affect the environment. This means that public authorities involved in law-drafting are not considered by the Convention as bodies or institutions acting in a “legislative capacity”.

2.3.1.4 *The Public*

The term “the public” can be found throughout the Convention therefore the definition of “the public” has paramount significance for its implementation.

According to Article 2, paragraph 4, “the public” denotes “. . . one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”. The term “the public” in the Convention does not mean the public sphere or forum, but denotes the sum total of all the potential actors of a society.⁴⁰¹ “The public” under the definition applies the “any person” principle.⁴⁰² This paragraph also covers NGOs and other groups that are established in accordance with national legislation.⁴⁰³ Article 3, paragraph 4 requires Parties to provide appropriate recognition of and support to environmental NGOs within a legal framework.⁴⁰⁴ Article 3, paragraph 9⁴⁰⁵, requires that no person should be excluded from the definition of “the public” on the grounds of citizenship, domicile, citizenship, or place of registered seat and this means that in some cases non-citizens may also have rights under the Convention: for example, the right of access to information under Article 4 applies to non-citizens and non-residents alike.⁴⁰⁶ Because of the non-discrimination provision in Article 3, paragraph 9, the term “public” does not limit itself to the UNECE region and it can imply a global public.⁴⁰⁷ It should be noted here that Article 3, paragraph 8,

⁴⁰¹ Rodenhoff, V. *op cit.*, (2002), p. 344.

⁴⁰² Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 39.

⁴⁰³ Nagy, M.T. *op cit.*, (2004), p. 10.

⁴⁰⁴ According to Article 3, paragraph 4, “Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.”

⁴⁰⁵ Article 3, paragraph 9 states: “[w]ithin the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.”

⁴⁰⁵ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 39.

⁴⁰⁶ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 39.

⁴⁰⁷ Rodenhoff, V. *op cit.*, (2002), p. 345, footnote 20. p. 345. When dealing with the communication against Ukraine, the Compliance Committee of the Aarhus Convention made it clear that “[f]oreign or international nongovernmental environmental organizations that have similarly expressed an interest in or concern about the procedure” would generally also fall under the definition laid down in Article 3, paragraph 4. Ukraine ACCC/C/2004/03 and ACCC/2004/; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 26. available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf>> [accessed on 18th October, 2008]. It should be noted that the foreign organizations referred to are organizations established in another country Andruskevych, A. Alge, T. and Clements, C. *op cit.*, (2008), p. 11.

prohibits persecution, penalization or harassment of persons for seeking exercise of their rights in accordance with the Convention.⁴⁰⁸

2.3.1.5 Who Can Request Information?

According to paragraph 1 (a), Parties are obliged to ensure that public authorities, in response to a request, disclose environmental information to the public without any interest having to be stated. Under Article 4, individuals who request information, “do so as interested citizens” and there is no requirement to demonstrate a particular interest in the case.⁴⁰⁹ Any member of the public, whether a person or organization, can make a request under Article 4 for environmental information without having to justify the enquiry.⁴¹⁰ Under Article 4, every person has the right to request environmental information regardless of nationality, state, age, gender etc.⁴¹¹ This provision, in fact, creates an “any person” right.⁴¹² According to this provision there is no requirement of standing.⁴¹³ “[E]ach and every individual” may request environmental information.⁴¹⁴

2.3.1.6 Timescale for Responses

Under paragraph 2, environmental information must be made available as soon as possible and at the latest within one month after submission of the request, unless one can apply the exception rule in the case of voluminous or complex information, allowing an extension of up to another one month period. When the request concerns the viewing of files in a public office, “as soon as possible” can mean within a few days.⁴¹⁵ It should be emphasized that the time limits provided by paragraph 2 constitute ceilings and the Convention obliges Parties to supply information in a shorter time-

⁴⁰⁸ According to Article 3, paragraph 8, “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings”.

⁴⁰⁹ Rose-Ackerman, S. and Halpap, A. A. *op cit.*, (2001), p. 4; Ebbeson, J. *op cit.*, (2007), p. 698.

⁴¹⁰ McAllister, S. T. *op cit.*, (1999), p. 190; Parliamentary Office of Science and Technology, The United Kingdom Parliament, *op cit.*, (2006), p. 2.

⁴¹¹ Nagy, M.T., *op cit.*, (2004), p. 32.

⁴¹² Wates, J. *op cit.*, (2005), p. 3.

⁴¹³ McCracken, R. and Jones, G. “The Aarhus Convention” (2003), *Journal of Planning and Environmental Law* 802, p. 4.

⁴¹⁴ Kravchenko, S. *What is the Aarhus Convention? Citizens’ environmental rights under the Aarhus Convention* (PLAN 2000 INC), p. 4.

⁴¹⁵ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 56.

frame whenever possible.⁴¹⁶ The “one month” time period reflects the present reality that information can be supplied by email or released by a CD-Rom.⁴¹⁷ If the request concerns voluminous or complex information, the one month time limit can be extended by a further month.⁴¹⁸ Paragraph 2 also requires public authorities to inform applicants of an extension and the reasons justifying such an extension.

2.3.1.7 Onward Referral of Requests

Under Article 4, paragraph 5, a public authority which does not hold the information requested, must, “as promptly as possible”, either inform the applicant of the public authority which might hold such information or transfer the request to the public authority which it believes to be the proper one and to inform the applicant accordingly. Paragraph 5 reflects the principle according to which public authorities have a collective responsibility to deal with requests, irrespective of the particular recipient of the request.⁴¹⁹ It is noteworthy that Article 4, paragraph 3 (a) allows a public authority to refuse a request if it does not hold the requested information. As for the obligation to take actions “as promptly as possible”, it should be noted that some countries have much shorter time limits for referrals than for the release of environmental information.⁴²⁰

It has been emphasized that Article 4 is silent on the presentation of information.⁴²¹ The presentation of environmental information in a way that only a specialist can comprehend, can be seen as a limitation on access to environmental information.⁴²²

Article 4 of the Convention creates varying degrees of obligation for Parties and public authorities by imposing a general obligation to create a system whereby members of the public can request and receive information from public authorities.⁴²³ Under this general obligation, Parties and public authorities have some flexibility as to how to implement it at a domestic level.

⁴¹⁶ Nagy, M.T., *op cit.*, (2004), p. 34.

⁴¹⁷ Davies, P. “Public Participation, the Aarhus Convention, and the European Community” in Zillman, D. Lucas, A. and Pring, G. (eds.), *Human Rights in natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002), p. 162

⁴¹⁸ Brady, K. *op cit.*, (1998) p. 4.

⁴¹⁹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 63.

⁴²⁰ *Ibid.*

⁴²¹ Holder, J. and Lee, M. *op cit.*, (2007), p. 105.

⁴²² *Ibid.*

⁴²³ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 51, 53.

S. Stec and S. Casey-Lefkowitz suggest that Parties and public authorities may wish to implement requirements under Article 4 by: adopting domestic legislation on access to environmental information; informing the public which public authority holds which type of environmental information; setting clear time limits for the disclosure of information; establishing or maintaining a system helping the public to direct requests in an appropriate manner, etc.⁴²⁴

2.3.1 “Active” Access to Information

In addition to making available information upon request, Parties must be proactive.⁴²⁵ “Active” access to information under Article 5 implies the obligations of public authorities to collect and disseminate environmental information without request. Where there is an obligation of the public authorities to supply information to “the public”, the term cannot mean “one or more natural or legal persons” and the public authority cannot meet the obligation by supplying information only to a person of its choice.⁴²⁶ Article 5 sets out a positive obligation to actively disseminate environmental information.⁴²⁷ This positive obligation to supply information is also called “the right to know”.⁴²⁸ Article 5 identifies various forms of collection and dissemination of information.⁴²⁹ It has been argued that active dissemination of information can reduce the number of requests for information and therefore save the time of the public authorities.⁴³⁰

2.3.1.1 Possession and the Updating of Environmental Information

Article 5, paragraph 1 (a), requires each Party to ensure that a public authority possesses and updates environmental information relevant to its functions. This is quite a general obligation imposed on public authorities.⁴³¹ In order to implement this obligation, Parties can establish systems ensuring a systematic flow of

⁴²⁴ *Ibid.*, pp. 50-51.

⁴²⁵ Kiss, A. *op cit.*, (2003), p. 41.

⁴²⁶ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 39.

⁴²⁷ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 294.

⁴²⁸ Popovic, N. “The right to participate in decisions that affect the environment”, *Pace Environmental Law Review* (1993), Vol. 10, pp. 697-699. The notion of “right-to-know” has been developed in the US and it implies: “... first, an obligation on the part of the state to collect and make available the information; and second, an obligation on the part of operators of potentially harmful activities to transmit relevant information about their activities to the competent authorities”. Ebbeson, J. “The Notion of Public Participation in International Environmental Law” (1997) Vol. 8, *Yearbook of International Environmental Law*, p. 89.

⁴²⁹ Jendroska, J. *op cit.*, (1998), p. 38.

⁴³⁰ Nagy, M.T. *op cit.*, (2004), p. 17.

⁴³¹ Wates, J. *op cit.*, (2005), p. 4.

information from operators, monitoring systems, and researchers to the relevant public authorities.⁴³² The obligation under the subparagraph covers information produced by public authorities and information received from third parties as well.⁴³³ The obligation under the subparagraph (a) implies the creation of a trustworthy system for information collection, such as is described in Article 5, paragraph 1 (b), and the creation of trustworthy systems for information storing, such as is described in Article 5, paragraph 2 (b).⁴³⁴ The Compliance Committee of the Aarhus Convention made quite an interesting interpretation of this provision when dealing with the communication against Ukraine. The Committee stated that “public authorities should possess information relevant to its [sic] functions, including that on which they base their decisions, in accordance with Article 5, paragraph 1, and should make it public, subject to exemptions specified in article 4, paragraph 3 and 4”.⁴³⁵

2.3.1.2 Mandatory Systems

Paragraph 1 (b), requires the establishment of mandatory systems for ensuring an adequate flow of information to public authorities on proposed and existing activities having the potential to “significantly affect the environment”. It should be taken into consideration that Article 6, (Public Participation in Decisions on Specific Activities), paragraph 1 (b), uses the term “a significant effect on the environment”. Paragraph 1 (b) imposes certain obligations on public authorities with regard to the collection of information from private entities.⁴³⁶ For the implementation of subparagraph (b), Parties can create various obligations for public or private actors.⁴³⁷ According to Stec and Casey-Lefkowitz, the elements of possible information flow systems are: (i) monitoring of emissions and environmental quality by public authorities; (ii) the conducting of environmental research by public authorities; (iii) the regular monitoring of emissions by operators; (iv) the keeping of records of emissions by operators; (v) the

⁴³² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 68.

⁴³³ Schram, F. “Public Access to EU Environmental Documents – Regulation (EC) No. 1049/2001” (2005) Vol. 5 *The Yearbook of European Environmental Law* 23, p. 60.

⁴³⁴ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 68.

⁴³⁵ Ukraine ACCC/C/2004/03 and ACCC/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 31. available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf>> [accessed on 20th October, 2008].

⁴³⁶ Holder, J. and Lee, M. *op cit.*, (2007), p. 105.

⁴³⁷ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 69.

reporting by operators to the public authorities of the emissions monitoring data; (vi) the keeping by public authorities of records of information submitted in the procedure of granting permits and licensing.⁴³⁸ In its decision against Romania, the Compliance Committee of the Aarhus Convention stated: “Article 5, paragraph 1, of the Convention requires public authorities to possess and update information relevant to their functions, and requires Parties to establish mandatory systems ensuring an adequate flow of information about proposed and existing activities which may significantly affect the environment. It is the understanding of the Committee that as a minimum this should include EIA studies in their entirety, including specific methodologies of assessment and modelling techniques used in their preparation”.⁴³⁹

2.3.1.3 Emergency Information

When there is an imminent threat to human health or to the environment, it does not matter whether caused by human actions or natural causes, paragraph 1 (c), requires public authorities to disseminate immediately all information which could enable the members of the public to prevent or lessen harm arising from the threat, and which is held by them, to those members of the public who may be affected. Paragraph 1 (c) contains “emergency” provisions on information dissemination.⁴⁴⁰ The government has a special obligation to disclose certain information in the event of an imminent threat to human health or the environment.⁴⁴¹ According to paragraph 1 (c) actual harm is not a precondition for information dissemination.⁴⁴² Information that could enable members of the public to take preventive or mitigatory steps can encompass: “safety recommendations, predictions about how the threat could develop, results of investigations, reporting on remedial and preventive actions, etc.”⁴⁴³ Dissemination of information under paragraph 1 (c) can be done through radio, newspaper and television announcements and it has the potential to save lives and prevent damage in emergencies.⁴⁴⁴ It has been argued that where there is an imminent threat to human health or to the environment, the

⁴³⁸ *Ibid.*

⁴³⁹ Romania ACCC/C2005/15; EC/MP.PP/2008/5/Add.7 16 April 2008. para. 27. available at <http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_7_e.pdf> [accessed on 16th October, 2008]

⁴⁴⁰ Holder, J. and Lee, M. *op cit.*, (2007), p. 110.

⁴⁴¹ Kiss, A. *op cit.*, (2003), p. 42.

⁴⁴² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 70.

⁴⁴³ Nagy, M.T. *op cit.*, (2004), p. 22.

⁴⁴⁴ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 70.

public authority has to disseminate information under paragraph 1(c), since it is unlikely that the public authority would be able to claim exceptions under article 4.⁴⁴⁵

2.3.1.4 Transparency and Effective Accessibility of Information

According to Article 5, paragraph 2, Parties must ensure that, within the framework of their national laws, the way in which environmental information is made available to the members of the public is transparent and that information is effectively accessible. This is a quality guarantee regarding the way information is to be made available.⁴⁴⁶ Simply having a law on access to information does not guarantee access in practice and thus when public authorities make information available, they must do this openly and ensure a real accessibility of the information.⁴⁴⁷ Reference to national legislation means that Parties must incorporate obligations and mechanisms provided for in paragraph 2 into their national laws and it also means that Parties can be flexible when implementing this paragraph in the framework of their national laws.⁴⁴⁸ Transparency means that members of the public understand the origin of environmental information, the criteria for its collection, holding and dissemination, and how to access it.⁴⁴⁹ It has been argued that “effectively accessible” means that the information that is made available, should be in the form of systems allowing easy and effective access.⁴⁵⁰ Subparagraphs (a), (b) and (c) of paragraph 2 list some of the mechanisms for achieving transparency and effective accessibility.

2.3.1.4.1 “Meta-information”

According to paragraph 2 (a), transparent systems for the provision of environmental information and effective accessibility of environmental information must be ensured, *inter alia*, by giving sufficient information to the members of the public on “the type and scope” of information possessed by public authorities, “the terms and conditions under which information is made available and accessible”, and the process whereby it can be obtained. Subparagraph (a) requires Parties to make available information, free of charge, on information i.e.

⁴⁴⁵ *Ibid.*, p. 84.

⁴⁴⁶ Schram, F. *op cit.*, (2005), p. 61.

⁴⁴⁷ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 71.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Nagy, M.T. *op cit.*, (2004), p. 24.

meta-information.⁴⁵¹ Meta-information means information about information.⁴⁵² Public authorities can provide to the public information described in subparagraph (a) through announcements in government publications, government web sites, television or radio.⁴⁵³

2.3.1.4.2 Practical Arrangements

According to paragraph 2 (b), transparent systems for the provision of environmental information and effective accessibility of environmental information must be ensured, *inter alia*, by “establishing and maintaining practical arrangements”, such as (i) “lists, registers or files” that are publicly accessible; (ii) supporting the public in seeking access to information; (iii) “the identification of points of contact”. Under subparagraph 2 (c), access to environmental information contained in lists, registers or files provided for by subparagraph (b) (i) must be free of charge. Lists, registers and files that are publicly accessible denote systems for information storing that allow easy and effective access.⁴⁵⁴ Registers can contain information on a concrete decision-making case, environmental impact assessment, or the granting of permits or licensing.⁴⁵⁵ Subparagraph (b) (ii) is a restatement of the obligation provided for in Article 3, paragraph 2, requiring officials to assist and provide guidance to members of the public, *inter alia*, in seeking access to environmental information. In order to implement subparagraph (b) (iii) “[p]arties can consider identifying individual points of contact in specific cases, such as environmental impact assessment, permitting, or rule-making”.⁴⁵⁶ An effective way of establishing the above points of contact is through creating a specific environmental information office, service or centre.⁴⁵⁷

2.3.1.5 Dissemination of Documents Relating to the Environment

According to Article 5, paragraph 5, Parties must take measures within the framework of their national legislations to disseminate; (a) legislation and policy documents such as the texts of “strategies, policies, programmes and action plans relating to the environment”, and their implementation progress reports, prepared

⁴⁵¹ *Ibid.*, p. 23.

⁴⁵² *Ibid.*

⁴⁵³ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 72.

⁴⁵⁴ Nagy, M.T. *op cit.*, (2004), p. 24.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 74.

⁴⁵⁷ Nagy, M.T. *op cit.*, (2004), p. 26.

by governmental bodies of various levels; (b) “international treaties, conventions and agreements on environmental issues”; (c) other important international documents on environmental issues. International treaties, conventions and agreements are legally binding international documents that are governed by international law.⁴⁵⁸ It has been argued that one way to disseminate international environmental treaties, conventions and agreements is through publication and another way is through the Internet.⁴⁵⁹

It has been argued that article 5 addresses the rather neglected issue of the duties of the authorities.⁴⁶⁰ Article 5 creates a variety of positive and innovative obligations for Parties to the Convention.⁴⁶¹ Article 5 imposes varying degrees of obligations for Parties and public authorities and creates a general obligation to establish a system enabling public authorities to collect environmental information and to actively disseminate it to the public on its own initiative.⁴⁶² Under this general obligation, Parties and public authorities have some flexibility on how to implement it at a domestic level. It is good practice to disseminate the following types of information such as that which: a) is of broad public interest; b) affects many people; c) is frequently requested by the public.⁴⁶³

It has been argued that despite exemptions, the access to information pillar of the Convention contains extensive and comprehensive provisions on information and right-to-know.⁴⁶⁴ It has been argued that the access-to-information pillar is the “most detailed element” of the Convention and is the clearest obligation arising from the Convention.⁴⁶⁵ Two parts of the access to information pillar of the Convention are more advanced than previous treaties in specifying the various obligations of Parties and in demanding systems for the dissemination of information.⁴⁶⁶ Lee and Abbot argue that the access to information pillar of the convention is the strongest and least controversial: however it is in fact not fully straightforward.⁴⁶⁷ According to these authors some articles are vague and the

⁴⁵⁸ *Vienna Convention on the Law of Treaties* (1969).

⁴⁵⁹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 78.

⁴⁶⁰ Jendroska, J. *op cit.*, (1998), p. 38.

⁴⁶¹ Sands, P. *op cit.*, (2003), p. 859.

⁴⁶² Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 51.

⁴⁶³ Nagy, M.T. *op cit.*, (2004), p. 17.

⁴⁶⁴ Rose-Ackerman, S. and Halpap, A.A. *op cit.*, (2001), p. 4.

⁴⁶⁵ Holder, J. and Lee, M. *op cit.*, (2007), p. 101; Antonelli, A. and Biondi, A. *op cit.*, (2003), p. 2.

⁴⁶⁶ Ebbesson, J. *op cit.*, (2002), p. 2.

⁴⁶⁷ Lee, M. and Abbot, C. *op cit.*, (2003), p. 93.

convention does not solve the dilemma of the presentation of information: the raw data can be useful only to experts and explanations do not exclude manipulation.⁴⁶⁸

2.4 Public Participation in Environmental Decision-making

Article 6 regulates public participation in decisions on proposed activities with a potentially significant effect on the environment. Article 6 reflects the principle according to which those affected should enjoy the right to influence the process of decision-making.⁴⁶⁹ Article 6 provides a detailed framework for public participation.⁴⁷⁰ Article 6 requires Parties to ensure possibilities of public participation in decision-making by public authorities on permitting or licensing the proposed activities with a potentially significant environmental impact.⁴⁷¹

It has been noted that the absence of proper access to information, as provided for by the Convention, will result in a lessening of the effectiveness of public participation in decision-making.⁴⁷² It has been noted that without access to environmental information, it is hard to participate in decision-making.⁴⁷³ Public participation is the right of individuals to be informed about and to take part in decisions that affect their lives and environment.⁴⁷⁴ Individuals should be able to obtain information on proposed projects and actions that have the potential to damage their environment and these people should also be given the possibility of taking part in decision-making concerning such proposals.⁴⁷⁵ Public participation, at a minimum, requires effective notification, adequate information, appropriate procedures, and the taking of due account of the outcome of public participation.⁴⁷⁶ It has been argued that access to environmental information is ensured in two ways by the Convention: the first pillar ensures access to environmental information, and

⁴⁶⁸ *Ibid.*

⁴⁶⁹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 86.

⁴⁷⁰ Holder, J. and Lee, M. *op cit.*, (2007), p. 111.

⁴⁷¹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 89.

⁴⁷² Stookes, P. *op cit.*, (2005), pp. 33-34.

⁴⁷³ Paradissis, J. and Purdue, M. "Access to Environmental Justice in the United Kingdom" in Harding, A. (ed.) *Access to Environmental Justice: A comparative Study* (Leiden, 2007), chapter 11.

⁴⁷⁴ Saladin, C. *op cit.*, (2003), p. 57.

⁴⁷⁵ Kiss, A. *op cit.*, (2003), p. 32.

⁴⁷⁶ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 85.

the second ensures access to environmental information to those who enjoy the right of participation.⁴⁷⁷

2.4.1 Requirement of Public Participation

According to Article 6, paragraph 1(a), Parties are required to apply provisions of Article 6 with regard to decisions on whether to permit proposed activities⁴⁷⁸ that are listed in annex I (List of Activities Referred to in Article 6, paragraph 1 (a)). The term “decisions” in subparagraph (a) means mainly administrative decisions that are made to permit projects, activities or actions - for example, spatial-planning decisions, development consents, permits for operating, permits for construction, for use of natural resources or for discharge of pollutants into water, air or soil.⁴⁷⁹ It should be stressed that the establishment of a licensing or permitting procedure is not required by Article 6, but when such a procedure exists, Article 6 must be implemented.⁴⁸⁰ It has been argued that in all countries some kind of governmental approval is needed in order to carry out those activities listed in annex I.⁴⁸¹ It is presumed that activities listed in annex I⁴⁸² are those activities with a potentially significant environmental impact, for example pipelines for the transport of oil or gas.⁴⁸³ According to annex I, paragraph 20, activities not covered by the list in the annex, are subject to the application of the provisions of Article 6, if for them public participation is a requirement under an

⁴⁷⁷ Schram, F. *op cit.*, (2005), p. 50.

⁴⁷⁸ The Aarhus Convention does not define the phrase “proposed activity”, however this phrase is defined by the Convention on Environmental Impact Assessment in a Transboundary Context, the so called Espoo Convention, as “any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure”. Article 1 (v), *Convention on Environmental Impact Assessment in a Transboundary Context* (1992)

⁴⁷⁹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 90.

⁴⁸⁰ *Ibid.*, p. 89.

⁴⁸¹ *Ibid.*

⁴⁸² Annex I is based on the annexes of (a) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (*Official Journal* L 175, 05/07/1985 P. 0040-0048), as amended by Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (*Official Journal* L 053, 14/03/1997 P. 0005), (b) Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) and (c) Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (*Official Journal* L 257, 10/10/1996 P. 0026-0040), the so called IPPC Directive. Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 163.

⁴⁸³ *Ibid.*, p. 92. These are activities undertaken in: the energy sector, including mineral oil and gas refineries; the production and processing of metals; the mineral industry; the chemical industry; waste management, including installations for specific incineration and installations for the disposal of non-hazardous waste exceeding a certain amount per day; specific industrial plants; extraction of petroleum for commercial purposes where the amount exceeds 500 tons per day; pipelines for the transport of oil with a diameter of more than 800 mm and more than 40 km in length; installations for the storage of petroleum with a capacity of 200, 000 tons, etc.

EIA procedure in accordance with domestic legislation. According to annex I, paragraph 22, any change to or extension of activities must be subject to Article 6, paragraph 1 (a), if such a change or extension meets the threshold provided for in the annex. Paragraph 22 further states that other changes or extension of activities must be subject to Article 6 paragraph 1 (b). Paragraph 1 (b) requires Parties, in accordance with their national laws, also to apply the provisions of Article 6 with respect to decisions on proposed activities which are not contained in annex I and which may have a significant effect on the environment.⁴⁸⁴ According to paragraph 1 (c) a Party may decide, “on a case-by-case basis if so provided under national law”, not to apply Article 6 with respect to proposed activities that serve national defence purposes, if it believes that the application of Article 6 would have an adverse affect on the purposes mentioned.⁴⁸⁵

⁴⁸⁴ The Convention does not give a definition of “significant”: therefore it can be helpful to look at appendix III (General Criteria to assist in the determination of the environmental significance of activities not listed in Appendix I) of the Espoo Convention. According to appendix III, paragraph 1 (“General Criteria to assist in the determination of the environmental significance of activities not listed in Appendix I”), “In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria: (a) *Size*: proposed activities which are large for the type of the activity; (b) *Location*: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population; (c) *Effects*: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.” Paragraph 1, appendix III, *Convention on Environmental Impact Assessment in a Transboundary Context*. It should be noted that according to Article 1, paragraph 1 of the EC EIA Directive (as amended): “This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment”. According to Article 4, paragraphs 2 and 3 of the EC EIA Directive (as amended), annex III sets out criteria to be used when determining whether proposed projects listed in annex II are likely to have “significant” effects on the environment and therefore should be subject to assessment under the Directive. It should also be noted that, for example, the UK has developed guidelines (see DETR Circular 2/99, *Environmental Impact Assessment* (WO 11/99) in order to determine “significance”.

⁴⁸⁵ It should be noted that according to Article 1, paragraph 4 of the EC EIA Directive (as amended): “Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes.” It should also be noted that according to paragraph 3, article 2 of the EC EIA Directive (as amended): “Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive. In this event, the Member States shall: (a) consider whether another form of assessment would be appropriate; (b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it; (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable to their own nationals.” The European Commission gives clarification on the application of “exceptional cases” in Article 2, paragraph 3, see European Commission (2006), Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive), as amended: Clarification of the Application

The first impression can be that Article 6 refers simply to public participation in the decision-making procedure requiring “environmental impact assessment” (EIA), but whether Article 6 applies to a decision-making procedure depends on whether the decision-making itself may have a potentially significant effect on the environment and not on whether that procedure includes EIA.⁴⁸⁶ It should be noted that despite the fact that Article 6 does not refer exclusively to decisions requiring EIA, these are the most important form of decision-making which are subject to Article 6.⁴⁸⁷ Although the Aarhus Convention does not create an EIA regime per se, Article 6 of the Convention establishes a certain kind of review of environmental impacts of proposed activities in the process of decision-making, since it is explicit in the treaty that comments on environmental matters made by the public concerned must be taken into account.⁴⁸⁸ Article 6 assumes a legal basis providing for taking environmental considerations into account in the process of decision-making and makes a link with an EIA type procedure.⁴⁸⁹ The implementation of the Aarhus Convention will require some kind of EIA.⁴⁹⁰

2.4.2 The Public Concerned

The phrase “the public concerned” can be found in the provisions of Article 6 and related provisions of Article 9 on access to justice. Thus, the meaning of this term, as defined by Article 2, paragraph 5, has great significance for the implementation of these provisions.

According to paragraph 5, article 2 (“Definitions”) “the public concerned” denotes: “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. The “public concerned” is broadly defined in Article 2, paragraph 5 of the Convention.⁴⁹¹ It

of Article 2 (3) of the EIA Directive, available at http://ec.europa.eu/environment/eia/pdf/eia_art2_3.pdf [accessed on 21st February, 2009]).

⁴⁸⁶ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 90.

⁴⁸⁷ *Ibid.*, p. 100.

⁴⁸⁸ *Ibid.*, p. 91. According to Article 6, paragraph 8, decisions on proposed activities must take due account of the outcome of public participation.

⁴⁸⁹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 114.

⁴⁹⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 293.

⁴⁹¹ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 293.

refers to “a subset of the public at large with a special relationship to a particular environmental decision-making procedure”.⁴⁹² The public affected, or likely to be affected by decision-making, includes not only local residents but also local businesses and NGOs.⁴⁹³ This term the “public concerned” is narrower than the “public” defined under paragraph 4, article 2, but it is still very broad.⁴⁹⁴ Members of the public who are most affected by the environmental decision-making should have a greater opportunity to influence the outcome and this is the rationale behind the distinction between “the public” and the “public concerned”.⁴⁹⁵ The definition of this term includes members of the public whose material rights, property rights, social rights etc, guaranteed by law, might be impaired by the proposed activity and, in addition, this definition is also applicable to members of the public with unspecified interests in the environmental decision-making.⁴⁹⁶ Paragraph 5 refers to “having an interest” and not to “having a sufficient interest”. There is no requirement to show a legal interest in order to qualify a member of the public concerned under paragraph 5 and therefore, the term may include “legal interest” as well as “factual interest”.⁴⁹⁷ NGOs that have environmental protection as one of their aims, are included in the definition.⁴⁹⁸ Whether an NGO promotes environmental protection can be determined through its charter, through by-laws or through the activities it carries out.⁴⁹⁹ It has been argued that Article 2, paragraph 5, with other relevant provisions of the Convention, create a special status of environmental NGOs which may act on behalf of public environmental interests.⁵⁰⁰ It should be noted that generally the Convention has received a positive reaction from non-governmental organizations and governments.⁵⁰¹

2.4.3 Notice on the Proposed Activity

According to Article 6, paragraph 2, the public concerned must be informed by public or individual notice at an early stage of the environmental decision-making and in an “adequate, timely and effective manner”. Paragraph 2 sets out the

⁴⁹² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 40.

⁴⁹³ Nagy, M.T. *op cit.*, (2004), p. 51.

⁴⁹⁴ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 40.

⁴⁹⁵ *Ibid.*, p. 85.

⁴⁹⁶ *Ibid.*, p. 40.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Nagy, M.T. *op cit.*, (2004), p. 51.

⁴⁹⁹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 41.

⁵⁰⁰ *Ibid.*, p. 44; J. Ebbeson, *op cit.*, (1997), p. 53.

⁵⁰¹ McAllister, S. T. *op cit.*, (1999), p. 187.

minimum requirements for the content of a notice in subparagraphs (a), (b), (c), (d) and (e). Meaningful and effective participation requires informing the public concerned that a decision is being made.⁵⁰² Under the Aarhus Convention, the public concerned must be informed in detail regarding the proposed activity early in the decision-making process.⁵⁰³ In order to participate effectively, background information must be provided.⁵⁰⁴

The phrase “environmental decision-making” refers to any decision-making which could lead to a significant environmental impact covered by virtue of Article 6, paragraph 1, and not to any decision-making classified as “environmental” by domestic law.⁵⁰⁵

It has been argued that it is the responsibility of the organizer of public participation to choose the most appropriate way of reaching various stakeholders.⁵⁰⁶ “Public notice” implies the dissemination of information to possibly a maximum number of members of the public, for example by publishing in newspapers, by broadcasting on TV, radio or the internet, or by the posting of notices in prominent places.⁵⁰⁷ “Individual notice” implies the dissemination of information to certain persons individually and this can be done by establishing special zones that can assist in the identification of potentially affected people for later individual notification.⁵⁰⁸ Individual notification can be carried out by posted letter, by placing leaflets in mailboxes, and by door-to-door visits.⁵⁰⁹ Individual notice is also significant because the “public concerned” may include NGOs that promote environmental protection.⁵¹⁰ Notice should reach that portion of the public that is most directly interested in and affected by the decision-making.⁵¹¹

Paragraph 2 confers on the public concerned the right to be notified and imposes the obligation on public authorities to notify the public concerned. It is impossible to reach every single stakeholder; however reasonable efforts must be made to reach all stakeholders.⁵¹² Stakeholders can be residents in the immediate vicinity;

⁵⁰² Saladin, C. *op cit.*, (2003), p. 63.

⁵⁰³ Kiss, A. *op cit.*, (2003), p. 42.

⁵⁰⁴ Nagy, M.T. *op cit.*, (2004), p. 52.

⁵⁰⁵ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 95.

⁵⁰⁶ Nagy, M.T. *op cit.*, (2004), p. 56.

⁵⁰⁷ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 96.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Nagy, M.T. *op cit.*, (2004), p. 56.

⁵¹⁰ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 96.

⁵¹¹ Saladin, C. *op cit.*, (2003), p. 64.

⁵¹² Nagy, M.T. *op cit.*, (2004), p. 56.

other residents of a municipality; residents of surrounding municipalities; potentially affected local businessmen within certain municipalities such as hotel owners, farmers, restaurant owners; private landowners; or they could be environmental NGOs and other community organizations.⁵¹³ It has been argued that target groups and stakeholders could be defined, for example, according to the “location (local community, regional, state or international interest), effect (directly or indirectly affected), interest (general or professional interest), sectors (private or state sector, NGOs and individuals)”.⁵¹⁴ In dealing with the communication against Kazakhstan, the Compliance Committee of the Aarhus Convention stated: “The residents living along the proposed route of the power line were obviously among the “public concerned” and, as such, they should have received notice of the hearings, including all the details required under Article 6, paragraph 2.”⁵¹⁵ According to Article 6, paragraph 2, the public concerned must be informed at an early stage of the environmental decision-making. In order for there to be an effective participation process, various stakeholders should be involved as early as possible.⁵¹⁶ It is important that reasonable attempts be made to reach all members of the public concerned: the way and amount of information that will be supplied to potential stakeholders, and the stage at which information is made available are all vital for successful public participation.⁵¹⁷

The phrase “adequate, timely and effective manner” draws attention to the practical problems related to notification.⁵¹⁸ “An adequate manner” implies that the notification includes all information that is required for effective participation.⁵¹⁹ “An effective manner” implies that the public concerned is reached by the notice and that its meaning can be readily understood.⁵²⁰

According to paragraph 2 (a), the public concerned must be informed of the proposed activity and the application relating to it. According to paragraph 2 (b), notification must include information about “the nature of possible decisions” or the draft of a decision. According to paragraph 2 (c), the public concerned must be

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*, p. 83.

⁵¹⁵ Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 23, available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf>> [accessed on 18th October, 2008].

⁵¹⁶ Nagy, M.T. *op cit.*, (2004), p. 51.

⁵¹⁷ *Ibid.*, p. 56.

⁵¹⁸ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 96.

⁵¹⁹ Nagy, M.T. *op cit.*, (2004), p. 52.

⁵²⁰ *Ibid.*

informed of the public authority that has the responsibility for decision-making. According to paragraph 2 (d), the public concerned must be informed of the envisaged procedure, including, “as and when” this information can be supplied: (i) the starting of the procedure; (ii) the opportunities for public participation; (iii) the time and place of any envisaged public hearing; (iv) an indication of the public authority that possesses the relevant information and where the relevant information can be examined by the public; (v) an indication of the public authority, or other official body to which comments or questions may be submitted and an indication of a timetable for the submission of such comments or questions; (vi) information about what environmental information relevant to the proposed activity is available. According to paragraph 2 (e), the public concerned must be informed of the fact, if the proposed activity is subject to a national or transboundary EIA procedure.

2.4.4 Reasonable Time Frames for Public Participation

According to Article 6, paragraph 3, all public participation procedures must contain reasonable time-frames for the various stages, allowing sufficient time to inform the public according to Article 6, paragraph 2, and to prepare and effectively participate in the environmental decision-making. The public must have sufficient time to prepare and participate in decision-making.⁵²¹

All stages of decision-making, where public participation takes place, must include time-frames allowing sufficient time for the implementation of the related provisions of Article 6, including time to digest the information supplied by the notification under paragraph 2, to seek supplementary information from bodies identified as public authorities in the notification, to examine available information, to prepare for participation at a public hearing or for the opportunity to comment, and to effectively participate during the environmental decision-making.⁵²² In dealing with the communication against Kazakhstan, the Compliance Committee of the Aarhus Convention stated: “. . . the fact that construction started

⁵²¹ Kiss, A. *op cit.*, (2003), p. 42.

⁵²² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 102.

before . . . hearings were held is clearly not in conformity with the requirements under article 6, paragraph 3 . . . for “reasonable time frames.”⁵²³

2.4.5 Open Options and Effective Public Participation

Article 6, paragraph 4, requires Parties to provide for early public participation, when all options are open and public participation can be effective. Paragraph 4 provides for involvement at an early stage when it is possible to influence the decision.⁵²⁴ Involvement at an early stage means that concerns can be addressed when changes may be easier to make and would need less time and money.⁵²⁵ In dealing with the communication against Albania, the Compliance Committee of the Aarhus Convention stated: “. . . public participation must take place at an early stage of the environmental decisions-making process under the Convention”.⁵²⁶ In dealing with the communication against Kazakhstan, the Compliance Committee of the Aarhus Convention stated: “. . . the fact that construction started before . . . hearings were held is clearly not in conformity with the requirements under article 6, paragraph . . . 4, for .. “early public participation, when all options are open””.⁵²⁷

2.4.6 Encouragement of Applicants

According to Article 6, paragraph 5, where appropriate, prospective applicants should be encouraged by Parties to identify the public concerned, enter into discussions, and supply information on the aims of their application before submitting it for a permit. Paragraph 5 encourages certain measures to be taken by the prospective applicants before the beginning of the decision-making proceedings and this means that it is applicable to the period before the submission

⁵²³ Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25, available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf>> [accessed on 18th October, 2008].

⁵²⁴ Nagy, M.T. *op cit.*, (2004), p. 51, 52.

⁵²⁵ *Ibid.*, p. 42.

⁵²⁶ Albania, ACCC/C/2005/12; ECE/MP.PP/C.1/2007/4/Add.1, 31 July 2007, para.71, available at <http://www.unece.org/env/documents/2007/pp/ECE_MP.PP_C_1_2007_4_Add_1.pdf> [accessed on 18th October, 2008].

⁵²⁷ Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25, available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf>> [accessed on 18th October, 2008].

of the permit application.⁵²⁸ The encouragement of prospective applicants in paragraph 5 is not mandatory.⁵²⁹ It should emphasize that the duty of Parties under paragraph 5 to encourage prospective applicants should not be viewed as a substitute for the primary obligation of Parties under the treaty.⁵³⁰ It should be stressed that in dealing with the communication against Lithuania, the Compliance Committee of the Aarhus Convention concluded: “. . . the Committee finds that the following general features of the Lithuanian legal framework as not being in compliance with article 6 of the Convention: (c) Making developers (project proponents) rather than relevant public authorities responsible for organizing public participation, including for making available the relevant information and for collecting the comments (article 6, paragraph 2 (d) (iv) and (v), and article 6, para. 6)”⁵³¹

2.4.7 Disclosure of the Relevant Information

According to Article 6, paragraph 6, the competent public authorities are required to provide the public concerned with access for examination, upon request if so provided for under domestic legislation, to all information relevant to the decision-making referred to in Article 6 that is available at the time of the public participation procedure. And this should be done without charges and as soon as this information becomes available. This should also be done without prejudice to the right of public authorities to refuse the release of information under Article 4, paragraphs 3 and 4 of the Convention. Paragraph 6 requires public authorities to make available for examination, without prejudice to Article 4, all information relevant to decision-making that is listed in subparagraphs (a) to (f).

All information that is relevant to the decision-making must be made available and this obligation means information in whatever form and not only reports or summaries.⁵³² In paragraph 6, “examination” means the possibility to read the information and to make notes.⁵³³ Paragraph 6 prohibits charges for the simple examination of information, but reasonable charges can still be imposed, for

⁵²⁸ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 103.

⁵²⁹ Holder, J. and Lee, M. *op cit.*, (2007), p. 112.

⁵³⁰ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 103.

⁵³¹ Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para 90. available at <http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf> [accessed on 10th July, 2008].

⁵³² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 104.

⁵³³ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 104.

example for photocopying, in compliance with other stipulations of the Convention.⁵³⁴ As for the “time” of the public participation procedure, it should be noted that the public participation procedure begins at the time of the transmission of the notice under Article 6, paragraph 2, and the obligation to ensure access to information is triggered by the beginning of the public participation procedure.⁵³⁵ The phrase “as soon as it becomes available” creates an obligation for public authorities to release new information to the public concerned in the same way as the original one, as soon as new information comes to light.⁵³⁶

In dealing with the communication against Ukraine, the Compliance Committee of the Aarhus Convention stated: “. . . article 6, paragraph 6, of the Convention is aimed at providing the public concerned with an opportunity to examine relevant details to ensure that public participation is informed and therefore more effective. It is certainly not limited to the publication of an environmental impact statement. But had some of the requested information fallen outside the scope of article 6, paragraph 6, of the Convention, it would still be covered by provisions of article 4, regulating access to information upon request”.⁵³⁷

Categories of information listed in subparagraphs (a) to (f) constitute a minimum standard. According to paragraph 6, the competent public authority must make accessible for examination: (a) a description of the location and the physical and technical features of the proposed activity, including an estimate of the expected residues and emissions; (b) a description of the significant environmental effects of the proposed activity; (c) a description of the measures envisaged for preventing and/or reducing the effects, including emissions; (d) a non-technical summary of the afore mentioned⁵³⁸; (e) an outline of the main alternatives analysed by the applicant; (f) in compliance with national legislation, major “reports and advice” issued to the public authority at the time of the notification, in accordance with Article 6, paragraph 2.

⁵³⁴ Nagy, M.T. *op cit.*, (2004), p. 53.

⁵³⁵ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 104.

⁵³⁶ Nagy, M.T. *op cit.*, (2004), p. 59.

⁵³⁷ Ukraine ACCC/C/2004/03 and ACCC/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 32. available at <http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf> [accessed on 18th October, 2008].

⁵³⁸ A non-technical summary allows a lay person to understand often highly technical information and thus information in this form is important for meaningful participation by the lay public. Holder, J. and Lee, M. *op cit.*, (2007), p. 112.

2.4.8 Submissions by the Public

According to Article 6, paragraph 7, public participation procedures must allow the public to submit, in written form or, as appropriate, at a public hearing or enquiry with the project applicant, “any comments, information, analyses or opinions” that it deems relevant with regard to the proposed activity. Paragraph 7 is the backbone of public participation.⁵³⁹ The right to participate includes the right to submit “comments, information, analyses or opinions” that are considered relevant.⁵⁴⁰ This paragraph differs from most other parts of Article 6, in that it grants rights to the whole public, as opposed to the “public concerned”.⁵⁴¹ Paragraph 7 “mentions two possible means for the submission of comments, information, analyses or opinions – written submissions, or public hearings or enquiries with the applicant . . . [t]he latter offer the opportunity for the applicant to present the project, and respond to questions and comments”.⁵⁴² In many UNECE countries, a public hearing may take place in the framework of the EIA process.⁵⁴³ A public hearing is a meeting of members of the public with the public authority and the applicant or proponent, where experts can also participate, and it is also a venue for interaction between stakeholders.⁵⁴⁴ At a public hearing, the public may submit its “comments, information, analyses or opinions” orally or in writing.⁵⁴⁵

2.4.9 Due Account of the Outcome of Participation

According to Article 6, paragraph 8, decisions on proposed activities must take due account of the outcome of public participation. In general, public participation implies that “[t]he public should have a right to participate in the decision-making process and have that participation taken into account in the final decision”.⁵⁴⁶ The right to participate under Article 6 includes the requirement that the outcome of public participation be taken into account.⁵⁴⁷ Public participation implies the right to affect decisions.⁵⁴⁸ Public participation implies that public authorities are open

⁵³⁹ Holder, J. and Lee, M. *op cit.*, (2007), p. 112.

⁵⁴⁰ Sands, P. *op cit.*, (2003), p. 119.

⁵⁴¹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 108.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Nagy, M.T. *op cit.*, (2004), p. 53.

⁵⁴⁶ Saladin, C. *op cit.*, (2003), p. 61.

⁵⁴⁷ Sands, P. *op cit.*, (2003), p. 119.

⁵⁴⁸ Kiss, A. *op cit.*, (2003), p. 36.

to the possibility of being influenced by public input.⁵⁴⁹ Under paragraph 8 all comments, information, analyses, or opinions must be taken into account.⁵⁵⁰ This paragraph does not oblige the public authority to accept the substance of all comments received: the decision must be based on the total amount of information, including comments, and it must be able to demonstrate a substantive reason for the rejection of a comment.⁵⁵¹ Failure to take due account of the outcome should be sufficient ground to challenge the result of decision-making in an administrative or judicial proceeding under Article 9, paragraph 2, and could result in its annulment.⁵⁵²

It is noteworthy that in dealing with the communication against Kazakhstan, the Compliance Committee of the Aarhus Convention stated: “. . . it appears that the responsible authorities treated the outcome of the hearings as if it were the outcome of public participation. This would have been more acceptable if the hearings had genuinely involved all key groupings within the public concerned. As it was, the views of those who were not invited to participate in the hearings, which apparently were expressed in other ways and were well known to the authorities, do not appear to have been taken into account”.⁵⁵³

2.4.10 Informing the Public on the Decisions Taken

According to Article 6, paragraph 9, the public must be promptly informed, according to appropriate procedures, of the decision taken by the public authority. According to this paragraph, the text of the decision, together with the reasons and consideration on which it is based, must be made accessible to the public. The right to participate includes the requirement to inform the public of the decision that is made.⁵⁵⁴ Under this paragraph all decisions must be made public, but there is no requirement for publishing decisions.⁵⁵⁵ Similar to paragraph 7, the obligation

⁵⁴⁹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 86.

⁵⁵⁰ Kiss, A. *op cit.*, (2003), pp. 42.

⁵⁵¹ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 109.

⁵⁵² Saladin, C. *op cit.*, (2003), p. 64. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 110.

⁵⁵³ Kazakhstan ACCC/C/2004/2; ECE/MP.PP/C.1/2005/2/Add.2, 14 March 2005, para. 25, available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf>> [accessed on 18th October, 2008].

⁵⁵⁴ Sands, P. *op cit.*, (2003), p. 119.

⁵⁵⁵ Kiss, A. *op cit.*, (2003), p. 43. Paragraph 6 does not impose obligation on states to publish and disseminate decisions in print. In dealing with the communication against Lithuania, the Compliance Committee of the Aarhus Convention stated: “. . . the Committee wishes to underline that the Convention does not require the decision itself to be published”. Lithuania, ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para 81. available at

under paragraph 9 implies notification to the public at large and not only to parties to the proceeding or to the public concerned.⁵⁵⁶ The public must receive notification within a time limit, allowing to challenge the decision before the proponent proceeds with an activity to the extent that the status quo cannot be kept or can be restored only at great cost.⁵⁵⁷ The provision that decisions be in written form and that these decisions state the reasons for these decisions ensures both that the public input was adequately considered by the public authority and that the public has the feeling that serious consideration is being given to its input in decision-making.⁵⁵⁸ Countries might deliver response documents directly to those people who made comments and might simultaneously make available these documents to the general public, in the light of Articles 4, 5 and 6.⁵⁵⁹

2.4.11 Reconsiderations or Updates

According to paragraph 10, paragraphs 2 to 9 of Article 6 apply *mutatis mutandis*, and where appropriate, to the reconsideration or update by a public authority of operating conditions for those activities described in paragraph 1. This means that the right to participate applies equally with regard to the reconsideration or updating of operating conditions by public authorities of the activities referred to in paragraph 1.⁵⁶⁰ “Where appropriate” in paragraph 10 may be interpreted to permit Parties not to subject reconsiderations or updating of operating conditions to Article 6, when they consider such as being inappropriate.⁵⁶¹ It should be recalled here that according to annex I, paragraph 22, changes or extensions of activities must be subject to Article 6, paragraph 1 (a), if a change or extension meets the threshold set out in the annex. Paragraph 22 further states that any other change or extension of activities must be subject to Article 6, paragraph 1 (b). It should be noted that Article 6, paragraph 10 supplements paragraph 22 of annex I of the Aarhus Convention.⁵⁶²

<http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf> [accessed on 10th July, 2009].

⁵⁵⁶ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 110.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Saladin, C. *op cit.*, (2003), p. 64.

⁵⁵⁹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 111.

⁵⁶⁰ Sands, P. *op cit.*, (2003), p. 119.

⁵⁶¹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 111.

⁵⁶² *Ibid.*

It should be emphasized that the preamble of the Aarhus Convention states “recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.” Public participation under the Aarhus Convention increases public awareness of environmental issues and conditions public understanding of development actions and contributes to a broad-based consensus; it results in decisions that are better, more efficient, last longer; more widely applied; more acceptable, and environmentally sound and balanced.⁵⁶³ It has been argued that the idea of public participation in environmental decision-making is based on the following two major assumptions: individuals have the right to participate in decisions that affect their lives and environment; and the quality of such decisions can be improved by the active participation of the public concerned.⁵⁶⁴ Public participation is often justified on the grounds that it ensures better decisions.⁵⁶⁵ Involving more people in decision-making under the Aarhus Convention leads to more views expressed and makes use of knowledge on local conditions that might otherwise be unknown, and when decision makers take into consideration this wide range of views and knowledge, the decision is more likely to be “right”, because more issues have been discussed and more risk has been evaluated.⁵⁶⁶ The input provided at the community level by persons residing near the planned activity with potentially significant environmental effect makes a valuable contribution to decision-making and can avoid environmental impacts unforeseen by decision makers and private sector representatives.⁵⁶⁷ This process assists in the creation of more informed decision-making by incorporating different views, values, and ideas and by attaining immediate knowledge about environmental problems from members of the community.⁵⁶⁸

Since various people have various desires, public participation cannot secure that everyone will be satisfied with the decision, but hearing views and taking these

⁵⁶³ Nagy, M.T. *op cit.*, (2004), p. 6, 42.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ C. Saladin, *op cit.*, (2003), p. 57.

⁵⁶⁶ Nagy, M.T. *op cit.*, (2004), p. 42.

⁵⁶⁷ *Ibid.*, p. 6.

⁵⁶⁸ *Ibid.*

views into account, contribute to a consensus.⁵⁶⁹ Public participation establishes cooperation among decision makers and the stakeholders, including leaders of the community, consumers, the general public, NGOs and the media.⁵⁷⁰ The implementation of Article 6 of the Aarhus Convention can benefit the business sector and public authorities itself: public participation can delay the planning process and result in additional costs; however it prevents potential future environmental problems.⁵⁷¹ Public involvement can prevent impacts that were not predicted by the private developer and therefore it can save time and money for businesses.⁵⁷² The benefits of public participation for decision makers can be: increasing the amount of information about possible environmental problems and their possible solutions; avoidance of potential environmental problems and therefore saving the government money: studies have demonstrated that participation and the work of environmental groups have saved millions of dollars of governmental money in costs by avoiding environmental problems; enabling decision makers to better know the preferences of the public and to take them into account in future planning processes; getting feedback from the general public and thus better enabling to meet its needs; increasing the trust in governmental decisions and reducing the likelihood of opposition to government and business development activities.⁵⁷³

Under general obligations, prescribed in paragraphs 1-11, Parties have some flexibility on how to implement them at a domestic level.⁵⁷⁴ S. Stec and S. Casey-Lefkowitz suggest the following practical considerations for the implementation of “general requirements” under Article 6: developing criteria for the assessment of significance for non-listed activities; ensuring the existence of a legal basis for decision makers in order to take into account environmental considerations; developing motivation for applicants to become involved in early dialogue; creating guidelines and standards for the quality of relevant information; establishing apparent procedures for the submission of comments in the written form or at public hearings; supervising the ways of taking into account comments

⁵⁶⁹ *Ibid.*, p. 42.

⁵⁷⁰ *Ibid.*, p. 6.

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*, p. 42.

⁵⁷⁴ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 88.

by public authorities; defining clearly exemptions; facilitating public participation by early dialogue with applicants; applying of information exemptions etc.⁵⁷⁵

2.5 Access to Justice in Environmental Matters

Article 9 (Access to Justice) contains the right to have access to judicial and other review procedures in order to challenge violations of the rights of access to environmental information and public participation in environmental decision-making. Article 9 also requires Parties to ensure access to administrative or judicial review procedures in order to challenge acts and omissions by private persons and public authorities which contravene national environmental law. By ensuring access to judicial and other reviews, access to justice provisions of the Convention should enable the enforcement of the rights of access to environmental information and public participation in environmental decision-making.

2.5.1 Access to Information Appeals

According to Article 9, paragraph 1, Parties are required to ensure access to a review procedure before a court or another independent and impartial body established by law, to any person who thinks that his request under provisions of Article 4 has not been properly dealt with in accordance with Article 4, for example has been ignored, wrongfully refused, whether partially or fully, inadequately answered etc. Parties have to meet this obligation within the framework of their national laws. Under this paragraph, Parties are required to ensure access to review in respect to the right to environmental information under Article 4.⁵⁷⁶ Under paragraph 1, “any person”, including an NGO, who has made a request for information, has the “standing” to challenge decisions that are made under Article 4.⁵⁷⁷ It should be noted that the Compliance Committee of the Aarhus Convention, when dealing with the communication against Kazakhstan, made the following clarification: “The Committee also finds that the lengthy review procedure and denial of standing to the non-governmental organization in a lawsuit on access to environmental information was not in compliance with article 9, paragraph 1”.⁵⁷⁸ The reference to “another independent and impartial body

⁵⁷⁵ *Ibid.*, p. 87.

⁵⁷⁶ Sands, P. *op cit.*, (2003), p. 119.

⁵⁷⁷ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 126.

⁵⁷⁸ Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, para. 26

established by law” was made in paragraph 1 in order to accommodate countries which have well-established institutions of Ombudsperson.⁵⁷⁹

According to paragraph 1, where a Party to the Convention provides for the mentioned review by a court of law, that Party must ensure that such a person also has access to an expeditious procedure, determined by law and one that is free of charge or inexpensive, for reconsideration by a public authority or for a review by an independent and impartial body other than a court. Final decisions under paragraph 1 must be binding on public authorities that hold such environmental information. Moreover, at least where access to information is rejected under paragraph 1, reasons must be given in writing. Paragraph 1 requires Parties to ensure that there is a lower-level review or reconsideration by a public authority.⁵⁸⁰ Judicial review can require high costs therefore, Article 9 aims to ensure a low threshold for appeals by providing access to an expeditious review procedure that is free or inexpensive.⁵⁸¹ A court review can be lengthy and expensive and environmental information is usually needed quickly: not many applicants have sufficient money to pay for the necessary litigation costs and delays and such expenses can bar effective access to environmental information.⁵⁸² The requirement for administrative review in the paragraph is a recognition that formal, expensive court proceedings have limitations.⁵⁸³ Such a procedure can be either in the form of reconsideration⁵⁸⁴ by a public authority, or in the form of a review by an independent and impartial body other than a court.⁵⁸⁵ It should be noted that usually final judicial and quasi-judicial decisions are binding: however in some countries decisions made by independent bodies such as a commission or ombudsmen are simply advisory.⁵⁸⁶

2.5.2 Public Participation Appeals

According to Article 9, paragraph 2, Parties must, within the framework of their domestic legislation, ensure that members of the public concerned have “access to a review procedure before a court and/or another independent and impartial body

⁵⁷⁹ Wates, J. *op cit.*, (2005), p. 6.

⁵⁸⁰ Brady, K. *op cit.*, (1998) p. 9.

⁵⁸¹ Wates, J. *op cit.*, (2005), p. 6.

⁵⁸² Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 127.

⁵⁸³ Holder, J. and Lee, M. *op cit.*, (2007), p. 119.

⁵⁸⁴ “Reconsideration” means that the same institution reconsiders its decision to ensure its full compliance with the law. Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 127.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*, p. 128.

established by law” for the following cause: in order to challenge legality, whether substantive or procedural, of any decision, act or omission subject to Article 6 and, if provided for under domestic law, subject to other relevant provisions of the Convention. Members of the public concerned can have access to the above review procedure, if they (a) have a sufficient interest, or alternatively (b) maintain impairment of a right, if the domestic administrative procedural law demands it as a precondition. Paragraph 2 provides for the right to have access to a review in connection with decision-making on projects and activities regulated by Article 6 of the Convention.⁵⁸⁷ When dealing with the communication against Belgium, the Compliance Committee of the Aarhus Convention made it clear that “[w]hen determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal function and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity”.⁵⁸⁸

In respect to acts or omissions subject to other relevant provisions of the Convention, the matter is regulated by domestic law.⁵⁸⁹ Paragraph 2 applies primarily to Article 6, but it may also be applied to “other relevant provisions” where so provided for under national law: meaning that the review procedures may be applied to other articles of the Convention, for example Articles 3, 5, 7 and Article 8.⁵⁹⁰

For example, limiting the participants at a public hearing, arranging for a late public hearing, refraining from holding a public hearing, or failing to inform certain individuals, may be subject to review under paragraph 2.⁵⁹¹ Article 6 contains provisions that apply to the “public” (paragraphs 7 and 9) as well as to the “public concerned” (paragraphs 2 and 6), and since Article 9, paragraph 2, is aimed at enforcing all of Article 6, and since it is applicable only to the “public concerned”, it can be argued that it is the intention of the Convention to hold that a member of the public who participates under Article 6, paragraph 7, gains the status of a member of the “public concerned”.⁵⁹²

⁵⁸⁷ Wates, J. *op cit.*, (2005), p. 6.

⁵⁸⁸ Belgium ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 29.

⁵⁸⁹ Sands, P. *op cit.*, (2003), p. 119.

⁵⁹⁰ Stec, S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 128.

⁵⁹¹ *Ibid.*, p. 129.

⁵⁹² *Ibid.*, p. 108, 129.

It should be noted that the scope of persons who have the right to bring an appeal is slightly narrower than that of the “public concerned” since there is a requirement to have a “sufficient interest” or maintain impairment of a right.⁵⁹³ According to paragraph 2, what is “sufficient interest” or “impairment of a right” must be determined according to national law and consistently with the intention of providing the public concerned wide access to justice under the Convention. The use of the concept of “sufficient interest” in national law has tended to be a commonsense test and not one of a legal or economic interest.⁵⁹⁴ Paragraph 2 further states that the interest of any NGO that meets the requirements of Article 2, paragraph 5, must be considered sufficient. Such NGOs must also be considered as having rights capable of being impaired. This means that NGOs, promoting environmental protection, have the right to challenge violations of the public participation provisions of the Convention on behalf of public environmental interest. It has been argued that the expansion of the opportunities for environmental NGOs to bring cases to courts will not automatically result in overloaded courts, a point often claimed.⁵⁹⁵

Paragraph 2 states that its provisions must not exclude a preliminary review procedure before an administrative authority and must not have an effect on the requirement of the exhaustion of administrative review procedures prior to a judicial review, where this is required by national law. A review before an administrative authority does not replace access to a review procedure before a court of law, but it very often may resolve the matter speedily and avoid the necessity to go to court.⁵⁹⁶

2.5.3 Minimum Standards of Access o Justice

Article 9, paragraphs 1 and 2 describe grounds for pursuing a review procedure, and paragraph 4 describes the minimum standards of quality that must be met in all such procedures, as well as the category of remedies to be provided.⁵⁹⁷ According to paragraph 4, additional to and without prejudice to paragraph 1, the procedures set out in paragraphs 1, 2 and 3 must provide “adequate and effective remedies”,

⁵⁹³ Wates, J. *op cit.*, (2005), p. 6.

⁵⁹⁴ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 130.

⁵⁹⁵ Sadeleer, N. Roller, G. and Dross, M. *Access to Justice in Environmental Matters* (2003), p. 123.

⁵⁹⁶ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 130.

⁵⁹⁷ *Ibid.*, p. 132.

including injunctive relief when appropriate, and must be “fair, equitable, timely and not prohibitively expensive”. Decisions under article 9 must be given or recorded in writing. Court decisions, and if possible decisions of other bodies, must be publicly accessible. In 1998, when the Convention was adopted, the requirements of the paragraph on the quality of remedies, were a significant advance.⁵⁹⁸

It has been argued that “[t]he ultimate objective of any administrative or judicial reviews process is to obtain a remedy for a transgression of law.”⁵⁹⁹ According to paragraph 4, remedies provided must be “adequate and effective”. The application of injunctive relief can be decisive in environmental cases, because environmental disputes are often related to proposed activities or to current activities that pose a threat to health and the environment.⁶⁰⁰

The procedure to be fair requires the process, including the final decision, to be “impartial and free from prejudice, favouritism or self-interest”.⁶⁰¹ The Compliance Committee of the Aarhus Convention made it clear when dealing with the communication against Kazakhstan that “. . . the Committee is of the opinion that a procedure which allows for a court hearing to commence without proper notification of the parties involved (including a confirmation that notifications have indeed been received), cannot be considered a fair procedure in the meaning of article 9, paragraph 4, of the Convention. Although the court decision refers to multiple notifications being sent to the plaintiffs, no evidence was presented in support of this by the Party. In absence of such evidence the Committee considers that the claim of the communicants that they were not duly notified has not been reputed (sic).”⁶⁰² It has been argued that equitable review procedures are procedures “which avoid the application of the law in an unnecessarily harsh and technical manner”.⁶⁰³ The timeliness requirement is also significant and it reinforces the obligation of paragraph 1, article 9 regarding an “expeditious” review procedure.⁶⁰⁴

⁵⁹⁸ Brady, K. *op cit.*, (1998) p. 9.

⁵⁹⁹ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 132.

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*, p. 133.

⁶⁰² Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 28.

⁶⁰³ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 134.

⁶⁰⁴ *Ibid.*

In dealing with the communication against Kazakhstan, the Compliance Committee made clear that: “[it] also finds that the failure to communicate the court decision to the parties, . . . constitutes a lack of fairness and timeliness in the procedure. At the Committee’s eighth meeting, the representatives of the Party concerned argued that even if the decision was not communicated directly to the plaintiffs, they still had a possibility to access the text of the decision in the court records. Clearly, while public accessibility of decisions is commendable, it does not in itself satisfy the fairness of the procedure. A fair and timely procedure requires that a decision should be communicated to the parties within a short time to enable them to take further actions, including filing an appeal.”⁶⁰⁵ As for the obligation to ensure that review procedures be not prohibitively expensive, it should be noted that the cost of making a challenge may not be so expensive as to prevent the public from seeking a review.⁶⁰⁶ However, it has been noted that in most countries court fees do not create a barrier to access to justice, the problem lies with the fees for lawyers and experts!⁶⁰⁷

The whole edifice of the Convention is backed by access to justice and access-to-justice pillar is a means for enforcing of other procedural environmental rights: however access-to-justice provisions of the Convention require the implementation by Parties.⁶⁰⁸ Article 9 of the Convention creates varying degrees of obligation for Parties and public authorities by imposing a general requirement to create a system to provide a review of decisions that are made by public authorities on the basis of Articles 4 and 6 and other relevant provisions. Under these general obligations, Parties and public authorities have some flexibility as to how to implement them at a domestic level. S. Stec and S. Casey-Lefkowitz suggest that Parties and public authorities may wish to implement requirements under Article 9 by: ensuring a proper functioning of independent and impartial review bodies; developing clear rules on the standing of individuals and non-governmental organizations for breaches of the provisions of the Convention and national environmental legislation; etc.⁶⁰⁹

⁶⁰⁵ Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 29.

⁶⁰⁶ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 134.

⁶⁰⁷ Sadeleer, N. Roller, G. and Dross, M. *op cit.*, (2003), p. 122.

⁶⁰⁸ Stec. S. and Casey-Lefkowitz, S. *op cit.*, (2000), p. 43.

⁶⁰⁹ *Ibid.*, p. 124.

2.6 Conclusions

The analysis suggests that the Aarhus Convention grants to the public and to the public concerned extensive and detailed rights of access to environmental information, participation in environmental decision-making, and access to judicial and other review procedures, and thus creates extensive and detailed obligations for the legislative, executive and judicial authorities of Parties for the implementation of these three procedural environmental rights. Article 4 imposes the main thrust of obligation on public authorities; however its implementation might require legislative action, for example the creation of a legal base whereby requests can be made and information received from public authorities. Article 5 imposes the obligation mainly on public authorities; however its implementation might require legislative action, for example the establishment of a legal framework to enable public authorities to collect and disseminate environmental information without request from members of the public. Article 6 imposes the main thrust of obligation on public authorities; however its implementation might require legislative action, for example the creation of a legal framework for public participation and for decision makers to take into account environmental consideration. Article 9 imposes the main thrust of obligation on the judiciary; however its implementation depends on public authorities as well, considering the obligation to ensure access to administrative review procedures. Its implementation might also require legislative action, for example the creation of a legal framework for impartial and proper functioning of review bodies.

The analysis suggests that the right of access to environmental information, the right of participation in environmental decision-making, and the right to have access to judicial and other review procedures under the Convention are closely interrelated. Environmental information, as defined under Article 2, paragraph 3 (b), also includes information on administrative decision-making, such as information on proposed activities and therefore, under Articles 4 and 5 such information must also be made available. More specifically, in a public participation process, Article 4 can be used by a member of the public to request information concerning decision-making from a public authority. Article 5, paragraph 1 (b), requires Parties to establish mandatory systems for ensuring an adequate flow of information to public authorities on proposed and existing activities having the potential to “significantly affect the environment”, and this

information must be publicly available. Article 5, paragraph 2 (b) (i) requires the establishment and maintenance of practical arrangements such as publicly accessible registers that can contain information on a concrete decision-making case and this information must be publicly available. Therefore it can be argued that absence of access to environmental information under Articles 4 and 5 can result in the lessening of the effectiveness of public participation, since it requires availability of environmental information in order to be informed and effective. This means that without the implementation of access to environmental information under Articles 4 and 5, public participation under Article 6 cannot be so effective. The public participation provisions under Article 6 provide a certain framework for the disclosure of necessary environmental information for those who enjoy the right of participation. This means that the implementation of public participation under Article 6 can result in the disclosure of additional and more detailed environmental information rather than by the implementation of the access-to-information pillar. And the enforcement of rights of access to environmental information (Article 4 and, Article 5 where so provided for under domestic law) and public participation (Article 6) depend on the implementation of access-to-justice pillar. It should be noted that Article 4, paragraph 7 and Article 9, paragraph 5, require provision on information to the public on the access to review procedures, but such information cannot be qualified as environmental information under Article 2, paragraph 3.

The analysis suggests that NGOs enjoy the three procedural environmental rights under Articles 4, 5, 6, and 9 of the Convention and they can act on behalf of public environmental interests. They are considered to be members of the public under Article 2, paragraph 2. Specifically, environmental NGOs are considered as members of the public concerned under Article 2, paragraph 5 and they have standing to access to review procedures under Article 9, paragraph 2.

Material examined in this chapter should enable the case study part of the thesis to determine whether provisions of the Aarhus Convention on (a) access to environmental information, (b) public participation in environmental decision-making, and (c) access to justice in environmental matters, were violated in the context of the four formally adjudicated complaints. And without detailed examination in this chapter of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention,

it would be impossible to reach conclusions on the (a) pre-requisites for the exercise of access to environmental information and public participation and (b) benefits to be hoped for from the implementation of access to environmental information and public participation for the protection of the ECHR rights.

Chapter Three: Requirements under the Equator Principles regarding Disclosure of Information and Public Consultation

3.1 Introduction

It is one of the purposes of the study to examine the requirements of private sector borrowers under the Equator Principles regarding disclosure of information and public consultation. The BTC project is considered to be the first test of the implementation of the Equator Principles by the Equator Banks. In February 2004, a number of Equator Banks made the decision to provide loans to the BTC Co. This means that the Equator Banks considered the BTC project as compliant with the original 2003 version of the Equator Principles which required the BTC Co. to take measures, *inter alia*, for the disclosure of information and public consultation. It is noteworthy that in November 2003, the IFC approved the lending to the BTC pipeline project. This means that the IFC considered the BTC project to be in compliance with its standards, including the IFC Safeguard Policies.

The BTC case study in *Chapter Six: Four Formally Adjudicated Complaints* analyses two complaints to the CAO regarding the activities of the BTC Co. The two complaints to the CAO did not allege non-compliance with the Equator Principles; however they alleged non-compliance with the requirements regarding disclosure of information and public consultation under the IFC Safeguard Policies, which were referred to in the original version of the Equator Principles of 2003, as the minimum standard with which to comply.

A complaint was made by Green Alternative on behalf of individuals to the CAO in May 2004 concerning the village of Dgvari. The complaint concerned the BTC project and the activities of the BTC Co. The village is located 1 km away from the pipeline route and the villagers were not informed of this before permission for the construction of the BTC pipeline was granted to the BTC Co. in November 2002. According to the complaint the BTC Co. did not consult residents of the village on

the planned construction of the BTC pipeline in summer 2002 when it held a public consultation. It should be stressed that the village of Dgvari is a landslide risk area and this is confirmed by governmental studies.

A complaint was made to the CAO in March 2004 by residents of sub-districts 18 and 19 of the town of Rustavi concerning the activities of the BTC Co. The residents of sub-districts 18 and 19 complained that they did not know until the construction started that the BTC pipeline would pass within 250 metres of their housing blocks. According to the complaint, the BTC Co. did not even reply to the residents' letters addressed to the BTC Co. enquiring the routing of the pipeline.

This calls for an examination of the issue as to whether the BTC Co. met the requirements of the Equator Principles of 2003 regarding disclosure of information and public consultation in the case of the village of Dgvari and of sub-districts 18 and 19 of the town of Rustavi. For that purpose, this chapter analyses the requirements of the Equator Principles of 2003 regarding disclosure of information and public consultation.

Section 2 provides an introduction to the Equator Principles. It examines its purpose and the nature of its requirements for borrowers and for the Equator Banks. Section 3 provides an outline of the original version of the Equator Principles of 2003, which was revised in 2006. Section 3 also outlines the main changes made to the original version of the Equator Principles by the revised Equator Principles. Section 4 examines the Equator Principles as the first test for the BTC project. This section also gives a general description of allegations regarding the non-compliance of the BTC Co. with the requirements of the Equator Principles (2003). Section 5 examines the requirements of the Equator Principles of 2003 for borrowers regarding the disclosure of information and public consultation under Principle 5. The section also examines the World Bank and IFC Specific Guidelines and, the IFC Safeguard Policies, which are referred to in Principle 3 as a minimum standard to be complied with, in order to identify the requirements for borrowers regarding the disclosure of information and public consultation. The section contains detailed examination of the requirements regarding the disclosure of information and public consultation within the framework of the EA procedure under the IFC Environmental Assessment OP 4.01

(1998). Section 6 contains the conclusions on the requirements of the Equator Principles regarding disclosure of information and public consultation.

3.2 Introduction to the Equator Principles⁶¹⁰

As already noted in *Chapter One*⁶¹¹, there are “soft law” documents that are adopted beyond the intergovernmental system and that engage business entities directly: these are multi-stakeholder standards and the Equator Principles is one example of such a document. As already stated in *Chapter One*⁶¹², on 4 June 2003 ten leading banks adopted the document: *the “Equator Principles” – An Industry Approach for Financing Institutions in Determining, Assessing and Managing Environmental & Social Risk in Project Financing*. In the years before the adoption of the Equator Principles, NGOs had started a campaign of criticism addressed to private commercial banks for not undertaking legal and moral responsibility for environmental and social damage caused by the projects they financed.⁶¹³ The Equator Principles are a set of voluntary guidelines aimed at establishing a benchmark for assessing and managing environmental and social matters in the project finance⁶¹⁴ sector globally, i.e. not only in emerging markets.⁶¹⁵ The Equator Principles constitute the standard for environmental and social due diligence in the sector of the project finance.⁶¹⁶ The Equator Principles are based on environmental and social policies and guidelines of the World Bank

⁶¹⁰ See Appendix V “The Equator Principles” of the thesis.

⁶¹¹ See Chapter One, section 1.5, p. 34.

⁶¹² See Chapter One, section 1.5.2.2, p. 51.

⁶¹³ Esty, B. “The Equator Principles: An Industry Approach to Managing Environmental and Social Risks”, *Harvard Business School, HBS Publishing Case No. 9-205-114*, July, 2005; Nwete, B. “The Equator Principles: How Far will it Affect Project Financing?” (2005) *International Business Law Journal*, p. 175.

⁶¹⁴ The project financing constitutes a significant method of financing private-sector development throughout the world, and refers to the financing of projects where repayment of the loan depends on the revenues expected to be generated from the implementation of the project. *Leading Banks Announce Adoption of Equator Principles*, June 4, 2003, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2009]; Nappert, S. and Velkova, E. “Principles of International Law as a Governing Law Clause – What are you Signing Up?” (2005), *Journal of International Banking and Financial Law*, p. 4.

⁶¹⁵ *About the Equator Principles*, p. 1. Available at <<http://www.equator-principles.com/abouttheeps.shtml>> [accessed 8 March, 2011]. Chaves, J. A. C. *Socio-Environmental Corporate Governance*, EnvironGrade, p. 1.

⁶¹⁶ Larson, K. “Put Carbon and Equator together” (2008) 27 *International Financial Law Review*, p. 62. It should be noted that the “due diligence usually comes in the form of environmental or social assessment, couples with mandatory consultation with local communities and an internal grievance mechanism”, *The Equator Principles*, TransnationalCorporateGovernance.net, available at <<http://transnationalcorporategovernance.net/csr/reporting/ep>> [accessed on 8th September, 2010].

and the IFC.⁶¹⁷ This document created new standards regulating decision making by banks on project finance loans.⁶¹⁸

The Equator Banks pledged to apply these principles to project financing in the various industry sectors, for example in mining, oil and gas.⁶¹⁹ The implementation of the Equator Principles has particular significance in the context of oil and gas exploration in emerging markets.⁶²⁰ There are differences between the requirements of the Equator Principles for the Equator Banks and for the borrowers.⁶²¹ The Equator Banks commit themselves to provide loans to projects only if the borrower complies with their social and environmental policies and procedures set out in compliance with the Equator Principles.⁶²² It is the responsibility of the Equator Banks to determine whether the borrower complies with the Equator Principles.⁶²³ According to this document, developers of big projects such as pipelines and power stations are required to prove that the negative environmental and social impacts of the development have been scrutinized and will be subject to mitigation.⁶²⁴ The adoption of the Equator Principles is voluntary, but once a financial institution has adopted these principles, it must implement and adhere to these principles.⁶²⁵ However, the adoption of the Equator Principles does not create legal obligations for adopting institutions.⁶²⁶

It has been argued that the Equator Principles are also a recognition “that responsible development makes commercial sense – environmental and social controversies have the potential to affect the profitability of projects, increase

⁶¹⁷ Lazarus, S. “the Equator Principles: a milestone or just good PR?”, *Global Agenda*, 2004; *Leading Banks Announce Adoption of Equator Principles*, June 4, 2003, p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2009].

⁶¹⁸ Esty, D. C. and Winston, A. S. *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Values, and Build Competitive Advantage* (Yale University Press, 2006), p. 95.

⁶¹⁹ *Leading Banks Announce Adoption of Equator Principles*, June 4, 2003. p. 1, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2009]; *About the Equator Principles*, p. 1. Available at < <http://www.equator-principles.com/abouttheeps.shtml> > [accessed 8 March, 2011].

⁶²⁰ Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004), p. 20.

⁶²¹ Watchman, P. Q. Delfino, A. and Addison, J. *op cit.*, (2007), p. 1.

⁶²² *About the Equator Principles*, p. 1. Available at < <http://www.equator-principles.com/abouttheeps.shtml> > [accessed 8 March, 2011]. Forster M, Watchman P. and July C, *op cit.*, (2005), p. 2; Chaves, J. A. C. *op cit.*, p. 2.

⁶²³ Hardenbrook, A. *op cit.*, (2007), p. 203; Lee, M. K. *op cit.*, (2006), p. 72.

⁶²⁴ Esty, D. C. and Winston, A. S. *op cit.*, (2006), p. 95.

⁶²⁵ Hardenbrook, A. *op cit.*, (2007), p. 203; Williams, J. P. *op cit.*, (2008), p. 698; *About the Equator Principles, Adopting the Equator Principles*, p. 1. Available at < <http://www.equator-principles.com/abouttheeps.shtml> > [accessed 8 March, 2011].

⁶²⁶ Nwete, B. *op cit.*, (2005), footnote 30; Bohaslavsky, J.P and Rulli, M. “Corporate Complicity and Finance as a “Killing Agent”” (2010), 8 (3) *Journal of International Criminal Justice*, p. 8.

political risk and tarnish the reputations of those who promote and finance them”.⁶²⁷

Before the revision took place these principles had been adopted during a three year period by more than forty financial institutions.⁶²⁸ It has been argued that the pressure from NGOs was among other reasons for the adoption of the Equator Principles by numerous banks.⁶²⁹ As already noted in *Chapter One*⁶³⁰, in July 2006 the Equator Principles were revised. The revised Equator Principles are sometimes referred to as “EP II”.⁶³¹

It should be noted that often the Equator Principles are criticized by NGOs for the lack of an accountability mechanism.⁶³² There is an accountability mechanism for the IFC social and environmental standards in the form of the CAO which can review compliance with these standards. The efficiency of the Equator Principles depends on the manner in which they are implemented by the Equator Banks.⁶³³ It has been argued that these “principles are only as good as the commitment behind them”.⁶³⁴ It has been argued that despite the fact that there are no formal sanctions in the case of a breach of the Equator Principles by the Equator Banks, the majority of these banks take into account informal sanctions of breach such as bad publicity, accusations of hypocrisy and loss of retail clients.⁶³⁵

3.3 Outline of the Equator Principles

This section examines the content of the original version of the Equator Principles which was adopted in 2003. This section also outlines the main changes made to the original version of the Equator Principles in 2006.

⁶²⁷ Chaves, J. A. C. *op cit.*, p. 2.

⁶²⁸ *Frequently Asked Questions About the Equator Principles*, p. 1, available at <<http://www.equator-principles.com/faq.shtml>> [accessed on 11th October 2009].

⁶²⁹ Hardenbrook, A. *op cit.*, (2007), p. 207.

⁶³⁰ Chapter One, section 1.5.2.2, p. 52.

⁶³¹ *Frequently Asked Questions About the Equator Principles*, p. 2, available at <<http://www.equator-principles.com/faq.shtml>> [accessed on 12th January 2011].

⁶³² Kamijyo, M. “The “Equator Principles”: Improved Social Responsibility in the Private Finance Sector” (2004) vol. 40 (2) *Sustainable Development Law and Policy*, p. 36; Kass, S. L. and McCarrol, J. “The Revised Equator Principles” (2006), *New York Law Journal*, p. 1.

⁶³³ Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004), p. 26.

⁶³⁴ BankTrank founding members quoted in BankTrank, *Principles, Profits or just PR? Triple PInvestments under the Equator Principles: An Anniversary Assessment*, BankTrack, 2004, p. 8.

⁶³⁵ Watchman, P. Q. Delfino, A. and Addison, J. *op cit.*, (2007), p. 21.

The preamble of the Equator Principles states that the document aims to serve as a framework for the implementation by the Equator Banks of their internal environmental and social procedures and standards when financing projects globally.

The document states that “we [the Equator Banks] will only provide loans directly to projects in the following circumstances” and lists these circumstances as its principles.

Principle 1 states that the Equator Banks categorize the risks of projects in accordance with internal guidelines which are based on the environmental and social screening criteria of the IFC, as described in the attachment (Exhibit I).⁶³⁶

According to Principle 2, the Equator Banks will provide loans for Category A and B projects, if the borrower has completed an environmental assessment (EA), the preparation of which is in compliance with the outcome of the Equator Banks’ categorization process and if an EA covers, to the satisfaction of the Equator Banks, environmental and social issues that were identified during the categorization process.

According to Principle 3, the Equator Banks will provide loans, if the environmental assessment (EA) report has addressed, *inter alia*, participation of affected parties in design, review and implementation of the project.⁶³⁷ There is a “note” at the end of Principle 3 which states that the EA must address compliance with the host country’s legislation and permits required by the project. According

⁶³⁶ Exhibit I (Environmental and Social Screening Process) states that environmental screening of each project must be carried out, in order to determine the extent and type of environmental assessment (EA). According to Exhibit I, a project will be categorized Category A, B, or C according to the type, location, sensitivity, scale and its potential environmental and social impacts. A project will be classified as belonging to Category A if it is likely to have significant environmental impacts that are sensitive, diverse, or unprecedented. For Category A projects, a full Environmental Assessment (EA) must be carried out, which is normally an environmental impact assessment (EIA), to examine a project’s negative environmental impacts, and to recommend any measures needed for the prevention, minimization, mitigation and compensation. A project will be classified as belonging to Category B if its impacts are site-specific; few if any of them are irreversible; and can be mitigated in most cases. The scope of EA for Category B is narrower than that for Category A; however like Category A, an EA for a Category B project must examine the project’s negative environmental impacts and recommend any measures required for the prevention, minimization, mitigation and compensation. A project is classified in Category C if it is likely to cause minimal or no adverse environmental impacts. For this category of projects, no EA is required.

⁶³⁷ It should be noted here that, according to Principle 5, the EA must take into account the consultation process with project affected groups.

to the “note”, the EA has to make reference to the minimum standards under the World Bank and IFC Pollution Prevention and Abatement Guidelines that are provided in Exhibit III (World Bank and IFC Specific Guidelines) and for those projects located in low and middle income states, as classified by the World Bank, the EA has to further take into account the applicable IFC Safeguard Policies that are provided in Exhibit II (IFC Safeguard Policies). According to the “note”, the EA has to address, to the satisfaction of the Equator Banks, the overall compliance of the project with the aforementioned Guidelines and Safeguard Policies or any justified deviations from them.

According to Principle 4, the Equator Banks will provide loans, if the borrower or third party expert has prepared an Environmental Management Plan (EMP) for all Category A projects and, when appropriate, for Category B projects.

According to Principle 5, the Equator Banks will provide loans if the borrower has carried out consultations with the project affected groups and if the EA, or its summary, has been publicly available. It should be noted here that Principle 5 is discussed in detail in section 5 of this chapter.

According to Principle 6, the Equator Banks will provide loans if the borrower has covenanted to comply with the EMP; to provide regular reports concerning compliance with the EMP; and, where applicable, to decommission the facilities according to the Decommissioning Plan that had been agreed upon.

According to Principle 7, if necessary, lenders have to appoint an independent environmental expert in order to provide additional monitoring and reporting.

According to Principle 8, if a borrower does not comply with environmental and social covenants, resulting in a debt financing default, the Equator Banks must engage the borrower to find solutions for bringing the latter back into compliance with those covenants.

According to Principle 9, the Equator Banks apply the Equator Principles to those loans for projects with a capital cost of \$50 million or more.

Finally, the Equator Principles state that the Equator Banks consider the Equator Principles as being a framework for creating individual, internal practices and policies. It further states that “[a]s with all internal policies, these principles do not create any rights in, or liability to, any person, public or private. Banks are adopting and implementing these principles voluntarily and independently, without reliance on or recourse to IFC or the World Bank”.

The original Equator Principles of 2003 were revised and new Equator Principles became effective on 6th July 2006.⁶³⁸ The revision was considered necessary in order to reflect the replacement⁶³⁹ of the IFC Safeguard Policies which were referred to in the Equator Principles as a standard to be complied with.⁶⁴⁰ This revision also reflected knowledge gained from the implementation of the Equator Principles and from critical comments received from various actors involved, including NGOs, made over 3 years.⁶⁴¹ The revision involved a substantive review and has resulted in significant changes to the Equator Principles.⁶⁴²

The preamble of the revised Equator Principles contains similar aspirational language. It introduced the phrase “the Equator Principles Financial Institutions (EPFIs)” to denote the financial entities that adopted the Equator Principles. The section entitled “scope” is inserted after the preamble. According to this section, the project finance threshold is lowered from \$50 million to \$10 million and the application of these principles is extended to project finance advisory activities. The section “scope” makes the following innovative statement: “while the Principles are not intended to be applied retroactively, we [the EPFIs] will apply them to all project financing covering expansion or upgrade of an existing facility where changes in scale or scope may create significant environmental and/or social impacts, or significantly change the nature or degree of an existing impact”. This statement makes clear that the EPFIs will provide loans to borrowers for expansion

⁶³⁸ The “Equator Principles” – A financial industry benchmark for determining, assessing and managing social & environmental risk in project financing, July 2006; Thomas, W. “The need to be sustainable: new environmental rules are forcing banks to change the way they look at the real cost of project finance” (2006) 25 *Int’l Fin. L. Rev.* p. 65.

⁶³⁹ As already noted in Chapter One, section 1.5.2.1, on 30 April 2006, the IFC replaced the Safeguard Policies by the IFC’s Policy on Social and Environmental Sustainability and by the IFC’s Performance Standards on Social and Environmental Sustainability.

⁶⁴⁰ *Frequently Asked Questions About the Equator Principles*, p. 1, available at <<http://www.equator-principles.com/faq.shtml>> [accessed on 12th June 2009].

⁶⁴¹ *Ibid.*; Kass, S. L. and McCarrol, J. *op cit.*, p. 1.

⁶⁴² Townsend, T. “Risky Business? Assessing the Lender’s Real Environmental Risk and How to Avoid It” (2006), *Journal of International Banking and Financial Law*, p. 13.

or upgrading of an existing project, even when the existing project was not initially funded by the EPFIs, subject to the conditions of the Equator Principles.

The revised Principles state that “EPFIs will provide loans to projects that conform to Principles 1-9” and lists innovative and more detailed requirements.⁶⁴³ It should be particularly emphasised that Principle 5 contains more stringent and detailed requirements for borrowers regarding disclosure of information and public consultation. It introduces the concept of “free, prior and informed consultation”. It is also important to note that Principle 8 contains new covenant requirements for compliance, namely it requires borrowers to covenant in financing documents to comply, *inter alia*, with the relevant host country’s social and environmental legislation and the permits in all material respects. Principle 10 establishes the requirement of self-reporting by the EPFIs on the implementation practices of the Equator Principles that can be considered as a significance element of accountability. Currently there are 70 EPFIs.⁶⁴⁴

3.4 BTC Project as the First Test of the Equator Principles

The BTC project was the first major test of the implementation of the Equator Principles by the Equator Banks.⁶⁴⁵ The BTC project was categorized as a Category A project under the Equator Principles and thus it became the first project to be treated as such by the Equator Banks.⁶⁴⁶ After the adoption of the Equator

⁶⁴³ Principle 1 provides for the categorization of projects in accordance with the environmental and social screening criteria of the IFC. Principle 2 requires borrowers to conduct a Social and Environmental Assessment (“Assessment”) as opposed to environmental assessment (EA) required by Principle 2 of the original Equator Principles. Principle 3 introduces a new classification of countries in accordance to OECD membership and makes reference to the newly adopted IFC Performance Standards. Principle 4 requires borrowers to prepare an Action Plan (AP) and to keep a Social and Environmental Management System. Principle 6 contains innovatory provision by requiring borrowers, for projects located in a certain category of countries, to establish a grievance mechanism in order to address grievances of project-affected communities. Principle 7 provides for the review of the Assessment by an independent social or environmental expert. Principle 9 provides for the appointment by the borrower of an independent environmental and/or social expert to ensure ongoing monitoring and reporting to be shared with the EPFIs.

⁶⁴⁴ *About the Equator Principles*, p. 1. Available at < <http://www.equator-principles.com/abouttheeps.shtml> > [accessed 8 March, 2011].

⁶⁴⁵ *BTC Project is the First Major Test of the Equator Principles*, 2004, p. 1, available at <<http://www.equator-principles.com/btc.shtml>> [access on 6th January, 2010]; Nwete, B. *op cit.*, (2005), p. 181. Muttitt, G. “Disaster in the pipeline: Baku-Tbilisi-Ceyan”, *PLATFORM*, 2004, p. 1; *NGOs attack Equator Principles for being ineffective, A News Item from Business Respect Issue Number 75, dated 12 Jun 2004*, Corporate Social Responsibility, mallenbaker.net, available at <http://mallenbaker.net/csr/page.php?Story_ID=1295> [accessed on 23rd March 2011].

⁶⁴⁶ *BTC Project is the First Major Test of the Equator Principles*, 2004, p. 1, available at <<http://www.equator-principles.com/btc.shtml>> [access on 6th January, 2010]; Nwete, B. *op cit.*, (2005), p. 181.

Principles, observers started speculations as to whether the Equator Principles would prevent the Equator Banks from funding the BTC project.⁶⁴⁷

The BTC Co. claimed the BTC project was in compliance with the requirements of Principle 5 of the Equator Principles: “BTC Co. has carried out consultation with groups affected by the BTC Project, including local NGOs and has made the ESIA [Environmental and Social Impact Assessments] available to the public for their review in local language, as required by Principle 5 of the Equator Principles. In addition, the ESIA has been reviewed by Mott Macdonald, an independent environmental consultant, as required by Principle 5 of the Equator Principles.”⁶⁴⁸ It should be taken into consideration that the reference to “local language” in the afore citation implies that the ESIA in Georgia was made available in the Georgian language, in Turkey in the Turkish language and in Azerbaijan in Azerbaijani language. It should be noted that by that time Georgia and Azerbaijan were classified by the World Bank as low income countries and Turkey as a lower-middle income country and therefore for obtaining funding from the Equator Banks, the EA prepared by the BTC Co. had also to comply with the IFC Safeguard Policies referred to in the “note” to Principle 3 and listed in Exhibit II of the Equator Principles.⁶⁴⁹ It is noteworthy that the IFC also categorized the BTC project as Category A under the screening criteria of the IFC Environmental Assessment OP 4.01 (1998) and on 4 November 2003, approved the lending to the BTC pipeline project of a loan of up to \$125 million.⁶⁵⁰ This means that the IFC considered the BTC project in compliance with its standards, including the IFC Safeguard Policies.

In October 2003, several NGOs prepared a document on “Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles, Supplementary Appendix

⁶⁴⁷ *Principles, Profits or just PR? Triple P investments under the Equator Principles: An Anniversary Assessment*, BankTrack, June 2004, p. 13.

⁶⁴⁸ Baku-Tbilisi-Ceyhan Pipeline Operations Environmental and Social Action Plan, the BTC, AZSPU-HSSE-PMT-00119-2 (formerly BTCP-HSE-PLN-501-C1), revised in 2007, pp. 22-23; Baku-Tbilisi-Ceyhan Pipeline Environmental and Social Action Plan, p. 28.

⁶⁴⁹ The World Bank Development Indicators Database, available at <<http://www.worldbank.org/data/countryclass/classgroups.htm>> [accessed 8th March 2008]; Nwete, B. *op cit.*, (2005), p. 182; Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles, Supplementary Appendix to EIA Review – BTC pipeline (Turkey section), Platform *et al*, October, 2003, p. 2, 6; *ABN AMRO's explanation to its participation in the BTC pipeline project*, ABN AMRO, 2003, p. 4.

⁶⁵⁰ *BTC Project*, the IFC, available at <<http://www.ifc.org/ifcext/btc.nsf/content/Home>> [accessed on 12th March, 2008]; *BTC Project ESIA, Georgia, Final ESIA, Legislation and Policy Framework*, 2002, p. 6-10. *ABN AMRO's explanation to its participation in the BTC pipeline project*, ABN AMRO, 2003, p. 3.

to EIA Review – BTC pipeline (Turkey section)”.⁶⁵¹ The document alleged non-compliance, on 127 accounts, of the BTC Project with the IFC Safeguard Policies and therefore with the Equator Principles.⁶⁵² An analysis in the document covered only the Turkish section of the BTC Project; however it assumed cases of non-compliance within the Georgian and Azerbaijanian sections of the BTC pipeline.⁶⁵³ It should be noted that the analysis claimed at least 35 cases of non-compliance with the consultation requirements under the IFC Environmental Assessment OP 4.01 (1998).⁶⁵⁴ In response to this document, the Equator Banks hired Mott MacDonald, an independent environmental consultant, to evaluate compliance with the IFC Safeguard Policies and with the Equator Principles, and later claimed that the BTC project was fully compliant, but rejected requests on making public the report prepared by Mott MacDonald.⁶⁵⁵ The IFC also concluded that the BTC project was in compliance with its safeguard policies.⁶⁵⁶

On 3 February 2004, the decision was made by 15 commercial banks, nine of which were the Equator Banks, to provide loans to the BTC Co. for the BTC project.⁶⁵⁷ The announcement of funding was followed by criticism: on the same day the WWF argued the following: “the Royal Bank of Scotland’s funding of this pipeline totally undermines its commitment, as a signatory of the Equator Principles, to responsible funding practices. As a test case, the BTC pipeline would

⁶⁵¹ Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles, Supplementary Appendix to EIA Review – BTC pipeline (Turkey section), Platform *et al*, October, 2003; Muttitt, G. “Disaster in the pipeline: Baku-Tbilisi-Ceyhan”, *PLATFORM*, 2004, p. 2.

⁶⁵² Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles, Supplementary Appendix to EIA Review – BTC pipeline (Turkey section), Platform *et al*, October, 2003; Affolder, N, “Cachet not Cash: Another Sort of World Bank Group Borrowing” (2006) 14 *Mich. St. J. Int’l L.* p. 156; *BTC Project is the First Major Test of the Equator Principles*, 2004, p. 1, available at <<http://www.equator-principles.com/btc.shtml>> [access on 6th January, 2010].

⁶⁵³ Evaluation of compliance of the Baku-Tbilisi-Ceyhan (BTC) pipeline with the Equator Principles, Supplementary Appendix to EIA Review – BTC pipeline (Turkey section), Platform *et al*, October, 2003, p. 2.

⁶⁵⁴ *Ibid.*, p. 9.

⁶⁵⁵ Principal objections: Analysis of the Sakhalin II oil and gas project’s compliance with the Equator Principles, Platform, May 2004, p. 10; *Implementation of ECGD’s Business Principles: Government Response to the Committee’s Ninth Report of Session 2004-05*. House of Commons, Trade and Industry Committee, HC 366, 2005, pp. 1-2; Muttitt, G. *op cit.*, (2004), p. 2; Nwete, B. *op cit.*, (2005), p. 182; *BTC Project is the First Major Test of the Equator Principles*, 2004, p. 1, available at <<http://www.equator-principles.com/btc.shtml>> [access on 6th January, 2010]; Muttitt, G. *op cit.*, (2004), p. 2.

⁶⁵⁶ *Project is the First Major Test of the Equator Principles*, 27 February, 2004, p. 1, available at <<http://www.equator-principles.com/btc.shtml>> [access on 6th January, 2010]; BTC Pipeline and ACG Phase 1 Projects Environmental and Social Documentation, IFC Response to submissions received during the 120-day Public Comment Period, the IFC, 27 October, 2003, p. 4; Nwete, B. *op cit.*, (2005), p. 182.

⁶⁵⁷ Muttitt, G. *op cit.*, (2004), p. 1.

seem to expose the signing of these banks to the Principles as a public relations exercise which allows them to continue with business as usual whatever the risks to people and nature”.⁶⁵⁸ Friends of the Earth stated the following: “our organization last year cautiously welcomed the Equator Principles as a first step towards environmentally and socially sound banking. However, since then we have seen already several occasions where these banks continued to finance controversial projects with vast consequences for the environment, the BTC being only the last of them. The very credibility of the Equator Principles is at stake here.”⁶⁵⁹ It has been argued that “the Equator Principles can be used in two ways – to exclude financing of projects which fail to meet certain minimum standards, and to set markers for improving projects’ standards. In the BTC case, *banks* failed on both counts”.⁶⁶⁰ It was noted that several banks, in private, acknowledged that they did not carry out due diligence regarding the BTC project because they trusted the IFC and the BTC Co.⁶⁶¹ It was claimed that the Equator Banks comprehensively failed to implement the Equator Principles when making a decision on providing funding to the BTC project.⁶⁶² Some NGOs have criticized the Equator Banks for not implementing the Equator Principles in the following projects: the BTC, Sakhalin I and II, the Three Gorges Dam, Chad-Cameroon etc.⁶⁶³ According to Nguyen, “due to the EP’s lax requirements on transparency and disclosure, and how wording in the EP [Equator Principles] can lead to subjective assessment on compliance, finding a proper case study can be tricky. Nonetheless, the Baku-Tbilisi-Ceyhan (BTC) pipeline project serves as an excellent example because of its sheer size, which garnered the project much media attention. Moreover, members of the press covering this project have brought up issues that are clearly antithetical in nature to the spirit of the EP (ensuring that environmental or social concerns related to the project are addressed). Also, because there are public financial institutions involved in the project, such as the IFC, public documents

⁶⁵⁸ *Royal Bank of Scotland to fund controversial oil pipeline*, WWF-UK press release, 3 February 2004, available at < http://www.wwf.org.uk/wwf_articles.cfm?unewsid=837 > [accessed on 11 February, 2011]; See also *RBS attacked over unethical oil pipeline Controversial projects*, Sunday Herald, 8 February, 2004.

⁶⁵⁹ *Major banks criticised for supporting Caspian pipeline project*, BankTrack Network press release, 3 February, 2004.

⁶⁶⁰ Muttitt, G. *op cit.*, (2004), p. 2.

⁶⁶¹ *Ibid.*

⁶⁶² *Principles, Profits or just PR? Triple P investments under the Equator Principles: An Anniversary Assessment*, BankTrack, June 2004, pp. 13-14.

⁶⁶³ Watchman, P. “Banks, Business and Human Rights” (2006), *Journal of International Banking and Financial Law*, p. 4.

about the project are also available.”⁶⁶⁴ For example, the documents prepared by the Office of the Compliance Advisor/ombudsman (CAO) of the IFC on the information disclosure and public consultation aspects of the BTC project, may contain valuable information for the determination of the non-compliance of the Equator Banks with the Equator Principles.

The case study in *Chapter Six* aims to examine whether the BTC Co. fulfilled the requirements of the Equator Principles regarding disclosure of information and public consultation and whether the Equator Banks adhered to Principles 3 and 5 of the Equator Principles when providing loans to the BTC Co. When the BTC Co. received loans from the Equator Banks in February 2004, the 2003 version of the Equator Principles was valid; therefore the following section examines the requirements of borrowers regarding disclosure of information and public consultation under the original 2003 version of the Equator Principles.

3.5 Requirements of the Borrowers under the Equator Principles regarding Disclosure of Information and Public Consultation

This section examines in detail the relevant provisions of the original version of the Equator Principles (2003), in order to find out the requirements for borrowers regarding disclosure of information and public consultation.

3.5.1 Principle 5 of the Equator Principles

It has been noted that by the adoption of the Equator Principles, communities and other civil society entities can be involved in project finance issues that ordinarily involved only project sponsors and lenders.⁶⁶⁵ Principle 5 of the Equator Principles sets out clearly the requirements for borrowers regarding disclosure of information and public consultation. It should be noted that Principle 5 does not require the Equator Banks to make public information held by them.

⁶⁶⁴ Nguyen, A. L. “Investigating Compliance/Non-Compliance with the Equator Principles: To Comply or Not to Comply . . . That is the Question”, (2007), University of California, *Corporate Social Responsibility*, p. 30.

⁶⁶⁵ Nwete, B. *op cit.*, (2005), p. 174.

3.5.1.1 Requirement for Public Consultation under Principle 5

According to Principle 5 of the Equator Principles, the Equator Banks will provide loans if the borrower or third party expert, to the satisfaction of the Equator Banks, has consulted, in a structured and culturally appropriate way, groups that are affected by the project, including the indigenous population and local NGOs, for all Category A projects and, when appropriate, for Category B projects. Principle 5 states that the EA and the EMP must take into account such consultations and, for Category A projects, must be subject to independent expert review. The Equator Principles provide for the avoidance of adverse impacts of projects on communities through consultation.⁶⁶⁶ Under the Equator Principles, the project sponsor is expected to carry out public consultations with potentially impacted actors.⁶⁶⁷ Principle 5 requires the borrower, or a third-party expert, to consult with project affected groups in a meaningful way.⁶⁶⁸ The borrower is required to carry out appropriate consultations.⁶⁶⁹ The requirement under Principle 5 to consult project affected groups in a “structured and culturally appropriate” way is of great importance; “this requirement stipulates that the consultation must be in a manner which is appropriate to the location of the project and the local communities. . . cultural appreciation appears to imply that a borrower or expert considers which form of communication may be necessary, what language or languages should be adopted, what the affected communities’ decision process is, and where meetings should be held”.⁶⁷⁰ It is important to bear in mind that under Principle 5, the EA and EMP must address comments made by the affected groups.⁶⁷¹

⁶⁶⁶ Townsend, T. *op cit.*, (2006), p. 5.

⁶⁶⁷ Jenkins, J. Bowman, J. and Kaminskaite-Salters, G. “A socially responsible construction industry” (2006), 17 *5 Construction Law* 13, p. 4; Hardenbrook, A. *op cit.*, (2007), p. 202.

⁶⁶⁸ Tulder, R. and Zwart, A. *International Business Society Management: Linking corporate responsibility and globalization* (Oxon: Routledge, 2006), p. 242; Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004), p. 21; Coleman, L. *Risk Strategies: Dialing Up Optimum Firm Risk* (Surrey: Gower Publishing, 2009), p.159. Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004), p. 21.

⁶⁶⁹ Brown, C.S. *Sustainable Enterprise: Profiting from Best Practice* (UK: Cogan Page, 2005), p. 416.

⁶⁷⁰ Watchman, P. Q. Delfino, A. and Addison, J. *op cit.*, (2007), p. 12.

⁶⁷¹ Hardenbrook, A. *op cit.*, (2007), p. 202.

3.5.1.2 Requirement for Disclosure of Information under Principle 5

According to Principle 5 of the Equator Principles, the Equator Banks will provide loans if the EA, or its summary, has been made public to the public for a reasonable minimum period of time in its language and in a culturally appropriate way. Under the Equator Principles, the borrower is required to ensure disclosure of information to the public.⁶⁷² Principle 5 requires the borrower to make public for public comment the EA in local language.⁶⁷³ The borrower must provide information to ones who are involved on the risks of the project.⁶⁷⁴ The requirement of the disclosure of the EA or its summary under Principle 5 might also imply the requirement of publication of a notice thereof in a local language newspaper.⁶⁷⁵

In the Equator Principles only Principle 5 directly addresses the requirements of borrowers regarding disclosure of information and public consultation. However it should be taken into consideration that under the “note” to Principle 3, the borrower is required to conduct an EA process in compliance with the World Bank and IFC Specific Guidelines and, for projects in the emerging markets, with the IFC Safeguard Policies.⁶⁷⁶ The Equator Principles link their requirements to the IFC standards and therefore compliance with these standards is mandatory, as they form an integral part of the conditions on which loans are provided to the borrowers.⁶⁷⁷ It has been noted that “the IFC standards also have spillover effects, as they are followed by banks adhering to the Equator Principles, which are responsible for some 80 percent of global commercial-project lending.”⁶⁷⁸ By the

⁶⁷² Wilhelm, K. *Return on Sustainability: How Business Can Increase Profitability & Address Climate Change in Uncertain Economy* (Indianapolis: Dog Ear Publishing, 2009), p. 106; Shankleman, J. *Oil, Profits, and Business: Does Business have a Role in Peacekeeping?* (Washington: United Nations Institute of Peace, 2006), p. 62.

⁶⁷³ Kamijyo, M. *op cit.*, (2004), p. 35; OECD, *Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches* (OECD, 2005), p. 33; Hardenbrook, A. *op cit.*, (2007), p. 202.

⁶⁷⁴ *Watershed Victoria*, The Banks and the Equator Principles, 2009, p. 1.

⁶⁷⁵ Lawrence, R. F. and Thomas, W. L. *op cit.*, (2004), p. 21.

⁶⁷⁶ Kamijyo, M. *op cit.*, (2004), p. 35; Tulder, R. and Zwart, A. *op cit.*, (2006), p. 242; *Leading Banks Announce Adoption of Equator Principles*, June 4, 2003, p. 2, available at <<http://www.equator-principles.com/pr030604.shtml>> [accessed on 8th May 2009]; Lee, V. “Enforcing the Equator Principles: An NGOs Principles Effort to Stop the Financing of a Paper Pulp Mill in Uruguay” (2008) Vol. 6 (2) *Northwestern Journal of International Human Rights*, p. 359; Nwete, B. *op cit.*, (2005), p. 177; Affolder, N, *op cit.*, (2006) p. 156;

⁶⁷⁷ Leader, S. “Human Rights, Risks, and New Strategies for Global Investment” (2006) 9 (3) *Journal of International Economic Law*, p. 8.

⁶⁷⁸ Ruggie, G. J. *op cit.*, (2007), p. 835.

adoption of the Equator Principles, the IFC Safeguard Policies were diffused beyond the clients of the IFC and to the project finance industry.⁶⁷⁹

It is necessary to examine (a) the World Bank and IFC Specific Guidelines provided for in Exhibit III of the Equator Principles and (b) the IFC Safeguard Policies provided for in Exhibit II of the Equator Principles, that are referred to in Principle 3 of the Equator Principles, as minimum standards to be complied with by the EA. This understanding is necessary in order to find out which applicable standards they created for borrowers if any, regarding disclosure of information and public consultation within the framework of the EA procedure.

3.5.2 Requirements of Standards, referred to in Principle 3 of the Equator Principles, regarding Disclosure of Information and Public Consultation within the Framework of the Environmental Assessment (EA) Procedure

3.5.2.1 Exhibit III: World Bank and IFC Specific Guidelines

Exhibit III of the Equator Principles states that, as of 4 June 2003, the IFC was using for its projects the following two series of guidelines: 1) all environmental guidelines provided for in the World Bank Pollution Prevention and Abatement Handbook (PPAH); 2) sets of environmental, health and safety guidelines elaborated by the IFC. Exhibit III also states that, as of 4 June 2003, the IFC was using the World Bank General Environmental Guidelines, and the IFC General Health and Safety Guidelines, in the absence of a specific guideline for a sector of any particular project.⁶⁸⁰ The above listed guidelines are “soft law” documents and were used by the IFC, until they were replaced⁶⁸¹, to require private sector borrowers the compliance with them in order to obtain loans from the IFC.

⁶⁷⁹ Park, S. “The World Bank Group: Championing Sustainable Development Norms?” (2007) 13 *Global Governance*, p. 537.

⁶⁸⁰ Exhibit III: World Bank and IFC Specific Guidelines, The Equator Principles (2003); *Bank Information Center, IFC spreading overhaul of Pollution Prevention and Abatement Handbook*, available at <<http://www.bicusa.org/en/Article.1399.aspx>> [accessed on 8th November, 2010].

⁶⁸¹ On 30 April, 2007 the World Bank Group adopted the Environmental, Health, and Safety (EHS) Guidelines, known as the “EHS Guidelines” which replaced 1. all World Bank Guidelines set out in Part III (Project Guidelines) of the Pollution Prevention and Abatement Handbooks (PPAH), and 2. all the IFC guidelines which were prepared in 1991-1993. *The International Finance Corporation (IFC), Archived Policies and Guidelines*, available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/Policies_Archived#EHSPPAH> [accessed on 11th November, 2010].

The World Bank Pollution Prevention and Abatement Handbook (PPAH)⁶⁸² consists of three parts.⁶⁸³ Part III (Project Guidelines) sets out specific guidelines⁶⁸⁴, which are listed in Exhibit III of the Equator Principles as the applicable PPAH Guidelines, and which cover various industrial sectors.⁶⁸⁵ Examination of the content of guidelines provided for in Part III of the PPAH, suggests that these guidelines are used as an input to the environmental assessment (EA) processes of the World Bank Group and set out certain standards for various sectors regarding pollution prevention and abatement measures that are acceptable to the World Bank Group. These standards do not provide for the requirements of the borrowers regarding disclosure of information and public consultation. The same can be said about the World Bank General Environmental Guidelines and the IFC General Health and Safety Guidelines referred to in Exhibit III of the Equator Principles.

A series of environmental, health and safety guidelines were prepared by the IFC in 1991-1993 and for these guidelines there are no parallel guidelines in the PPAH handbook.⁶⁸⁶ The list of IFC guidelines provided for in Exhibit III of the Equator Principles, and used by the IFC as of 4 June 2003, covers 28 fields.⁶⁸⁷ These

⁶⁸² Pollution Prevention and Abatement Handbook 1998: Toward Cleaner Production, The World Bank Group, Washington, D.C. 1999.

⁶⁸³ Part I (Overview) is aimed at public authority decision-makers and sets out briefly the most important pollution lessons in pollution management. Part II (Implementing Policies in Practice) sets out good practice notes on the implementation of policy aims. The chapter “The Environmental Assessment Process” of part II describes and explains the purpose of EA under the then relevant World Bank’s OD 4.01 “Environmental Assessment” (1991) which was later replaced by the World Bank Operational Policy on Environmental Assessment OP4.01 (1999). Pollution Prevention and Abatement Handbook 1998: Toward Cleaner Production, The World Bank Group, Washington, D.C. 1999, pp. vii-viii.

⁶⁸⁴ 1. Aluminum Manufacturing; 2. Base Metal and Iron Ore Mining; 3. Breweries; 4. Cement Manufacturing; 5. Chlor-Alkali Plants; 6. Coal Mining and Production; 7. Coke Manufacturing; 8. Copper Smelting; 9. Dairy Industry; 10. Dye Manufacturing; 11. Electronics Manufacturing; 12. Electroplating Industry; 13. Foundries; 14. Fruit and Vegetable Processing; 15. General Environmental Guidelines; 16. Glass Manufacturing; 17. Industrial Estates; 18. Iron and Steel Manufacturing; 19. Lead and Zinc Smelting; 20. Meat Processing and Rendering; 21. Mini Steel Mills; 22. Mixed Fertilizer Plants; 23. Monitoring; 24. Nickel Smelting and Refining; 25. Nitrogenous Fertilizer Plants; 26. Oil and Gas Development (Onshore); 27. Pesticides Formulation; 28. Pesticides Manufacturing; 29. Petrochemicals Manufacturing; 30. Petroleum Refining; 31. Pharmaceutical Manufacturing; 32. Phosphate Fertilizer Plants; 33. Printing Industry; 34. Pulp and Paper Mills; 35. Sugar Manufacturing; 36. Tanning and Leather Finishing; 37. Textiles Industry; 38. Thermal Power Guidelines for New Plants; 39. Thermal Power Rehabilitation of Existing Plants; 40. Vegetable Oil Processing; and 41. Wood Preserving Industry.

⁶⁸⁵ Pollution Prevention and Abatement Handbook 1998: Toward Cleaner Production, The World Bank Group, Washington, D.C. 1999, pp. vii.

⁶⁸⁶ Exhibit III: World Bank and IFC Specific Guidelines, the Equator Principles (2003); *Bank Information Center, IFC spearheading overhaul of Pollution Prevention and Abatement Handbook*, available at <<http://www.bicusa.org/en/Article.1399.aspx>> [accessed on 8th November, 2010].

⁶⁸⁷ 1. Airports; 2. Ceramic Tile Manufacturing; 3. Construction Materials Plants; 4. Electric Power Transmission and Distribution; 5. Fish Processing; 6. Food and Beverage Processing; 7. Forestry Operations: Logging; 8. Gas Terminal Systems; 9. General Health and Safety; 10. Health Care; 11.

guidelines are designed to be used in the context of environmental assessment (EA) process of the IFC and contain the performance levels and measures that are considered acceptable to the IFC.⁶⁸⁸ An examination of the content of these guidelines listed in Exhibit III, suggests that the majority of these guidelines do not address the requirements of the borrowers regarding disclosure of information and public consultation. The exceptions are Hazardous Materials Management Guidelines⁶⁸⁹ and Guidelines for Health Care Facilities⁶⁹⁰ which contain certain requirements of the borrower, in their specific context, regarding disclosure of information and public consultation. However considering the nature of these two guidelines, they are not relevant in the context of the two complaints to the CAO to be discussed in *Chapter Six* in the case study part of this thesis.

3.5.2.2 Exhibit II: The IFC Safeguard Policies

Exhibit II of the Equator Principles lists the IFC Safeguard Policies relevant as of 4 June 2003.⁶⁹¹ The IFC Safeguard Policies constitute “soft law” documents adopted within the intergovernmental system. These safeguard policies were used by the IFC, until they were replaced⁶⁹², to require private sector borrowers the compliance with them in order to obtain loans from the IFC.⁶⁹³ The examination of the content

Geothermal Projects; 12. Hazardous Materials Management; 13. Hospitals; 14. Office Buildings; 15. Offshore Oil & Gas; 16. Polychlorinated Biphenyls (PCBs); 17. Pesticide Handling and Application; 18. Plantations; 19. Port and Harbor Facilities; 20. Rail Transit Systems; 21. Roads and Highways; 22. Telecommunications; 23. Tourism and Hospitality Development; 24. Wildland Manage; 25. Wind Energy Conversion Systems; 26. Wood Products Industries; 27. Waste Management Facilities; 28. Wastewater Reuse.

⁶⁸⁸ See Notes to the IFC Environmental, Health and Safety Guidelines (1991-1993).

⁶⁸⁹ According to Hazardous Materials Management Guidelines, the potentially affected community must be informed of the activities involving hazardous materials and provided with means for public feedback. The potentially affected community must be informed of the nature of the potential effects of hazardous materials on human health or the environment, and on the response and safety measures in the case of an accident. Hazardous Materials Management Guidelines, p. 1, 5.

⁶⁹⁰ According to Guidelines for Health Care Facilities, the potentially affected public must be informed of human health effects arising from ordinary and emergency operations at the health care facility and on safety measures in case of an accident. Guidelines for the Health Care, p. 6.

⁶⁹¹ This is the list: Environmental Assessment OP4.01 (1998); Natural Habitats OP4.04 (1998); Pest Management OP4.09 (1998); Forestry OP4.36 (1998); Safety of Dams OP4.37 (1996); Indigenous Peoples OD4.20 (1991); Involuntary Resettlement OP4.30 (1990); Cultural Property OPN11.03 (1986); Child and Forced Labor Policy Statement (1998); and International Waterways OP7.50 (1998). Exhibit II: IFC Safeguard Policies, the Equator Principles (2003).

⁶⁹² As already noted in Chapter One, on 30 April 2006, the IFC replaced its Safeguard Policies by the IFC’s Policy on Social and Environmental Sustainability and by the IFC’s Performance Standards on Social and Environmental Sustainability.

⁶⁹³ It is noteworthy that the IFC, before 1998 followed World Bank policies by adapting them as needed for private sector projects. However, in 1998 the IFC started to create its own safeguard policies consistent with the safeguard policies of the World Bank but aimed at private sector projects: the IFC safeguard policies are: Environmental Assessment OP4.01 (1998), Natural Habitats OP4.04 (1998), Pest Management OP4.09 (1998), Forestry OP4.36 (1998); International

of the IFC Safeguard Policies listed in Exhibit II, suggests that the following policies include requirements for the borrowers regarding disclosure of information and public consultation: Environmental Assessment OP 4.01 (1998), Indigenous Peoples OD4.20 (1991)⁶⁹⁴, Natural Habitats OP4.04 (1998)⁶⁹⁵, Involuntary Resettlement OP4.30 (1990)⁶⁹⁶, and Forestry OP4.36 (1998)⁶⁹⁷. However considering the nature of these safeguard policies, except Environmental Assessment OP 4.01 (1998), they are not relevant in the context of the two complaints to the CAO to be discussed in the case study part of the thesis in *Chapter Six*.⁶⁹⁸

Waterways OP7.50 (1998) and Child and Forced Labor Policy Statement (1998). After 1998, the IFC continued to follow World Bank safeguard policies in those fields where its policies were not yet developed, for example: Involuntary Resettlement OP4.30 (1990), Indigenous Peoples OD4.20 (1991) and Cultural Property OPN11.3 (1986). *Approach Paper*, Joint OED/OEG Evaluation of WBG Activities in the Extractive Industries Sector, pp. 2-3. IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information: Report on the First Three Years of Application, IFC, July 29, 2009, p. 1.

⁶⁹⁴ According to Indigenous Peoples OD4.20 (1991), indigenous populations must be consulted and the strategy for addressing the matters relating to indigenous peoples must be based on the informed participation of these peoples. Paragraph 8, Indigenous Peoples OD 4.20 (1991).

⁶⁹⁵ According to Natural Habitats OP4.04 (1998), the project sponsor must inform affected groups and local communities on projects involving natural habitats and must take their views into account. Paragraph 8, Natural Habitats OP 4.04 (1998).

⁶⁹⁶ According to Involuntary Resettlement OP4.30 (1990), involuntary resettlers must be systematically informed and consulted during the preparation of the resettlement plan. Paragraph 8, Involuntary Resettlement OD 4.30 (1990).

⁶⁹⁷ According to Forestry OP4.36 (1998), the project sponsor must identify and consult the interested groups that are involved in a certain forest area. Paragraph 1 (b), Forestry OP 4.36 (1998).

⁶⁹⁸ Paragraph 3 of the IFC Safeguard Policy on Indigenous Peoples OD4.20 (1991) gives the following definition of indigenous peoples: "the terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process". In the two complaints to the CAO concerning the residents of the village of Dgvari and of sub-districts 18 and 19 of the town of Rustavi, Indigenous Peoples OD4.20 (1991) is not referred to because affected individuals in both cases could not be categorized as indigenous peoples. In both complaints to the CAO to be discussed in Chapter Six, the IFC Safeguard Policy on Involuntary Resettlement OP4.30 (1990) was referred to by residents; however according to the CAO, "the BTC pipeline project does not involve any physical resettlement, but BTC Co. has developed a Resettlement Action Plan (RAP) to address the economic resettlement associated with land acquisition for the project." ("Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia", July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 14.) Involuntary Resettlement OP4.30 (1990) was not applied by the BTC Co. with regard to the residents of the village of Dgvari and sub-districts 18 and 19 of the town of Rustavi and their resettlement did not take place by the BTC Co. The case study does not examine as to whether the BTC Co. had to apply certain safeguard policies of the IFC in the context of the two complaints to the CAO. It only examines whether the disclosure of information and public consultation took place in compliance with the safeguard policy which was applied by the BTC Co. Considering that Involuntary Resettlement OP4.30 (1990) was not applied by the BTC Co in relation to the residents of the village of Dgvari and of sub-districts 18 and 19 of the town of Rustavi, it is inappropriate to argue that the BTC Co. did not fulfill the requirements of the Involuntary Resettlement OP4.30 (1990) on disclosure of information and public consultation. The same could be said about the IFC Safeguard Policies on Natural Habitats OP4.04 (1998) and Forestry OP4.36 (1998): the BTC Co. did not apply these policies in relation to the village of Dgvari and sub-districts 18 and 19 of the town of Rustavi. Natural Habitats OP4.04 (1998) concerns requirements regarding the conservation of natural habitat and Forestry OP4.36 (1998) concerns

3.5.2.2.1 Requirements of the IFC Environmental Assessment OP 4.01 (1998) regarding Disclosure of Information and Public Consultation within the Framework of the Environmental Assessment (EA) Procedure

The IFC Environmental Assessment OP4.01 (1998)⁶⁹⁹, which is listed in Exhibit II of the Equator Principles as a safeguard policy and as a standard to be complied with by the EA, provides the framework for the EA procedure to be carried out by the borrower and contains detailed requirements for borrowers regarding disclosure of information and public consultation within the framework of the EA procedure.⁷⁰⁰

It is important to differentiate the IFC Environmental Assessment OP 4.01 (1998) from the World Bank Environmental Assessment OP4.01 (1999)⁷⁰¹ which was referred to in some BTC project documents and in some challenges against the BTC Co. made by NGOs.⁷⁰² Under the IFC Environmental Assessment OP 4.01 (1998), in order to obtain a loan from the IFC, a project sponsor from a private sector must carry out environmental assessment (EA) for Category A and B

requirements regarding the decrease of deforestation and promotion of afforestation. The content of these two policies was not relevant in the context of the two complaints to the CAO.

⁶⁹⁹ Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy.

⁷⁰⁰ As already noted in Chapter One, section 1.5.2.1, on 30 April 2006, the IFC replaced the IFC Environmental Assessment OP4.01 (1998) with Performance Standard 1: Social and Environmental Assessment and Management System which is part of the IFC's Performance Standards on Social and Environmental Sustainability.

⁷⁰¹ The IFC Safeguard Policy on Environmental Assessment OP4.01 (1998) requires an environmental assessment (EA) of projects that are proposed for IFC financing (Paragraph 1, Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy) The World Bank Operational Policy on Environmental Assessment OP4.01 (1999) requires an environmental assessment of projects proposed for the IBRD and IDA financing and not for financing by the IFC (Paragraph 1, Environmental Assessment OP4.01 (1999), the World Bank Operational Policy). The clients of both the IBRD and IDA are countries and the clients of the IFC are private companies, since the IFC lends directly to private companies. *The World Bank, International Bank for Reconstruction and Development, Frequently Asked Questions*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,contentMDK:21116492~menuPK:3126966~pagePK:64168445~piPK:64168309~theSitePK:3046012,00.html>> [accessed on 14th November, 2010]; *The World Bank, International Development Association (IDA), What is IDA*, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21206704~menuPK:83991~pagePK:51236175~piPK:437394~theSitePK:73154,00.html>> [accessed on 14th November, 2010]; Environmental Assessment OP4.01 (October 1998), the International Finance Corporation Operational Policy, p.1, footnote 1.

⁷⁰² BTC Pipeline and ACG Phase 1 Projects Environmental and Social Documentation: IFC Response to submissions received during the 120-day Public Comment Period, IFC, October 27, 2003, p. 5; Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project, Rustavi, Georgia, the CAO, 2004, p. 14; Environmental Assessment OP4.01 (January 1999), The World Bank Operational Policy.

projects.⁷⁰³ It should be noted that the term “EA” in the IFC Environmental Assessment OP 4.01 (1998), refers to the entire process set out in the document.⁷⁰⁴ For Category A projects an environmental assessment (EA) report is usually an environmental impact assessment (EIA)⁷⁰⁵, with elements of other instruments included if appropriate.⁷⁰⁶ The EA process under the IFC Environmental Assessment OP 4.01 (1998) constitutes a procedural framework for the promotion of public consultation and information disclosure.⁷⁰⁷

3.5.2.2.1.1 Requirements of the IFC Environmental Assessment OP4.01 (1998) regarding Public Consultation

The IFC defined the term “public consultation” in the context of the IFC Safeguard Policies as follows: “the process of engaging affected people and other interested parties in open dialogue through which a range of views and concerns can be expressed in order to inform decision-making and help build consensus. To be meaningful, consultation should be carried out in a culturally appropriate manner, with information in local language distributed in advance”.⁷⁰⁸

According to paragraph 12, for a Category A project and, if appropriate, for a Category B project, the project sponsor must consult, during the EA process, groups that are affected by the project and local NGOs of the project’s

⁷⁰³ Paragraphs 1, 4 and 8, Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy; Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 3.

⁷⁰⁴ Paragraph 1, footnote 1, Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy.

⁷⁰⁵ All EIAs should normally address “(a) existing environmental and social baseline conditions; (b) potential environmental and social impacts (direct and indirect), including opportunities for enforcement; this includes the cumulative impact of the proposed project and other developments which are anticipated; (c) systematic comparison of feasible alternative investments, sites, technologies, and designs; (d) preventive, mitigating, and compensatory measures; (e) capacity for environmental and social management and training programs; (f) detailed results of the public consultation and disclosure program; and (g) monitoring”. Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 22; paragraph 2, “Annex A – Definitions”, Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy.

⁷⁰⁶ Paragraph 8 (a); footnote 1, “Annex B – Content of an Environmental Assessment Report for a category A Project”; Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy. See also paragraph 7.

⁷⁰⁷ *Doing Better Business Through Effective Public Consultation and Disclosure: A Good Practice Manual*, the IFC, 1998, p. 4.

⁷⁰⁸ Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 39.

environmental impacts and must take their views into account.⁷⁰⁹ Such consultations must be initiated as early as possible.⁷¹⁰ For all Category A projects, consultation should take place at least twice: (a) after environmental screening and before the terms of reference for the EA are finalized, and (b) when a draft EA report is prepared.⁷¹¹ Additionally, the project sponsor is required to consult with these groups during the implementation of the project, where necessary, in order to address issues related to the EA and affecting these groups.⁷¹²

It should be noted that according to paragraph 13, if a Category A Environmental Assessment was completed before the involvement of the IFC in a project, the IFC must review the disclosure of information and public consultation by the project sponsor, in order to identify deficiencies if any.⁷¹³ When necessary, the IFC and project sponsor should agree on additional public consultation and information disclosure plan and later the project sponsor should prepare a report reflecting the results of such additional actions.⁷¹⁴

3.5.2.2.1.2 Requirements of the IFC Environmental Assessment OP4.01 (1998) regarding Disclosure of Information

The IFC defined the meaning of “disclosure of information” in the context of the IFC Safeguard Policies as follows: “the process of making information available to affected people and other interested parties, particularly with regard to the environmental and social aspects of projects. Disclosure of information should be done in a timely manner, in publicly accessible locations and in a language and format readily understood by affected groups”.⁷¹⁵ It has been argued that the information has critical significance for the effective participation of affected

⁷⁰⁹ Paragraph 12, Environmental Assessment OP4.01 (1998), the International Finance Corporation Operational Policy.

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² *Ibid.*

⁷¹³ *Ibid.*, paragraph 13.

⁷¹⁴ *Ibid.*

⁷¹⁵ Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 39.

individuals near the project.⁷¹⁶ In order for the consultations to be meaningful, the project sponsor must ensure disclosure of information.⁷¹⁷

According to paragraph 14, in order to ensure meaningful consultations with groups affected by the project and with local NGOs on a Category A project and, where appropriate, for a Category B project, the project sponsor must ensure the disclosure of relevant material on time prior to the consultation, and in a form and language understandable and accessible to these groups.⁷¹⁸

According to paragraph 15, for all Category A projects, the project sponsor must ensure, for the initial consultation, the disclosure of a summary of the project's objectives, description, and potential impacts.⁷¹⁹ When the draft EA report is prepared, the project sponsor must ensure the disclosure of a summary of the EA's conclusions for consultations i.e. a non-technical summary of the project's findings.⁷²⁰ In both cases, the summaries should be made available prior to consultation and proactively disseminated to project-affected groups and local NGOs.⁷²¹ Additionally, for all Category A projects, the project sponsor must make the draft EA report available at a public place that is accessible to project-affected groups and local NGOs.⁷²² This means that for all Category A projects, the project sponsor must give public notification and make the draft EA report available to project-affected groups and local NGOs.⁷²³ The draft EA report should include responses to the public consultation process.⁷²⁴

⁷¹⁶ *Doing Better Business Through Effective Public Consultation and Disclosure: A Good Practice Manual*, the IFC, 1998, p. 3.

⁷¹⁷ *Ibid.* p. 22.

⁷¹⁸ Paragraph 14, Environmental Assessment OP4.01 (October 1998), the International Finance Corporation Operational Policy.

⁷¹⁹ *Ibid.*, paragraph 15.

⁷²⁰ Paragraph 15, Environmental Assessment OP4.01 (October 1998), the International Finance Corporation Operational Policy; Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 13.

⁷²¹ Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 13; *Doing Better Business Through Effective Public Consultation and Disclosure: A Good Practice Manual*, the IFC, 1998, p. 40.

⁷²² Paragraph 15, Environmental Assessment OP4.01 (October 1998), the International Finance Corporation Operational Policy.

⁷²³ Procedure for Environmental and Social Review of Projects, the International Finance Corporation, 1998, p. 14.

⁷²⁴ *Doing Better Business Through Effective Public Consultation and Disclosure: A Good Practice Manual*, the IFC, 1998, p. 40.

3.7 Conclusions

An analysis of the material in *Chapter Three* suggests that the Equator Principles as a “soft law” initiative has established a standard for assessing and managing environmental and social issues in the project finance sector globally. The implementation of the Equator Principles has great significance in emerging markets and particularly, in the context of oil and gas exploration. There are differences between the requirements of the Equator Principles for the banks which adopted these principles and for the borrowers which apply for loans to such banks. The adoption of the Equator Principles is voluntary for banks, but when they are adopted, the Equator Banks are required to adhere to these principles by ensuring that they do not provide loans to borrowers which do not comply with the requirements of this document. The borrowers are required to comply with the principles set out in the document if they intend to obtain loans from the Equator Banks. The revision of the Equator Principles in 2006 made improvements to these principles in the light of the experience gained during the 3 year period of implementation.

The examination in the chapter suggests that in 2004 the Equator Banks considered the BTC project in compliance with the Equator Principles of 2003 and provided a loan to the BTC Co. despite allegations from NGOs on the non-compliance of the BTC project with these principles on the Turkish section of the project.

The analysis in the chapter suggests that only Principle 5 of the Equator Principles of 2003 directly addresses the requirements of borrowers regarding disclosure of information and public consultation. The examination of the requirements for borrowers regarding disclosure of information and public consultation under the IFC Environmental Assessment OP4.01 (1998), which is referred to in Principle 3 as a minimum standard to be complied with by the EA, suggests that these requirements are multi-tiered and thus more extensive and more detailed than the requirements for disclosure of information and public consultation under Principle 5 of the Equator Principles. Under Principle 3 of the Equator Principles, the borrowers are required, in order to obtain loans from the Equator Banks, to comply with the minimum standards of disclosure of information and public consultation

within the EA procedure that are set out in the IFC Environmental Assessment OP4.01 (1998).

Material examined in *Chapter Three* should enable the case study part in *Chapter Six* to determine whether the BTC Co. complied with the requirements of the Equator Principles regarding the disclosure of information and public consultation and whether the Equator Banks adhered to the Equator Principles of 2003 when making a decision of providing loans to the BTC Co.

Chapter Four: European Convention on Human Rights and Environmental Protection

4.1 Introduction

It is one of the purposes of the study to examine the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection.

The BTC case study in *Chapter Six: Four Formally Adjudicated Complaints* analyses two complaints to the CAO regarding the activities of the BTC Co. These complaints did not allege violations of provisions of the ECHR; however they are informative in terms of possible violation of the right to respect for private and home life under Article 8 of the ECHR, the right to property under Article 1 of Protocol No. 1 of the ECHR, the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR.

A complaint made to the CAO in March 2004, concerning sub-districts 18 and 19 of the town of Rustavi was made in relation to the activities of the BTC Co. and not against the government; however it, as well as a newspaper article, alleged that 1) residents of these sub-districts were subjected to an unbearable pungent smell and loud noise arising from the construction of the BTC pipeline within 250 metres of their housing blocks; 2) residents of these sub-districts held a peaceful protest demonstration to express their concern about the pipeline construction, but their assembly was dispersed by the police force and participants of the rally beaten. This calls for an examination of the following: 1) did the government violate Article 8 of the ECHR by not taking measures for the prevention of the pungent smell and loud noise arising from the construction and causing nuisance to the residents? 2) did the government violate Articles 10 and 11 of the ECHR by dispersing a peaceful demonstration by the use of force?

A complaint made to the CAO in May 2004, concerning the village of Dgvari was made in relation to the activities of the BTC Co. and not against the government; however it, as well as other documents, alleged that 1) the construction of the BTC pipeline activated landslides in the village of Dgvari located 1 km away from the pipeline route and caused great damage to the houses of the villagers; 2) residents of the village of Dgvati held peaceful protest demonstrations to express their concern about the pipeline construction but the police used force against them and beat them. This calls for an examination of the following: 1) did the government violate Article 1 of Protocol No. 1 of the ECHR by not taking measures for the prevention or compensation of damage to the houses of villagers from the construction activities? 2) did the government violate Articles 10 and 11 of the ECHR by dispersing the peaceful protests of villagers by the use of force?

This chapter examines the relevant provisions of the European Convention on Human Rights (ECHR) in the light of their potential to be used for environmental protection in order to find answers to the questions in the case study, as to whether these provisions were violated in the context of the residents of sub-districts 18 and 19 of the town of Rustavi and the villagers of Dgvari.

Section 2 provides an introduction to the ECHR and the European Court of Human Rights (ECtHR). It also introduces and examines the following concepts: the positive obligation under the ECHR, the principle of proportionality, the doctrine of margin of appreciation, and dynamic interpretation of the ECHR. Then it introduces the conceptual links between the ECHR and environmental protection. Section 3 examines the right to private and home life under Article 8 of the Convention and its potential to protect individuals against environmental harm. Section 4 examines the right to property under Article 1 of Protocol No. 1 in the light of protection against environmental harm. Section 5 examines freedom of expression under Article 10 and its relevance for environmental protection. Section 6 examines the right to freedom of assembly under Article 11 and links it to environmental protection. Section 7 contains conclusions on the issue of the ECHR and environmental protection. It should be noted that sections 3-6 refer to and analyse the major decisions of the ECtHR involving environmental aspects; however it is not claimed that these sections analyse all such decisions. It would be impossible to analyse them all within one chapter of the thesis.

4. 2 Introduction to the ECHR⁷²⁵

4.2.1 ECHR and ECtHR

The European Convention on Human Rights (ECHR) was adopted by the Council of Europe⁷²⁶ on 4 November, 1950 and entered into force on 3 September, 1953.⁷²⁷ The ECHR constitutes the European system for the protection of human rights.⁷²⁸ It has been argued that the collective enforcement mechanism of the ECHR is its unique feature.⁷²⁹ The ECHR established the first international complaints procedure and the first international court for determining matters of human rights.⁷³⁰ The European Court for Human Rights (ECtHR)⁷³¹ is a regional court for human rights protection.⁷³² It has been argued that the Convention has generated a

⁷²⁵ See Appendix VI “The European Convention on Human Rights” of the thesis. The full title of the Convention is “the Convention for the Protection of Human Rights and Fundamental Freedoms”, but it is usually referred to as “the European Convention on Human Rights”. The European Convention on Human Rights, as amended by Protocols No. 11 and No. 14, consists of a preamble; Article 1; Section I (Articles 2-18) which mostly lays down human rights (except Articles 15-18); Section II (Articles 19-51) which contains provisions regarding the European Court of Human Rights (ECtHR); Section III (Articles 52-59) which sets out miscellaneous provisions; and additional Protocols No. 1, 4, 6, 7, 12 and 13 which also lay down human rights. It should be noted that Protocol No. 11 replaced and repealed in 1998 Protocols No. 2, 3, 5, 8, 9 and 10.

⁷²⁶ The Council of Europe was established on 5 May, 2005 and it aims to protect human rights, pluralist democracy and rule of law. *The Council of Europe in Brief*, available at <<http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en>> [accessed on 19 March 2011]. The institutions of the Council of Europe include: the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities and the European Court of Human Rights. *Council of Europe*, available at <www.coe.int> [accessed on 21th April, 2011].

⁷²⁷ Leach, P. *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press, 2005), p. 5.

⁷²⁸ Lillich, R. B. *et al*, *International Human Rights: Problems of Law, Policy, and Practice* (New York: ASPEN Publishers, 2006), p. 618.

⁷²⁹ Salcedo, J.A.C. “The Place of the European Convention in International Law” in Macdonald, R.St.J. Mather, F. and Petzhold, H. (eds.) *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 17.

⁷³⁰ Steiner J. H., and Alston P, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2000), p. 786.

⁷³¹ It should be noted that Protocol No. 11 abolished the two-tier system of the European Commission of Human Rights and the European Court of Human Rights, removed the quasi-judicial role of the Committee of Ministers of the Council of Europe, and created a single permanent European Court of Human Rights. Leach, P. *op cit.*, (2005), p. 7. And Protocol No. 14 introduced in 2010 functional changes to the system of the European Court of Human Rights as opposed to the structural changes made by Protocol No. 11. *Explanatory Report, Protocol No. 14, The Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe*, available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>> [accessed on 23 April, 2011]. To consider cases, the new Court sits in a single judge formation, committees consisting of three judges, Chambers of seven judges and a Grand Chamber of seventeen judges (Article 26, paragraph 1 of the ECHR, as amended by Protocol No. 14). The Grand Chamber decides on cases which raise serious questions affecting the interpretation of the Convention or which might result in inconsistency with previously delivered judgment or which were referred to it by a party, after the judgment of the Chamber (Articles 30-31 and 43 of the ECHR).

⁷³² Tomuschat, C. *op cit.*, (2003), p. 198.

more extensive jurisprudence over human rights than any other international system.⁷³³

Although there is no hierarchy of the Convention rights, the rights laid down by the Convention can be divided into two categories: unqualified rights⁷³⁴ and qualified rights.⁷³⁵ In the case of a qualified right the Convention provides for the right in the Article, but indicates in the same Article that the state may interfere with the right in order to secure other interests.⁷³⁶ Qualified rights are the rights set out in Articles 8-11, Article 1 of Protocol No. 1, Article 2 of Protocol No. 4 and Article 1 of Protocol No. 7. Limitation clauses are attached to these Articles designed to qualify the rights set out in the first paragraphs.⁷³⁷ For example, the second paragraphs of Articles 8-11 permit interferences with the rights set out in the first paragraphs, to the extent that these interferences are (a) in accordance with the law and (b) “necessary in a democratic society” in pursuit of particular legitimate objectives. In the case of Article 1 of Protocol No. 1, the first and second paragraphs qualify the exercise of the right provided for in the first part of the first paragraph.

It should be noted that accession to the ECHR has become a precondition for joining the Council of Europe,⁷³⁸ for example, Georgia signed the ECHR upon joining the Council of Europe on 27 April, 1999 and ratified it on 20 May, 1999 which is also the date of its entry into force with regard to Georgia.⁷³⁹ In some member states of the Council of Europe, after ratification of a treaty, its provisions become part of the domestic law while in others incorporation into domestic law must be done through legislature.⁷⁴⁰ The ECHR does not oblige states to make its provisions part of domestic law; however this is the practice mostly followed by

⁷³³ Steiner J. H., and Alston P, *op cit.*, (2000), p. 786.

⁷³⁴ Unqualified rights are for example, the rights set out in Articles 2-7 or 12-14. Some of these are claimed to be absolute considering that no derogations in time of war or other public emergency under Article 15 are permitted: these are rights listed in Articles 2, 3, 4, and 7. Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 5.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ Arai, Y. “The System of Restrictions” in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), pp. 333 - 34.

⁷³⁸ Williams, S. “Human Rights in Europe” in Power, S. and Allison, G. *Realizing Human Rights: Moving from Inspiration to Impact* (New York: Palgrave, 2000), p. 86.

⁷³⁹ *Convention for the protection of Human Rights and Fundamental Freedoms, Status, Council of Europe*, available at <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=28/04/2011&L=ENG>> [accessed on 23 January, 2011].

⁷⁴⁰ Williams, S. *op cit.*, (2000), p. 83.

the signatory states of the Convention.⁷⁴¹ According to the Law of Georgia on Treaties, a treaty to which Georgia is party, constitutes an integral part of the legislation of Georgia.⁷⁴² In Georgia, the ECHR has the status of Georgian legislation and is directly applicable in the Georgian courts as a source of domestic law.⁷⁴³ And according to the Constitution of Georgia, treaties to which Georgia is party, take precedence over domestic normative acts.⁷⁴⁴ In 2000-2003 in Georgia, under the aegis of the Council of Europe, a study was conducted on the compatibility of the Georgian legislation with the requirements of the ECHR for the purpose of making recommendations for ensuring the compliance of the Georgian law with the standards of the ECHR⁷⁴⁵; also this indicates that the ECHR is the relevant expression for the Georgian human rights system.

According to Article 34 of the ECHR, applications may be brought to the ECtHR by a person, NGO or group of individuals who claim to be victims of violations of the Convention rights by a State Party to the Convention.⁷⁴⁶ Thus, individuals and NGOs, claiming to be victims of violations, have standing before the ECtHR.⁷⁴⁷ It should be emphasised that only victims of alleged violations may apply: Article 34 does not permit complaints in abstracto of a violation of the ECHR and the ECtHR has always rejected applications *actio popularis*.⁷⁴⁸ It should be noted that Article 41 provides for the possibility of just satisfaction to the injured party in the form of

⁷⁴¹ Blackburn, R. and Polakiewicz, J. (eds.), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), p. 423.

⁷⁴² *The Law of Georgia on Treaties* (1997), Article 6, paragraph 1.

⁷⁴³ Korkelia, K. *The Application of the European Convention on Human Rights in Georgia* (Tbilisi: Council of Europe Publishing, 2004), p. 11; Korkelia, K. and Kurdadze, I. *International Human Rights Law under the the European Convention on Human Rights* (Tbilisi: Council of Europe Publishing, 2004), p. 26.

⁷⁴⁴ According to Article 6 of the Constitution of Georgia “1. The Constitution of Georgia shall be the supreme law of the state. All other legal acts shall correspond to the Constitution. 2. 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, the Constitutional Agreement, shall take precedence over domestic normative acts.” *The Constitution of Georgia* (1995), Article 6.

⁷⁴⁵ “Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and its Protocols”. 2003. The Council of Europe.

⁷⁴⁶ The possibility of inter-state applications to the ECtHR for violations of the Convention rights is provided for by Article 33 but it should be noted that such applications are rarely made in practice. Tomuschat, C. *op cit.*, (2003), p. 200.

⁷⁴⁷ Ovey, C. and White, R. C.A. *op cit.* (2002), p. 8, 405; Hart, D. “The Impact of the European Convention on Human Rights on Planning and Environmental Law” (2000) *Journal of Planning Law*, p. 121.

⁷⁴⁸ *Klass and others v. Germany* (1979), Series A. No. 28, paragraphs 26 and 33; *De Becker v. Belgium* (1962), Series A No. 4, paragraph 14; Loucaides, L. “Environmental Protection Through the Jurisprudence of the European Convention on Human Rights” (2006) Vol. 75 *British Yearbook of International Law*, p. 249; Schall, C. “Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept” (2008) 20 (3) *Journal of Environmental Law*, p. 3.

financial compensation for pecuniary or non-pecuniary damage, provided the Court decides there has been a violation and if the national law of the state concerned allows only partial reparation to be made.⁷⁴⁹ It is noteworthy that the ECtHR is not bound by its previous judgments; however “it is in the interests of legal certainty, foresee-ability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases”.⁷⁵⁰ The final judgments of the ECtHR have binding force.⁷⁵¹

4.2.2 Positive Obligation

Over the last decades the ECtHR has been developing the notion of positive obligations of states under the ECHR.⁷⁵² A negative obligation implies that the securing of human rights is limited to an abstention from state actions which interfere with these rights while a positive obligation implies that the securing of human rights requires the state to take measures to ensure the observance of these rights.⁷⁵³ The Convention mainly concerns what states should not do and not what states must do.⁷⁵⁴ There are areas of the ECHR where it is established that states have a positive obligation to take measures for the prevention of violations of the Convention.⁷⁵⁵ According to the doctrine of positive obligation, the state may be responsible in certain circumstances for the violation of the ECHR by non-state actors.⁷⁵⁶ Thus, states can be under obligations to protect individuals from the

⁷⁴⁹ Mowbray, A. *op cit.*, (2001), p. 728; Shelton, D. *Remedies in International Human rights Law* (Oxford: Oxford University Press, 2005), pp. 294-298.

⁷⁵⁰ *Beard v. UK* (2001) 33 EHRR 19, paragraph 81. Leach, P. *op cit.*, (2005), p. 165.

⁷⁵¹ Under Article 46 of the ECHR, State Parties to the ECHR undertake the obligation to abide by the judgment of the ECtHR in all cases to which they are parties, and the Committee of Ministers of the Council of Europe supervises the execution of judgments. The Committee of Ministers is the decision-making organ of the Council of Europe and consists of Ministers of Foreign Affairs and permanent diplomatic representatives of member states. *About the Committee of Ministers, Council of Europe*, available at <http://www.coe.int/t/cm/aboutCM_en.asp> [accessed on 21st April, 20011]; Smith, R. K. M. *Textbook on International Human Rights* (Oxford: Oxford University Press, 2005), p. 98.

⁷⁵² Mowbray, A. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Portland Oregon, 2004), “Preface”.

⁷⁵³ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 38.

⁷⁵⁴ Feldman, D. *Civil Liberties and Human Rights in England and Wales* (Oxford, 2002), p. 53; Merrilis, J. G. *The development of international law by the European Court of Human Rights* (Manchester: Manchester University Press, 1988), p. 94;

⁷⁵⁵ Leach, P. *op cit.*, (2005), p. 166. The right to life has been interpreted by the ECtHR as imposing a positive obligation on states to safeguard lives (*Osman v. UK* (2000) 29 EHRR 245, paragraph 15) or to conduct effective investigation into a death resulting from actions by the state (*McCann, Farrell and Savage v. UK* (1996), 21 EHRR 97). *McCann, Farrell and Savage v. UK* (1996), 21 EHRR 97; Zwaak, L. “Right to Life” in in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), p. 353.

⁷⁵⁶ Leach, P. *op cit.*, (2005), p. 167.

violation of the rights of the European Convention from both private persons and public officials.⁷⁵⁷

4.2.3 Principle of Proportionality

The principle of proportionality is a frequent subject matter when interpreting the Convention.⁷⁵⁸ When the question arises as to whether interference with the right is justifiable, the ECtHR examines its proportionality.⁷⁵⁹ The use of the principle of proportionality is most evident with regard to Articles which expressly permit restrictions on rights: for example, the second paragraphs of Articles 8-11, which allow interference with the substantive rights to the extent that this is “necessary for a democratic society” for specific listed public interests.⁷⁶⁰ The Court stated that the restriction under the second paragraph “must be proportionate to the legitimate aim pursued”.⁷⁶¹ The principle of proportionality has been also applied with regard to Articles providing for the right to property having a qualifying paragraph.⁷⁶² To determine whether a measure is justified to restrict the use of property, the ECtHR must strike a fair balance “between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.⁷⁶³ It can be argued that the principle of proportionality has great significance for the protection of the rights of individuals from the unrestricted general interest of the community and for the protection of the general interest of the community from the unrestricted exercise of the rights of individuals.

⁷⁵⁷ Mowbray, A. *op cit.*, (2004), p. 4. It should be noted that positive obligations have also financial implications. Harris, D.J. O’Boyle M. and Warbrick, C. *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 19. The positive obligation also requires states to create prison conditions that cannot be considered as “inhuman”. *Ibid.*

⁷⁵⁸ *Ibid.*, p. 11.

⁷⁵⁹ Matscher, F. *op cit.*, (1993), p. 78.

⁷⁶⁰ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 11; Matscher, F. *op cit.*, (1993), p. 78; Arai, Y. *op cit.*, (2006), p. 340.

⁷⁶¹ *Handyside v. UK* (1976) A 24, paragraph 49.

⁷⁶² Leach, P. *op cit.*, (2005), p. 163; Arai, Y. *op cit.*, (2006), p. 336.

⁷⁶³ Matscher, F. *op cit.*, (1993), p. 79. The ECtHR stated that: “inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. *Soering v. UK* (1989) A 161, paragraph 89.

4.2.4 Doctrine of a Margin of Appreciation

When considering the proportionality of interferences with the Convention rights, the ECtHR applies the doctrine of a margin of appreciation.⁷⁶⁴ The doctrine of a margin of appreciation means that, in assessing proportionality of interferences, the state is permitted a certain measure of discretion.⁷⁶⁵ This doctrine indicates that protection of human rights is first of all the task of the national judiciary and the European Convention does not aim to replace it; it only aims to correct and supplement.⁷⁶⁶ The doctrine of margin of appreciation is applied by the ECtHR within the concept of proportionality in Articles 8-11, however this doctrine is also applicable to other articles, for example, Article 1 of Protocol No. 1.⁷⁶⁷ The extent of a margin of appreciation depends on the rights and on the context.⁷⁶⁸ For example, the ECtHR uses a wider margin of appreciation when dealing with potential violations of Article 1 of Protocol No. 1 than with Articles 8 or 10.⁷⁶⁹

4.2.4 Dynamic Interpretation

According to dynamic or evolutive interpretation, the standards by which the right of the European Convention are assessed are not static.⁷⁷⁰ The ECHR is seen as a “living instrument” by the ECtHR, which interprets it in the light of present day situations.⁷⁷¹ The concepts of the ECHR must be understood in the light of the current democratic European society, since the present day conditions are more important for the interpretation of the European Convention.⁷⁷² According to the ECtHR, standards currently accepted in the European society are determinative, and not those which were prevalent when the ECHR was adopted in 1950.⁷⁷³

⁷⁶⁴ Leach, P. *op cit.*, (2005), p. 163.

⁷⁶⁵ *Ibid.* Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 12.

⁷⁶⁶ Matscher, F. *op cit.*, (1993), p. 76.

⁷⁶⁷ Macdonald, R. “Margin of Appreciation” in Macdonald, R. Matscher, F. and Petzold, H. (eds.) *The European System for the Protection of Human Rights* (Dordrecht, 1993), p. 83; Leach, P. *op cit.*, (2005), p. 163; Merrilis, J. G. *op cit.*, (1988), p. 140; Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 210; Bernhardt, R. “Thoughts on the Interpretation of Human-rights treaties” in Matscher, F. and Petzold, H. (eds.) *Protecting Human rights: the European Dimension* (Bonn: Carl Heymanns Verlag KG, 1987) p. 68; Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 12.

⁷⁶⁸ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 210.

⁷⁶⁹ Macdonald, R. *op cit.*, (1993), p. 118.

⁷⁷⁰ Clayton, R. and Tomlinson H. *The Law of Human Rights* (Oxford: Oxford University Press, 2003), p. 269.

⁷⁷¹ Leach, P. *op cit.*, (2005), p. 164.

⁷⁷² Matscher, F. *op cit.*, (1993), p. 68; Bernhardt, R. *op cit.*, (1987) p. 70.

⁷⁷³ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 8. For example, decisions based on dynamic interpretation have reflected the changed social attitudes in relation to children born out of

However, it has been argued in the context of dynamic interpretation, that the ECHR will not be interpreted to introduce a new right: a line must be drawn between judicial interpretation and judicial legislation.⁷⁷⁴ It can be argued that this method of interpretation of the ECHR plays a significant role in the process of human rights development in Europe; it accelerates the elaboration of new common European standards for the protection of human rights.⁷⁷⁵

4.2.6 European Convention on Human Rights and Environmental Protection

Some rights of the ECHR can be interpreted in the light of protection from environmental harm.⁷⁷⁶ The ECHR does not mention the environment; however the ECtHR has interpreted the provisions of the ECHR in the context of environmental issues by the dynamic method of interpretation i.e. in the light of current

wedlock and to homosexuals. *Marckx v Belgium* A 31 (1979); *Dudgeon v UK* A 45 (1981). Harris, D.J. O'Boyle M. and Warbrick, C. *op cit.*, (1995), p. 8.

⁷⁷⁴ Harris, D.J. O'Boyle M. and Warbrick, C. *op cit.*, (1995), p. 8.

⁷⁷⁵ It should be noted that when interpreting the ECHR, the ECtHR uses also the following principles of interpretation: 1. teleological interpretation (teleological interpretation of the Convention seeks to realise the "object and purpose" of the ECHR. Dijk P and Hoof, G. *Theory and Practice of the European Convention on Human Rights* (The Hague: Netherlands 1998), p. 72. It should be emphasised that the ECHR constitutes a treaty under the Vienna Convention on the Law of Treaties (1969) and according to Article 31, paragraph 1 of the Vienna Convention "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); 2. limits resulting from the clear meaning of the text (despite relying heavily upon the "object and purpose", the European Court has sometimes found that such a method of interpretation is constrained by the clear meaning of the text. Harris, D.J. O'Boyle M. and Warbrick, C. *op cit.*, (1995), p. 16); 3. effective interpretation (According to effective interpretation, the rights of the ECHR must be interpreted to ensure "practical" and "effective" safeguards in the Convention, as opposed to "theoretical" or "illusory". Leach, P. *op cit.*, (2005), p. 165); 4. autonomous meaning of Convention terms (some terms of the ECHR are given an autonomous meaning because they may have different meanings in domestic laws of member states. Harris, D.J. O'Boyle M. and Warbrick, C. *op cit.* (1995), p. 17; Leach, P. *op cit.*, (2005), p. 165.); 5. and recourse to the *travaux préparatoires* (According to Article 31 of the Vienna Convention on the Law of Treaties, supplementary means of interpretation of a treaty can be used including the preparatory work that is same as *travaux préparatoires*..)

⁷⁷⁶ See for example, San José, D. G. *Environmental protection and the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2005); Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006); Loucaides, L. *op cit.*, (2006) p. 249-68; Desgagne, R. "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89 *American Journal of International Law*, pp. 263-294; Churchill, R.R. *op cit.*, (1996), pp. 89-109; Shelton, D. *op cit.*, (2003); Shelton, D. "Human Rights and the Environment: Jurisprudence of Human Rights", *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment: Background Paper No. 2*, Geneva, 2002, pp. 6-11; Rest, A. "Improved Environmental Protection Through an Expanded Concept of Human Rights?" (1997) Vol. 27 (3) *Environmental Policy and Law*, p. 213; DeMerieux, M. "Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms" (2001) Vol. 21 (3) *Oxford Journal of Legal Studies*, pp. 521-561; Sherlock, A. and Jarvis, F. "The European Convention on Human Rights and the Environment" (1999) *European Law Review*, pp. 15-29; Stallworthy, M. "Wither environmental human rights?" (2005) 7 1 (12) *Environmental Law Review*, pp. 12-33; Cook, K. "Environmental Rights as Human Rights" (2002) *European Human Rights Law Review*, pp. 196-230; Corner, T. "Planning, Environment, and the European Convention on Human Rights" (1998) *Journal of Planning and Environmental Law*, pp. 301-314; Pedersen, O. W. "The ties that bind: the environment, the European Convention on Human Rights and the rule of law" (2010) 16 (4) *European Public Law*, pp. 571-595.

conditions; namely the ECtHR has produced a body of environmental jurisprudence in which the “greening” of existing rights of the ECHR has taken place.⁷⁷⁷ The ECHR is not “specifically designed to provide general protection of the environment as such”;⁷⁷⁸ however the ECtHR has interpreted some rights of the ECHR to protect against environmental harms.⁷⁷⁹ The ECtHR has established in its case law that positive obligation under Articles 2 and 8 and Article 1 of Protocol No. 1 may require states to protect individuals against environmental harms.⁷⁸⁰ However, for an individual to be able to invoke any of these rights in an environmental context, he will need to prove to be a victim.⁷⁸¹ It should be noted here that considering the content of the four formally adjudicated complaints discussed in the case study, *Chapter Four* omits the discussion of the right to life in the context of environmental protection.

The ECHR may have a more indirect effect on the environmental sphere: freedom of expression under Article 10 and the right to peaceful assembly under Article 11 may be applied by individuals “[t]o the extent that changes to environmental law or policy are argued for through public protest rather than lobbying”.⁷⁸²

It should be noted that the procedural right to access to court under Article 6, paragraph 1 of the ECHR has been discussed by the ECtHR in cases involving environmental aspects.⁷⁸³ However the application of this right is limited to the determination of (a) “civil rights and obligations” within the meaning of the ECHR or (b) a criminal charge against an individual, and it does not provide for the

⁷⁷⁷ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 275; Loucaides, L. G. *The European Convention on Human Rights: Collected Essays* (Leiden: Martinus Nijhoff Publishers, 2007), p. 167; Weber, S. *op cit.*, (1991), p. 180.

⁷⁷⁸ *Kyrtatos v. Greece* (2003) ECHR 242, paragraph 52.

⁷⁷⁹ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 72;

⁷⁸⁰ For example, *L.C.B. v. the UK* (1999) 27 EHRR 212; *Lopez Ostra v. Spain* (1995) 30 EHRR 277; *Fedeyeva v. Russia* (2005) Application no. 55723/00; *Guerra and Others v. Italy* (1998) 26 EHRR 357; *Hatton and Others v. UK* (2003) 37 ECtHR 28; *Powell and Rayner v. the United Kingdom* (1990) 12 EHRR 355; *Rayner v. UK* (1986) 47 DR 5; *S. v. France* (1990) D 13728/88; *Öneryildiz v. Turkey* (2004) ECHR 657; *Taskin v. Turkey* (2005/6) 42 EHRR 50. Boyle, A. “Human Rights or Environmental Rights? A Reassessment” (2007) 18 *Fordham Env'tl. L. Rev.* pp. 487-488; DeMerieux, M. *op cit.*, p. 527; Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 282-83; Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), p. 6; Cook, K. *op cit.*, pp. 198-199; Eleftheriadis, P. “The Future of Environmental Rights in the European Union” in Alston, P. (ed) *The EU and Human Rights* (Oxford: Oxford University Press, 1999), p. 534.

⁷⁸¹ Loucaides, L. G. *op cit.*, (2007), p. 168.

⁷⁸² Bell, S. and McGillvray, D. *op cit.*, (2008), pp. 72-73.

⁷⁸³ Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), pp. 60-71; DeMerieux, M. *op cit.*, (2001) p. 527. *Zander v. Sweden* (1993) ECHR, Series A, No. 97; *Zimmermann and Steiner v. Switzerland* (1983) ECHR, Series A, No. 66.

general right to apply to a court for all violations of law.⁷⁸⁴ For example, since the right to property is considered by the ECtHR as a “civil right”, in the case *Zander v. Sweden*⁷⁸⁵, the ECtHR found a violation of Article 6 on account of the rejection of the judicial review of a decision threatening environmental harm to the property of the applicant. Considering that the ECHR does not contain provisions on access to information held by public authorities and on public participation in decision-making by public authorities and considering the content of the four formally adjudicated complaints discussed in the case study, *Chapter Four* omits the discussion of the right of access to a court under Article 6.

Additionally, the ECHR can be used for environmental protection in the following way: environmental protection can be considered as of general interest to the community justifying the restrictions in the exercise of the qualified rights of the Convention.⁷⁸⁶ The ECtHR has stated that “in today’s society the protection of the environment is an increasingly important consideration” and has established that environmental protection may coincide with the “public interest” of a community.⁷⁸⁷ However, considering the content of the four formally adjudicated complaints discussed in the case study, *Chapter Four* omits the discussion of this type of a link between the ECHR and environmental protection.

4.3 Right to Respect for Private and Family Life and Environmental Protection

The Right to Respect for Private and Family Life under Article 8 of the ECHR consists of two paragraphs. Paragraph 1 provides for the right to respect for private life, family life, home and correspondence. Paragraph 2 provides for permissible grounds for restrictions in the exercise of this right: the public authority may

⁷⁸⁴ Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), p. 61; Dijk, P. “The Interpretation of “civil rights and obligations” by the European Court of Human Rights – one more step to take” in Matscher, F. and Petzold, H. (eds.) *Protecting Human rights: the European Dimension* (Bonn: Carl Heymanns Verlag KG, 1987) pp. 131-545; Mowbray, A. *op cit.*, (2001), pp. 235-58.

⁷⁸⁵ *Zander v. Sweden* (1993) ECHR, Series A, No. 97.

⁷⁸⁶ *San José, op cit.*, (2005), pp. 8-10; DeMerieux, M. *op cit.*, (2001), p. 540; Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), pp. 42-45.

⁷⁸⁷ *Fredin v. Sweden* (1991), 13 EHRR 787, paragraph 48. See also *Gillow v. UK* (1986) A 109; *Oerlemas v. the Netherlands*. No.12565/86 62 D&R 200,205; *Pine Valley Developments Ltd. v. Ireland* (1991) A222.

interfere in the exercise of this right only in accordance with the law and when it “is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

According to the ECtHR, it is not “possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However, it would be too restrictive to limit the notion to an “inner circle” in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.”⁷⁸⁸ It has been noted that some interferences with the individual’s moral and physical integrity may impinge on his private life.⁷⁸⁹ As for the definition of “family life”, it includes husband and wife and dependent children, including illegitimate and adopted children.⁷⁹⁰ The right to respect home does not imply a right to a home.⁷⁹¹ It covers a requirement that the physical security of a person’s actual home and belongings there are protected from interference.⁷⁹² It should be emphasized that the ECtHR has often made use of the concept of positive obligations within the scope of Article 8.⁷⁹³ It has been noted that the principle of proportionality plays a significant role in the interpretation of the positive obligations of states under Article 8.⁷⁹⁴

The ECtHR has creatively and dynamically interpreted the right to respect for private and family life and for home under Article 8 of the ECHR to provide a remedy against extreme environmental pollution.⁷⁹⁵ Environmental pollution may lead to a violation of Article 8 of the ECHR.⁷⁹⁶ According to the case law of the

⁷⁸⁸ *Niemetz v. Germany* (1993) 16 EHRR 97, paragraph 29.

⁷⁸⁹ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 307.

⁷⁹⁰ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 222. It should be emphasized that the notion of family life now extends beyond formal relationships and arrangements. *Johnston v. Ireland* (1986) A 112.

⁷⁹¹ *X v. Germany* (1956) 1 Yearbook 202.

⁷⁹² Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 224. And the right to respect for correspondence implies the right to uninterrupted and uncensored communication with others. Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 320.

⁷⁹³ Hergina, A. W. and Zwaak, L. “Right to Respect for Privacy” in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), p. 739.

⁷⁹⁴ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 12.

⁷⁹⁵ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 72; Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (Oxford: Oxford University Press, 2009), p. 275

⁷⁹⁶ Mare, T. and Kennely, B. “Article 8: Right to respect for Private and Family Life, Home and Correspondence”, in Lester, A. and Pannick, D. (eds.), *Human Rights Law and Practice* (2004), p. 302.

ECtHR, “environmental harm attributable to state action or inaction which has significant injurious effect on a person’s home or private and family life constitutes a breach of Art. 8 (1)”.⁷⁹⁷

4.3.1 *Lopez Ostra v. Spain*

In the case *Lopez Ostra v. Spain*,⁷⁹⁸ the application filed in 1990 alleged the violation of the right to respect for home and for private and family life under Article 8 of the Convention on account of smells, noise and fumes coming from a nearby plant, causing health problems and making living conditions unbearable.⁷⁹⁹

The applicant, Lopez Ostra, lived in the Spanish town of Lorca with her family.⁸⁰⁰ Her flat was twelve metres away from a tannery waste reprocessing plant belonging to a private company.⁸⁰¹ The plant started operation in 1988 without the required license from the municipal authorities.⁸⁰² The plant caused health problems and nuisance through gas fumes, smells and contamination to many people, particularly to those living in the district of the applicant.⁸⁰³ The plant was not closed until 1993.⁸⁰⁴ Thus, for years Lopez Ostra and her family resided only twelve metres away from the plant which was releasing smells, fumes and noise causing health problems to herself and to her family members.⁸⁰⁵ In particular, the daughter of the applicant suffered from nausea, vomiting and anorexia as a result of pollution from the plant.⁸⁰⁶

⁷⁹⁷ Kiss, A, and Shelton, D. *op cit.*, (2004), p. 385.

⁷⁹⁸ *Lopez Ostra v. Spain* (1995) 30 EHRR 277.

⁷⁹⁹ *Lopez Ostra v. Spain*, paragraphs 30, 34 and 47. It should be noted that the applicant also alleged the violation of prohibition of degrading treatment under Article 3 of the Convention on account of smells, noise and fumes coming from a nearby plant.

⁸⁰⁰ *Ibid.*, paragraph 6.

⁸⁰¹ *Ibid.*, paragraph 7.

⁸⁰² *Ibid.*, paragraph 8.

⁸⁰³ *Ibid.* In 1988 the town council re-housed the local residents free of charge in the centre of Lorca for the months of July, August and September. In September 9, 1988, the town council gave order to stop the settling of chemical and organic residues in water tanks - one of the activities of the plant. However the council did not order the plant to stop the treatment of waste water contaminated with chromium. In October 1988, Lopez Ostra with her family returned home and lived there until February 1992. Regardless of the partial shutdown of the plant, the environmental impact on those living near the plant continued. In February 1992, the applicant with her family was again re-housed in a flat in the town centre free of charge, whilst in February 1993, Lopez Ostra’s family moved to a new house in a different part of Lorca purchased with family funds. *Ibid.*, paragraphs 8 and 9.

⁸⁰⁴ *Ibid.*, paragraph 22.

⁸⁰⁵ *Ibid.*, paragraph 57.

⁸⁰⁶ *Ibid.*, paragraph 19.

In the case *Lopez Ostra v. Spain*, the ECtHR stated that: “[n]aturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”.⁸⁰⁷ By this statement the Court accepted that actual harm to health was not a pre-condition for the determination of violation of Article 8.⁸⁰⁸ The ECtHR noted that the plant resulted in nuisance and health problems to those living nearby and “emissions from the plant exceeded the permitted limit”.⁸⁰⁹ According to the ECtHR, the Spanish authorities were not directly responsible for the emissions from the privately owned plant, but they had a positive duty under the first paragraph of Article 8 to take measures.⁸¹⁰ The Court stated that despite the margin of appreciation left to Spain, it failed to strike a fair balance between the interest of Lorca’s economic well-being that of having the plant and the applicant’s exercise of the right to respect for home, private and family life.⁸¹¹ The Court found a violation of Article 8.⁸¹²

This case “demonstrated that if governmental authorities allowed the persistence of severe pollution from industrial facilities to adversely affect local residents, the state was liable to breach of its positive obligations to respect those persons’ homes and family/private lives”.⁸¹³ This case is considered to be a turning point for environmental considerations in the European human rights system.⁸¹⁴

4.3.2 *Fadeyeva v. Russia*

In the case *Fadeyeva v. Russia*,⁸¹⁵ the application filed in 1999 alleged the violation of Article 8 of the ECHR, on the account of the government’s failure to

⁸⁰⁷ *Ibid.*, paragraph 51.

⁸⁰⁸ Loucaides, L. G. *op cit.*, (2007), p. 176.

⁸⁰⁹ *Lopez Ostra v. Spain*, paragraphs 49 and 52.

⁸¹⁰ *Ibid.*, paragraphs 51-52.

⁸¹¹ *Ibid.*, paragraph 58.

⁸¹² *Ibid.*, paragraph 58. It should be noted that the Court established that the difficult conditions of the applicant’s family did not amount to degrading treatment and thus found no violation of Article 3. *Ibid.*, paragraph 58.

⁸¹³ Mowbray, A. R. *op cit.*, (2004), 183.

⁸¹⁴ Hunter, D. Salzman, J. and Zaelke, E. *op cit.*, (2007), p. 1382.

⁸¹⁵ *Fadeyeva v. Russia* (2005) Application no. 55723/00.

protect her private life and home from severe environmental pollution caused by the activities of a nearby plant.⁸¹⁶

The applicant, Fedeyeva, lived in the town of Cherepovets with her family approximately 450 metres away from a private steel plant – “Sevestral”.⁸¹⁷ According to the applicant, the concentration of toxic substances in the air near her flat regularly exceeded the safety levels established by domestic legislation.⁸¹⁸ The applicant also alleged an unacceptably high concentration of dust in the air and the existence of systematic noise.⁸¹⁹ It should be emphasized that the applicant’s request for resettlement was refused by the government.⁸²⁰

In the case *Fedeyeva v. Russia*, the ECtHR observed that pollution levels exceeded the domestic limits over a significant period of time in the air near the applicant’s flat.⁸²¹ The Court concluded that prolonged exposure of the applicant to the industrial emissions from the plant resulted in the deterioration of her health and negatively affected her quality of life at home.⁸²² The Court noted that the plant was not owned or operated by the state; however the state’s responsibility in environmental contexts may arise from inaction to regulate a private industry.⁸²³ In this case, the government made reference to the economic well-being of the country under the second paragraph of Article 8.⁸²⁴ However, the Court stated that “despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life”.⁸²⁵ According to the Court, the government did not offer Fedeyeva any effective solution in order to move away from the dangerous area and “the resettlement of the applicant in an ecologically safe area would be only one of many possible solutions”.⁸²⁶ The Court found a violation of Article 8.⁸²⁷

⁸¹⁶ *Fedeyeva v. Russia*, paragraph 64.

⁸¹⁷ *Ibid.*, paragraph 10. The plant was the biggest iron smelter in Russia. The applicant’s flat was within “the sanitary security zone” which was established by the authorities as a buffer zone around the premises of the plant, in order to delimit the areas in which the pollution might be excessive.

Ibid., paragraph 11.

⁸¹⁸ *Ibid.*, paragraph 31.

⁸¹⁹ *Ibid.*, paragraph 26 and 31.

⁸²⁰ *Ibid.*, paragraph 100.

⁸²¹ *Ibid.*, paragraphs 83 and 87.

⁸²² *Ibid.*, paragraph 88.

⁸²³ *Ibid.*, paragraph 89.

⁸²⁴ *Ibid.*, paragraph 101.

⁸²⁵ *Ibid.*, paragraph 134.

⁸²⁶ *Ibid.*, paragraphs 133 and 142.

⁸²⁷ *Ibid.*, paragraph 134.

In this case the ECtHR determined the violation of positive obligation under Article 8, by the failure of the government to resettle the applicant's family from a severely polluted area and to take effective measures for the reduction of industrial pollution.⁸²⁸

4.3.3 *Guerra and Others v. Italy*

In the case *Guerra and Others v. Italy*⁸²⁹, the application filed in 1988 claimed the violation of Articles 2, 8, 10.⁸³⁰

The applicants lived in the town of Manfredonia approximately a kilometre away from a private chemical factory which was classified as posing a high risk according to the 175/88 Presidential Decree of 1988.⁸³¹ The applicants alleged before the ECtHR that the government's failure to supply information to the public about the hazards and about the procedures to be followed in the case of an accident, violated their right to freedom of information under Article 10 and their right to respect for their private and family life under Article 8 and their right to life under Article 2.⁸³² According to the application, in the course of operation the factory released large quantities of toxic substances.⁸³³ In 1988 a group of technical experts, appointed by the local Council, prepared a report according to which the

⁸²⁸ Loucaides, L. G. *op cit.*, (2007), p. 177; Information Note No. 76 on the case-law of the Court, the European Court of Human Rights, June 2005, p. 17.

⁸²⁹ *Guerra and Others v. Italy* (1998) 26 EHRR 357.

⁸³⁰ *Ibid.*, paragraphs 35, 38 and 56.

⁸³¹ *Ibid.*, paragraphs 12 and 57.

⁸³² *Ibid.*, paragraphs 39 and 41. It should be noted that the applicants initially alleged before the European Commission on Human Rights that the lack of practical measures to reduce pollution and the risks of major accidents arising from the factory violated their right to respect for their lives and physical integrity under Article 2 and that the government's failure to provide information to the public about the hazards and about the procedures to be followed in the case of an accident, violated their right to freedom of information under Article 10. However in 1995 the Commission declared the application admissible as to the complaint under Article 10 and inadmissible as to complaint under Article 2. *Ibid.*, paragraphs 35 and 36.

⁸³³ *Ibid.*, paragraph 57. Of note is also the factory's past - in 1976 an accident took place at the factory when gas exploded and arsenic trioxide escaped leading to the hospitalization of 150 people on account of acute arsenic poisoning. In 1989 the factory restricted its activity to fertiliser production and in 1994 the factory stopped the latter activity and continued to operate a thermoelectric power station and plant for the treatment of feed and waste water. It is noteworthy that the 175/88 Presidential Decree of 1988 required local authorities to "inform local inhabitants of the hazards of the industrial activity concerned, the safety measures taken, the plans made for emergencies and the procedure to be followed in the event of an accident." *Ibid.*, paragraphs 15, 17, 18, and 25.

factory's emission treatment equipment was inadequate and the environmental impact assessment was incomplete.⁸³⁴

The right to freedom of expression under Article 10 of the ECHR includes freedom to receive and impart information without interference from a public authority. However, this provision is interpreted restrictively by the ECtHR.⁸³⁵ The right to receive information under Article 10 does not encompass the right of access to information held by public authorities, even when requested.⁸³⁶ Therefore, in the case *Guerra and Others v. Italy*, the Court did not find a violation of Article 10.⁸³⁷ However the ECtHR found a violation of Article 8 on account of the failure of the government to inform the public about the risk factor and how to proceed in the case of an accident at the factory.⁸³⁸ In this case, the right to information was derived from Article 8.⁸³⁹ The Court has established the violation of positive obligation under Article 8: the government “interfered” with the applicants’ private or family life by its failure to act.⁸⁴⁰

⁸³⁴ *Ibid.*, paragraph 16.

⁸³⁵ Weber, S. *op cit.*, (1991), p. 177. In the case *Guerra and Others v. Italy*, the ECtHR reiterated its previous interpretation of Article 10: “the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.” *Ibid.*, paragraph 53. *Leander v. Sweden* (1987) ECHR series A, number 117. According to the European Commission of Human Rights, Article 10 does not provide for the right of individuals to be informed by public authorities of matters considered to be of public interest in a specific way. *Baden v. Austria* (1996) No. 26633/95, Decision of 15 May, 1996. Council of Europe, *Freedom of Expression in Europe: Case law concerning Article 10 of the European Convention on Human Rights*, Human rights files No. 18 (revised) (Strasbourg: Council of Europe, Publishing, 2002), p. 48.

⁸³⁶ Weber, S. *op cit.*, (1991), p. 180; Churchill, R.R. *op cit.*, (1996), p. 97; Desgagne, R. *op cit.*, (1995), p. 289; *Gaskin v. UK* (1989) ECHR series A, number 160; Gomien, D. Harris, D and Zwaak, L. *Law and practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996), “Right to freedom of expression (Article 10)”. The reason behind such an interpretation can be the following: Article 10 refers to “freedom to receive information” and it does not mention a right of access to information or an obligation of the state to supply information. Weber, S. *op cit.*, (1991), p. 179.

⁸³⁷ *Guerra and Others v. Italy*, paragraph 59. It should be noted that eight judges out of 20 claimed in separate opinions that the obligation to collect and disseminate information might arise in different circumstances.

⁸³⁸ *Ibid.*, paragraph 60. The Court stated “the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory . . . therefore, . . . the respondent State did not fulfil its obligations to secure the applicants’ right to respect for their private and family life, in breach of Article 8 of the Convention”. *Ibid.*

⁸³⁹ Hunter, D. Salzman, J. and Zaelke, E. *op cit.*, (2007), p. 1392.

⁸⁴⁰ *Guerra and Others v. Italy*, paragraph 58. As regards the claimed violation of Article 2, the Court stated that considering that there had been a violation of Article 8, it found it unnecessary to also examine the case under Article 2. *Ibid.*, paragraph 62.

In this case, the actual basis of the application was not environmental pollution but the failure of the government to release environmental information.⁸⁴¹ According to this case, “states may be found in breach of their positive obligations under Article 8 if they fail to provide crucial safety and environmental information to local residents facing serious risks of severe pollution”.⁸⁴² This case provides evidence that applicants can obtain compensation in respect of non-pecuniary damage for mental anxiety and distress suffered as a result of risks from industrial pollution.⁸⁴³

4.3.4 *Hatton and Others v. UK*

It is important to emphasise that not all cases under Article 8 involving environmental issues can be successful in Strasbourg: the second paragraph of Article 8 may well justify interferences with the right under the first paragraph, considering the use of the principle of proportionality and the margin of appreciation. One such case is *Hatton and Others v. UK*.⁸⁴⁴ In the case *Hatton and Others v. UK*, the application filed in 1997 by Hatton and eight others claimed that the policy of the government on night flights at Heathrow Airport violated Article 8 of the Convention and that, in the context of this violation, Article 13 of the Convention was also violated.⁸⁴⁵

The applicants lived near Heathrow Airport. Between 1991 and 1997 Ruth Hatton lived with her family 11.7 km away from the nearest runway of the airport.⁸⁴⁶ According to Hatton, due to the night flight noise, she and her family members could not sleep normally resulting in headaches and depression.⁸⁴⁷ According to the applicants, the government policy on night flights, introduced by the 1993 Scheme, violated their right to respect for their private life and for home under Article 8 and that they were denied an effective domestic remedy for this

⁸⁴¹ Kiss, A, and Shelton, D. *op cit.*, (2004), p. 387; Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), 37.

⁸⁴² Mowbray, A. *op cit.*, (2004), 145.

⁸⁴³ Mowbray, A. “Guerra and Others v. Italy: The Right to Environmental Information under the European Convention on Human Rights” (1998) Vol. 6 (3) *Environmental Liability*, p. 83.

⁸⁴⁴ *Hatton and Others v. UK* (2003) 37 ECtHR 28.

⁸⁴⁵ *Ibid.*, paragraphs 1 and 3.

⁸⁴⁶ *Ibid.*, paragraph 11.

⁸⁴⁷ *Ibid.*, paragraph 12. Hatton complained that in 1993 the level of night noise increased and that it was “intolerable” at night. *Hatton and Others v. UK*, paragraph 12. In 1997 the applicant’s family moved away in order to escape noise at night. Eight other applicants made similar allegations in the application. *Ibid.*, paragraphs 13-25.

complaint, in violation of Article 13⁸⁴⁸ of the Convention.⁸⁴⁹ It should be noted that Heathrow Airport being the busiest airport in Europe, is not owned or operated by the government.⁸⁵⁰ The application was initially examined by the Chamber of the ECtHR which gave its judgment in 2001.⁸⁵¹ The Chamber examined the application in terms of the positive obligation of the State to take appropriate measures for securing the right under Article 8, paragraph 1.⁸⁵² It found a violation of Article 8.⁸⁵³

The UK Government referred the case to the Grand Chamber for reconsideration.⁸⁵⁴ In the case *Hatton and Others v. UK*, the Grand Chamber acknowledged that “the implementation of the 1993 Scheme was susceptible of adversely affecting the quality of the applicants’ private life and the scope of their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention.”⁸⁵⁵ It emphasised that night flights were contributing to a certain extent to the general economy of the UK.⁸⁵⁶ The Grand Chamber noted that the 1993 Scheme was challenged by local authorities and was amended to comply with domestic law.⁸⁵⁷ It also took note of the following: unlike cases *Lopez Ostra* and *Guerra and Others*, in *Hatton* domestic law was not violated: night flight noises did not violate the 1993 Scheme.⁸⁵⁸ The Grand Chamber noted that the subsequent modification to the 1993 policy imposed some limitation on operators of the Airport and that a series of noise mitigation and abatement

⁸⁴⁸ According to Article 13, “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

⁸⁴⁹ *Hatton and Others v. UK*, paragraphs 3 and 84.

⁸⁵⁰ *Ibid.*, paragraphs 28 and 85.

⁸⁵¹ *Ibid.*, paragraph 85.

⁸⁵² *Ibid.*, paragraph 85.

⁸⁵³ The Chamber held that “the fair balance that had to be struck between the competing interests of the individual and the community as a whole . . . [and] . . . in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country was not sufficient to outweigh the rights of others”. *Ibid.*, paragraph 86. The Chamber found also a violation of Article 13; it held that “the scope of review by the domestic courts did not allow consideration whether the increase in night flight under the 1993 Scheme represented a justified limitation on the Article 8 rights of those who lived in the vicinity of Heathrow Airport”. *Ibid.*, paragraph 133.

⁸⁵⁴ *Ibid.*, paragraph 8. It should be noted that in the case *Powell and Rayner v. UK*, (*Powell and Rayner v. the United Kingdom* (1990) 12 EHRR 355.) the applicants similarly alleged a violation of Article 8 on account of the noise of aircrafts from Heathrow Airport and in which the ECtHR found the violation of the right under Article 8, but justified the violation under the second paragraph of the Article, as being necessary in a democratic society for the economic well-being of the state. Kiss, A, and Shelton, D. *op cit.*, (2004), p. 385.

⁸⁵⁵ *Hatton and Others v. UK*, paragraph 118.

⁸⁵⁶ *Ibid.*, paragraph 126.

⁸⁵⁷ *Ibid.*, paragraph 120.

⁸⁵⁸ *Ibid.*, paragraph 120.

measures were in place at the Airport.⁸⁵⁹ It also considered that the applicants did not claim that the house prices where they lived were adversely affected by the night noise and that the applicants could choose to live elsewhere without financial loss.⁸⁶⁰ Thus, the Grand Chamber did not find a violation of the right to respect for private life and for home under Article 8. In the implementation of the 1993 Scheme concerning night flights, a fair balance was struck between the interests of those individuals affected by noise and the community.⁸⁶¹ In *Hatton*, the Grand Chamber decided to give the UK a “wide” margin of appreciation as opposed to a “narrow” one.⁸⁶²

4.3.4.1 Procedural Requirements of Article 8

It must be particularly emphasized that when assessing whether the interferences caused by the 1993 policy were compatible with the fundamental right under Article 8, the Grand Chamber stated: “in a case such as the present one, involving State decisions affecting environmental issues, there are two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual”.⁸⁶³ According to the Grand Chamber, “[o]n the procedural aspect of the case, the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. . . . The particular new measures introduced by that scheme were announced to the public by way of a Consultation Paper which referred to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance. . . . This paper was published in January 1993 and sent to bodies

⁸⁵⁹ *Ibid.*, paragraphs 74 and 126.

⁸⁶⁰ *Ibid.*, paragraph 127.

⁸⁶¹ *Ibid.*, paragraphs 129 and 130. However, the Grand Chamber found a violation of Article 3: it held that “the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13 of the Convention”. *Ibid.*, paragraph 142.

⁸⁶² Hyam, J. “*Hatton v United Kingdom* in the Grand Chamber: One Step Forward, Two Steps Back” (2003) *European Human Rights Law Review*, p. 636; Stallworthy, M. *op cit.*, (2005), p 20.

⁸⁶³ *Hatton and Others v. UK*, paragraph 99.

representing the aviation industry and people living near airports. The applicants and persons in a similar situation thus had access to the Consultation Paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts.”⁸⁶⁴ This means that when assessing the proportionality of the interference caused by the 1993 policy with the right under Article 8, the ECtHR took into account a) whether the public authorities had assessed the adverse environmental impacts of the 1993 policy; and b) whether potentially affected individuals were informed of the proposed scheme before its adoption and had the possibility to participate in the relevant decision-making. There were no procedural flaws in the process of the preparation of the 1993 policy, since the applicants had access to documents and they could participate in the decision-making; thus no violation of Article 8 in this respect took place.⁸⁶⁵

It should be noted that in other cases, the ECtHR has also emphasised the importance of the procedural aspects of Article 8.⁸⁶⁶ In the case *Taşkın and Others v. Turkey*,⁸⁶⁷ which concerned the allegation of violations of Articles 2 and 8 on account of a gold mine’s environmental threat to the life and health of the local population, the ECtHR stated: “It is therefore necessary to consider all the procedural aspects [of Article 8], including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available. . . [T]he decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those

⁸⁶⁴ *Ibid.*, paragraph 128.

⁸⁶⁵ Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), p. 57.

⁸⁶⁶ In the case *Chapman v. UK*, (2001, 33 EHRR 339) which concerned planning and enforcement measures against a gypsy applicant’s caravans, the ECtHR stated: “the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8”. *Chapman v. UK*, paragraph 92. In the case *W v. UK*, (1987, 10 EHRR) which concerned the child adoption issue, the ECtHR stated “what ... has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of Article 8 (art. 8).” *W v. UK*, paragraphs 62 and 64.

⁸⁶⁷ *Taşkın and Others v. Turkey* (2005), Application no. 46117/99.

activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake. The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question."⁸⁶⁸ It has been argued that this passage of decision on the *Taşkın* case reflects the Aarhus Convention and constitutes a profound extension of the scope of Article 8.⁸⁶⁹ In the *Taşkın* case the ECtHR noted that the decision of a public authority, which authorized the continuation of an already illegally operating gold mine, deprived the applicants of the procedural guarantees under Article 8.⁸⁷⁰ The ECtHR found violation of Article 8. In the case *Demir v. Turkey*,⁸⁷¹ the ECtHR stated: "[i]n the *Taşkın* . . . case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection . . . largely on the basis of principles enshrined in the Aarhus Convention . . ."⁸⁷² The cases *Hatton* and *Taşkın* suggest the following: in order to strike a fair balance, the decision-making process must in advance assess environmental impacts where public authorities determine complex environmental issues; it is important that potentially affected individuals are provided access to these assessments; it is important that individuals are involved in decision-making in environmental matters when the Convention rights are at stake; concerned individuals must be able to challenge decisions of the public authorities before the domestic courts in cases where they believe that their comments have not been considered.⁸⁷³

4.4 Right to Property and Environmental Protection

The right to property under Article 1 of Protocol No. 1 of the ECHR consists of two paragraphs. Paragraph 1 provides for the right of natural and legal persons to the peaceful enjoyment of possessions. The second part of paragraph 1 provides for permissible grounds for restrictions in the exercise of this right: deprivation of possession is prohibited except in the public interest and subject to the conditions

⁸⁶⁸ *Ibid.*, paragraphs 118 and 119.

⁸⁶⁹ Boyle, A. *op cit.*, (2007), pp. 497-499.

⁸⁷⁰ *Taşkın and Others v. Turkey*, paragraph 125.

⁸⁷¹ *Demir v. Turkey* (2009) 48 EHRR 54.

⁸⁷² *Ibid.*, paragraph 83.

⁸⁷³ Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), pp. 56-57.

of law and to the general principles of international law. Paragraph 2 states further grounds for the justification of interference with the right to property: the provisions of paragraph 1 “shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

The term “possessions” in the article covers immovable and movable property, and extends far beyond to all manner of things having an economic value.⁸⁷⁴ The ECtHR stated that “[b]y recognizing that everyone has the right to the peaceful enjoyment of his possession, Article 1 is in substance guaranteeing the right to property”.⁸⁷⁵ The right to property under this Article essentially aims to protect individuals from unjustified interferences by the state; however the positive obligation of the states under this Article may require the taking of measures necessary for the protection of the right to property.⁸⁷⁶

The right to property under Article 1 of Protocol No. 1 is a qualified right;⁸⁷⁷ however its structure differs from the qualified rights provided for by Articles 8-11;⁸⁷⁸ the latter rights contain second paragraphs that qualify those rights set out in the first paragraphs. According to the ECtHR, Article 1 of Protocol No. 1 comprises three rules: the first rule is set out in the first sentence of paragraph 1 and provides for the right to property; the second rule is set out in the second sentence of paragraph 1 and allows deprivation of possessions for the public interest and subject to certain conditions. The third rule is set out in paragraph 2 and recognises the right of the state to control the use of property in accordance with the general interest through enforcing laws.⁸⁷⁹ The notion of a “fair balance”

⁸⁷⁴ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 303.

⁸⁷⁵ *Marckx v. Belgium* (1979) 31 Eur. Ct. H. R. Series A, paragraph 63.

⁸⁷⁶ Grgic, A. Mataga, Z. Longer, M. and Cilfan, A. *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbook, No. 10 (Strasbourg: Council of Europe, 2007), p. 9; Rijn, A. “Right to the Peaceful Enjoyment of Ones’ Possessions (Article 1 of Protocol No. 1)” in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), p. 864; Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 302.

⁸⁷⁷ Leach, P. *op cit.*, (2005), p. 354.

⁸⁷⁸ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 300.

⁸⁷⁹ *Sporrong and Lonnroth v. Sweden* (1982) A 52, paragraph 61.

and therefore the notion of proportionality are present in Article 1 of Protocol No. 1.⁸⁸⁰

The second rule applies to a deprivation of property.⁸⁸¹ The deprivation of property is “the extinction of legal rights of the owners”.⁸⁸² However, a deprivation of property encompasses both formal deprivation as well as *de facto* deprivation, since a deprivation of property can take place in the absence of a formal transfer of ownership.⁸⁸³ In certain cases a situation may amount to *de facto* expropriation with the legal title to property remaining with the original owner.⁸⁸⁴ Expropriations are allowed only when the conditions provided for by law and by the general principles of law are observed.⁸⁸⁵ Although Article 1 is silent on the question of compensation, it generally requires compensation for deprivation of property: otherwise this right would be largely illusory and ineffective.⁸⁸⁶ It has been argued in relation to the standard of compensation that the “taking of property without an amount of compensation reasonably related to its value would normally be disproportionate” and it would constitute a disproportionate interference.⁸⁸⁷ However Article 1 does not provide for the right to full market value compensation in all situations: but the compensation should at least be reasonably related to the value of property.⁸⁸⁸ It has been noted that delays in paying compensation may lead to the reduction of the sum in question by inflation.⁸⁸⁹ It should be noted that in very exceptional circumstances, a total lack of compensation can be justified, but the interference must be lawful and not arbitrary.⁸⁹⁰ When interfering with the

⁸⁸⁰ Eissen, M. “The Principle of Proportionality in the Case-Law of the European Court of Human rights” in Macdonald, R. Matscher, F. and Petzold, H. (eds.) *The European System for the Protection of Human Rights* (Dordrecht, 1993), p. 135; Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 300.

⁸⁸¹ Carss-Frisk, M. *The right to property: A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Human rights handbooks, No. 4 (Strasbourg: Council of Europe, 2001), p. 21.

⁸⁸² Grgic, A. Mataga, Z. Longer, M. and Cilfan, A. *op cit.*, (2007), p. 10.

⁸⁸³ Leach, P. *op cit.*, (2005), p. 357; Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 309.

⁸⁸⁴ *Papamichalopoulos v. Greece* (1993) A260-B; *Brumarescu v. Romania* (1999) 28 October; Carss-Frisk, M. *op cit.*, (2001), p. 21.

⁸⁸⁵ Rijn, A. *op cit.*, (2006), p. 885.

⁸⁸⁶ *James v. UK* (1986) A 98, paragraph 54; *Lithgow v. UK* (1986) A102, paragraph 120; *Hentrich v. France* (1994) A296-A, paragraph 48. Carss-Frisk, M. *op cit.*, (2001), p. 28.

⁸⁸⁷ *Ibid.*; Leach, P. *op cit.*, (2005), p. 350. *Platakou v. Greece* (2001) Application No: 38460/97, paragraph 55.

⁸⁸⁸ *James v. UK* (1986) A 98, paragraph 54; *Holy Monasteries v. Greece* (1994) A301-A, paragraph 71. Mowbray, A. *op cit.*, (2001), p. 677.

⁸⁸⁹ *Baltekin v. Turkey* (2001) No. 19266/92.

⁸⁹⁰ Rijn, A. *op cit.*, (2006), p. 882.

right to property by deprivation of property, national authorities enjoy a certain margin of appreciation to assess proportionality of restricting measures.⁸⁹¹

The third rule is applicable when an interference with property is intentional and part of the legislative scheme aiming to control the use of property.⁸⁹² The third rule does not relate to the deprivation of property itself; it concerns restrictions in the use of property.⁸⁹³ Examples of the application of the third rule are *Sporrong and Lonnroth v. Sweden*⁸⁹⁴ which concerned the prohibition of construction on land, *Mellacher v. Austria*⁸⁹⁵ which concerned the control of rented property, *Raimondo v. Italy*⁸⁹⁶ which concerned the temporary seizure of property in criminal proceedings, and *Pine Valley Developments Ltd. v. Ireland*⁸⁹⁷ which concerned planning controls. It should be noted that despite the wide power of the state to secure the payment of taxes or penalties, a taxing measure can be subject to the requirements of proportionality.⁸⁹⁸

In general, any interference with the right to property to be justified must serve a legitimate purpose in the public or general interest and must be proportionate.⁸⁹⁹ And states enjoy a certain margin of appreciation when interfering with the exercise of the right to property under Article 1 of Protocol No. 1.⁹⁰⁰

Article 1 of Protocol No. 1 can be “invoked against a State when external environmental nuisances affect a person’s enjoyment of possessions.”⁹⁰¹ Applications concerning environmental harms have been also formulated as violations of the right to property.⁹⁰² Protection of the right to property under the ECHR “may require the public authorities to ensure certain environmental standards”.⁹⁰³ The relevant case law suggests that every kind of negative effect that

⁸⁹¹ *Sporrong and Lonnroth v. Sweden* (1982) A 52, paragraph 69. Merrilis, J. G. *op cit.*, (1988), pp. 140-143; Carss-Frisk, M. *op cit.*, (2001), p. 27.

⁸⁹² *Ibid.*, p. 24.

⁸⁹³ Rijn, A. *op cit.*, (2006), p. 887.

⁸⁹⁴ *Sporrong and Lonnroth v. Sweden* (1982) A 52.

⁸⁹⁵ *Mellacher v. Austria* (1989) A169.

⁸⁹⁶ *Raimondo v. Italy* (1994) Series A, No. 281-A.

⁸⁹⁷ *Pine Valley Developments Ltd. v. Ireland* (1991) A222.

⁸⁹⁸ Carss-Frisk, M. *op cit.*, (2001), p. 36.

⁸⁹⁹ *James v. UK* (1986) A 98, paragraph 46; *Sporrong and Lonnroth v. Sweden* (1982) A 52, paragraph 69. DeMerieux, M. *op cit.*, (2001), p. 541.

⁹⁰⁰ Corner, T. *op cit.*, (1998), p. 305; Desgagne, R. *op cit.*, (1995), pp. 278-280.

⁹⁰¹ Sherlock, A. and Jarvis, F. *op cit.*, (1999), p. 16.

⁹⁰² Rest, A. *op cit.*, (1997), p. 215.

⁹⁰³ Council of Europe, *Manual on human rights and the environment: Principles emerging from the case-law of the European Court of Human Rights* (Council of Europe Publishing, 2006), pp. 44-45.

is caused by environmental nuisances could indirectly amount to interference with the right to property under the ECHR.⁹⁰⁴ The ECtHR has found positive obligations of states under Article 1 of Protocol No. 1 in cases involving environmental issues: in the context of environmental risk to property, public authorities may be required to take measures for ensuring that the right to property is not violated.⁹⁰⁵

Article 1 of Protocol No. 1 has been interpreted to protect the monetary value of a possession.⁹⁰⁶

It should be noted that “the negative effects caused by the deterioration of the environment are not likely to be considered as interference unless the property declines in value”.⁹⁰⁷ In order to invoke the right to property in the context of environmental nuisances, the interference should be grave enough to be equated to a *de facto* expropriation of property.⁹⁰⁸ Adverse environmental effects are only caught by Article 1 of Protocol No. 1 when a loss in value of a property occurs as a result of such environmental effects and when such loss is not compensated by the state.⁹⁰⁹ However an adequate compensation by the authorities may exclude a violation of the right to property under the ECHR.⁹¹⁰ For example, in the case *Rayner v. UK*,⁹¹¹ in which the applicant alleged a violation of the right to property on account of aircraft noise nuisance from Heathrow Airport, the European Commission of Human Rights stated: Article 1 of Protocol No. 1 “does not, in principle, guarantee a right to the peaceful enjoyment of possessions in a pleasant environment. It is true that aircraft noise nuisance of considerable importance both as to level and frequency may seriously affect the value of real property or even render it unsaleable and thus amount to a partial taking of property. However, the applicant has not submitted any evidence showing that the value of his property was substantially diminished on the grounds of aircraft noise as to constitute a disproportionate burden amounting to a partial taking of property necessitating payment of compensation”.⁹¹² Thus, despite recognizing that noise nuisance may

⁹⁰⁴ Desgagne, R. *op cit.*, (1995), p. 277.

⁹⁰⁵ Council of Europe, *Manual on human rights and the environment: Principles emerging from the case-law of the European Court of Human Rights* (Council of Europe Publishing, 2006), p. 45.

⁹⁰⁶ Desgagne, R. *op cit.*, (1995), p. 278; Weber, S. *op cit.*, (1991).

⁹⁰⁷ Desgagne, R. *op cit.*, (1995), p. 277.

⁹⁰⁸ Sherlock, A. and Jarvis, F. *op cit.*, (1999), p. 23.

⁹⁰⁹ Churchill, R.R. *op cit.*, (1996), p. 95; Kiss, A. and Shelton, D. *op cit.*, (2004), p. 389; Shelton, D. *op cit.*, (2003), p. 13; Weber, S. *op cit.*, (1991), p. 181; Shelton, D. *op cit.*, (2002), p. 6.

⁹¹⁰ Weber, S. *op cit.*, (1991), p. 181.

⁹¹¹ *Rayner v. UK* (1986) 47 DR 5.

⁹¹² *Ibid.*, paragraph 14.

amount to partial expropriation of a property, the Commission did not find a violation of the right to property due to the absence of relevant evidence of actual harm.⁹¹³ Another example is the case *S. v. France*⁹¹⁴, in which the applicant alleged violation of the right to property on account of noise pollution, industrial light during the night, modification of a microclimate and devaluation of property all arising from the construction of a nuclear power station within three hundred metres away from her house. The Commission reiterated that the right to property under the ECHR does not provide for the right to peaceful enjoyment of possessions in a pleasant environment and that noise nuisance of a certain level could greatly affect the value of property and could therefore amount to partial expropriation.⁹¹⁵ Considering the details of the case, the Commission concluded that compensation received by the applicant was proportionate to the noise nuisance from which she suffered and, as regards other nuisances, the Commission pointed out that the applicant was in a position to sell her house; thus no violation of Article 1 of Protocol No. 1 was found.⁹¹⁶ It has been noted that an extensive margin of appreciation afforded to the states under Article 1 of Protocol No. 1, especially when compensation has been provided, makes it unlikely to provide as much protection as Article 8, in cases involving environmental harm.⁹¹⁷

4.4.1 *Öneriyıldız v. Turkey*

The case *Öneriyıldız v. Turkey*⁹¹⁸ is an example of a successful application to the ECtHR under Article 1 of Protocol No. 1 involving environmental aspects. More precisely, in the case *Öneriyıldız v. Turkey*, the application filed in 1999 alleged violation of Articles 2, 8, 13 and Article 1 of Protocol No. 1 of the ECHR on account of the deaths of his close relatives and the destruction of his property caused by a methane explosion in April 1993 at the municipal rubbish tip in Ümraniye, a district of Istanbul.⁹¹⁹

The applicant lived with 12 close relatives in the slum quarter of Ümraniye, a settlement which was adjacent to the rubbish tip which since 1972 was under the

⁹¹³ Weber, S. *op cit.*, (1991), p. 181.

⁹¹⁴ *S. v. France* (1990) D 13728/88. The decision is only available in French, *see* *Revue universelle des droits de l'homme*, vol. 3 (1991), part 5.

⁹¹⁵ Desgagne, R. *op cit.*, (1995), p. 277.

⁹¹⁶ Churchill, R.R. *op cit.*, (1996), p. 93; Weber, S. *op cit.*, (1991), p. 181.

⁹¹⁷ Cook, K. *op cit.*, p. 206.

⁹¹⁸ *Öneriyıldız v. Turkey* (2004) ECHR 657

⁹¹⁹ *Ibid.*, paragraph 2.

authority of municipality.⁹²⁰ It should be emphasised that when the rubbish tip started functioning, the area was uninhibited, but over the years rudimentary dwellings were built in that area without any authorization.⁹²¹ On 28 April of 1993 “a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died in the accident.”⁹²² The applicant alleged, *inter alia*, a violation of Article 1 of Protocol No. 1 on account of the negligent omissions of authorities that resulted in the loss of his property.⁹²³

Despite the fact that the applicant built and was living in an unauthorised dwelling, the Court stated that “the applicant’s proprietary interest in his dwelling was of a sufficient nature and sufficiently recognised to constitute a substantive interest and hence a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, which provision is therefore applicable to this aspect of the complaint”.⁹²⁴ The Court established the causal link between the negligence of the authorities and the destruction of the applicant’s property.⁹²⁵ The Court took into account that the compensation awarded to the applicant for pecuniary damage, was still unpaid.⁹²⁶ According to the ECtHR, the exercise of the right to property under Article 1 of Protocol No. 1 did not depend only on the obligation of states not to interfere, but could require positive measures of protection; therefore the Court held that administrative bodies failed to take necessary measures for the prevention of the risk of a methane explosion and “interfered” with the protected right.⁹²⁷ The Court found a violation of Article 1 of Protocol No. 1. Based on similar reasoning, the Court also found a violation of the right to life under Article 2 of the Convention.⁹²⁸ It should be noted that in the context of the discussion of violation of Article 2, the Court cited the case *Guerra and Others v. Italy* and stressed that the authorities had not taken any measure to inform the inhabitants of Ümraniye slums of any dangers arising from the rubbish tip: particular emphasis should be placed on the right to information, as established by the case-law of the

⁹²⁰ *Ibid.*, paragraph 10.

⁹²¹ *Ibid.*

⁹²² *Ibid.*, paragraph 18.

⁹²³ *Ibid.*, paragraph 119.

⁹²⁴ *Ibid.*, paragraph 129.

⁹²⁵ *Ibid.*, paragraph 135.

⁹²⁶ *Ibid.*, paragraph 137.

⁹²⁷ *Ibid.*, paragraphs 130 and 134.

⁹²⁸ According to the Court, no separate issue was arising under Articles 6 and 8 and therefore, it did not find any violation of these Articles.

Convention institutions.⁹²⁹ It can be argued that such information, in this particular case, could have prevented the violation of the right to property.

The case law examined in this section and in section 2 of this chapter suggests that failure of the state to take adequate measures for the prevention of industrial nuisance may constitute a violation of Article 8 and Article 1 of Protocol No. 1; however “where the state had done all it could to avoid a risk to individuals, there will be no violation of the Convention.”⁹³⁰

4.5 Freedom of Expression and Environmental Protection

The right to freedom of expression under Article 10 of the ECHR consists of two paragraphs. Paragraph 1 states that everyone has the right to freedom of expression, and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authorities, irrespective of frontiers. Paragraph 1 clarifies that the right to freedom of expression cannot prevent states from licensing broadcasting, television or cinema enterprises. Paragraph 2 provides for the circumstances in which states may interfere with the exercise of the right to freedom of expression: the exercise of these freedoms “since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

According to the case law of the ECtHR “freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and

⁹²⁹ *Ibid.*, paragraphs 75, 86, 90 and 108.

⁹³⁰ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), pp. 281-282.

broadmindedness without which there is no “democratic society”.”⁹³¹ It has been argued that toleration of different opinions is a significant aspect of democracy.⁹³² This right of the ECHR has crucial significance for the well-functioning of a democracy.⁹³³ Under Article 10 all forms of expression are covered regardless of content.⁹³⁴ According to the ECtHR, Article 10 protects the substance of ideas, as well as the form in which they are conveyed.⁹³⁵ The exercise of this right is subject to “duties and responsibilities”: for example, there is a duty not to be unreasonably offensive in respect of objects of religious veneration.⁹³⁶ It has been argued that it is crucial to protect the right to expression due to its power to promote democracy and uncover abuses; however it should be taken into consideration that free speech can be used to incite violence: therefore the case law of the ECtHR attempts to strike the proper balance between competing interests.⁹³⁷ States have a certain margin of appreciation under Article 10 in assessing the proportionality of restrictions on the right; however according to the ECtHR, exceptions under the second paragraph must be interpreted strictly.⁹³⁸ A wider margin of appreciation is permitted in relation to issues of morality and a narrower margin, if appreciation is allowed in respect to political speech.⁹³⁹ It is noteworthy that states have a broad positive obligation under Article 10 to take protective security measures for safeguarding journalists from unlawful violence.⁹⁴⁰

The right to freedom of expression under the first paragraph comprises two main components: the first, freedom to hold opinions and impart information and ideas, and the second, freedom to receive information and ideas.⁹⁴¹ Within the first component, “freedom to impart information and ideas can still be regarded as an expression of an opinion of the informant himself.”⁹⁴² Holding an opinion is a

⁹³¹ *Handyside v. UK* (1976) 1 EHRR 737, Series A No 24, paragraph 49.

⁹³² Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 377.

⁹³³ Rijn, A. “Freedom of Expression (Article 10)” in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), p. 774.

⁹³⁴ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 373.

⁹³⁵ *News Verlags GmbH and Co KG v. Austria* (2001) 31 EHRR 8, paragraph 39.

⁹³⁶ *Ahmed and Others v. UK* (2000) 29 EHRR 1, paragraph 55. Leach, P. *op cit.*, (2005), p. 321.

⁹³⁷ Ovey, C. and White, R. C.A. *op cit.*, (2002), p. 277.

⁹³⁸ Leach, P. *op cit.*, (2005), p. 321; Rijn, A. *op cit.*, (2006), pp. 774-75.

⁹³⁹ *Vgt Verein Gegen Tierfabriken v. Switzerland* (2002) 32 EHRR, paragraphs 69-71. Leach, P. *op cit.*, (2005), p. 321.

⁹⁴⁰ Mowbray, A. *op cit.*, (2004), p. 194.

⁹⁴¹ Lester, A. “Freedom of Expression” in Macdonald, R. Matscher, F. and Petzold, H. (eds.) *The European System for the Protection of Human Rights* (Dordrecht, 1993), pp. 469-482.

⁹⁴² Rijn, A. *op cit.*, (2006), p. 778.

precondition for expressing it, but it is hardly “expression” itself.⁹⁴³ Protection under Article 10 is not limited to spoken and written words.⁹⁴⁴ Freedom to hold opinions and to impart information and ideas covers all forms and content of expression: *inter alia*, statements in interviews, information pamphlets, paintings, books, films, photos, television commercials, advertisement in newspapers.⁹⁴⁵ Expression in the form of public protest or demonstration also falls under the protection of Article 10.⁹⁴⁶ Article 10 protects different means of the free expression of opinions: for example, “protesting against fox hunting and disrupting the hunt by diverting the dogs’ attention with the aid of a hunting horn constitutes an expression of opinion”.⁹⁴⁷ As afore noted in this chapter, freedom of expression may have an impact on the environmental sphere when environmental changes are argued for through public protest.⁹⁴⁸ The freedom of expression under Article 10 protects reporting on environmental matters and dissemination of environmental information from an extension of the laws on defamation.⁹⁴⁹ The right to disseminate environmental information is protected by Article 10.⁹⁵⁰ In the case *Bladet Tromsø and Stensaas v. Norway*,⁹⁵¹ the ECtHR held that the right to freedom of expression of a newspaper “Bladet Tromsø” and its editor “Stensaas” were violated by fining them for defamation after they published some extracts of a governmental report on seal hunting.⁹⁵² According to the report, there were violations of seal hunting regulations: for example, seals had been flayed alive.⁹⁵³ It should be emphasised that despite the fact that the names of the crew were deleted from publication, the men successfully sued for defamation.⁹⁵⁴ The ECtHR took into account that the report was an official one.⁹⁵⁵ The ECtHR states that the judgment on defamation was an unjustified interference with Article 10 of the

⁹⁴³ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.* (1995), p. 379.

⁹⁴⁴ Macovei, M. *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks, No. 2 (Strasbourg: Council of Europe, 2004), p. 15.

⁹⁴⁵ Ovey, C. and White, R. C.A. *op cit.* (2002), p. 276; Rijn, A. *op cit.* (2006), p. 779.

⁹⁴⁶ *Steel and Others v. UK* (1999) 28 EHRR 603; *Appleby and Others v. UK* (2003) 37 EHRR 38. Leach, P. *op cit.*, (2005), p. 326.

⁹⁴⁷ Rijn, A. *op cit.*, (2006), p. 779. *Hashman and Harrup v. UK* (2000) 30 EHRR 241, paragraph 28.

⁹⁴⁸ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 72.

⁹⁴⁹ Kiss, A. and Shelton, D. *op cit.*, (USA: Transnational Publisher, 2004), p. 390; Shelton, D. *op cit.*, (2002), p. 10.

⁹⁵⁰ Council of Europe, *Manual on Human Rights and the Environment* (Strasbourg: Council of Europe Publishing, 2006), 49.

⁹⁵¹ *Bladet Tromsø and Stensaas v. Norway* (1999) Judgment of May 20, 1999.

⁹⁵² *Ibid.*, paragraphs 6, 8, 10 and 73.

⁹⁵³ *Ibid.*, paragraph 10.

⁹⁵⁴ *Ibid.*, paragraphs 34-36.

⁹⁵⁵ *Ibid.*, paragraph 68.

ECHR.⁹⁵⁶ According to the ECtHR, the reporting of the controversial seal hunting should have been considered in the wider context of the newspaper's coverage being a matter of public interest.⁹⁵⁷ In the case *Thoma v. Luxemburg*⁹⁵⁸, the ECtHR again examined the question of a conviction of defamation for reporting on environmental issues.⁹⁵⁹ In this case, the applicant was a journalist who presented a weekly programme on nature and the environment.⁹⁶⁰ During one of his programmes, he discussed a written article alleging bribery in reforestation woodlands.⁹⁶¹ He was convicted of defamation in a civil action brought about by 54 forest wardens and nine engineers.⁹⁶² The ECtHR noted that public officials, not private individuals, were criticised and that freedom of expression allows journalists recourse to a degree of exaggeration or even provocation.⁹⁶³ According to the ECtHR, states can limit the freedom of speech by law in order to protect the rights and reputation of others, but this particular interference was not "necessary in a democratic society": a fair balance had not been struck.⁹⁶⁴ The ECtHR emphasised that restrictions of freedom of expression are to be strictly interpreted when they are directed to contribute to a debate over a problem of general interest.⁹⁶⁵ Similarly, in the case *Steel and Morris v. UK*,⁹⁶⁶ the ECtHR found a violation of Article 10 on account of successful libel proceedings by McDonald against environmental activists involved in a campaign against McDonald. The scope of the right to freedom of expression under Article 10 suggests that it can protect expression of opinions on environmental protection issues, including expression of such opinions in the form of public protest or demonstration.

As for the second component of the right to freedom of expression under the first paragraph - freedom to receive information and ideas – it is interpreted restrictively by the ECtHR and does not provide for the right to access information held by the public authorities, as afore noted in this chapter. This provision only prohibits public authorities from restricting a person from receiving information that others wish to impart to him. The case law of the ECtHR suggests that the freedom to

⁹⁵⁶ *Ibid.*, paragraph 73.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Thoma v. Luxemburg* (2001), Judgment of 29 March, 2001.

⁹⁵⁹ Kiss, A. and Shelton, D. *op cit.*, p. 390.

⁹⁶⁰ *Thoma v. Luxemburg*, paragraphs 1 and 10.

⁹⁶¹ *Ibid.*, paragraphs 11 and 13.

⁹⁶² *Ibid.*, paragraph 17.

⁹⁶³ *Ibid.*, paragraph 46.

⁹⁶⁴ *Ibid.*, paragraphs 48 and 66.

⁹⁶⁵ *Ibid.*, paragraph 58.

⁹⁶⁶ *Steel and Morris v. UK* (2005), Judgment of 15 February, 2005.

receive information under article 10 does not guarantee a right of access to environmental information held by public authorities.

4. 6 Freedom of Assembly and Environmental Protection

The right to freedom of assembly and association under Article 11 of the ECHR consists of two paragraphs. According to paragraph 1, everyone has the right to freedom of peaceful assembly and of association with others. The paragraph states that these rights include the right to form and become a member of a trade union. Paragraph 2 provides for allowable grounds for restrictions in the exercise of these rights: “[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 11 provides for the protection of two different freedoms: freedom of assembly and freedom of association both sharing the “objective of allowing individuals to come together for the expression and protection of their common interests”.⁹⁶⁷ It should be emphasised that Article 11 is closely linked to Article 10: “the exercise of the right to freedom of association and of the right to freedom of assembly will generally involve the holding and propagation of specific opinions”.⁹⁶⁸

Freedom of peaceful assembly protects the expression of opinions by word, gesture and silent demonstrations⁹⁶⁹: organizers and participants of the assembly can invoke Article 11.⁹⁷⁰ This right does not protect those who have violent

⁹⁶⁷ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 417.

⁹⁶⁸ Heringa, A. W. and Hoof, F. in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *Theory and Practice of the European Convention on Human Rights* (Antwerpen: Intersentia, 2006), p. 818.

⁹⁶⁹ *Ezelin v. France* (1991) 14 EHRR 362, paragraph 52.

⁹⁷⁰ Leach, P. *op cit.*, (2005), p. 332.

intentions.⁹⁷¹ The ECtHR stated that “the protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11”.⁹⁷² According to the European Commission of Human Rights, the right to freedom of assembly is considered alongside article 10, to be “a fundamental right in a democratic society and ... is one of the foundations of such a society”.⁹⁷³ It has been emphasised in the context of Article 11 that demonstrations in the form of marches, picketing and processions has played an important role in Europe’s political history.⁹⁷⁴ The freedom of assembly protects demonstrations that may be annoying to persons opposed to the opinions promoted by the demonstrators.⁹⁷⁵ The principle of proportionality requires the striking of a fair balance between the right to peaceful assembly and restrictions listed in paragraph 2.⁹⁷⁶ Freedom of peaceful assembly must not be interpreted restrictively.⁹⁷⁷

It has been argued that an individual participant of a peaceful assembly enjoys full protection under Article 11 and his right cannot be restricted in any way.⁹⁷⁸ It should be noted that genuine and effective freedom of peaceful assembly cannot imply only a negative obligation not to interfere, Article 11 requires states to take measures.⁹⁷⁹

There are many examples throughout the world of protest demonstrations on the issues of environmental protection. For example, the residents of North East England conducted in the seventies the protest campaign “the Druridge Bay Campaign”, against the construction of atomic power stations in Northumberland.⁹⁸⁰ And proposals to build new motorways or by-passes have also resulted in local protests in the UK and in the coining of the term NIMBY (Not In

⁹⁷¹ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001) Judgment of 20 December, 2001, paragraph 77.

⁹⁷² *Ezelin v. France* (1991) 14 EHRR 362, paragraph 37.

⁹⁷³ *Rassemblement jurassien et Unite jurassienne v. Switzerland* (1980), Appl. 8191/78, D&R 17, p. 93 (119).

⁹⁷⁴ Harris, D.J. O’Boyle M. and Warbrick, C. *op cit.*, (1995), p. 418.

⁹⁷⁵ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (2001) Judgment of 20 December, 2001, paragraph 88.

⁹⁷⁶ *Ezelin v. France* (1991) 14 EHRR 362, paragraph 52.

⁹⁷⁷ Leach, P. *op cit.*, (2005), p. 332.

⁹⁷⁸ Heringa, A. W. and Hoof, F. in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L. (eds.), *op cit.*, (2006), p. 824.

⁹⁷⁹ *Plattform “Aarzte fuer das Leben” v. Austria* (1988), EHRR, 204.

⁹⁸⁰ Cubbins, B. *Generating Pressure: Campaign Against Nuclear Power at Druridge Bay* (Newcastle: Roger Booth Associates, 1991).

My Back Yard),⁹⁸¹ in the nineties, there were protests across the UK in the form of direct action against a large number of road schemes involving the so called “eco-warriors” in a large variety of obstructive activities on new road sites.⁹⁸²

As already noted in this chapter, the right to freedom of peaceful assembly under Article 11 may have an impact on the environmental sphere to the extent that environmental changes are argued for through public protest.⁹⁸³ Complaints made to the CAO concerning sub-districts 18 and 19 of the town of Rustavi and the village of Dgvari suggest that Article 11 of the ECHR might have been violated on numerous occasions in the context of the BTC project. According to a complaint made to the CAO in March 2004, concerning sub-districts 18 and 19 of the town of Rustavi, the residents of these sub-districts held a peaceful protest demonstration to express their concern about the pipeline construction, but their assembly was dispersed by the police force. And according to a complaint made to the CAO in May 2004 concerning the village of Dgvari, residents of the latter held peaceful protest demonstrations to express their concern about the pipeline construction but the police beat them. There is no doubt that the scope of freedom of peaceful assembly under Article 11 allows for the protection of assemblies dedicated to issues of environmental protection: however it should be noted that there is no case law of the ECtHR on the issue so far.

With regard to freedom of association under Article 11, the ECtHR stated: “the most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interests.”⁹⁸⁴ Therefore, refusals of registration fall under the ambit of Article 11.⁹⁸⁵ It can be argued that the right to freedom of association can be applied to the creation of NGOs whose goal is environmental protection, however considering the content of the four formally adjudicated complaints to be discussed in the case study, this section omits detailed discussion of the right to freedom of association.

⁹⁸¹ Byrne, P. *Social Movements in Britain* (London: Routledge, 2004), p. 142.

⁹⁸² Coxall, B. Robins, L. and Leach, R. *Contemporary British Politics* (New York: Palgrave Macmillan, 2003), p. 141. Byrne, P. *Social Movements in Britain* (London: Routledge, 2004), p.

⁹⁸³ Bell, S. and McGillvray, D. *op cit.*, (2008), p. 72.

⁹⁸⁴ *Gorzelik v Poland* (2001), Human Rights Case Digest, Volume 12, Numbers 7-8, 2001 , paragraph. 55.

⁹⁸⁵ Heringa, A. W. and Hoof, F. in Dijk, P. Hoof, F. Rijn, A. and Zwaak, L., *op cit.*, (2006), p. 825.

4.7 Conclusions

The examination of Articles 8 and Article 1 of Protocol No. 1 suggests that the rights protected under these Articles can be violated by environmental harm arising from private industries. Positive obligation requires states to take appropriate measures for the prevention of nuisances arising from private industries and interfering with rights under Article 8 and Article 1 of Protocol No. 1. These Articles provide for qualified rights and this means that the principle of proportionality and the doctrine of margin of appreciation apply to them.

The right to respect for private and home life under Article 8 may be violated when actual nuisances such as toxic emissions, noise or smell affect individuals, even without seriously endangering the health and when states fail to take adequate measures. The ECtHR takes into account the intensity and duration of nuisance in determining violations. Violation of domestic law, including legislation on access to environmental information and environmental impact assessment is a factor which is taken into account by the ECtHR.

An actual environmental harm is not a pre-condition for a violation of Article 8 when the government fails to release crucial safety and environmental information to local residents threatened by severe pollution. However, the lack of access to environmental information that are held by public authorities may be sufficient for a violation of Article 8, and not for a violation of Article 10, which does not provide for an access to information held by public authorities. This means that Article 8 is being interpreted in certain situations to encompass the right to access to environmental information held by public authorities.

In the case of big economic actors causing pollution, a state may strike a fair balance between competing interests of individuals and the economic well-being of the country by paying for the resettlement of individuals from polluted areas or by taking certain mitigating measures.

Article 8 is interpreted to include procedural safeguards. Namely, when assessing the proportionality of interferences of nuisances with the right under Article 8, the ECtHR takes into account several factors. Did the public authorities assess adverse

environmental impacts of complex environmental decisions? Did the government provide access to potentially affected individuals to information on environmental impacts of decisions? Did the government provide the possibility for individuals concerned to participate in decision-making in environmental matters? Did the judiciary provide the possibility for affected individuals to challenge decisions of the public authorities?

The right to property under Article 1 of Protocol No. 1 may be violated when environmental nuisances affect it and when the property declines in value. Environmental nuisances may be grave enough to amount to a *de facto* expropriation. However, a state may strike a fair balance by providing adequate compensation. It can be argued that the right of access to information on environmental risks held by public authorities, similarly to Article 8, arises also from Article 1 of Protocol No. 1.

The right to freedom of expression under Article 10 and the right to peaceful assembly under Article 11 may have an impact on the environmental sphere, if environmental changes are promoted through public protest.

The right to freedom of expression under Article 10 protects the substance of opinions, as well as the form in which they are expressed. Therefore, Article 10 protects the expression of opinions on environmental issues, including expression of such opinions in the form of public protest and demonstration. It can be argued that Article 10 may apply to stakeholders wishing to express their views on the environmental impact of a proposed project within the environmental assessment (EA) procedure.

Article 11 is closely linked to Article 10, since the freedom of association and freedom of assembly both generally involve the holding and propagation of opinions. The freedom of assembly can be exercised in the form of protest demonstrations. It can be concluded that the scope of freedom of a peaceful assembly under Article 11 allows for the protection of assemblies dedicated to issues of environmental protection.

Material examined in this chapter should enable the case study part of the thesis in *Chapter Five* to determine whether Articles 8, 1 of Protocol No. 1, 10 and 11 were

violated in the context of the residents of sub-districts 18 and 19 of the town of Rustavi and the village of Dgvari. And without detailed examination in this chapter, it would be impossible to reach conclusions on the pre-requisites for the exercise of access to environmental information and public participation under the Aarhus Convention and the benefits to be hoped from the implementation of access to environmental information and public participation under the Aarhus Convention.

Chapter Five: Legal Regime of the BTC Project Regulating the Implementation of Procedural Environmental Rights by Georgia and Disclosure of Information and Public Consultation by the BTC Co.

5.1 Introduction

Section 2 of *Chapter Five* has a general introduction to the BTC project within Georgia and stresses its political and economic implications. Section 3 analyses the legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and domestic normative acts of Georgia in order to solve possible tensions among them.

Section 4 starts with an analysis of the legal regime of the BTC project in the light of the obligation of Georgia regarding the implementation of procedural environmental rights. This analysis is important to determine whether the BTC project agreements created more specific obligations for Georgia under certain standards for ensuring procedural environmental rights in the BTC project context than are generally provided for by the Aarhus Convention and by the domestic normative acts of Georgia on procedural environmental rights. It examines the relevant provisions of the IGA and the HGA. It also examines in detail provisions of the applicable domestic normative acts of Georgia on procedural environmental rights. In specific contexts, it involves a comparative analysis of the provisions of the BTC project agreements, the Aarhus Convention and domestic normative acts of Georgia. Section 4 proceeds with an analysis of the legal regime of the BTC project in the light of the legal requirements of the BTC Co. regarding the disclosure of information and public consultation. This analysis is important to determine the extent of the obligations of the BTC as to the disclosure of information and public consultation regarding the village of Dgvari and town of Rustavi to be discussed in *Chapter Six*. It examines Appendix 3 of the HGA and the ESIA. It also makes reference in specific contexts to the relevant requirements of the Equator Principles.

Section 5 summarises the main themes of the chapter and draws conclusions.

5.2 Introduction to the BTC Project

The Baku-Tbilisi-Ceyhan (BTC) Pipeline was built to transport crude oil from Baku, through Georgia, to Ceyhan.⁹⁸⁶ It transports oil from the Sangachal terminal in the Caspian Sea to the Ceyhan terminal on the Mediterranean, from where the crude oil is further transported to international markets.⁹⁸⁷ The project has created the first direct pipeline link between the landlocked Caspian Sea and the Mediterranean Sea.⁹⁸⁸ The pipeline bypasses the environmentally fragile Black Sea and the Bosphorus Straits.⁹⁸⁹ The length of the pipeline is 1,768 km and can transport one million barrels of oil per day.⁹⁹⁰ In August 2002, the Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co.) was formed.⁹⁹¹ The BTC Co. was made responsible for the construction and operation of the BTC pipeline.⁹⁹² The BTC Co. is an incorporated joint venture company consisting of 11 shareholders.⁹⁹³ The following 11 are the BTC Co. co-venturers: BP, AzBTC, Chevron, StatoilHydro, TPAO, ENI, Total, Itochu, INPEX, ConocoPhillips, and Hess.⁹⁹⁴ All 11 are oil companies.⁹⁹⁵ The BTC Co. is managed by British Petroleum (BP) which is the

⁹⁸⁶ *Baku-Tbilisi-Ceyhan Pipeline*, available at <<http://www.bp.com/sectiongenericarticle.do?categoryId=9006669&contentId=7015093>> [accessed on 11th March, 2008].

⁹⁸⁷ *Ibid.*

⁹⁸⁸ *The BTC Project*, available at <<http://www.caspiandevlopmentandexport.com/ASP/BTC.asp>> [accessed on 16 April 2007].

⁹⁸⁹ *BTC Project*, available at <<http://www.ifc.org/ifcext/btc.nsf/content/Home>> [accessed on 12th March, 2008].

⁹⁹⁰ *Baku-Tbilisi-Ceyhan Pipeline*, available at <<http://www.bp.com/sectiongenericarticle.do?categoryId=9006669&contentId=7015093>> [accessed on 14th March, 2008].

⁹⁹¹ *Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co.)*, available at <<http://www.bp.com/managedlistingsection.do?categoryId=9007996&contentId=7014981>> [accessed on 14th March, 2008].

⁹⁹² *Baku-Tbilisi-Ceyhan Pipeline*, available at <<http://www.bp.com/sectiongenericarticle.do?categoryId=9006669&contentId=7015093>> [accessed on 14th March, 2008].

⁹⁹³ *Ibid.*

⁹⁹⁴ *The BTC Co. co-venturers*, available at <<http://www.bp.com/managedlistingsection.do?categoryId=9007998&contentId=7015010>> [accessed on 14th March, 2008].

⁹⁹⁵ *Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co.)*, available at <<http://www.bp.com/managedlistingsection.do?categoryId=9007996&contentId=7014981>> [accessed on 14th March, 2008]. *Project Participants*, available at <http://www.caspiandevlopmentandexport.com/ASP/BTC_ProjectParticipants.asp> [accessed on 16 April 2007].

largest shareholder of the company.⁹⁹⁶ The construction of the BTC pipeline started in April 2003 and the linefill started on 18th May 2005.⁹⁹⁷ The cost of the pipeline was \$3.9 billion.⁹⁹⁸

The Caspian Sea is rich in oil and gas reserves and the domestic demand for oil in the Caucasus countries is not high.⁹⁹⁹ The BTC pipeline is designed specifically for the export of oil.¹⁰⁰⁰ The BTC pipeline has great political and economic significance since it was designed to enhance world energy security by developing a non-OPEC oil source.¹⁰⁰¹ The project creates an east-west energy corridor and provides global markets with a new source of oil.¹⁰⁰² The BTC project clearly signified the shift of the United States' energy priorities away from the Middle East.¹⁰⁰³ Bill Richardson, the former US Energy Secretary stated: "this is not just another pipeline; it is a strategic framework that advances America's national security interests. It is a strategic vision for the future of the Caspian region."¹⁰⁰⁴ Russia has been trying for years to gain control over the energy export routes in the Caspian basin and it considers the BTC pipeline as an instrument designed against Russia, by aiming to weaken its influence over oil supplies to Europe.¹⁰⁰⁵ Some outstanding analysts have argued that the Georgian-Russian war in August 2008 was motivated by the eagerness of Russia to gain effective control over the pipeline, and to be thus in a position to cut off oil supplies to the West.¹⁰⁰⁶

⁹⁹⁶ *Baku-Tbilisi-Ceyan Pipeline*, available at <<http://www.bp.com/sectiongenericarticle.do?categoryId=9006669&contentId=7015093>> [accessed on 12th March, 2008].

⁹⁹⁷ *BTC Quick Facts*, available at <http://www.bp.com/liveassets/bp_internet/bp_caspian/bp_caspian_en/STAGING/local_assets/downloads_pdfs/e/00_2006_h1_btc_quick_facts.pdf> [accessed on 12th March, 2008].

⁹⁹⁸ *Ibid.*

⁹⁹⁹ *BTC Project ESIA, Georgia, Final ESIA, Executive Summary*, available at <[http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/Geo+-+ESIA+Exec+Summ/\\$FILE/Geo+-+ESIA+Summary.pdf](http://www.ifc.org/ifcext/btc.nsf/AttachmentsByTitle/Geo+-+ESIA+Exec+Summ/$FILE/Geo+-+ESIA+Summary.pdf)> [accessed on 11th December, 2008].

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ *Global Security*, The Institute of Analysis of Global Security, available at: <<http://www.iags.org/n1104041.htm>> [accessed on 12th February, 2007].

¹⁰⁰² *Summary of Project Information*, available at <<http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135?OpenDocument>> [accessed on 11th December, 2007].

¹⁰⁰³ *Global Security*, The Institute of Analysis of Global Security, available at: <<http://www.iags.org/n1104041.htm>> [accessed on 12th February, 2007].

¹⁰⁰⁴ "BTC Pipeline – An IFI Recipe for Increasing Poverty", Green Alternative, Tbilisi, October 2005, p. 5. Available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf> [accessed on 10th December, 2007].

¹⁰⁰⁵ *Azerbaijan Frustrates Russia's Bid to Control Caucasus Energy Grid*, available at <<http://www.eurasianet.org/departments/business/articles/eav031406.shtml>> [accessed on 12th June, 2007].

¹⁰⁰⁶ For example, see *Brzezinski: Russia after BTC pipeline*, available at <http://www.upi.com/Energy_Resources/2008/06/13/Brzezinski-Russia-after-BTC-pipeline/UPI-91051213397627/> [accessed on 25th October, 2008].

Since the break up of the Soviet Union, the South Caucasus countries have been waiting for years for an oil boom, in order to overcome their economic crises and poverty.¹⁰⁰⁷ It has been argued that the pipeline can contribute to the economic welfare of many people in the Caucasus.¹⁰⁰⁸ Operation expenditures are estimated to have peaked by 2009 at \$200 million per year for all three countries together and this expenditure is expected to have an additional “multiplier” effects on their economies.¹⁰⁰⁹ The BTC project has created both temporary and permanent employment in the region.¹⁰¹⁰ It is generating significant revenues for all three countries: for example, Georgia as a transit country, will receive in total \$600 million for the life of the pipeline which is intended to last until 2024.¹⁰¹¹ The BTC project has advanced links between Georgia, Azerbaijan and Turkey through cooperation on various matters and through the interdependence that is required to obtain the maximum benefits from the project.¹⁰¹²

5.3 Analysis of the Legal Regime of the BTC Project in the Light of the Relationship between the BTC Project Agreements, the Aarhus Convention and Domestic Normative Acts of Georgia

A special legal regime called the Prevailing Legal Regime (PLR) was created to provide the legal framework for the BTC pipeline project.¹⁰¹³ The PLR denotes the

¹⁰⁰⁷ “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, Tbilisi, October 2005, p. 5. Available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf> [accessed on 10th December, 2007].

¹⁰⁰⁸ *Global Security*, The Institute of Analysis of Global Security, available at: <<http://www.iags.org/n1104041.htm>> [accessed on 12th February, 2007].

¹⁰⁰⁹ *Summary of Project Information, attachment I*, available at <[http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/\\$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf](http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf)> [accessed on 15th December, 2007].

¹⁰¹⁰ *Summary of Project Information, attachment I*, available at <[http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/\\$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf](http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf)> [accessed on 15th December, 2007].

¹⁰¹¹ *Summary of Project Information, attachment I*, available at <[http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/\\$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf](http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf)> [accessed on 15th December, 2007].

¹⁰¹² *Summary of Project Information, attachment I*, available at <[http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/\\$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf](http://ifcfn1.ifc.org/IFCExt/spiwebsite1.nsf/f451ebbe34a9a8ca85256a550073ff10/616956b20188a9ab85256d74007a6135/$FILE/attachment%20--%20Principal%20Economic%20Benefits.pdf)> [accessed on 15th December, 2007].

¹⁰¹³ Citizen’s Guide to the BTC Project Agreements: *Environmental, Social and Human Rights Standards*, the BTC Co. p. 5; *BP: Following through with Global Compact commitments*, World Business Council for Sustainable Development, 2005 p. 2.

legal framework that governed the construction and operation of the BTC pipeline project.¹⁰¹⁴ It should be emphasized that the PLR encompassed obligations, *inter alia*, in the field of the environment.¹⁰¹⁵ The PLR includes “existing national law and international law and Project Agreements between BTC and three states. The Project Agreements build on, supplement and, in some cases, supersede, existing national law”.¹⁰¹⁶ The PLR supplements local laws and regulations.¹⁰¹⁷ The so called “Project Agreements” of the BTC pipeline consist of an Intergovernmental Agreement (IGA);¹⁰¹⁸ three Host Government Agreements (HGAs); and “Other Project Agreements”.¹⁰¹⁹ The project agreements for the BTC pipeline were intended to provide legal protection to governments, investors, employees, landowners and other affected individuals.¹⁰²⁰ The “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA) constitutes an international treaty and creates binding obligations between the Azerbaijan Republic, Georgia and the Republic of Turkey.¹⁰²¹ The Host Government Agreement between and among the Government of Georgia and the MEP Participants” (HGA)¹⁰²² is Appendix I of the IGA and its integral part.¹⁰²³ It should be noted that before the BTC Co. was formed in August 2002, the project developer oil companies of the BTC pipeline were referred to as “Main Export Pipeline Participants” (MEP Participants).¹⁰²⁴ Usually, as a kind of concession agreements, the HGAs are private law contracts.¹⁰²⁵ The HGA is between Georgia

¹⁰¹⁴ Citizen’s Guide, *op cit*, p. 6.

¹⁰¹⁵ Citizen’s Guide, *op cit*, p. 8.

¹⁰¹⁶ Citizen’s Guide, *op cit*, p. 9.

¹⁰¹⁷ *BP: Following through with Global Compact commitments*, World Business Council for Sustainable Development, 2005 p. 2.

¹⁰¹⁸ See Appendix VII “The Intergovernmental Agreement” of the thesis.

¹⁰¹⁹ Article I of the “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA), p. 3.

¹⁰²⁰ Citizen’s Guide, *op cit*, p. 5.

¹⁰²¹ Boyd-Carpenter, H. and Labadi, W. *Striking a balance: Intergovernmental and host governmental agreements in the context of the Baku-Tbilisi-Ceyhan pipeline project*, LiT online: a supplement to Law in transition, EBRD, available at <www.ebrd.com/pubs/legal/lit042e.pdf>, p. 2. [accessed on 22nd July, 2009].

¹⁰²² See Appendix VIII “Host Government Agreement Between and Among the Government of Georgia and the MEP Participants” of the thesis (Appendix I to IGA).

¹⁰²³ Article I and Article II, paragraph (2) of the “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA).

¹⁰²⁴ *Comments to the IFC Baku-Tbilisi-Ceyhan Pipeline Project*, Center for International Environmental Law, p. 3.

¹⁰²⁵ Boyd-Carpenter, H. and Labadi, W. *op cit.*, p. 4.

and the BTC Co. which is a private entity and not a subject of public international law capable of concluding international treaties. According to Article 3 of the Vienna Convention on the Law of Treaties, the Convention applies only to international agreements concluded between states.¹⁰²⁶ It should be noted that international treaties can be also concluded between states and other subjects of international law, such as international governmental organizations.¹⁰²⁷ However the BTC HGAs are an integral part of the IGA and the provisions of the HGAs have become law in all three states, as well as being considered to be contracts.¹⁰²⁸ The HGA between Georgia and investors, being an integral part of the IGA, creates international legally binding obligations and rights for Georgia and the BTC Co.¹⁰²⁹ The provisions of the HGA are considered to be treaty law.¹⁰³⁰ The project agreements of the BTC pipeline do not replace existing national laws: they build upon them and supplement them, and only supersede them if the provisions of national laws are in direct conflict with the project agreements.¹⁰³¹ The IGA and the HGA override all domestic law except the Constitution of Georgia where such laws are in conflict with the provisions of the IGA and the HGA.¹⁰³² Thus, the provisions of the existing national laws of Georgia were applicable to the BTC project, to the extent that they were not in direct conflict with the provisions of the IGA and the HGA. Since the legal framework for the BTC project comprised international law in addition to the BTC project agreements and existing national law, a possible tension could have arisen between the BTC project agreements which had a status of international treaties and other internationally binding treaties to which Georgia is a Party, including the Aarhus Convention. For example, Appendix 1 (Certain Definitions) of the HGA states: “*Double Tax Treaty* means any applicable or relevant treaty or convention with respect to Taxes that is in force in Georgia”. And Article 8 (Taxes) of the HGA resolves a possible tension between the HGA and such treaties by stating: “[i]t is acknowledged that, notwithstanding any other provisions in this Agreement to the contrary, Double

¹⁰²⁶ *The Vienna Convention the Law of Treaties* (1961).

¹⁰²⁷ See *The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986). However, this Convention is not yet in force. *Audiovisual Library of International Law*, the UN, available at <<http://untreaty.un.org/cod/avl/ha/vcltsio/vcltsio.html>> [accessed on 14 May, 2001].

¹⁰²⁸ Boyd-Carpenter, H. and Labadi, W. *op cit.*, p. 4.

¹⁰²⁹ Citizen’s Guide, *op cit.*, p. 10.

¹⁰³⁰ Boyd-Carpenter, H. and Labadi, W. *op cit.*, p. 3.

¹⁰³¹ Citizen’s Guide, *op cit.*, pp. 5-6, p. 9. *BP: Following through with Global Compact commitments*, World Business Council for Sustainable Development, 2005, p. 2.

¹⁰³² Corner House *et al.* *The Legal Regime for the Baku-Tbilisi-Ceyhan (BTC) Oil Pipeline Project, Company Undertaking on the OECD Guidelines and Implications of the UK National Contact Point’s March 2011 Final Statement on the BTC Specific Instance*, 9 March, 2011, p. 1; Corner House, *BTC legal arrangement: IGA, HGAs, Joint Statement and Human Rights Undertaking*, p. 1.

Tax Treaties shall have effect to give benefits with respect to Taxes.” This chapter aims, *inter alia*, to examine whether there is such a tension between the BTC project agreements and the provisions of the Aarhus Convention: it does not aim to examine possible tensions between the BTC project agreements and other relevant treaties to which Georgia is a party.

The IGA was signed on 18 November 1999 in Istanbul by the Presidents of the Azerbaijan Republic, Georgia and the Republic of Turkey and witnessed by the US President, Bill Clinton.¹⁰³³ The IGA is considered as the foundation for the project agreements.¹⁰³⁴ By signing the IGA, the three states undertook an obligation to present the Agreement and its appendices to their national parliaments for ratification.¹⁰³⁵ On 31 May, 2000 the Parliament of Georgia ratified the IGA, including its Appendix 1 – Host Government Agreement between and among the Government of Georgia and the MEP Participants.¹⁰³⁶ The IGA, including its Appendix HGA, entered into force as a result of the submission to the depository of the last instrument of ratification on 21 June 2000.¹⁰³⁷ As for the Aarhus Convention, it entered into force on 30 October 2001, including with regard to Georgia.

As already stated in *Chapter Four*, according to Article 6 of the Constitution of Georgia “1. The Constitution of Georgia shall be the supreme law of the state. All other legal acts shall correspond to the Constitution. 2. The legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement to which Georgia is a party, unless it contradicts the Constitution of Georgia or the Constitutional Agreement, shall take

¹⁰³³ The “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA), p. 13.

¹⁰³⁴ Citizen’s Guide, *op cit.*, p. 6.

¹⁰³⁵ Article II, paragraphs (1) and (2) of the “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA).

¹⁰³⁶ “Analysis of Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline”, Green Alternative, 2002, p. 3; Abashidze, B. “Analysis of the International Agreement among Georgia, the Azerbaijan Republic and the Republic of Turkey Relating to the Transportation of Petroleum Via the Territories of The Azerbaijan Republic, Georgia and The Republic of Turkey Through the Baku-Tbilisi-Ceyhan Main Export Pipeline”. Georgian Young Lawyers’ Association, 2003, p. 6.

¹⁰³⁷ “Analysis of Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline”, Green Alternative, 2002, p. 3; Abashidze, B. *op cit.*, (2003, p. 6.

precedence over domestic normative acts.”¹⁰³⁸ According to Article 4 of the Law of Georgia on Normative Acts, international treaties to which Georgia is party, constitute normative acts of Georgia.¹⁰³⁹ It should be noted that “Law of” in the Georgian legal system is used to denote the same as “an Act” in England and Wales. Article 19 of the Law of Georgia on Normative Acts determines the following hierarchy of the normative acts of Georgia: a) the Constitution; b) a constitutional agreement; c) an international treaty or agreement to which Georgia is a party; d) a law or code; e) a decree of the president; f) a resolution of the parliament; and g) decrees of ministers.¹⁰⁴⁰ The superior force of the Constitution of Georgia over international treaties is evident in Article 6, paragraph 1 of the Constitution of Georgia, since international treaties are covered by the phrase “all other legal acts”. According to Article 6 of the Law of Georgia on International Treaties, “international treaties to which Georgia is party are an integral part of the legislation of Georgia”.¹⁰⁴¹ When Georgia becomes a party to an international treaty, the latter automatically becomes part of the legislation of Georgia and there is no need to adopt a special legal act for that purpose; thus international treaties are normative acts of Georgia and are directly applicable in the Georgian courts as part of the legislation of Georgia, but they are not considered as domestic normative acts.¹⁰⁴² In Article 6, paragraph 2 of the Constitution, the phrase “domestic normative acts” consists of: a) a law or code; b) a decree of the president; c) a resolution of the parliament; and d) decrees of ministers.¹⁰⁴³ All this suggests that the IGA, including the HGA and the Aarhus Convention as international treaties take precedence over the domestic normative acts of Georgia. This means that in the case of a conflict between the domestic normative acts of Georgia (such as a specific code or law containing procedural environmental rights) and the provisions of the IGA, HGA and the Aarhus Convention, the international treaties apply.

It is relevant to examine the relationship between the BTC project agreements and the Aarhus Convention. It has been argued that in general a tension may arise

¹⁰³⁸ *The Constitution of Georgia* (1995), Article 6.

¹⁰³⁹ *The Law of Georgia on Normative Acts* (1996), Article 4.

¹⁰⁴⁰ *Ibid.*, Article 19.

¹⁰⁴¹ *The Law of Georgia on Treaties* (1997), Article 6, paragraph 1.

¹⁰⁴² Korkelia, K. *op cit.*, (2004), p. 11; Korkelia, K. and Kurdadze, I. *op cit.*, (2004), p. 26.

¹⁰⁴³ Korkelia, K. *International Treaty in International Law and Domestic Law* (Tbilisi: Tbilisi University Press, 1998), p. 206.

among treaties governing the same topic.¹⁰⁴⁴ It should be noted that, according to Article 103 of the UN Charter,¹⁰⁴⁵ “[i]n the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Present Charter shall prevail.” It has been argued that from the point of view of international law all treaties, except the UN Charter, are equally binding on parties: “there are nevertheless certain rules concerning the solution of a conflict of treaties on the same subject, which relate to a hierarchy of specific provisions which might be embodied in a treaty”.¹⁰⁴⁶ Article 30 (Application of Successive Treaties relating to the Same Subject-Matter) and Article 59 (Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty) of the Vienna Convention on the Law of Treaties are such rules. According to Article 59, “1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.” It should be recalled here that the IGA and the HGA entered into force on 21 June 2000 and the Aarhus Convention entered into force later on 30 October 2001, including with regard to Georgia. However, the Aarhus Convention could not terminate or suspend the IGA for the following simple reason: Turkey is not a party to the Aarhus Convention. This means that Article 59 is not relevant in the context of the issue. Additionally, it can be argued that the subject-matter of the IGA and the Aarhus Convention is different because the Aarhus Convention is about procedural environmental rights and the IGA is about the BTC project; attention should be drawn to the fact that some of the same issues can be regulated differently by these two treaties. It has been noted that “determining when two or more instruments relate to the same subject matter can be problematic.”¹⁰⁴⁷ According to Article 30, “1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to

¹⁰⁴⁴ Shelton, D. “International Law and ‘Relative Normativity’” in Evans, M. (ed.) *International Law* (Oxford: Oxford University Press, 2006), p. 177.

¹⁰⁴⁵ *The Charter of the United Nations* (1945)

¹⁰⁴⁶ Degan, V. D. *Sources of International Law* (The Hague: Kluwer Law International, 1997), p. 476.

¹⁰⁴⁷ Shelton, D. *op cit.*, (2006), p. 177.

successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41¹⁰⁴⁸, or to any question of the termination or suspension of the operation of a treaty under article 60¹⁰⁴⁹ or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.” Article 30 cannot resolve a possible tension between the IGA, including the HGA and the Aarhus Convention for the following reasons: 1) the IGA or HGA do not make reference to the Aarhus Convention as to a document to be adopted in the future and the Aarhus Convention does not make reference to the IGA or HGA; 2) Turkey is not

¹⁰⁴⁸ Article 41 (Agreements to modify multilateral treaties between certain of the parties only) states: “1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides”.

¹⁰⁴⁹ Article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach) states “1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. 2. A material breach of a multilateral treaty by one of the parties entitles:(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. 3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty. 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach. 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

party to the Aarhus Convention; 3) there is no occasion in applying the Aarhus Convention only between Georgia and Azerbaijan by restricting the application of the conflicting provisions of the HGA. The nature of the Aarhus Convention does not provide for its application between states: it does not create mutual rights and obligations for states, it creates rights for the public and obligations for the states. Additionally, there is a question whether the subject-matter of the BTC project agreements and the Aarhus Convention can be considered as one and the same. Thus, this analysis suggests that the Vienna Convention on the Law of Treaties cannot resolve a possible tension between the provisions of the Aarhus Convention and the BTC project agreements.

Sometimes treaties contain provisions to resolve the problem of a conflict among them.¹⁰⁵⁰ According to Article 6 (Representations and Warranties) of the HGA, “[t]he Government hereby represents and warrants to each of the MEP Participants that as of the Effective Date: . . . (ii) all parliamentary, legislative and executive actions and enactments required of the State Authorities by Georgian Law, to cause the terms of the Intergovernmental Agreement, together with the attachments thereto, and the various grants and obligations of the State Authorities thereunder in favour of the MEP Participants [the BTC Co.] and/or other Project Participants to become effective in Georgia *as the prevailing legal regime under Georgian Law with respect to the Project and all Project Activities* as the binding obligations of the State Authorities have been completed”. Appendix 1 of the HGA defines “Georgian Law” as being “the laws of Georgia binding and legally in effect from time to time and forming the organic law constituting the entire legal regime of Georgia, including the Constitution, all other laws, codes, decrees with the force of law, decrees, by-laws, regulations, official declarations, principle decisions, orders, normative acts and policies, *all international agreements to which Georgia is or may be a party* together with all domestic enactments, laws and decrees for the ratification or implementation of such international agreements, and prevailing judicial interpretations of all such legal instruments.” These two provisions of the IGA can be construed as imposing an obligation on Georgia to give superiority to the provisions of the IGA and the HGA solely in relation to the BTC project activities, as opposed to any provisions of the existing or future international agreement of Georgia conflicting with them. It should be noted here that according

¹⁰⁵⁰ Talalaev, A. N. *The Vienna Convention on the Law of Treaties: A Commentary* (Moscow: Legal Literature Publishing, 1997), p. 75.

to Article II (6) of the IGA, “[w]ith respect to this Agreement, each State hereby represents and warrants that, as of its ratification and/or adoption as herein contemplated, the State is not a party to any domestic or international agreement or commitment or lawfully bound to observe or enforce any domestic law or regulation, or international agreement or treaty, that conflicts with, impairs or interferes with this Agreement or limits, abridges or adversely affects the State’s ability to implement this Agreement or enter into force and implement any other applicable Project Agreement”. However the Aarhus Convention cannot be considered as such by its nature; for example, Section 6 (Legislation and Policy Framework) of the BTC ESIA ¹⁰⁵¹ which was prepared in November 2002 lists the Aarhus Convention among many other international environmental treaties as applicable of the BTC project.

As for “Other Project Agreements”, they include the Environmental and Social Impact Assessments (ESIAs); the BTC Human Rights Undertaking; the Joint Statement; and the Security Protocols.¹⁰⁵² Here it should be emphasized that the Environmental and Social Impact Assessments (ESIA) for Georgia was prepared in November 2002. The HGA was not subject to those domestic legal procedures in Georgia that are as a rule necessary for entry into force for a treaty. The preparation of the ESIA is discussed in Appendix 3 of the HGA, but the ESIA is not part of the HGA: it is a document prepared by the BTC Co. and does not have the status of an international treaty. The same can be said about the BTC Human Rights Undertaking which was adopted unilaterally by the BTC Co. in September 2003 and the government is not a signatory to it. Neither does the Joint Statement - which was issued by the BTC Co. and representatives of the three host governments in May 2003 - has the status of an international agreement: it is of a declaratory nature and does not claim to give rise to legal obligations. The “Security Protocol between the Government of Georgia and BP Exploration (Caspian Sea) Limited on the Provision of Security for the Baku-Tbilisi-Ceyhan Pipeline Project, the South Caucasus Pipeline Project and the Western Route Export Pipeline and Related Installations Located at the Supsa Terminal” was signed in July 2003, but this too does not amount to an international treaty since BP is one of the parties and cannot be considered to be a subject of international law capable of concluding an international treaty.

¹⁰⁵¹ Legislation and Policy Framework, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 6-9.

¹⁰⁵² Citizen’s Guide, *op cit*, p. 6.

5.4 Analysis of the Legal Regime of the BTC Project in the Light of the Obligation of Georgia regarding the Implementation of Procedural Environmental Rights and the Legal Requirements of the BTC Co. regarding the Disclosure of Information and Public Consultation

5.4.1 Analysis of the Legal Regime of the BTC Project in the Light of the Obligation of Georgia regarding the Implementation of Procedural Environmental Rights

5.4.1.1 Intergovernmental Agreement (IGA)

The IGA itself consists of a preamble, eleven articles and five appendices¹⁰⁵³. The provisions of the IGA create a detailed basis for taxation of the BTC project; set out commitments of the three governments with regard to the provision of security for the BTC pipeline; create guarantees from governments for the BTC Co. relating to the fiscal, technical and legal aspects of the BTC project etc. The IGA agrees on the applicable environmental standards.¹⁰⁵⁴

According to Article IV concerning technical, safety, and environmental standards, there are several essentials. The first is that the states should cooperate and coordinate with each other and with the project investors in the formulation and establishment of uniform technical, safety and environmental standards, as regards the construction, operation, repair, replacement, capacity extension and

¹⁰⁵³ Appendix 1 “the Host Government Agreement between and among the Government of Georgia and the Project Investors”; Appendix 2 “the Host Government Agreement between and among the Government of Republic of Turkey and Project Investors”; Appendix 3 “the Turnkey Agreement between and among turkney contractor and the Project Investors”; Appendix 4 “the Government Guarantee by which the Government of Republic of Turkey guarantees the payment and performance obligations of turkney contractor under the Turnkey Agreement”; and Appendix 5 “the Host Government Agreement between and among the Government of the Azerbaijan and the Project Investors”. See Article II, paragraph (2) of the “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum Via the Territories of The Azerbaijan Republic, Georgia and The Republic of Turkey Through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA).

¹⁰⁵⁴ Boyd-Carpenter, H. and Labadi, W. *op cit.*, p. 2. See Article IV (Technical, Safety, and Environmental Standards) of the “Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey through the Baku-Tbilisi-Ceyhan Main Export Pipeline” (IGA).

maintenance of the facilities of the pipeline. The second demand is that the aforementioned technical, safety and environmental standards must comply with all international standards and practices within the petroleum pipeline industry and, in particular with those generally applied in member states of the European Union. In this respect, the legal requirements of the Host Government Agreement must also be met, regardless of any national standard or practice contrary to these. It has been argued that by referring to EU standards, the IGA created a floor for what was deemed “international standards and best practices” for the BTC pipeline project, and this means that the BTC project was at least obliged to meet EU standards and directives.¹⁰⁵⁵ Article IV in fact does not specify whether any international standard must be met by Georgia or the BTC Co. regarding the disclosure of environmental information and public participation/consultation.

5.4.1.2 Host Government Agreement (HGA)

The HGA consists of a preamble, twenty-three articles and three appendixes. The HGA sets out the following rights and guarantees granted by Georgia to MEP Participants i.e. BTC Co: the right to obtain land necessary for the construction and operation of the BTC pipeline; the right to import and export goods, services and materials for the BTC pipeline; the right to transfer and convert currency; a guarantee of economic stabilization if the fiscal regime changes; a guarantee of security provision for the BTC pipeline etc.

Section 7.3 of Article 7 (Certain Covenants and Consents of the Government) provides for the right of the BTC Co. to information on the application requirements necessary for obtaining specific consents. It states that, upon request by MEP Participants, the Georgian authorities must provide a list of all documents and requirements necessary for obtaining a specific licence, permit, certificate, authorisation, environmental approval or permission. It further states that subject only to the submission and/or satisfaction of the application requirements, the Georgian authorities must, within thirty days and at the latest sixty days, secure all licences, permits, certificates, authorisations, environmental approvals and permissions. It is worth noting that Section 7.3 does not make reference to any document that establishes an assessment process for granting development

¹⁰⁵⁵ Citizen’s Guide, *op cit*, p. 19.

consents or that provides for the exercise of procedural environmental rights within that assessment procedure, for example Council Directive 85/337/EEC 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Therefore, it is evident that the HGA would not regulate the framework for granting environmental consents, except for those time limits fixed by Section 7.3 of the HGA.

5.4.1.3 Article 6 of the Aarhus Convention

Section 7.3 means that the decision of the government of Georgia as to whether to permit the construction and operation of the BTC project would be subject to the requirements on public participation of the Aarhus Convention. Article 6, paragraph 1 (a) of the Aarhus Convention requires Parties to apply the provisions of Article 6 to all decisions on whether to permit proposed activities contained in annex I. According to annex I, such proposed activities include projects on pipelines with a diameter of more than 800 mm and more than 40 km in length for the transport of oil or gas. The BTC pipeline easily meets these criteria: the BTC pipeline has a diameter of 1.070 mm diameter and is 249 km in length in its Georgian section.¹⁰⁵⁶ Section 7.3 also means that the implementation of Article 6 of the Aarhus Convention should not affect the right of the BTC Co. to obtain an environmental permit for the BTC project within thirty days and at the latest sixty days, if the application for the environmental permit satisfies the application requirements. Thus, the government of Georgia was given a maximum of sixty days for the implementation of the provisions of Article 6 on the disclosure of project related information and public participation in decision-making. It should be emphasised that Article 6 does not set out time frames for its implementation similar to Article 4 which requires public authorities, upon request, to supply environmental information within one month unless the volume and the complexity of the information requested justify an extension of this period for another month. However, it should be taken into account that, for the purpose of public participation an individual may apply provisions of Article 4, and request environmental information, including such information that might justify the extension of the period of disclosure of up to two months from the submission of

¹⁰⁵⁶ *The Baku-Tbilisi-Ceyhan (BTC) Pipeline*, available at <<https://www.piersystem.com/go/doc/1339/150562/Baku-Tbilisi-Ceyhan-BTC-Pipeline->> [accessed on 8 April, 2011].

the request.¹⁰⁵⁷ Theoretically, this might have a result of the incompatibility of Section 7.3 of the HGA with the requirements under Article 6 of the Aarhus Convention. Here it should be recalled that the IGA, including the HGA, entered into force on 21 June 2000 and the Aarhus Convention entered into force on 30 October 2001, including with regard to Georgia; the conclusion of the HGA by Georgia could not be considered in 2000 in the light of its obligations under the Aarhus Convention. However it is interesting that both treaties were applicable in 2002 in Georgia, in the context of granting a permit to the BTC project. Considering Article 6 of the HGA and the definition of “Georgian Law” provided for by Appendix 1 of the HGA, it can be argued that the provisions of Section 7.3 of the HGA would prevail in the situation.

5.4.1.4 Domestic Normative Acts of Georgia

In the context of Section 7.3 of the HGA, it is relevant to examine the provisions of the domestic normative acts of Georgia that regulate permitting of activities and that would apply to the BTC project. The examination of the IGA and HGA so far suggests that the legal regime of the BTC project in general obliged Georgia to implement procedural environmental rights under the Aarhus Convention and domestic normative acts of Georgia in the context of the BTC project.

The Law of Georgia on Environmental Permit was adopted in 1996 and was abrogated in 2007 by the Law of Georgia on Environmental Impact Permit. Thus, the Law of Georgia on Environmental Permit was applicable in 2002 when the permit for the construction and operation of the BTC project was issued by the Ministry of Environmental Protection and Natural Resources of Georgia. The Law of Georgia on Environmental Permit of 1996 regulates the legal basis for granting an environmental permit, for the preparation of conclusions by governmental ecological experts, and for the disclosure of information and public participation in the process of decision-making on granting an environmental permit. There is a list of activities in Article 4 which are divided into four categories. Category I lists

¹⁰⁵⁷ Ukraine ACCC/C/2004/03 and ACCC/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005, para. 32. available at <<http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf>> [accessed on 18th October, 2008].

activities with serious environmental impact and requires, within the procedure of decision-making, the disclosure of project related information and opportunities for public participation. It should be emphasized that Category I lists underground or aboveground construction of pipelines for the transportation of oil or gas as an activity having a serious environmental impact. According to Article 5, for a Category I project, the project developer must submit a written application for a permit, which should include the following attachments: technical-economic documentation, an EIA report and a brief annotation of the project. According to Article 7, the Ministry of Environmental Protection and Natural Resources of Georgia must conduct the EIA procedure for all Category I activities: namely, it must 1) within 10 days after submission of the application for an environmental permit, publish in the press the application for an environmental permit (without attachments) and a brief annotation in order to inform the public; 2) during a period of 45 days after the afore mentioned publication, ensure the possibility for the public to submit written comments on the proposed activity; 3) within two months after submission of the application for an environmental permit, hold public hearings on the proposed project; 4) ensure public access to the documentation related to the application for a permit, including the EIA report; 5) ensure the preparation of conclusions by governmental ecological experts on the proposed activity; 6) take into due account the outcome of public participation when making a decision on the permit; and 7) within three months after submission of the application for an environmental permit, make a decision on granting or refusing an environmental permit. The Law of Georgia on Environmental Permit sets certain time limits for the disclosure of project related information and for public participation in decision-making, however it does not contradict the requirements of Article 6 of the Aarhus Convention. Section 7.3 of the HGA sets out time limits for the government of Georgia for the consideration of the application requesting an environmental permit for the BTC project: a maximum of sixty days as opposed to three months provided for under Article 7 of the law. In this situation, under the Constitution of Georgia the provisions of the HGA take precedence over the domestic normative acts: the Law of Georgia on Environmental Permit.

The Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts was adopted in 1996 and abrogated by the Law of Georgia on the Preparation of Conclusion by Ecological Experts in 2007. Thus, the Law of

Georgia on the Preparation of Conclusions by Governmental Ecological Experts was applicable in 2002. According to Article 1 of the Law of 1996, the preparation of a conclusion by governmental ecological experts is an integral part of the process of decision-making on an environmental permit and a necessary prerequisite for reaching a decision on an environmental permit. According to Article 4, the Ministry of Environmental Protection and Natural Resources of Georgia must ensure the preparation of conclusions by governmental ecological experts before making a decision on an application for an environmental permit. The process of the preparation of conclusions by governmental ecological experts also includes possibilities for public participation, in addition to those provided by the Law of Georgian on Environmental Permit: Article 4 states that interested members of the public should be given possibility to participate in the process of the preparation of conclusions and the public's comments must be taken into account when making a final conclusion. It can therefore be concluded that the Law of Georgia on Environmental Permit constitutes a framework for permitting procedure and regulating the preparation by the project developer of an environmental statement, making publicly available this environmental statement, holding of public hearings on the environmental statement and making a final decision on the issuing of an environmental permit. And the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts regulates the preparation of the conclusions of ecological experts which is an assessment of the environmental impact of the proposed project based on an environmental statement and public input, and additionally provides for public participation. However the conclusion of governmental ecological experts is not a decision as to whether the project should go ahead. It is up to the Ministry of Environmental Protection and Natural Resources to make the final decision on granting permission. The Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts does not provide for the time frames for the preparation of ecological conclusions; it only indicates that this process should take place within the procedure of decision-making on environmental permitting regulated by the Law of Georgia on Environmental Permit: therefore, there is no ground to argue on the direct incompatibility of the provisions of the Law on the Preparation of Conclusions by Governmental Ecological Experts with Section 7.3 of the HGA.

The General Administrative Code of Georgia was adopted on January 1, 2000. It regulates the general principles of administrative decision-making, including

decisions involving environmental issues.¹⁰⁵⁸ According to Article 100 of the Code, if it is not otherwise provided for by a specific law, in general a decision in response to an application must be made by the relevant administrative body within one month from the date of its submission. According to Article 116, the announcement of the receipt of an application requesting a permit should be published and such an announcement must include information on the decision-making administrative authority, the time limits for the submission of comments and for making a decision. According to Article 99, members of the public concerned must have the possibility to access information relating to the proposed activity free of charge. According to Article 118, all members of the public have the right to submit comments within 20 days of the published announcement. According to Article 120, a public hearing should take place and a decision should not be taken before the expiration of a 10 day period from the day of the public hearing. According to Article 110, the public concerned must be informed concerning the time and venue of a public hearing at least seven days ahead. For example, Articles 116 and 99 can be applied to the decision-making on an environmental permit. However, Article 100 of the Code fixes tighter time frames for making administrative decisions than those provided by the Law of Georgia on Environmental Permit viz within three months, and by Section 7.3 of the HGA which allows for a maximum of 60 days. The Law of Georgia on Environmental Permit is more specific and under Article 100 of the General Administrative Code the former is applicable to a decision on granting an environmental permit: however in the BTC case, considering Article 6 of the Constitution of Georgia, Section 7.3 of the HGA would apply. It should be noted that these provisions of the Code cannot be considered as contradictory to Article 6 of the Aarhus Convention.

It should be noted here that according to Article 6, paragraph (f) of the Law of Georgia on Environmental Protection¹⁰⁵⁹, “a citizen has the right to take part in the process of discussion and of the adoption of significant environmental decisions.”

There is no provision the IGA or the HGA that would suggest that provisions of the Aarhus Convention on access to environmental information and on access to justice in environmental matters, and provisions of domestic normative acts on

¹⁰⁵⁸ *The General Administrative Code of Georgia* (2000), Article 115.

¹⁰⁵⁹ *The Law of Georgia on Environmental Protection* (1996).

access to information and access to justice are not applicable in the context of the BTC project.

According to Article 37, paragraph 5 of the Constitution of Georgia “an individual has the right to receive complete, objective and timely information on the condition of his working and living environment”. According to Article 41, paragraph 1 of the Constitution of Georgia “every citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law with . . . official documents existing there [in state institution] unless they contain state, professional or commercial secret”.

Chapter III of the General Administrative Code of Georgia deals with “passive” access to information. According to this Chapter, all information, including environmental information that is held by public authorities, must be publicly available upon request unless it is confidential. Article 42 (a) of this Code states that information on the protection of the environment, and data on threats to human life and health should not be confidential. “Any person” has the right to request and receive information under Article 37 of the General Administrative Code. It should be noted here that there is no commentary to the General Administrative Code of Georgia suggesting that “any person” in Article 37 includes non-nationals; however considering the practice of the Aarhus Convention, there seems no legal ground to argue that Article 37 does not include non-nationals. Under Article 37, paragraph 1 of the Code, any individual also has the right to view the original document. Under the same paragraph, any individual has the right to choose the form in which he would like to obtain the information, if the public authority holds this information in several forms. Under Article 37, paragraph 2 of the Code, an individual has the right to access information without having to state an interest in the disclosure. Under Article 40, paragraph 1 of the Code, the information should be made public immediately or at the latest within ten days. Here it should be recalled that Article 4 of the Aarhus Convention provides for longer time frames which are considered to be a ceiling and do not prevent states to fix shorter time frames. Article 27 of the Code sets out the categories of confidential information and this provision is in compliance with the Aarhus Convention. Article 80 of the Code provides for onward referral of requests; if a public authority does not hold the information requested, that public authority must, within five working days, find the public authority that holds the requested information and transfer the

request for information to it. And if no such body can be found, the applicant must be informed within five working days. According to Article 33 of the Code, information that can be separated from confidential information must be made public. Article 41 of the Code makes tighter requirements regarding time frames of refusals than does the Aarhus Convention. According to it, the applicant should be informed of the refusal immediately and a written explanation should be provided to the applicant within three days after the decision. And the right of access to a review procedure must be provided in the notice. Under Article 99, paragraph 6 of the Code, no charge must be levied for the supply of the information, except for copies or for mailing the information.

The Law of Georgia on Environmental Protection¹⁰⁶⁰ deals with “active” access to environmental information. According to Article 26, state registration, reporting and assessment of qualitative and quantitative environment indices are run by the Ministry of Environmental Protection, together with the Ministry of Labour, Health and Social Affairs and the Ministry of Agriculture and Food. According to Article 27 of the law, “the environmental monitoring system comprises analyses of information obtained through observation of the environment and forecasting”. Article 27 states that the Ministry of Environmental Protection and Natural resources of Georgia must coordinate the environmental monitoring system. It further states that all results of environmental monitoring must be made public. According to Article 14 of the law, the Ministry of Environmental Protection and Natural Resources of Georgia must submit an annual national report on the state of the environment to the president to inform the public. It should be noted that under Article 35 of the General Administrative Code of Georgia, public authorities are required to keep a public register of information which should be open to everyone.

According to Article 17, paragraph 2 of the Law of Georgia on Environmental Permit, any person may appeal against a public authority both to the higher administrative authority and to the court, if a violation of his right to access of information has taken place.

According to Article 47 of the General Administrative Code of Georgia, a person has the right to apply to a court for annulling a decision on the refusal of the disclosure of information. In the case of illegal denial of access to public

¹⁰⁶⁰ *The Law of Georgia on Environmental Protection* (1996).

information or disregard of responsibilities by a public servant, he/she must be brought to account according to the norms of the Georgian law on Public Service. According to the General Administrative Code, any person has the right to bring a case before a court against any action or inaction which contradicts provisions of the national environmental legislation. The costs that members of the public incur in bringing cases to court are based on the tariff for public tax rates laid down by the Georgia Law on Public Taxes, Article 4, of the year 1998.

The examination of provisions of the domestic normative acts on procedural environmental rights suggests that these provisions cannot be considered as contradictory to the provisions of the Aarhus Convention.

5.4.2 Analysis of the Legal Regime of the BTC Project in the Light of the Legal Requirements of the BTC Co. regarding the Disclosure of Information and Public Consultation

5.4.2.1 Appendix 3 (Code of Practice) of the HGA

According to Section 12.1 of the HGA, the applicable environmental, health and safety standards and practices are provided for in Appendix 3 of the HGA which must apply, notwithstanding any conflicting standards and practices required by Georgian law. The HGA includes Appendix 3 which sets out additional environmental, technical, health, safety and social standards in compliance with which BTC Co. has to construct and operate the pipeline.¹⁰⁶¹ According to the first sentence of Appendix 3 (Code of Practice), the code sets out technical, environmental, health, safety and social standards and practices to be adhered to by the BTC Co. It should be emphasised that Appendix 3 sets out the standards which must be complied with by the BTC Co. and not by the Government of Georgia.

Section 3 (Environmental Standards) of Appendix 3 sets out environmental standards of the BTC project. Section 3.1. states: “[w]ith respect to minimising potential disturbances to the environment, including the surface, subsurface, sea, air, watercourses and reservoirs, lakes, flora, fauna, landscapes, ecosystems and

¹⁰⁶¹ Citizen’s Guide, *op cit*, pp. 19-20.

other natural resources and property, the MEP Participants shall, in conducting all Pipeline Activities and with respect to the Facilities, conform to the environmental standards and practices set forth in this Appendix 3 as well as those generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project, but in no event shall such environmental standards and practices be less stringent than the relevant standards and practices applied in the Netherlands (and, with respect to mountainous and earthquake-prone terrain as well as whenever the Netherlands has no relevant standard or practice, the relevant standards or practices, if any, of Austria) in respect of comparable projects (the ‘Environmental Standards’). For the avoidance of doubt, whenever the Environmental Standards refer to or are drawn from the standards and practices of any particular country or jurisdiction (such as the Netherlands or Austria), those standards and practices: . . . (ii) do not include the regulatory administrative structure or procedures (including those for licensing, permitting and regulatory approvals) of that country or jurisdiction, it being agreed that the regulatory administrative structure and procedures, including environmental permitting as set forth in Section 7.3. of the Agreement, of Georgia shall apply . . .” The latter statement of Section 3.1 is very logical, since Appendix 3 makes it clear that it imposes the obligation of compliance with certain environmental standards on the BTC Co. and not on Georgia. Therefore, it could not replace or supersede rules that regulate environmental permitting by the competent public authority of Georgia or replace rules that impose an obligation on the government of Georgia with regard to information disclosure and public participation within the framework of such environmental permitting.

Appendix 3 (Code of Practice) required the BTC Co. to prepare a scoping study, risk assessment, baseline study, an environmental impact assessment (EIA), and spill response plan, the whole to be denoted as an “Environmental Strategy Product”.¹⁰⁶²

More specifically, Section 3.6 of Appendix 3 requires the BTC Co. to produce an EIA. According to Section 3.6 the EIA report must include: (i) a description of the project; (ii) an environmental and socio-economic description of the areas of possible impact; (iii) an evaluation of impact to the environment of the proposed project (iv) a plan of mitigation measures; (v) an assessment of the environmental

¹⁰⁶² Section 3.8. Appendix 3 (Code of Practice), the HGA.

risks; and (vi) the formulation of a monitoring programme to verify the effectiveness of the mitigation measures. This obligation of the BTC Co. does not contradict the requirements of Principle 3 of the Equator Principles of 2003. It should be recalled here that Article 5 of the Law of Georgia on Environmental Permit also requires the project developer to prepare an EIA report. And the obligation imposed on the BTC Co. to prepare an EIA report cannot be considered as contradictory to Article 6 of the Aarhus Convention.

Section 3.9 provides for the obligation of the BTC Co. regarding the disclosure of information and public participation within its environmental impacts assessment (EIA) procedure. According to Section 3.9 (ii) (a) an EIA, which should include an executive summary reflecting an adequate response to public concerns, must be subject to the approval of the Georgian government. According to Section 3.9 (ii) (b), “[i]f the Government requires clarification of any portion of . . . the EIA, or determines that it has not satisfied the requirements of this Appendix 3, it shall submit its specific concerns or questions to the MEP Participants in writing within thirty (30) days of receipt of the item in question.” According to Section 3.9, (iii) “the EIA shall be subjected to public review and comment in accordance with the following procedures: (a) Affected public and non-governmental organizations will be notified about the nature of the operation of the Facilities during the development of the EIA through dissemination of information to these organizations through meetings and exhibitions. (b) Following the completion of the EIA, the public will be provided with information on the environmental aspects of the Project to enable it to comment with respect thereto. To facilitate this process the EIA and an executive summary (in the Georgian language) will be made available in a public place for review and comments; additionally an information copy of the executive summary shall be submitted simultaneously to the Government. (c) A maximum of (60) days will be allowed for public comments, which will be provided to the Government by the MEP Participants within (30) days after the expiration of said sixty (60)- day period. Demonstration that the MEP Participants have reasonably addressed public concerns (through modification of the EIA, if necessary) will be included in a final executive summary that will be submitted to the Government”. This obligation of the BTC, when fulfilled, could contribute to the compliance with the requirements of Principle 5 of the Equator Principles of 2003, including to the IFC Environmental Assessment OP4.01 (1998) referred to in Principle 3. It should be noted here that

Article 6, paragraph 5 of the Aarhus Convention states that “[e]ach Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to supply information regarding the objectives of their application before applying for a permit”. “Where appropriate”, in paragraph 5, allows discretion to Parties on whether to encourage prospective applicants to take the afore mentioned steps. And according to Article 7, paragraph 2 of the Law of Georgian on Environmental Permit, the project developer has the right, but no obligation, during the preparation of the EIA report to make public the existing documentation and make arrangements for public consultation. Thus, Appendix 3 of the HGA creates an obligation for the BTC Co. to identify the affected public concerned, to disclose the EIA report to them and to engage in public discussions. This is not mandatory under the Aarhus Convention nor under the Law of Georgia on Environmental Permit.

According to Section 3.10, the preparation of an “Environmental Strategy Product”, which includes an EIA, must comply with the environmental standards. Section 3.10 further states that the “[c]reation of the EIA shall also be in accordance with the principles of the EC Directive 85/337/EEC (as amended by EC Directive 97/11/EC) and its conclusions will be based upon the following general environmental principles: (i) there should be no discharging of Petroleum; (ii) waste Petroleum, sludge, pigging wastes, polluted ballast waters and other wastes will either be recycled, treated, burned, or buried employing the best practicable environmental option; (iii) all waste streams will be disposed of in an acceptable manner and concentration; ...”. Here it should be noted that the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (the EC EIA Directive, as amended), makes various requirements for public authorities, including the obligation to secure information disclosure and public participation. However, Section 3.10 does not impose any obligation on the public authorities of Georgia to apply the principles of the EC EIA Directive and thus does not give rise to a requirement by the Georgian authorities to ensure the public be informed of the proposed activity and to ensure public participation under this directive, when dealing with the request to grant a permit for the BTC project. Section 3.10 only imposes the obligation on the BTC Co. to prepare the EIA in accordance with the EC EIA Directive. It should be noted here that under the EC EIA Directive, a project developer has to prepare and supply information to a public authority and

this information under Article 5, paragraph 3 of Directive as amended, must include at least: “a description of the project comprising information on the site, design and size of the project; a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects; the data required to identify and assess the main effects which the project is likely to have on the environment; an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects; a non-technical summary of the information mentioned in the previous indents”.¹⁰⁶³ It should be noted that the EC EIA Directive does not oblige the project developer to disclose information and ensure public consultation on its behalf: it clearly imposes this obligation on public authorities upon formally receiving an application for an environmental permit.

5.3.3 BTC Environmental and Social Impact Assessment (ESIA)

In accordance with Appendix 3 of the HGA, the BTC Co. prepared the Environmental and Social Impact Assessment (ESIA)¹⁰⁶⁴ report for Georgia which involved studies of environmental and social impacts and consultation with stakeholders.¹⁰⁶⁵ The ESIA constitutes an “Other Project Agreement” of the BTC project.¹⁰⁶⁶ It should be emphasized that the preparation of the ESIA, that would meet certain requirements, was a legal obligation for the BTC Co. under Section 3.6, Appendix 3 of the HGA.

Section 7.2 (Consultation, participation and disclosure) of Section 7 (Environmental and Social Impact Assessment Methodology)¹⁰⁶⁷ of the ESIA states that disclosure of timely and detailed information to stakeholders ensures understanding by stakeholders of likely impacts of the project and allows them to provide feedback on the project. Section 7.2. provides for the selection of stakeholders from the following main groups: authorities; international and local NGOs; interested groups such as institutions and media; community groups;

¹⁰⁶³ See also Article 5, paragraph 1, and annex IV of the EC EIA Directive (as amended).

¹⁰⁶⁴ The BTC Project ESIA, Georgia, 2002.

¹⁰⁶⁵ Citizen’s Guide, *op cit*, p. 12.

¹⁰⁶⁶ Citizen’s Guide, *op cit*, p. 6.

¹⁰⁶⁷ 7. Environmental and Social Impact Assessment Methodology, The BTC Project ESIA, Georgia, 2002.

residents, landowners or land users of towns and villages that are known as the pipeline affected communities, those within a 2 km corridor either side of the pipeline or pipeyard or within 5km of a worker camp; etc.¹⁰⁶⁸

Section 9 (Socio Economic Baseline)¹⁰⁶⁹ of the ESIA outlines the social and economic issues mentioned by stakeholders in the process of interviews and consultations conducted during 2000 and 2001 i.e. during the preparation of the ESIA.¹⁰⁷⁰ According to Section 9.2.2, this survey included 72 communities within 2km either side of the centreline of the ROW¹⁰⁷¹ and within 5km of worker camps.¹⁰⁷² Section 9.10 identifies some negative attitudes of stakeholders regarding possible negative environmental impact resulting from the construction of the pipeline.¹⁰⁷³ It should be noted that Appendix D Annex I of the ESIA contains the list of and information on these 72 communities.¹⁰⁷⁴

Section 16 (Consultation)¹⁰⁷⁵ of the ESIA provides an outline of consultations which took place during the preparation of the ESIA and not during the sixty day disclosure period between 30 May 2002 and 31 July 2002.¹⁰⁷⁶ According to Section 16.4, later the draft ESIA report was to be made public for comment for a 60 day period; the non-technical Executive Summary in Georgian was to be directly distributed to a range of stakeholders; special pamphlets containing information on the impacts of the project on affected communities was to be distributed among communities within 2 km of the route and 5km of worker camps in the period between late May and June 2002; two public meetings were to take place in Tbilisi and Rustavi in July to discuss the draft ESIA; and 10 village meetings were to take place along the route of the pipeline corridor in June.¹⁰⁷⁷

The ESIA's Appendix F (Annex I Public Consultation and Disclosure Plan – BTC

¹⁰⁶⁸ *Ibid.*, p. 7-3.

¹⁰⁶⁹ 9. Socio Economic Baseline, The BTC Project ESIA, Georgia, Final ESIA, November, 2002.

¹⁰⁷⁰ *Ibid.*, p. 9-1.

¹⁰⁷¹ "ROW" denotes "The corridor area required for the construction and installation of the pipeline." Glossary and Abbreviations, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 2-11.

¹⁰⁷² 9. Socio Economic Baseline, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 9-6.

¹⁰⁷³ *Ibid.*, pp. 9-50 – 9-55.

¹⁰⁷⁴ Appendix D Social Baseline, Annex I Community Survey Summary, The BTC Project ESIA, Georgia, Final ESIA, November, 2002.

¹⁰⁷⁵ 16. Consultation, The BTC Project ESIA, Georgia, Final ESIA, November, 2002.

¹⁰⁷⁶ *Ibid.*, p. 16-7.

¹⁰⁷⁷ 16. Consultation, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, pp. 16-7 – 16-8.

and SCP Projects, Georgia) contains more detailed information on the methodology of data collection, consultation and stakeholders.¹⁰⁷⁸

According to Section 3.9 (iii) (c), Appendix 3 of the HGA, the final executive summary of the ESIA had to demonstrate that the BTC Co. had reasonably addressed public concerns. According to Section 1.2.1 (Public Consultation) of the final “Executive Summary” of the ESIA report, consultation was an integral part of the ESIA process.¹⁰⁷⁹ Section 1.5.1 (Environmental Methodology) of the final “Executive Summary” of the ESIA report states that information on environmental impact was made public and consultation with local communities along the route took place.¹⁰⁸⁰ According to Section 1.6.2 (Socio-economic baseline) of the final “Executive Summary” of the ESIA report, “data on existing social and economic conditions, and attitudes to the project, were gathered through interviews and consultation in every community within a 2km either side of the centre of the pipeline corridor . . .”¹⁰⁸¹ Section 1.10.2 defines pipeline affected communities as “those that are located within (or partly encroach into) a 2km corridor either side of the route, or are within 5km of a potential worker camp or pipe yard. These communities are likely to experience and be affected by the activities of construction, operation and decommissioning of the pipeline.”¹⁰⁸²

It has been noted that the BTC project documents refer to the World Bank policies and not those of the IFC’s; for example they refer to the World Bank Policy OP 4.01 on Environmental Assessment (1999) and not to the IFC Safeguard Policy OP4.01 Environmental Assessment (1998).¹⁰⁸³ According to the ESIA’s Appendix F (Annex I Public Consultation and Disclosure Plan – BTC and SCP Projects, Georgia), the World Bank Group’s Environmental Assessment – OP 4.01 of 1999 - is an international standard on public consultation that is relevant for the BTC pipeline project.¹⁰⁸⁴ The World Bank OP 4.01 on Environmental Assessment (1999) is very similar to the IFC Safeguard Policy OP4.01 Environmental

¹⁰⁷⁸ Appendix F, Annex I, Public Consultation and Disclosure Plan – BTC and SCP Projects, Georgia, The BTC Project ESIA, Georgia, Final ESIA, November, 2002.

¹⁰⁷⁹ 1. Executive Summary, the BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 1-4.

¹⁰⁸⁰ *Ibid.*, p. 1-9.

¹⁰⁸¹ *Ibid.*, p. 1-12.

¹⁰⁸² *Ibid.*, p. 1-35, footnote 1.

¹⁰⁸³ See “Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”, July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 14, footnote 4.

¹⁰⁸⁴ Appendix F, Annex I Public Consultation and Disclosure Plan – BTC and SCP Projects, Georgia, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. F-1-7.

Assessment (1998) in terms of the obligations imposed on project developers to prepare an EA for Category A projects¹⁰⁸⁵ and to ensure public consultation¹⁰⁸⁶ and information disclosure¹⁰⁸⁷.

The examination of obligations of the BTC Co. under the ESIA suggests that these obligations, when fulfilled, could contribute to the meeting of requirements of the Equator Principles regarding the disclosure of information and public consultation.

It should be noted that the following “Other Projects Agreements”: “the Joint Statement” (2003), “the BTC Human Rights Undertaking” (2003), and the so called “Security Protocols” (2003) are not examined in detail because they were adopted after the completion of the disclosure of information and public consultation procedures by the BTC Co. in 2002. For the purpose of the case study, namely for the four formally adjudicated complaints, these documents could not make a difference in terms of the obligation of the BTC Co. regarding the disclosure of information and public consultation.

5.5 Conclusions

The examination of the legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and domestic normative acts of Georgia suggests that a) the IGA and HGA, similar to the Aarhus Convention, have the status of binding international agreements under international law and, according to the Constitution of Georgia take precedence over the domestic normative acts of Georgia; 2) the Vienna Convention on the Law of Treaties cannot resolve a possible tension between the Aarhus Convention and the BTC project agreements; 3) considering the wording of the HGA, the project agreement may prevail over the Aarhus Convention if a conflict of application arises in relation to the BTC project; 4) tension may arise only between Section 7.3 of the HGA and Article 6 of the Aarhus Convention; however this would not be of great significance.

¹⁰⁸⁵ See Paragraph 1, and Annex B, the World Bank Policy OP 4.01 on Environmental Assessment (1999).

¹⁰⁸⁶ See Paragraph 15, the World Bank Policy OP 4.01 on Environmental Assessment (1999).

¹⁰⁸⁷ See Paragraphs 16-19, the World Bank Policy OP 4.01 on Environmental Assessment (1999).

The examination of the legal regime of the BTC project in the light of the obligation of Georgia regarding the implementation of procedural environmental rights, suggests that the BTC project agreements have not created more specific obligations for Georgia under certain standards for ensuring procedural environmental rights in the BTC project context than is generally provided for by the Aarhus Convention and domestic normative acts of Georgia on procedural environmental rights; the only exception is Section 7.3 of the HGA which provides for the different time frames for granting a permit upon satisfaction of application requirements. It can be also concluded that the provisions of the domestic normative acts of Georgia on procedural environmental rights do not contradict the provisions of the Aarhus Convention.

An examination of the legal regime of the BTC project in the light of the legal requirements of the BTC Co. regarding the disclosure of information and public consultation, suggests that they provide for extensive obligations and if these obligations be fulfilled, they could contribute to the meeting of requirements of the Equator Principles.

An analysis in this chapter is important for the analysis in *Chapter Six* which examines the possible violations of procedural environmental rights by Georgia and possible non-compliance with the Equator Principles by the BTC Co. in the context of the four formally adjudicated complaints.

Chapter Six: Four Formally Adjudicated Complaints

6.1 Introduction

Chapter Six analyses four formally adjudicated complaints in order to determine violations of procedural environmental rights by Georgia under the Aarhus Convention and domestic normative acts of Georgia, violations of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR, and the non-fulfillment by the BTC Co. of its requirements regarding disclosure of information and public consultation under the Equator Principles and the BTC project agreements. Section 2 analyses litigation initiated by Green Alternative. Namely it deals with a) a formal litigation process initiated by Green Alternative in the Tbilisi Regional Court against the Georgian authorities, concerning Environmental Permit No. 0011, on the construction and operation of the BTC pipeline project by the BTC Co. and b) a formal litigation process initiated by Green Alternative in the Tbilisi Regional Court against the Ministry of Environmental Protection and Natural Resources, concerning Environmental Permit No. 0122, on storage of waste and the operation of a waste incinerator by the BTC Co.'s contractor the SPJV. Section 2 draws conclusions on the non-implementation of procedural environmental rights by Georgia under the Aarhus Convention and domestic normative acts of Georgia. It also draws conclusions on the effectiveness of the legal remedy. Section 3 analyses two complaints to the CAO. It starts with an examination of the nature and scope of the CAO as a body competent to deal with complaints from the public. Then the section deals with a complaint to the CAO by the residents of the 18th and 19th subdistricts of the town of Rustavi. Then it deals with a complaint to the CAO regarding the village of Dgvari. Sections 2 and 3 refer to interviews with five respondents: a representative of an NGO, a judge, a former employee of the Ministry of Environmental Protection and Natural Resources of Georgia, a citizen of Rustavi, and a resident of the village of Dgvari. These interviews were conducted to collect additional and more detailed information on the issues discussed in the four formally adjudicated complaints. Section 3 draws conclusions on the non-implementation of procedural environmental rights by Georgia under the Aarhus Convention and domestic normative acts of Georgia, violations of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR, and the non-fulfillment by

the BTC Co. of its requirements regarding disclosure of information and public consultation under the Equator Principles and the BTC project agreements. Section 3 also examines the effectiveness of the CAO mechanism in the BTC project context. Section 4 draws general conclusions and explains the significance of the analysis and its findings for the thesis of the four formally adjudicated complaints.

6.2 Litigation Initiated by Green Alternative

6.2.1 Green Alternative

Green Alternative was established in July 2000 as a Georgian NGO.¹⁰⁸⁸ Green Alternative is a partner of CEE Bankwatch Network, one of the leading environmental campaigning organization in Central and Eastern Europe.¹⁰⁸⁹ Green Alternative closely cooperates with Friends of the Earth International.¹⁰⁹⁰

Green Alternative aims to protect the environment of Georgia through creating economically viable and socially desirable alternatives; to protect the unique biological and cultural heritage of Georgia; and to promote social justice and public participation.¹⁰⁹¹ It pursues these aims through public awareness raising campaigns; resistance to projects and programmes that are environmentally and socially controversial; encouraging public participation; promotion of principles of equality and justice; and support to local community and industry development.¹⁰⁹²

Green Alternative carries out different programmes in the following fields: protection of environmental, social and economic rights of local communities; monitoring of international financial institutions; biodiversity; poverty reduction; sustainable development; the energy and climate change.¹⁰⁹³

¹⁰⁸⁸ *Green Alternative, Mission*, available at <http://www.greenalt.org/en_misia.php?lng=en_> [accessed on 18 July, 2011].

¹⁰⁸⁹ *Green Alternative, Our Partners*, available at <http://www.greenalt.org/en_partners.php?lng=en> [accessed on 18 July, 2011].

¹⁰⁹⁰ *Ibid.*

¹⁰⁹¹ *Green Alternative, Mission*, available at <http://www.greenalt.org/en_misia.php?lng=en_> [accessed on 18 July, 2011].

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Green Alternative, Programs*, available at <http://www.greenalt.org/en_programs_list.php?lng=en_> [accessed on 18 July, 2011].

Green Alternative was actively involved in the monitoring campaign of the BTC project.¹⁰⁹⁴ Green Alternative issued numerous critical reports, sometimes together with other NGOs, on different aspects of the BTC project. It initiated several lawsuits in the Georgian courts on the BTC project and it filed several complaints to the CAO Ombudsman on its own behalf and on behalf of the BTC pipeline affected communities.

6.2.2 Litigation Process Initiated by Green Alternative concerning Environmental Permit No. 0011 on the Construction and Operation of the BTC Pipeline Project by the BTC Co.

On 29 May 2003, in the Tbilisi Regional Court, Green Alternative filed a lawsuit against the Ministry of Environmental Protection and Natural Resources of Georgia, the BTC Co., the Ministry of Foreign Affairs of Georgia, and the Parliament of Georgia.¹⁰⁹⁵ The lawsuit contained a demand to (a) repeal Environmental Permit No. 0011 on the transport of oil through the territory of Georgia; (b) oblige the Ministry of Environmental Protection and Natural Resources of Georgia to ensure public participation in the decision-making process on the granting of Environmental Permit No. 0011 to the BTC Co.; (c) oblige the Ministry of Foreign Affairs of Georgia and the Parliament of Georgia to ensure the immediate official publication of the IGA between Georgia and the BTC Co. and its appendices.¹⁰⁹⁶

On 30 November, 2002 the Ministry of Environment issued Environmental Permit No. 0011 to the BTC Co. for the construction and operation of the BTC pipeline project.¹⁰⁹⁷ Green Alternative commented on its lawsuit: political pressure coming

¹⁰⁹⁴ *Green Alternative, Campaigns*, available at <http://www.greenalt.org/en_campaigns_list.php?lng=en_> [accessed on 18 July, 2011].

¹⁰⁹⁵ Lawsuit filed by Green Alternative against the Ministry of Environmental Protection and Natural Resources of Georgia, the Baku-Tbilisi-Ceyhan Pipeline Company (BTC Co.), the Ministry of Foreign Affairs of Georgia, and the Parliament of Georgia “On the Repeal of the Administrative Act, Provision of Public Access to Environmental Information and Public Participation in the Decision-Making Process”, case number 3a/40-04, lodged in Tbilisi Regional Court on 29 May 2003. First BTC court case filed in Georgia, 27 June, 2003, Green Alternative and CEE Bankwatch Network, available at <<http://www.bankwatch.org/project.shtml?apc=-153907r--3&x=163811>>, p. 2. [accessed on 12th March, 2007].

¹⁰⁹⁶ Lawsuit filed by Green Alternative, *op cit.*, 29 May 2003. p. 8.

¹⁰⁹⁷ Environmental Permit No. 0011 “On the Transport of Oil through the Territory of Georgia”, issued on 30 November, 2002 by the Ministry of Environmental Protection and Natural Resources of Georgia to the BTC Co. The Ministry of Environmental Protection and Natural Resources of Georgia.

from the government was the main reason for the failure of the Ministry of Environment to supply information to the public on the proposed BTC project before making its decision on Environmental Permit No. 0011.¹⁰⁹⁸

In its lawsuit, Green Alternative argued that the Ministry of Environment had not ensured public participation when making its decision on the granting of Environmental Permit No. 0011 and that the right to access to environmental information had been violated.¹⁰⁹⁹ More specifically, the lawsuit argued that the government of Georgia violated Articles 4 and 6 of the Aarhus Convention; Article 7 of the Law of Georgia on Environmental Permit; Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts; Article 37, paragraph 5 of the Constitution of Georgia; and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection.¹¹⁰⁰

In the lawsuit, Green Alternative noted that on 15 October 2002, the BTC Co. submitted the BTC ESIA report documentation to the Ministry of Environmental Protection in order to obtain an environmental permit.¹¹⁰¹ On 30 November 2002, the Ministry granted Environmental Permit No. 0011 for the transport of oil through the territory of Georgia and thus authorized the BTC Co. to start the construction of the BTC pipeline on the territory of Georgia.¹¹⁰² It was pointed out that between 15 October 2002 and 30 November 2002, the Ministry did not notify the public in any form about the proposed activity, had not made publicly available the BTC ESIA documentation submitted by the BTC Co. and had not held any public hearing on this documentation.¹¹⁰³

According to the other part of the lawsuit, the Ministry of Foreign Affairs of

¹⁰⁹⁸ First BTC court case filed in Georgia, *op cit.*, 27 June, 2003, pp. 1-2. According to Green Alternative, in a letter dated November 26, 2002, just before granting an environmental permit to the BTC Co., the Minister of Environmental Protection complained to BP's Chief Executive, Lord Browne, that BP was requesting the government of Georgia to make a decision in violation of its environmental legislation. First BTC court case filed in Georgia, *op cit.*, 27 June, 2003, p. 2. There was heavy pressure from the BTC Co. on the president of Georgia and on the Minister of Environmental Protection and Natural Resources of Georgia regarding the BTC project. BTC pipeline court case in Tbilisi, Georgia, 15 January, 2004, Green Alternative and CEE Bankwatch Network, p. 1.

¹⁰⁹⁹ Lawsuit filed by Green Alternative, *op cit.*, 29 May 2003, p 1; BTC court case: oil and water democracy, 20 January, 2004, Green Alternative and CEE Bankwatch Network, available at <<http://www.bankwatch.org/project.shtml?apc=-153907r-2&x=165457>>, p. 1. [accessed on 11th February, 2007].

¹¹⁰⁰ Lawsuit filed by Green Alternative, *op cit.*, 29 May 2003. p. 1.

¹¹⁰¹ *Ibid.*, p. 2.

¹¹⁰² Environmental Permit No. 0011, *op cit.*, 30 November, 2003, p. 1.

¹¹⁰³ Lawsuit filed by Green Alternative, *op cit.*, 29 May 2003. p. 2.

Georgia and the Parliament of Georgia violated provisions of the Law of Georgia on International Treaties by not ensuring the publication of the IGA and its appendices.¹¹⁰⁴

In 2003, shortly after the case was lodged, the Tbilisi Regional Court advised Green Alternative to separate the issue of the legality of Environmental Permit No. 0011 from the issue of the omission of the Georgian authorities to publish the HGA and its appendices; Green Alternative followed this advice.¹¹⁰⁵

The Tbilisi Regional Court, on 22 March 2004, considered the modified lawsuit to be groundless and rejected it.¹¹⁰⁶ According to the text of the decision of the Tbilisi Regional Court, Green Alternative was requested during the court hearing to specify in detail and motivate its arguments regarding violation of Articles 4 and 6 of the Aarhus Convention.¹¹⁰⁷ As a result of this request, Green Alternative specified in detail that the Ministry of Environment violated Article 6 of the Aarhus Convention by not adequately and timely informing the public concerned of the proposed activity, by failing to provide to the public concerned access to all information relevant to decision-making, and by failing to make arrangements for public participation in decision-making.¹¹⁰⁸

According to the decision of the Tbilisi Regional Court, before the court hearing the Ministry of Environment submitted its written arguments and claimed that: between 30 May 2002 and 31 July 2002 the BTC Co. had ensured the disclosure of the BTC ESIA report and had held public consultations regarding it; it would be senseless to ensure by the Ministry the disclosure of the same ESIA report to the same people for public consultation; the BTC Co. had made an announcement through the mass media that it had submitted the ESIA documentation to the

¹¹⁰⁴ Green Alternative argued that the IGA and its appendices were not translated into the Georgian language and were not publicly available through publication. Lawsuit filed by Green Alternative, *op cit.*, 29 May 2003, pp. 5-6. This part of the lawsuit did not claim violation of the law by the Ministry of Environment of Georgia. The lawsuit did also indicate that the IGA and the HGA have the status of international treaties and concern environmental issues and therefore they should have been disseminated under Article 5, paragraph 5 of the Aarhus Convention.

¹¹⁰⁵ Short Summary of Green Alternative's Lawsuits regarding BTC Pipeline Project, Green Alternative, 2007, p. 2. The Tbilisi Regional Court decided to transfer the demand of Green Alternative on publication of the IGA and its appendices to a lower court - that of the Krtsanisi-Mtatsminda District Court of Tbilisi. Short Summary of Green Alternative's Lawsuits regarding BTC Pipeline Project, Green Alternative, 2007, p. 2.

¹¹⁰⁶ Decision of the Tbilisi Regional Court on the Case 3a/40-04, 22 Mach 2004. pp. 9-10.

¹¹⁰⁷ *Ibid.*, p. 2.

¹¹⁰⁸ *Ibid.*, It should be noted that the plaintiffs did not present arguments regarding violation of Article 4 of the Aarhus Convention.

Ministry on 15, October 2002; by the verbal request of the Ministry, between 15 October and 30 November 2002, several meetings and seminars on the different issues related to the BTC project had been held by the BTC Co. in the offices of the BTC Co. and a number of experts and NGOs had participated; the ESIA documentation submitted to the Ministry was publicly available if requested; and Environmental Permit No. 0011 was published by the Ministry in a newspaper.¹¹⁰⁹ The Tbilisi Regional Court considered these arguments of the Ministry to be sufficient and added a general statement that the HGA between the government of Georgia and BTC Co. created obligations for the BTC Co. to ensure disclosure of information and public consultation.¹¹¹⁰ According to the court, the HGA was a legal basis, by which the government of Georgia obliged and authorized the BTC Co. to act as its agent for ensuring the disclosure of information and public participation and there was no need to repeat the same actions.¹¹¹¹ The court declared the arguments of Green Alternative set out in that part of the lawsuit as irrelevant.¹¹¹²

On 25 May 2004 Green Alternative, appealed against the decision of the Tbilisi Regional Court in the Supreme Court of Georgia.¹¹¹³ The appeal demanded the repeal of the decision of Tbilisi Regional Court made on 22 March 2004 based on the same arguments previously stated in the lawsuit filed in the Tbilisi Regional Court.¹¹¹⁴ The Supreme Court considered the appeal to be groundless and on 24 November 2004 rejected it.¹¹¹⁵ The Supreme Court did not add its arguments to the decision of the Tbilisi Regional Court. In fact it repeated all the arguments of the Tbilisi Region Court and upheld the previous decision.

It should be noted that Green Alternative on 29 March, 2004 filed a lawsuit in the Krtsanisi-Mtatsminda District Court of Tbilisi against the Ministry of Foreign Affairs of Georgia and the Parliament of Georgia and demanded official

¹¹⁰⁹ Decision of the Tbilisi Regional Court, *op cit.*, 22 Mach 2004. pp. 6-7.

¹¹¹⁰ *Ibid.*, p. 8.

¹¹¹¹ *Ibid.*, p. 9.

¹¹¹² *Ibid.*, p. 9.

¹¹¹³ Appeal of Green Alternative Against the Decision of Tbilisi Regional Court of 22 March 2004, 25 May, 2004. p. 1.

¹¹¹⁴ *Ibid.*, pp. 1-7.

¹¹¹⁵ Decision of the Supreme Court of Georgia, 24 November 2004, number BS-718-619-K-04, p. 12.

publication of the IGA and its appendices.¹¹¹⁶ The Krtsanisi-Mtatsminda District Court of Tbilisi made decision on the satisfaction of the claim of Green Alternative.¹¹¹⁷

6.2.2.1 Analysis and Conclusions

6.2.2.1.1 Violations of Procedural Environmental rights under the Aarhus Convention and Domestic Normative Acts of Georgia

Green Alternative, being an environmental NGO, had the standing under the Aarhus Convention to challenge the legality of Environmental Permit No. 0011.¹¹¹⁸

The decision of the Ministry of Environment on the granting of Environmental Permit No. 0011 had to be subject to the provisions of Article 6 for the following reasons: a) according to Article 6, paragraph 1 (a) of the Aarhus Convention, Parties must apply the provisions of the article to decisions on whether to permit proposed activities contained in annex I of the Convention; b) according to annex I, such proposed activities include projects on pipelines with a diameter of more than 800 mm and more than 40 km in length for the transport of oil or gas; c) the BTC pipeline has a diameter of 1.070 mm diameter and its Georgian section is 249 km in length. Thus, it can be concluded that when dealing with the application of the BTC Co. on the granting of Environmental Permit No. 0011, the Ministry of Environmental Protection and Natural Resources of Georgia had the obligation to implement the provisions of Article 6 on giving notice of the proposed activity (paragraph 2), reasonable time frames for public consultation (paragraph 3), open options and effective public participation (paragraph 4), disclosure of the relevant information (paragraph 6), submission by the public (paragraph 7), due account of the outcome of participation (paragraph 8) and informing the public on the decision taken (paragraph 9). As for the application of the domestic normative acts of Georgia, firstly it should be noted that the Law of Georgia on Environmental Permit was applicable to the granting of Environmental Permit No. 0011 to the

¹¹¹⁶ Lawsuit filed by Green Alternative against the Ministry of Foreign Affairs of Georgia and the Parliament of Georgia “On Publication of the IGA and its Appendices”, case number 3/545-04, lodged in the Krtsanisi-Mtatsminda District Court of Tbilisi, on 29 March, 2004.

¹¹¹⁷ Decision of the Krtsanisi-Mtatsminda District Court of Tbilisi, 1 April, 2004.

¹¹¹⁸ According to Article 2, paragraph 5, NGOs promoting environmental protection are included in the definition of “the public concerned”. And according to Article 9, paragraph 2, NGOs promoting environmental protection have access to review procedures in order to challenge the legality of decisions on activities regulated by Article 6 of the Convention.

BTC Co., since the BTC project was a Category I project under that law. Article 7 of the Law of Georgia on Environmental Permit imposed the obligation on the Ministry of Environment to implement procedural environmental rights within the framework of the EIA procedure on the BTC project. It should be noted that Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts imposed the obligation on the Ministry to enable interested members of the public to participate in the process of the preparation of conclusions on the application of the BTC Co. and to take into account the public's comments when making a final conclusion on the permit. It can be further argued that Article 6, paragraph (f) of the Law of Georgia on Environmental Protection authorized members of the public to take part in the decision-making as to whether to grant Permit No. 0011. As for Article 37, paragraph 5 of the Constitution of Georgia, it would not apply due to its abstract wording.¹¹¹⁹

It can be argued that the Ministry of Environment had the obligation to ensure the disclosure of information on the proposed BTC project under Article 5, paragraph 1 (b) which imposes the obligation to establish mandatory systems for ensuring an adequate flow of information to public authorities on proposed activities having the potential to “significantly affect the environment”, and to disseminate this information to the public.

The arguments of the Ministry of Environment, submitted to the Tbilisi Regional Court, mainly focused on the measures by the BTC Co. with regard to public consultation on the BTC project and to the disclosure of the BTC project related information.¹¹²⁰ However, according to the Compliance Committee of the Aarhus Convention, “[m]aking developers (project proponents) rather than relevant public authorities responsible for organizing public participation, including for making available the relevant information and for collecting the comments (article 6, paragraph 2 (d) (iv) and (v), and article 6, para. 6)” is not in compliance with the

¹¹¹⁹ According to Article 37, paragraph 5 of the Constitution of Georgia “an individual has the right to receive complete, objective and timely information on the condition of his working and living environment”.

¹¹²⁰ These arguments cannot be considered to contain information on measures that would implement provisions of Article 6 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection.

obligations under Article 6 of the Aarhus Convention.¹¹²¹ Article 6 imposes the obligation on public authorities and not on project developers. Article 6, paragraph 5, which provides for the encouragement of prospective applicants by Parties to identify the public concerned, enter into discussions, and supply information on the aims of their application before submitting it for a permit, is not mandatory and cannot be considered as a substitute for the primary obligation of Parties under the Aarhus Convention. It is noteworthy that under Article 7, paragraph 2 of the Law of Georgia on Environmental Permit, the project developer has the right, but no obligation, to make public the existing documentation and to make arrangements for public consultation while preparing the EIA report. And this right under Article 7, paragraph 2 does not affect the obligation of the government of Georgia under the law with regard to the implementation of procedural environmental rights. Thus it can be concluded that the measures undertaken by the BTC Co., with regard to the disclosure of information and public consultation, cannot be considered as the implementation by the government of Georgia of the provisions of Article 6 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, or Article 6, paragraph (f) of the Law of Georgia on Environmental Protection.

According to the Ministry, the BTC ESIA documentation submitted to the Ministry was publicly available if requested, and Environmental Permit No. 0011 was published by the Ministry in the press. However it should be emphasized that Article 6, paragraph 2 of the Convention required the Ministry to inform the public concerned on the proposed BTC project, without request, either by public notice or individually. As afore noted, Article 6, paragraph 6 required the Ministry to provide the public concerned with access for examination, upon request if so provided for under Georgian domestic legislation, to all information relevant to decision-making, and Article 7 of the Law of Georgia on Environmental Permit required the Ministry to ensure, without request, public access to the documentation related to the application, including the EIA report. As for the publication of Environmental Permit No. 0011 by the Ministry, it should be emphasized that Article 6, paragraph 9 of the Convention required the Ministry to inform the public of the decision taken by the public authority and to make

¹¹²¹ Lithuania ACCC/2006/16; ECE/MP.PP/2008/5/Add.6, 4 April 2008, para 90. available at <http://www.unece.org/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf> [accessed on 10th July, 2008].

accessible to the public the text of the decision, together with the reasons and considerations on which it is based. According to the information presented to the court, the Ministry published not only the information on the granting of Permit No. 0011, but also its whole text which includes conditions of the permit. It should be noted that there is no document or information available suggesting that the Ministry made accessible the reasons and considerations on which the decision for granting the permit was based. And the text of the permit does not touch upon the issue of the public input. Thus it can be concluded that the Ministry did not implement Article 6, paragraphs 2, 6 and 9 of the Convention and Article 7 of the Law of Georgia on Environmental Permit.

According to the additional argument of the Tbilisi Regional Court, the HGA between the government of Georgia and BTC Co. obliged and authorized the BTC Co. to act on behalf of the government of Georgia for ensuring the disclosure of information and public participation. And the position of the Tbilisi Regional Court on the lawsuit was fully shared by the Supreme Court of Georgia. However this argument cannot be considered valid in terms of the obligations stemming from Article 6 of the Aarhus Convention, from the relevant provisions of domestic normative acts of Georgia and from the relevant provisions of the HGA. As already discussed in *Chapter Five*, considering Section 7.3 of Article 7 of the HGA, the HGA does not regulate the framework for granting environmental consents, except for those time limits fixed by Section 7.3 of the HGA and the decision of the government of Georgia as to whether to permit the BTC project to go ahead had to be subject to the requirements concerning public participation of the Aarhus Convention and to the relevant provisions of the domestic normative acts of Georgia. According to Section 3 of Appendix 3 of the HGA, environmental standards established by the HGA for the BTC project do not encompass the regulatory administrative procedures; therefore the regulatory administrative procedures of Georgia apply, including environmental permitting. Appendix 3 of the HGA imposes the obligations on the BTC Co. and it could not replace or supersede rules that regulate environmental permitting by the government of Georgia, including rules that impose an obligation with regard to information disclosure and public participation within the framework of an environmental permitting. There is no provision in the HGA that would justify the argument of the Tbilisi Regional Court on the lifting of the obligations of the government of Georgia with regard to the implementation of procedural environmental rights and

on giving exclusive authorization to the BTC Co. for ensuring the disclosure of information and public participation on its behalf. The HGA imposed the obligation on the BTC Co. with regard to the disclosure of information and public consultation, but it did not relinquish the obligations of the government with regard to the implementation of procedural environmental rights. The analysis in *Chapter Five* suggests that there is no such tension between the provisions of the HGA, Article 6 of the Aarhus Convention and the domestic normative acts of Georgia, that would exclude the application of the Aarhus Convention and domestic normative acts of Georgia in the context of the BTC project with regard to the implementation of procedural environmental rights. As afore noted in this section, Article 6 of the Aarhus Convention clearly imposes the obligation on public authorities and not on project developers. The argument of the court directly contradicts the essence of the obligation under Article 6 of the Aarhus Convention. In fact, the HGA created a legally binding obligation for the BTC Co. regarding the disclosure of information and public consultation; however there is no provision in the HGA that indicates that the government of Georgia a) annulled its obligation under the then existing legislation on the implementation of procedural environmental rights in the BTC project context and b) delegated authority to the BTC Co. to act on its behalf for ensuring the disclosure of information and public participation. It can be argued that for the court, imposition of the obligation on the BTC Co. in the HGA, regarding the disclosure of information and public consultation automatically implied the relinquishment of the obligation of the government of Georgia concerning the implementation of procedural environmental rights in the BTC project context; however this was not the case. The argument of the court contradicts the provisions of Appendix 3 of the HGA itself which makes clear that those environmental standards established by the HGA for the BTC project do not encompass the regulatory administrative procedures, including environmental permission. Following the logic of the court, two other BTC HGAs between the governments of Turkey and Azerbaijan, on the one hand, and the BTC Co. on the other hand, which also had similar provisions concerning the obligation of the BTC Co. regarding the disclosure of information and public consultation, also relinquished the obligations of these two governments to implement procedural environmental rights. However this was not the case.

The HGA and its appendices had the status of international treaties and covered environmental issues, and thus under Article 5, paragraph 5 of the Aarhus

Convention they should have been made available through publication or through the Internet.¹¹²²

It should be emphasized that during the interview with a representative of an NGO, my respondent stated that the Ministry did not ensure information disclosure and public participation when making the decision on granting Permit No. 0011. According to the respondent, even representatives of the Ministry had verbally acknowledged that the Ministry did not implement procedural environmental rights in the context of Permit No. 0011. The respondent stated that NGOs could not change much in this regard because the government wanted to proceed with the BTC project at all costs. In the interview with a former employee of the Ministry of Environment, the respondent acknowledged that the Ministry had failed to take measures with regard to disclosure of information and public participation in the process of giving Permit No.0011 to the BTC Co. As for the reasons for that, the respondent stated that the decision not to disclose the BTC project to the public had been taken at the highest level. According to the respondent, it was the president of Georgia who gave instructions to carry on with the project without any hindrance.

Thus it can be concluded, based on the above analysis, that Article 6, paragraphs 2, 3, 4, 6, 7, 8 and 9, and Article 5, paragraphs 1 (b) and 5 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection were not implemented by Georgia in the context of the granting Environmental Permit No. 0011 to the BTC Co.

6.2.3 Litigation Process initiated by Green Alternative concerning Environmental Permit No. 0122 on Storage of Waste and Operation of a Waste Incinerator by the BTC Co.'s Contractor, the SPJV

On 23 June, 2004, Green Alternative filed a lawsuit in Tbilisi Regional Court against the Ministry of Environmental Protection and Natural Resources of

¹¹²² It should be noted that the Krtsanisi-Mtatsminda District Court of Tbilisi acknowledged the alleged violation and made decision which satisfied the claim of Green Alternative.

Georgia and the BTC Co.'s construction contractor, Spie-Capag-Petrofac International Joint Venture (SPJV).¹¹²³ The lawsuit demanded to (i) repeal Environmental Permit No. 0122 “On the Temporary Storage of Municipal and Household Waste in Special Containers and the Operation of a Waste Incinerator” issued on 24 December, 2003 by the Ministry of Environmental Protection and Natural Resources of Georgia to the BTC Co.'s construction contractor, Spie-Capag-Petrofac International Joint Venture (SPJV)¹¹²⁴; (ii) require the Ministry of Environmental Protection and Natural Resources of Georgia to ensure the holding of public hearings and to ensure public participation regarding the activity “On the Temporary Storage of Municipal and Household Waste in Special Containers and the Operation of a Waste Incinerator”.¹¹²⁵

Environmental Permit No. 0122, was issued to allow SPJV, in the process of the construction of the BTC pipeline, to temporarily dispose, on a plot of land near the town of Marneuli, waste generated at workers' camps and construction sites and then to transport this waste to and burn it in the incinerator located near the village of Jandara, in the region of Gardabani.¹¹²⁶

According to the plaintiffs, the SPJV did not submit the EIA report for the proposed activity and the Ministry of Environment issued Permit No. 0122 without receiving the required documentation.¹¹²⁷ This is proved by a letter from the Head of Department for Environmental Permit and for the Preparation of Conclusions by

¹¹²³ Lawsuit filed by Green Alternative against the Ministry of Environmental Protection and Natural Resources of Georgia and Spie-Capag-Petrofac International Joint Venture (SPJV) “On Repealing the Administrative Act, Ensuring Access to Environmental Information, and Public Participation in Decision-Making”, case number 3a/328-2004, lodged in Tbilisi Regional Court on 23 June 2004. p. 1. It should be noted that the lawsuit specified the Georgian International Oil Corporation (GIOC) and the BTC Co. as third parties to the case.

¹¹²⁴ Environmental Permit No. 0122 “On Temporary Storage of Municipal and Household Waste in Special Containers and Operation of Waste Incinerator”, issued on 24 December 2003 by the Ministry of Environmental Protection and Natural Resources of Georgia to the BTC Co.'s construction contractor Spie-Capag-Petrofac International Joint Venture (SPJV). The Ministry of Environmental Protection and Natural Resources of Georgia.

¹¹²⁵ Lawsuit filed by Green Alternative, *op cit.*, 23 June 2004. p. 11.

¹¹²⁶ Environmental Permit No. 0122, *op cit.*, 24 December 2003, p. 1; Conclusion of Governmental Ecological Experts on the draft proposal “On Temporary Storage of Municipal and Household Waste in Special Containers and Operation of Waste Incinerator”. Department for Environmental Permit and for the Preparation of Conclusions by Governmental Ecological Experts of the Ministry of Environmental Protection and Natural Resources of Georgia, No. 106, dated 22 December, 2003. p. 1.

¹¹²⁷ Lawsuit filed by Green Alternative, *op cit.*, 23 June 2004. p. 2.

Governmental Ecological Experts of the Ministry of Environment, dated 23 March, 2004.¹¹²⁸

Green Alternative claimed that the Ministry of Environmental Protection and Natural Resources of Georgia issued Permit No. 0122, in violation of legal requirements on access to environmental information and on public participation in environmental decision-making.¹¹²⁹ It was argued that there were violations of procedural environmental rights guaranteed under Article 7 of the Law of Georgia on Environmental Permit; Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts; Articles 5 and 6 of the Aarhus Convention; Article 37, paragraph 5 of the Constitution of Georgia; and Article 6, paragraphs (c), (d) and (f) of the Law of Georgia on Environmental Protection.¹¹³⁰ It should be noted here that *Chapter Five*¹¹³¹ does not discuss Article 6, paragraphs (c)¹¹³² and (d)¹¹³³ because paragraph (c) repeats Article 37, paragraph 5 of the Constitution of Georgia and paragraph (d) has no relevance in this particular context.

According to Green Alternative, the Ministry of Environment had not notified the public of the proposed activity in any form, had not made publicly available documentation submitted on the proposed activity, and had not held any public hearing on this documentation.¹¹³⁴ According to the plaintiffs, the Ministry did not implement all the provisions of the legislation on access to information and on public participation, in the context of the proposed activity “On the Temporary Storage of Municipal and Household Waste in Special Containers and the

¹¹²⁸ According to the letter, the submission of “Environmental and Social Impact Assessment Report on Operation of Waste Incinerator in the Village of Jandara, Gardabani Region” to the Ministry was not relevant for granting an environmental permit because the incinerator was mentioned in the BTC ESIA report; however information on the environmental effects on the air during the operation of the incinerator was requested by the Ministry after receiving a request for an environmental permit. Letter from Mr Gia Jorjoliani, the Head of the Department for Environmental Permit and for the Preparation of Conclusions by Governmental Ecological Experts of the Ministry of Environmental Protection and Natural Resources of Georgia, No. 13-12/34, dated 23 March, 2004.

¹¹²⁹ Lawsuit filed by Green Alternative, *op cit.*, 23 June 2004. p. 2.

¹¹³⁰ *Ibid.*

¹¹³¹ Section 5.4.1.4 “Domestic Normative Acts of Georgia”, Chapter Five.

¹¹³² According to Article 6, paragraph (c) of the Law of Georgia on Environmental Protection “a citizen has the right to receive complete, objective and timely information on the condition of his working and living environment”.

¹¹³³ According to Article 6, paragraph (d) of the Law of Georgia on Environmental Protection, “a citizen has the right to obtain education on environmental protection and ecology, and to raise environmental awareness”.

¹¹³⁴ Lawsuit filed by Green Alternative, *op cit.*, 23 June 2004. p. 2. It should be noted that the plaintiffs did not provide detailed reasoning regarding violation of Articles 5 and 6 of the Aarhus Convention.

Operation of a Waste Incinerator”.¹¹³⁵

The court hearing was planned for 17 September 2004. A day before the hearing of the case, on 16 September, 2004, the Minister of Environment issued Order No. 55 “On Annulling Environmental Permit No. 0122, dated 24 December 2003”, which annulled Environmental Permit No. 0122, issued to SPJV on 24 December 2003, by the Ministry.¹¹³⁶ However this order at the same time authorized SPJV to continue disposal and waste incineration activities, as previously permitted by Permit No. 0122, on the grounds of Environmental Permit No. 0011¹¹³⁷, issued by the Ministry of Environment to the BTC Co. on 30 November, 2002.¹¹³⁸

According to the text of the Order No. 55, Permit No. 0122 was annulled based on the following grounds: the BTC pipeline project, including all related activities was to be carried out by the BTC Co. As for SPJV, it was the contractor of the BTC Co. Environmental Permit No. 0011 authorized all activities related to the BTC pipeline project envisaged by the BTC ESIA report, including the functioning of a waste incinerator.¹¹³⁹ It should be stressed that Order No. 55 referred to a memo prepared by the Deputy Head of the Division for Environmental Permits and Licences of the Ministry of Environment, as grounds for making the decision to annul Environmental Permit No. 0122.¹¹⁴⁰ According to this memo, the BTC ESIA report mentioned the installation of a waste incinerator and thus the permit issued to the BTC Co. on 30 November, 2002 for the construction of the Baku-Tbilisi-Ceyhan pipeline should be the grounds for conducting waste incineration activities and there was no need to grant Permit No. 0122.¹¹⁴¹ It was argued by Green Alternative that the BTC ESIA report did not assess the environmental impacts of specific incinerators and that Permit No. 0011 did not contain

¹¹³⁵ *Ibid.*, p. 8.

¹¹³⁶ Order No. 55 of the Minister of Environmental Protection and Natural Resources of Georgia “On Annulling Environmental Permit No. 0122, dated 24 December 2003”. 16 September, 2004, p. 2.

¹¹³⁷ Environmental Permit No. 0011, *op cit.*, 30 November 2002, p. 1.

¹¹³⁸ Order No. 55, *op cit.*, 6 September, 2004, p. 2.

¹¹³⁹ *Ibid.*, p. 1.

¹¹⁴⁰ Memo prepared by G. Jorjoliani, the Deputy Head of the Division for Environmental Permits and Licences of the Ministry of Environmental Protection and Natural Resources of Georgia. The date is not indicated in the copy which was officially requested by Green Alternative and was disclosed and officially provided by the Ministry of Environmental Protection and Natural Resources of Georgia on 29 September 2004.

¹¹⁴¹ *Ibid.*, p. 1.

permission to operate incinerators.¹¹⁴² Green Alternative stated that according to the Ministry of Environment, the fact that the waste incinerator was merely mentioned in the BTC ESIA report as a possible stationary installation to be used during the construction of the pipeline, was sufficient and there was no need for an additional environmental permit for the SPJV.¹¹⁴³ Green Alternative noted that following the logic of the Ministry of Environment, the Ministry had authorized in advance the BTC Co. to operate waste incinerators using its discretion anywhere throughout the territory of Georgia, including for example, in the central square of the capital or on the premises of the Tbilisi Regional Court.¹¹⁴⁴

Green Alternative noted that by Order No. 55, the Ministry of Environment had in fact satisfied the first demand of their lawsuit.¹¹⁴⁵ Green Alternative declared its dismissal of its first claim i.e. the repeal of Environmental Permit No. 0122, since this had already been repealed by the Ministry.¹¹⁴⁶ Tbilisi Regional Court accepted this decision.¹¹⁴⁷

On 10 March 2005, Green Alternative filed another lawsuit against the Ministry of Environment and SPJV in Tbilisi Regional Court and demanded the repeal of Order N55 of the Minister of Environment, which authorized SPJV to operate the incinerator on the grounds of environmental permit N0011, granted to the BTC Co. in 2002 for the BTC pipeline project.¹¹⁴⁸ No hearing took place and only a year and a half later did Green Alternative receive a court notice saying that the case was dismissed by the decision of the Court, on the grounds of the inability to find Green Alternative for the court hearings! Green Alternative described this

¹¹⁴² Green Alternative, p. 6. available at <http://bankwatch.org/documents/study_construction_compliance_11_03.pdf> [accessed on 23rd June, 2007].

¹¹⁴³ “BTC Pipeline – An IFI Recipe for Increasing Poverty”, Green Alternative and CEE Bankwatch Network, Tbilisi, October 2005, p. 21.

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ *Ibid.*

¹¹⁴⁶ Short Summary of Green Alternative’s Lawsuits regarding BTC Pipeline Project, Green Alternative, 2007, p. 4.

¹¹⁴⁷ *Ibid.* The Court also decided to transfer the case with the remaining claim of ensuring public participation in the decision-making process, to a lower court - that of the Vake-Saburtalo District Court of Tbilisi. *Ibid.*

¹¹⁴⁸ Lawsuit filed by Green Alternative against the Ministry of Environmental Protection and Natural Resources of Georgia “On Partial Repealing of the Administrative Act”, case number 3a/186-2005, lodged in Tbilisi Regional Court on 10 March 2005. p. 1.

argument as completely groundless since the Court had its contact details none of which had changed.¹¹⁴⁹

6.2.3.1 Analysis and Conclusions

6.2.3.1.1 Violations of Procedural Environmental rights under the Aarhus Convention and Domestic Normative Acts of Georgia

The decision of the Ministry of Environment on the granting of Environmental Permit No. 0122 to the SPJV had to be subject to the provisions of Article 6 of the Aarhus Convention. Paragraph 5 “Waste management” of annex I (List of Activities Referred to in Article 6, paragraph 1 (a) of the Aarhus Convention), lists the following activities: “Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste; Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour; Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day; Landfills receiving more than 10 tons per day or with a total capacity exceeding 25, 000 tons, excluding landfills of inert waste”. It can be controversial to claim that the SPJV incinerator had a capacity exceeding 3 tons per hour, because such details are not available in Environmental Permit No. 0122 or in No. 106 conclusion of governmental ecological experts. However, according to annex I, paragraph 20 of the Aarhus Convention, activities not covered by the list in the annex, are subject to the application of the provisions of Article 6 of the Convention, if for them public participation is a requirement under an EIA procedure, in accordance with national legislation. According to Article 4, paragraph 2 (j), of the Law of Georgia on Environmental Permit, “the disposal of industrial and household waste, disposal and operation of their storage, as well as the installation for waste treatment and incineration” is a Category I activity. According to Article 7 of the Law of Georgia on Environmental Permit, Category I activities are subject to the EIA procedure and to public participation within the framework of an EIA. In addition, it can be argued that Article 6, paragraph 10 of the Aarhus Convention provided the grounds for the application of Article 6 of the Convention to the SPJV activity on the storage of waste and the operation of a

¹¹⁴⁹ Short Summary of Green Alternative’s Lawsuits regarding BTC Pipeline Project, *op cit.*, 2007, p. 5.

waste incinerator: according to paragraph 10, Article 6 applies, where appropriate, to all reconsiderations or updates, irrespective of the scope of environmental impact, by a public authority of operating conditions for those activities described in paragraph 1, and it should be recalled here that the BTC project was an activity described in paragraph 1. However, it should be noted that the phrase “where appropriate” in paragraph 10 may be interpreted to allow Parties to deviate from the requirement. It should also be taken into consideration that according to annex I, paragraph 22 of the Aarhus Convention, any change to or extension of activities must be subject to Article 6, paragraph 1 (a), if such a change or extension meets the threshold provided for in the annex. This paragraph applies only to such changes or extensions that meet the threshold of annex I; however considering the content of paragraph 20 of annex I, it can be claimed that activities, where public participation is provided for under the EIA procedure in accordance with national legislation, meet the threshold of annex I. Thus it can be concluded that, based on numerous considerations, the decision as to whether to permit the SPJV proposed activity had to be subject to Article 6, paragraphs 2, 3, 4, 6, 7, 8 and 9 of the Aarhus Convention. It can be further concluded that Article 7 of the Law of Georgia on Environmental Permit and Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts imposed the obligation on the Ministry of Environment to implement procedural environmental rights within the framework of the EIA procedure on the proposed activity “On the Temporary Storage of Municipal and Household Waste in Special Containers and the Operation of a Waste Incinerator”. Article 6, paragraph (f) of the Law of Georgia on Environmental Protection was also applicable to the decision-making as to whether to grant Permit No. 0122. As for Article 6, paragraphs (c) and (d) of the Law of Georgia on Environmental Protection, and Article 37, paragraph 5 of the Constitution of Georgia, these provisions would not apply due to their content.

It can be argued that the Ministry of Environment had the obligation to ensure the dissemination of information to the public on the proposed SPJV activity under Article 5, paragraph 1 (b) of the Convention.

The Ministry did not submit any arguments to the Court in response to the claim against it and there is no source available suggesting the implementation of procedural environmental rights in the context of granting Permit No. 0122. The factual situation that the SPJV did not submit the EIA report for the proposed

activity, suggests that information on the environmental impacts of the proposed activity could not have been made publicly available under Article 6, paragraph 6 of the Aarhus Convention and in such a situation public participation, if conducted, would be just a formality.

It should be noted that formally the annulment of permit No. 0122 by Order No. 55 was not the result of a court decision. Neither did the order mention the lawsuit in a court filed against the Ministry of Environment that demanded a repeal of the order. It is crucial to note that according to the BTC ESIA report, “[a]ll sites proposed for waste management must also meet any requirements needed for local regulatory approval. . . . Incineration will occur at one or more of the construction camps”.¹¹⁵⁰ According to the BTC ESIA report, the location and number of waste incinerators for waste management at worker camps will be determined in the future by the construction contractor.¹¹⁵¹ The BTC ESIA report further states: “At this stage of project development, it is not possible to present details of waste incineration units that may be applied, however the chosen system(a) will be operated in general compliance with EC directives 89/369/EEC; 94/67/EEC; 91/689/EEC and COM (97) 604”.¹¹⁵² Thus the BTC ESIA did not assess the environmental impact of waste disposal in Marneuli and the waste incineration activities in Gardabani. And the argument of the Ministry cannot be considered in compliance with the afore discussed Article 4, paragraph 2 (j), of the Law of Georgia on Environmental Permit, which classifies “the disposal of industrial and household waste, disposal and operation of their storage, as well as the installation for waste treatment and incineration” as a Category I activity, requiring an environmental permit and public participation procedures within the EIA framework. Thus the activity of the SPJV on the storage of waste and on the operation of a waste incinerator had to be subject to an environmental permit and the Ministry was required to implement the right to public participation under Article 6 of the Aarhus Convention and under the relevant domestic normative acts of Georgia, in the process of decision-making regarding the activity.

Thus, it can be concluded, based on the above analysis, that Environmental Permit No. 0122 violated Article 6, paragraphs 2, 3, 4, 6, 7, 8 and 9, and Article 5,

¹¹⁵⁰ 11. Social Impacts and Mitigation, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 11-45.

¹¹⁵¹ 5. Project Description, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 5-57.

¹¹⁵² 5. Project Description, The BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 5-64.

paragraph 1 (b) of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection; Order No. 55 of the Minister of Environment violated Article 4, paragraph 2 (j), of the Law of Georgia on Environmental Permit and it had a negative impact on the prospect of the implementation of Article 6 of the Aarhus Convention.

6.2.4 Effectiveness of Legal Remedies on Litigation Initiated by Green Alternative

With regard to the litigation initiated by Green Alternative concerning Environmental Permit No. 0011, it should be emphasized that according to Article 9, paragraph 4 of the Aarhus Convention, the procedure referred to in paragraph 2 of the article must provide adequate and effective remedies, since the ultimate objective of review procedures under the Aarhus Convention is to obtain a remedy for a violation of law. The decisions of the Tbilisi Regional Court and the Supreme Court of Georgia on the litigation initiated by Green Alternative suggest that Georgia did not implement Article 9 of the Aarhus Convention as a result of the failure of the judiciary to enforce in the courts the provisions of Article 6 of the Convention; more specifically, the judiciary did not implement Article 9, paragraph 4 by its failure to provide a remedy for the violation of Article 6. Thus it can be concluded that Article 9, paragraph 4 of the Aarhus Convention was not implemented by Georgia in the context of the granting of Environmental Permit No. 0011 to the BTC Co. It should be noted that in the interview with a former employee of the Ministry of Environment, the respondent assumed the dependence of the judiciary on the executive in the context of the BTC project.

With regard to the litigation initiated by Green Alternative concerning Environmental Permit No. 0122, it should be emphasized that, according to Article 9, paragraph 4 of the Aarhus Convention, the procedure referred to in paragraph 2 of the article must be fair and timely. According to the Compliance Committee of the Aarhus Convention, a commencement of a court hearing without proper notification to the parties involved is not a fair procedure in the meaning of Article

9, paragraph 4, of the Convention.¹¹⁵³ The timeliness requirement is also significant for ensuring an expeditious review procedure. It can be concluded that since the decision of the Tbilisi Regional Court took a year and half and was made in absence of Green Alternative, it violated Article 9, paragraph 4 of the Convention. Thus it can be concluded that the decision of the Tbilisi Regional Court violated Article 9, paragraph 4 of the Aarhus Convention. It should be emphasized that during the interview with a judge, the respondent acknowledged the lengthy review procedure in the context of the lawsuit of Green Alternative on Environmental Permit No. 0122 and tried to explain it by the then ongoing reform in the judiciary. The respondent acknowledged that often people with low income could not afford to bring about lawsuits due to the high fees fixed by the Georgian Law on Public Taxes. The respondent also made a general statement, according to which the knowledge of judges in the field of the Aarhus Convention was not profound. It should be noted that the respondent excluded any pressure from the government on the judges in the context of the litigation initiated by Green Alternative concerning the SPJV activity.

It should be emphasised here that during the interview with the resident of the village of Dgvari, the respondent stated that the residents of the village had no trust in the judicial system of Georgia; nevertheless some residents started to collect money for a lawsuit, but a lawyer promised only 1 per cent guarantee of success! The respondent stated that “the government would not allow the pipeline to be stopped by the decisions of people [judges] who depend on salaries from the state”. And in the interview with a citizen of Rustavi, the respondent stated that some residents were afraid to involve themselves in collecting money for a lawyer in order to bring about a lawsuit, because they were afraid to engage in a “war” against the government; even lawyers were afraid to take up the case due to a possible label from the government of being “a traitor and a spy for Russia”.

The analysis in section 6.2 suggests the ineffectiveness of legal remedy in the Georgian courts on the litigation initiated by Green Alternative. On both occasions, the judiciary failed to meet the requirements of Article 9, paragraph 4 of the Aarhus Convention for violations of the provisions of the Aarhus Convention and of the domestic normative acts of Georgia regulating procedural environmental rights. The analysis in sections 6.2 and the analysis of the information collected

¹¹⁵³ Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006, para. 28.

through the interviews suggest the existence of problems with regard to the implementation of Article 9 of the Aarhus Convention and with regard to the efficiency of justice in Georgia in general.

6.3 Complaints to the CAO

6.3.1 Compliance Advisor/Ombudsman (CAO)

Since this section analyses two complaints to the CAO regarding the activities of the BTC Co., it is relevant to examine the competence of the CAO and the scope of its activities. The CAO constitutes an independent recourse mechanism for the IFC and MIGA and its mission is to address complaints by people that are affected by the IFC/MIGA and to strengthen the social and environmental accountability of these institutions.¹¹⁵⁴ The CAO was established in 1999 and it reports directly to the President of the World Bank Group.¹¹⁵⁵ The CAO has three roles: 1. *the CAO Ombudsman*; 2. *the CAO Compliance*; and 3. *The CAO Advisor*.¹¹⁵⁶

The CAO Ombudsman responds to complaints that can be made by one or more individuals, or group or groups of people, or one or more organizations, who believe that they are affected or potentially affected by social and/or environmental impacts of the IFC/MIGA financed projects.¹¹⁵⁷ The complaint may be made in relation to different aspects of the activity of the project sponsor: it can relate to any aspect of the designing, implementation, or impact of IFC/MIGA funded projects, including in relation to arrangements for the involvement of affected communities in the project.¹¹⁵⁸ A project sponsor is the party that is most appropriate to address the matters raised in the complaint.¹¹⁵⁹ In every IFC funded project, the implementation of the IFC Safeguard Policies is the obligation of the

¹¹⁵⁴ *About the CAO, the CAO*, available at <<http://www.cao-ombudsman.org/about/>> [accessed on 28th February, 2011].

¹¹⁵⁵ *Who We Are, the CAO*, available at <<http://www.cao-ombudsman.org/about/whoweare/>> [accessed on 28th February, 2011].

¹¹⁵⁶ *Our Roles, the CAO*, available at <<http://www.cao-ombudsman.org/about/ourroles/>> [accessed on 28th February, 2011].

¹¹⁵⁷ CAO Operational Guidelines, the CAO, 2007, p. 12; Compliance Advisor Ombudsman - A Review of IFC's Safeguard Policies, Core Business: Achieving Consistent and Excellent Environmental and Social Outcomes, 2003, p. 10.

¹¹⁵⁸ CAO Operational Guidelines, the CAO, 2007, p. 11.

¹¹⁵⁹ *Ibid.*, p. 36.

project sponsor.¹¹⁶⁰ The CAO Ombudsman has the competence to investigate a complaint in consultation with affected individuals, project sponsors and the IFC/MIGA management, in order to correct project failures.¹¹⁶¹ However the CAO Ombudsman does not aim to find fault; he aims to identify problems and address reasons that contributed to the problems.¹¹⁶² The CAO Ombudsman aims to help parties play a leading role in finding and implementing their own solutions: he does not make judgments about the merits of a complaint; nor does he impose his solutions or find fault.¹¹⁶³ The Ombudsman works to respond to complaints through mediated settlements.¹¹⁶⁴ If the complaint is accepted, the CAO must conduct an assessment of the conflict to find a solution to the issue.¹¹⁶⁵ The assessment by the Ombudsman aims to clarify matters that are raised by the complainant and to assist parties in determining whether and how they can resolve the conflict.¹¹⁶⁶ The agreement reached as a result of the Ombudsman's involvement can include proposals for future remedial action to be carried out by the IFC/MIGA or by the project sponsor.¹¹⁶⁷ The Ombudsman reports on its findings and recommendations to the President of the World Bank Group.¹¹⁶⁸ The CAO Ombudsman may also review the implementation of its recommendations by the project sponsor or the IFC/MIGA and inform the President.¹¹⁶⁹

The CAO Compliance audits the IFC/MIGA's social and environmental performance in order to ensure compliance with applicable standards; it focuses on the IFC/MIGA and not on the project sponsor.¹¹⁷⁰ However often it is necessary to review the actions of the project sponsor, in order to assess whether the project and

¹¹⁶⁰ Compliance Advisor Ombudsman - A Review of IFC's Safeguard Policies, Core Business: Achieving Consistent and Excellent Environmental and Social Outcomes, 2003, preface.

¹¹⁶¹ Office of the Compliance Advisor/Ombudsman (CAO), Terms of Reference, the CAO, p. 2.

¹¹⁶² CAO Operational Guidelines, 2007, the CAO, p. 11.

¹¹⁶³ *How We Work: Ombudsman, the CAO*, available at <<http://www.cao-ombudsman.org/howwework/ombudsman/index.html>> [accessed on 28th February, 2011].

¹¹⁶⁴ Advisory Note, Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information, the CAO, 2010. p. 1.

¹¹⁶⁵ *How We Work: Ombudsman, the CAO*, available at <<http://www.cao-ombudsman.org/howwework/ombudsman/index.html>> [accessed on 28th February, 2011].

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ CAO Operational Guidelines, the CAO, 2007, p. 17.

¹¹⁶⁸ Office of the Compliance Advisor/Ombudsman (CAO), Terms of Reference, the CAO, p. 2.

¹¹⁶⁹ CAO Operational Guidelines, the CAO, 2007, p. 18.

¹¹⁷⁰ *CAO Compliance, the CAO*, available at <<http://www.cao-ombudsman.org/howwework/compliance/index.html>> [accessed on 28th February, 2011]. *CAO, Compliance Advisor/Ombudsman*, Annual Report, 2002-2003, the IFC/MIGA, p. 3; Office of the Compliance Advisor/Ombudsman (CAO), Terms of Reference, the CAO, p. 2; Compliance Advisor Ombudsman - A Review of IFC's Safeguard Policies, Core Business: Achieving Consistent and Excellent Environmental and Social Outcomes, 2003, p. 10.

measures undertaken are in compliance with the applicable requirements.¹¹⁷¹ The CAO Compliance examines compliance with applicable policies, standards, procedures and conditions.¹¹⁷² The CAO Compliance audit can be triggered at the request of the President of the World Bank Group, by the CAO Vice-President, or by transferring a complaint from the CAO Ombudsman.¹¹⁷³ If the IFC/MIGA, and/or project sponsor are found to be in compliance, the audit is closed and if the IFC/MIGA are found to be of non-compliance, the CAO Compliance retains the audit until the project complies.¹¹⁷⁴

The CAO Advisor provides advice from lessons learned and its advice aims to guide the IFC and MIGA on new trends and leading issues.¹¹⁷⁵ It provides advice regarding broader environmental and social policies, procedures, resources and systems.¹¹⁷⁶ The CAO advisory role is not project related, unlike the roles of the CAO Ombudsman and the CAO Compliance.¹¹⁷⁷

It has been argued that “broad mandate makes the three roles together powerful. For example, although the CAO is not a judge, court, or the police, there are influential ways in which it can define issues to be addressed in a complaint, make creative and practical proposals for settling an issue, and encourage parties to engage in dialogue”.¹¹⁷⁸ However, the CAO cannot force external entities such as project sponsors to change their practices; it can only use the leverage of the IFC/MIGA in urging parties to take into consideration recommendations.¹¹⁷⁹

6.3.2 Complaint to the CAO by the Residents of the 18th and 19th Subdistricts of the Town of Rustavi

On 17th March, 2004, Mr Merabi Vacheishvili and Ms Eleonora Digmelashvili, filed a complaint to the CAO Ombudsman on behalf of the inhabitants of the 18th

¹¹⁷¹ CAO Operational Guidelines, the CAO, 2007, p. 21.

¹¹⁷² *CAO Compliance, the CAO*, available at <<http://www.cao-ombudsman.org/howwework/compliance/index.html>> [accessed on 28th February, 2011].

¹¹⁷³ *Ibid.*

¹¹⁷⁴ *Ibid.*

¹¹⁷⁵ *CAO Advisor, the CAO*, available at <<http://www.cao-ombudsman.org/howwework/advisor/index.html>> [accessed on 28th February, 2011].

¹¹⁷⁶ *CAO, Compliance Advisor/Ombudsman*, Annual Report, 2002-2003, the IFC/MIGA, p. 3.

¹¹⁷⁷ CAO Operational Guidelines, the CAO, 2007, p. 8.

¹¹⁷⁸ *Ibid.*, p. 7.

¹¹⁷⁹ *Ibid.*

and 19th subdistricts of Rustavi.¹¹⁸⁰

The complaint alleged the non-disclosure of information relating to the route of the pipeline and issues related to the safety of the pipeline.¹¹⁸¹ Residents of the 18th and 19th subdistricts argued that they had not been informed that the BTC pipeline route would pass only 250 metres from their place of residence.¹¹⁸² The complaint claimed, *inter alia*, a violation by the BTC Co. of procedures for public disclosure and the IFC Environmental Assessment OP 4.01 (1998).¹¹⁸³

The reason for filing this complaint was that the BTC pipeline is located at a distance of 250 metres from the 18th and 19th districts and residents of these districts discovered this fact only when the BTC Co. started preparatory work for the construction phase of the pipeline in January 2004.¹¹⁸⁴ The inhabitants of these districts had applied several times to representatives of the BTC Co. and to public authorities in order to obtain safety guarantees; however these attempts were not successful and, even worse, their protest rally was dispersed by the police.¹¹⁸⁵

According to the complaint to the CAO Ombudsman, the ESIA, including a Resettlement Action Plan and maps that were distributed among residents for public discussion, did not even mention the fact that the pipeline would pass so

¹¹⁸⁰ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12th June 2007]; “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 38. [accessed on 21st May 2008]. It should be noted that the complainants did not request the CAO for confidentiality of their identities.

¹¹⁸¹ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, p. 2, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12th June 2007]; “Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”, July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 5.

¹¹⁸² BTC Pipeline: Summary of Complaints 2003-2006, Compliance Advisor Ombudsman (CAO), 2007, p. 1.

¹¹⁸³ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, pp. 4-5, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12th June 2007].

¹¹⁸⁴ *Ibid.*, p. 2, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12th June 2007]; “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 38. [accessed on 21st May 2008]. It should be noted that the complaint to the CAO also included a video material showing how close pipeline runs and interviews with local residents.

¹¹⁸⁵ *BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 38. [accessed on 21st May 2008].

close to subdistricts 18 and 19.¹¹⁸⁶ According to the complainants, maps that were given by the BTC Co. to local residents in summer 2002 indicated that 30 km of the pipeline would pass 10-20 km from the nearest homes; however it appeared later, namely in January 2004, that the pipeline would pass 180-250 metres from residential buildings.¹¹⁸⁷

The complainants were concerned that the pipeline was located so close to their homes and the area where they lived is located 500 metres from the river and is very sensitive due to aggressive underground sulphate waters, swamped patches, the presence of many channels, and the slow drainage of surface and underground water.¹¹⁸⁸ The complainants claim that their houses were in bad condition and required emergency repairs due to the low quality construction, and they were afraid that the pipeline could cause an additional danger by vibrating during operation.¹¹⁸⁹ According to the complainants, BP had stated that there was a 500 metre security zone where the construction of schools, hospitals and other buildings should be banned.¹¹⁹⁰

According to the complaint to the CAO Ombudsman, in January 2004, trucks and tractors appeared in the vicinity and construction workers told the complainants of the construction of the BTC pipeline: in this way local residents learned that the pipeline would pass very close to their homes.¹¹⁹¹ They had not been informed in advance about the planned construction.¹¹⁹² Housing blocks No. 4, 7, 9, and 23, with 700 families, of subdistricts 18 and 19 of Rustavi City, where the complainants reside, are located 250 m from the BTC oil pipeline route.¹¹⁹³

In the complaint, local residents stated that in November 2002 there were rumours that it was possible that the pipeline would pass close to their homes; however as nobody came to see them to explain this, these rumours were not considered to be serious.¹¹⁹⁴ The complainants assumed that the pipeline would pass on the other

¹¹⁸⁶ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, p. 2, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12 June 2007].

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Ibid.*, p. 3.

¹¹⁹² *Ibid.*

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*

side of the river.¹¹⁹⁵ The complaint stated that some residents of housing block No. 4 of the 19th subdistrict, were concerned about unofficial information and decided to send letters on 19 January 2003, and on 30 April, 2003, to the BTC Co. to enquire of the planned route of its pipeline; however they received no reply.¹¹⁹⁶ It should be emphasized that these residents sent a letter of enquiry to the Head of Rustavi Municipality on 11th November 2002, but received no reply.¹¹⁹⁷ A copy of that letter was obtained by Green Alternative from one of the residents of housing block No. 4 of the 19th subdistrict. According to the letter, these residents were expressing their utmost concern at the unofficial information that the BTC pipeline would pass close to their homes. In the letter, the residents demanded from the Head of Rustavi Municipality written proof, on behalf of the government of Georgia, that the route of the pipeline would not infringe upon the 500 metre security zone.¹¹⁹⁸

According to the complaint, in February 2004, the complainants consisting of 50-60 people, travelled to the capital, Tbilisi, to reach the Parliament of Georgia.¹¹⁹⁹ They gathered in front of the Parliament building and submitted a letter to the Parliament's Chairperson.¹²⁰⁰ They also wanted to meet the President or his representative.¹²⁰¹ After some hours of waiting, the Deputy Mayor of Rustavi and the Head of Rustavi Police Department approached them and told them to leave: after a short discussion, the complainants left.¹²⁰² According to the complainants, during January 2004, they had sent letters to the President of Georgia, relevant ministries, and to the IFC representative in Tbilisi with a request to solve their problem; however they did not receive any response up to the date of their complaint to the CAO.¹²⁰³

On 7th February 2004, approximately 400 residents, including many women and

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ Gujaraidze, K. *Summary of Official Correspondence: Tsalka, Rustavi, Akhalkalaki, Gardabani*, Green Alternative, 2006, p. 8.

¹¹⁹⁸ In addition, the letter made reference to the poor conditions of the housing blocks in the 19th subdistrict and reminded the Municipality of some of the social problems in general that they were facing as residents: for example, the regular cuts in both water and electricity supply. Letter addressed to the Head of Rustavi Municipality, signed by 12 residents, dated 11 November, 2011.

¹¹⁹⁹ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, p. 3, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12 June 2007].

¹²⁰⁰ *Ibid.*

¹²⁰¹ *Ibid.*

¹²⁰² *Ibid.*

¹²⁰³ *Ibid.*

small children, demonstrated near the pipeline area demanding from Rustavi City Council, that the central government of Georgia and the BTC Co. take more seriously their problem.¹²⁰⁴ As a result of that demonstration, the construction of the pipeline was stopped for one hour.¹²⁰⁵ Then the Council officials came, accompanied by police who started to beat the demonstrators.¹²⁰⁶ They were told by the police that they had instruction from the government to destroy anything that would cause problems and impede the construction of the BTC pipeline.¹²⁰⁷

The complaint made the following demands to the CAO: to review compliance of the BTC project with IFC social and environmental policies considering the information submitted by the complainant; to ensure an independent expertise of the impact of the pipeline on the complainants' homes; and to provide guarantees to the complainants that the BTC project would not adversely affect their homes and if the latter were not possible, to find an alternative route for the pipeline or to resettle complainants.¹²⁰⁸

The complaint by the residents of the 18th and 19th subdistricts of Rustavi was accepted by the CAO on 14 April 2004.¹²⁰⁹ The CAO staff and consultants travelled three times to Georgia between April and June 2004 to study and assess the issues raised in the complaint.¹²¹⁰

During these appraisal visits, in addition to the issues set out in the complaint, the following issue among others was raised by the complainants: “[d]uring construction of the in the vicinity of the 18th and 19th subdistricts, residents observed a pungent smell, which was considered to be associated with a livestock burial pit constructed in earlier times to hold livestock that perished or were killed as a consequence of an anthrax outbreak”.¹²¹¹ The CAO and independent pipeline safety engineers could not reach a conclusion on the issue, because it was not

¹²⁰⁴ *Ibid.* “Baku-Tbilisi-Ceyhan Pipeline, the BTC Company and Social and Environmental Protection Obligations”, May, 2004, Green Alternative, Georgian Young Lawyers Association, CEE Bankwatch Network, p. 4.

¹²⁰⁵ Complaint of the Residents of the 18th and 19th districts of Rustavi to the CAO, March, 2004, p. 3, available at <http://bankwatch.org/documents/complaint_cao_georgia_03_04.pdf>, [accessed on 12 June 2007].

¹²⁰⁶ *Ibid.*

¹²⁰⁷ *Ibid.*

¹²⁰⁸ *Ibid.* p. 5.

¹²⁰⁹ “Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”, July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 6.

¹²¹⁰ *Ibid.*, p. 8.

¹²¹¹ *Ibid.*, p. 6.

within the scope of the engineering assessment.¹²¹² It should be noted that on 25 May 2004 in the Newspaper “Mtavari Gazeti”, the journalist Zurab Dolidze revealed the pipeline problems of the residents of the 18th and 19th subdistricts of Rustavi in his article “Hostages of Black Gold”.¹²¹³ According to the author, in May 2004, he visited the 18th and 19th subdistricts and met local residents in order to verify reports of the existence of an appalling smell and unbearable noise in the area.¹²¹⁴ He met local residents who told him that after the start of the construction of the pipeline they had been disturbed by the noise of the construction and by a very strong and permanent pungent smell.¹²¹⁵ Himself he experienced that type of smell and loud noise while there.¹²¹⁶ In his article Dolidze, challenged the international standards of the pipeline and put forward a rhetorical question: “are unbearable noise and smell attributes of geopolitical security?”, hinting on the frequently claimed political significance of the pipeline.¹²¹⁷

In response to the complaint of the residents of subdistricts 18 and 19 of Rustavi, the CAO issued in July 2004 its “Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”.¹²¹⁸

With regard to safety concern, the assessment report concluded that the 260 metre proximity of the route of the pipeline to the residential areas, can be considered compliant with established technical standards.¹²¹⁹

The assessment report specified that Environmental Assessment OP4.01 (1999), which is referred to in the BTC Co.’s documents instead of the IFC Policies, imposes an obligation on project developers to consult the project affected

¹²¹² *Ibid.*, p. 13.

¹²¹³ Zurab Dolidze, “Hostages of Black Gold”, Georgian newspaper “Mtavari Gazeti” (meaning main newspaper), 25 May, 2004.

¹²¹⁴ *Ibid.*

¹²¹⁵ *Ibid.*

¹²¹⁶ *Ibid.*

¹²¹⁷ *Ibid.*

¹²¹⁸ According to this assessment, the concerns raised in the complaint can be categorized into two categories: safety of the pipeline; and adequacy of disclosure of information on the pipeline before the construction and the adequacy of related consultation with local residents. The assessment report reaches certain conclusions on both issues. “Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”, July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 9.

¹²¹⁹ According to this assessment, if the riverbank is eroded, which is possible, there is a sufficient distance between the route of the pipeline and the river for the erosion to be identified and measures to be taken; the BTC pipeline has no potential to generate vibration while operating; the 500 metre security zone is not mandatory under international technical standard - ASME B31.4 for managing land use and development close to the BTC pipeline. *Ibid.*, pp. 9-12.

communities on the potential environmental impact of projects at least twice: once shortly after the environmental screening and once a draft EA report is ready.¹²²⁰ With regard to concerns on the non-disclosure of information and consultations with local residents, the assessment report concluded that although there were possibilities for the complainants to obtain information on the BTC pipeline project during the public disclosure process, there is no compelling evidence suggesting that the complainants knew of the proximity of the pipeline route to their homes.¹²²¹ According to the assessment report, there was a lack of evidence of disclosure of information to and consultations with the residents of the Rustavi 18th and 19th subdistricts on the routing and safety standards of the pipeline.¹²²² According to the assessment report, the complainants argued that they did not receive information concerning the route of the pipeline.¹²²³ The BTC Co. argued that the letter addressed to it on 29 January, 2003 by some residents of the 18th and 19th subdistricts was the proof of the knowledge by the complainants of the pipeline route; the complainants could not recall such a letter, but suggested that it might have been a letter of enquiry from some residents on the safety of the pipeline.¹²²⁴ The BTC Co. argued that the letter sent to it on 30 April, 2003, which was referred to in the complaint and which failed to receive a response, was “from another group of residents of the 18th and 19th subdistricts whose association with the Complainants could not be determined.”¹²²⁵

In the assessment report, the CAO made the following recommendations among others, to the BTC Co.: a). to carry out targeted information campaign regarding pipeline safety for the residents of the 18th and 19th subdistricts of Rustavi; b) to pursue and resolve the concern regarding the alleged uncovering during the pipeline construction of a contaminated site close to the homes of complainants; c) to enhance development opportunities for residents living near to the pipeline route, including for residents of the 18th and 19th subdistricts of Rustavi.¹²²⁶

¹²²⁰ *Ibid.*, p. 14.

¹²²¹ *Ibid.*, p. 21.

¹²²² *Ibid.*

¹²²³ *Ibid.*, p. 17.

¹²²⁴ *Ibid.*

¹²²⁵ *Ibid.*

¹²²⁶ *Ibid.*, pp. 21-21.

6.3.2.1 Analysis and Conclusions

6.3.2.1.1 Violations of Procedural Environmental Rights under the Aarhus Convention and the Domestic Normative Acts of Georgia

It should be emphasized that the letter from the residents of housing block No. 4 of the 19th subdistrict of the town of Rustavi was sent to the Head of Rustavi Municipality on 11 November, 2002, i.e. before Environmental Permit No. 0011 was issued by the Ministry of Environment on 30 November, 2002. It should be also emphasized here that the Ministry of Environment had an obligation to ensure the disclosure of information on the BTC project between 15 October 2002 and 30 November, 2002. Based on the examination of the Aarhus Convention in *Chapter Two* and on the examination of the domestic normative acts of Georgia in *Chapter Five*, it can be argued that a) residents of housing block No. 4 of the 19th subdistrict of the town of Rustavi were members of “the public” under the meaning of Article 2, paragraph 4 of the Aarhus Convention and also of Article 37 of the General Administrative Code of Georgia; b) these residents had the right to request environmental information from the public authorities under Article 4, paragraph 1 of the Aarhus Convention, Article 37 of the General Administrative Code of Georgia and Article 41, paragraph 1 of the Constitution of Georgia; c) the requested information on the routing of the pipeline constituted “environmental information” under Article 2, paragraph 3 of the Aarhus Convention; d) the Rustavi Municipality is a “public authority” under Article 2, paragraph 2 of the Aarhus Convention; e) the Rustavi Municipality was obliged to supply the requested information to the residents within certain time limits under Article 4, paragraph 2 of the Aarhus Convention and Article 40, paragraph 1 of the General Administrative Code of Georgia and f) if the Municipality did not hold the information requested, it was obliged under Article 4, paragraph 5 of the Aarhus Convention and Article 80 of the General Administrative Code of Georgia, either to inform the residents of the public authority which might hold such information or transfer the request to the proper public authority and to inform the residents accordingly. However, the residents did not receive any reply to the information requested, not even a refusal explaining the reasons for the non-disclosure of information. This information was confirmed by the respondent during the interview with a resident of the 19th subdistrict of the town of Rustavi. It should be emphasized that during the interview with a former employee of the Ministry of

Environment, the respondent remarked that the Municipality of Rustavi had an obligation to transfer the request for environmental information, as requested on 11 November, 2002 by the residents of housing block No. 4 of the 19th subdistrict, to the Ministry of Environment because the latter held that particular information. According to the respondent, public officials in Rustavi failed to do so due to incompetence and unawareness of laws in that field. Thus it can be concluded that the government of Georgia did not implement Article 4, paragraphs 1, 2 and 3 of the Aarhus Convention, Articles 37, 40 (1) and 80 of the General Administrative Code of Georgia and Article 41, paragraph 1 of the Constitution of Georgia in the context of the request for information by the residents of housing block No. 4 of the 19th subdistrict. It should be emphasized that the complaint to the CAO suggests that there was a general atmosphere within the government to ignore concerns of the residents of the 18th and 19th sub-districts: January-February 2004 these residents applied to the various public authorities with the request of a solution to their problem concerning the proximity of the pipeline and received no feedback in any form.

The complaint to the CAO states that the residents of the 18th and 19th subdistricts of the town of Rustavi found that in January 2004, that the BTC pipeline would pass within 250 metres of their housing blocks. According to the complaint, the government did not inform them of this.¹²²⁷ Based on the examination of the Aarhus Convention carried out in *Chapter Two* and on the examination of the domestic normative acts of Georgia in *Chapter Five*, it can be argued that the residents of the 18th and 19th subdistricts of Rustavi were members of “the public concerned” under Article 2, paragraph 5 of the Aarhus Convention, and that they had the right of access to environmental information and public participation under Article 6 and Article 5, paragraph 1 (b) of the Aarhus Convention and the relevant provisions of the domestic normative acts in the context of decision-making as to whether to grant permission to the BTC Co. for the BTC project. It should be noted that the CAO determined: “there is no compelling evidence that they [the residents] knew of the proximity of the pipeline to their dwellings.”¹²²⁸ In the

¹²²⁷ It should be recalled here that the analysis in section 6.2.2 of this chapter suggests that in general the Ministry of Environment of Georgia did not implement Article 6 and Article 5, paragraph 1 (b) of the Aarhus Convention and the relevant provisions of the domestic normative acts of Georgia, when making a decision as to whether to grant a permit to the BTC Co. for the construction and operation of the BTC project.

¹²²⁸ Assessment Report: Complaint regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project Rustavi, Georgia”, July 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 21.

interview with a resident of the 19th subdistrict of Rustavi, the respondent confirmed that the government did not inform the residents of the route of the pipeline and that they were not given a chance to speak out and affect the policy. In the interview with the representative of an NGO, the respondent stated that the government did not implement procedural environmental rights in the case of the residents of the 18th and 19th subdistricts of Rustavi. In addition, it can be argued that the Ministry of Environment did not implement provisions of Article 5, paragraph 2 (a) and (b) of the Aarhus Convention and Article 27 of the Law of Georgia on Environmental Protection in the context of the residents of the 18th and 19th subdistricts of Rustavi. Thus it can be concluded that the Rustavi case is an additional proof that the government of Georgia did not implement procedural environmental rights when making its decision on granting Environmental Permit No. 0011.

6.3.2.1.2 Violation of Articles 8, 10 and 11 of the ECHR

The complaint made to the CAO in March 2004, concerning sub-districts 18 and 19 of the town of Rustavi is informative in terms of the possible violation of the right to respect for private and home life under Article 8 of the ECHR, the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR.¹²²⁹

Based on the examination of Article 8 of the ECHR in *Chapter Four*, it can be argued that a) the right to respect for private and home life of the residents of 18th and 19th subdistricts under Article 8 of the ECHR may be violated by nuisances in the form of systematic smell and noise arising from the construction of the BTC pipeline, without seriously endangering their health; b) positive obligation required Georgia to take adequate measures for the prevention of nuisances arising from the construction and interfering with the rights of the residents under Article 8; c) the

¹²²⁹ The complainants to the CAO, as well as a newspaper article, alleged that a) residents of these sub-districts were subjected to an unbearable pungent smell and loud noise arising from the construction of the BTC pipeline within 250 metres of their housing blocks; b) residents of these sub-districts held a peaceful protest demonstration to express their concern about the pipeline construction, but their assembly was dispersed by the police force and participants of the rally beaten. This calls for an examination of the following: a) did the government violate Article 8 of the ECHR by not taking measures for the prevention of the pungent smell and loud noise nuisances arising from the construction? b) did the government violate Articles 10 and 11 of the ECHR by dispersing a peaceful demonstration by the use of force?

intensity and duration of the smell and noise arising from construction of the BTC pipeline was an important factor to be taken into the consideration; d) violation of domestic law, including legislation on environmental impact assessment in the context of the complaint was an important factor; e) the principle of proportionality was applicable in the situation; f) procedural safeguards of Article 8 had to be taken into account when assessing the proportionality of interferences of nuisances with the right of the residents under Article 8.

However, the government of Georgia did not take adequate measures with regard to the nuisances coming from the construction of the pipeline and affecting the residents of 18th and 19th subdistricts. As for intensity and duration of nuisances, it should be emphasized that during the interview with a resident of the 19th subdistrict of the town of Rustavi, the respondent stated that the construction activities lasted 24 hours a day and loud noise lasted for more than one year without interruption; the respondent and other family members were having headaches and could not sleep; schoolchildren in the family could not prepare their homework; the health of family members was affected; there was a pungent smell for months and it was terrible, when combined with the noise. It can be argued that the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, requiring the Ministry of Environment an assessment of environmental impact of noise and smell nuisances to the residents, was violated. It can be argued that in the given situation the government was required to strike a fair balance between competing interests of the residents and the economic well-being of the country by taking certain mitigating measures, for example, by paying for the temporary resettlement of individuals away from the polluted area. With regard to procedural safeguards of Article 8, it can be argued that the government did not assess the adverse environmental impacts of the construction of the pipeline on the residents; did not provide access to information on the environmental impacts of the pipeline to the residents; did not provide the possibility for the residents to participate in decision-making on the BTC project. Considering that the government did not take any measures, it can be concluded that a fair balance was not struck and Article 8 of the residents of 18th and 19th subdistricts was violated by environmental nuisances coming from the construction of the pipeline and affecting the residents. It should be noted that the principle of the doctrine of margin of appreciation was not relevant here because the case was not filed with the ECtHR.

Based on the examination of Articles 10 and 11 of the ECHR in *Chapter Four*, it can be argued that a) the residents had the right to express their concerns under Article 10 about the impact of the construction of the pipeline; b) the residents had the right to exercise the freedom of assembly in the form of a peaceful protest demonstration, including picketing; c) the principle of proportionality was applicable in the situation and exceptions under the second paragraphs of Articles 10 and 11 had to be interpreted strictly. However the protesters were beaten by the police. It should be recalled here that freedom of expression under Article 10 protects all forms and contents of expression; expression in the form of demonstration also falls under the protection of Article 10. And protection of personal opinions, protected by Article 10, is one of the aims of freedom of peaceful assembly under Article 11. It is important to emphasize that an individual participant of a peaceful assembly is fully protected by Article 11 and his right cannot be restricted in any way. It should be taken into consideration that in the interviews with a citizen of Rustavi, the respondent stated that the governmental officials and police were threatening that all resistance to the BTC pipeline would be suppressed brutally and that is exactly what happened during the demonstration; we should point out however, that the respondent was not among the participants of the demonstration because of the fear of being beaten. Thus it can be concluded that a fair balance was not struck by beating up peaceful demonstrators and the rights of the residents under Article 10 and 11 were violated.

6.3.2.1.3 Non-Compliance by the BTC Co. with the Requirements of the Equator Principles and the BTC Project Agreements regarding the Disclosure of Information and Public Consultation

The complaint to the CAO by the residents of the 18th and 19th subdistricts of the town of Rustavi did not allege non-compliance with the Equator Principles; however they alleged non-compliance with the requirements regarding disclosure of information and public consultation under the IFC Safeguard Policy on Environmental Assessment OP 4.01 (1998), which was referred to in Principle 3 of the original version of the Equator Principles of 2003, as the minimum standard with which to comply. The residents of sub-districts 18 and 19 complained that they did not know until the construction started that the BTC pipeline would pass within 250 metres of their housing blocks. This calls for an examination of the

issue as to whether the BTC Co. met the requirements of the Equator Principles of 2003 regarding disclosure of information and public consultation in the case of sub-districts 18 and 19 of the town of Rustavi. It should be emphasized that the BTC project agreements, namely Section 3 of Appendix 3 of the HGA, imposed an obligation on the BTC Co. regarding the disclosure of information and public consultation within the framework of the EA process.

Based on the examination of the Equator Principles and of the IFC Environmental Assessment OP4.01 (1998) in *Chapter Three* and on the examination of the HGA and the BTC ESIA in *Chapter Five*, it can be argued that a) considering Sections 7.2 and 1.10.2 of the BTC ESIA, the residents of the 18th and 19th subdistricts of Rustavi were project affected groups under the meaning of Principle 5 of the Equator Principles, paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998), and Section 3.9 (iii) of Appendix 3 of the HGA; b) the BTC Co. had the obligation regarding the disclosure of information and meaningful public consultation in the context of the residents of the 18th and 19th subdistricts of Rustavi under Principle 5 of the Equator Principles, paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) and Section 3.9 (iii) of Appendix 3 of the HGA.¹²³⁰ The residents claimed in the complaint to the CAO that they found in January 2004 that the BTC pipeline would pass within 250 metres of their housing blocks; according to the complainants, the information on the proximity of the BTC pipeline route to their homes had not been made public to them by the BTC Co., even during the public consultations which took place on the ESIA report, in summer 2002. The assessment report of the CAO concluded there was no compelling evidence that complainants knew about the route of the pipeline and that there was a lack of evidence of actual consultations with the complainants. However, the CAO noted that there were opportunities for the complainants to obtain information on the BTC project. The argument that the information on the pipeline was available cannot be considered as a justification in the given situation. The BTC Co. was required to take measures in order to inform the complainants: according to Section 16.4 of the BTC ESIA, the draft ESIA report had to be made public for comment for a 60 day period and special pamphlets containing information on the impacts of the project on affected

¹²³⁰ It should be emphasized that paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998), and Section 3.9 (iii) of Appendix 3 of the HGA imposed an obligation on the BTC Co. to disclose information and to consult the project affected communities on the potential environmental impact of projects at least twice: during the preparation of the ESIA report and after the preparation of the ESIA report.

communities was to be distributed among communities within 2 km of the route, in the period between late May and June 2002. It should be recalled here that the BTC Co. made the following claim in Section 1.6.2 of the ESIA report: “data on existing social and economic conditions, and attitudes to the project, were gathered through interviews and consultation in every community within a 2km either side of the centre of the pipeline corridor . . .”¹²³¹ It is noteworthy that there is no evidence in the ESIA documentation , including in appendices and addenda, that the complainants knew of the route of the pipeline through the BTC Co.’s campaign of information disclosure and public consultation. It can be further argued that if the BTC Co. did not try to hide the information from the complainants on the BTC route, it could have provided the complainants with the information on the routing of the pipeline in response to the letters addressed to it in January and April of 2003. It should be noted that the information that the letters of enquiry to the BTC Co. were not replied to, was confirmed by the respondent during the interview with a resident of the 19th subdistrict of the town of Rustavi. And the position of the BTC Co. provided in the assessment report of the CAO arguing that the letter addressed to it on 29 January, 2003 by some residents of the 18th and 19th subdistricts, was the proof of the knowledge by the complainants of the pipeline route, cannot uphold the criticism; instead of making reference to a letter of reply that would inform the complainants on the route, it made reference to a letter sent to it presumably seeking information due to the prevalent rumours. It should be also taken into consideration that in the interview with a resident of the 19th subdistrict of the town of Rustavi, the respondent stated that the residents could not obtain in 2002 any document indicating the proximity of the route. According to the respondent, the BTC Co. did inform the residents of the route and the representative of the BTC Co could be seen at any time before the construction started. Thus it can be concluded that in the context of the residents of the 18th and 19th subdistricts of Rustavi, the BTC Co. did not comply with its own requirements regarding the disclosure of information and public consultation under a) Principle 5 of the Equator Principles; b) paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) which was referred to in Principle 3 as a standard to be complied with; c) Section 3.9 (iii) of Appendix 3 of the HGA and various statements made in the ESIA report. It can be further argued that the Equator Banks did not adhere to its requirements under the Equator Principles when making their decision on providing a loan to the BTC Co. The same can also be

¹²³¹ 1. Executive Summary, the BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 1-12.

said about the IFC with regard to the IFC Environmental Assessment OP 4.01 (1998).

6.3.3 Complaint to the CAO Regarding the Village of Dgvari

The village of Dgvari is a landslide zone and, since the 1990s, the inhabitants of the village have been calling on the government of Georgia to resettle them.¹²³² It should be noted that the village of Dgvari is located approximately 1 km from the BTC pipeline route.¹²³³ It has been pointed out that this village was not even marked on the BP map.¹²³⁴

On 21st May, 2004, Green Alternative, an NGO in Georgia, filed seven complaints to the CAO Ombudsman on its own behalf and on behalf of the BTC pipeline affected communities.¹²³⁵ One of the latter was a resident of the village of Dgvari.¹²³⁶

A complainant from the village of Dgvari claimed, *inter alia*, violation by the BTC Co. of the IFC Environmental Assessment OP 4.01 (1998) and public consultation procedures.¹²³⁷ According to the complaint to the CAO Ombudsman, the BTC Co. did not comply with IFC requirements on environmental assessment and this resulted in ignoring the village of Dgvari, that is located 1 km from the pipeline route, in the environmental impact assessment and in other documents of

¹²³² “Second International Fact-Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Georgian Section, Initial Summary Report”, 4 June, 2003, Bank Information Center, CEE Bankwatch Network, Friends of the Earth US, Green Alternative, National Ecological Centre of Ukraine, Platform. p. 6, available at: <http://bankwatch.org/documents/ffm_btc_georgia_06_03_1.pdf> [accessed on 12th September 2007].

¹²³³ “Baku-Tbilisi-Ceyhan Pipeline, the BTC Company and Social and Environmental Protection Obligations”, May, 2004, Green Alternative, Georgian Young Lawyers Association, CEE Bankwatch Network, p. 14.

¹²³⁴ Beselia, E. *GYLA condemns government apathy: Dgvari inhabitants given 3 months to leave their houses, but have no money and nowhere to go, advocates state*, The Messenger, Georgia’s English Language Daily, September 30, 2005, #185 (0959).

¹²³⁵ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 1, available at: <http://bankwatch.org/documents/complaint_ga_ifc_05_04.pdf> [accessed on 15th September 2007]; BTC Pipeline: Summary of Complaints 2003 -2006, Compliance Advisor Ombudsman (CAO), p. 2, 2007. Green Alternative requested the CAO to ensure the confidentiality of the complainants.

¹²³⁶ “BTC Pipeline – An IFI Recipe for Increasing Poverty”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, Available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 39. [accessed on 21st May 2008].

¹²³⁷ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 2.

the project.¹²³⁸ According to Green Alternative, in the process of the preparation of the Environmental and Social Impact Assessments (ESIA) report and the Resettlement Action Plan (RAP) the BTC Co. “had forgotten” to assess the potential environmental impact of the construction and operation of the BTC pipeline on the village of Dgvari.¹²³⁹ Information on the proximity of the BTC pipeline to the village was not made public by the BTC Co. to the residents of the village and people living in Dgvari did not have the chance to participate in public consultations held by the BTC Co. in the summer of 2002, on the issue of the construction of the pipeline.¹²⁴⁰ The lack of consultation with the residents of the village was problematic considering the risk of landslides in Dgvari.¹²⁴¹ It was emphasised that “despite Dgvari village lying within one kilometre of the pipeline corridor, BTC Co’s consultation forgot to include them as an affected community”.¹²⁴² It was only in 2003 that the BTC Co. visited the village for the first time.¹²⁴³

According to the complaint to the CAO, the BTC Co. did not provide any

¹²³⁸ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 2.

¹²³⁹ “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 39. [accessed on 21st May 2008]; “Second International Fact-Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Georgian Section, Initial Summary Report”, 4 June, 2003, Bank Information Center, CEE Bankwatch Network, Friends of the Earth US, Green Alternative, National Ecological Centre of Ukraine, Platform, p. 6, available at: <http://bankwatch.org/documents/ffm_btc_georgia_06_03_1.pdf> [accessed on 12th September 2007]; “Baku-Tbilisi-Ceyhan Pipeline, the BTC Company and Social and Environmental Protection Obligations”, May, 2004, Green Alternative, Georgian Young Lawyers Association, CEE Bankwatch Network, p. 14.

¹²⁴⁰ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative May 2004, p. 2.

¹²⁴¹ “Second International Fact-Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Georgian Section, Initial Summary Report”, 4 June, 2003, Bank Information Center, CEE Bankwatch Network, Friends of the Earth US, Green Alternative, National Ecological Centre of Ukraine, Platform, p. 6, available at: <http://bankwatch.org/documents/ffm_btc_georgia_06_03_1.pdf> [accessed on 12th September 2007].

¹²⁴² “Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts, Georgia Section, Final Report of Fact Finding Mission”, Centre for Civic Initiatives, Committee for the Protection of Oil Workers Rights, CEE Bankwatch Network, Green Alternative, Kurdish Human Rights Project, Platform, Urgewald, 16-18 September, 2005, p. 27.

¹²⁴³ “Second International Fact-Finding Mission to Baku-Tbilisi-Ceyhan Pipeline, Georgian Section, Initial Summary Report”, 4 June, 2003, Bank Information Center, CEE Bankwatch Network, Friends of the Earth US, Green Alternative, National Ecological Centre of Ukraine, Platform, p. 6, available at: <http://bankwatch.org/documents/ffm_btc_georgia_06_03_1.pdf> [accessed on 12th September 2007]. It should be noted that the complaint also questions the compliance of the BTC Co. with the IFC Resettlement Policy OP4.30: “[a]nother concern is that BTC Pipeline Company committed that it would construct the pipeline in a way that it does not require the physical resettlement of any affected family. However, in situation like in village Dgvari it becomes clear that commitments like this could lead to really adverse impacts.” “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 3.

explanation as to why the village was not mentioned in the ESIA report and why it did not assess the environmental impact of the BTC project.¹²⁴⁴ It has been claimed that the BTC Co. had the obligation to prepare a proper EIA, but in the case of Dgvari village, it ignored this obligation and did not assess the difficulties of one of the most sensitive areas in Georgia where the pipeline passes.¹²⁴⁵ According to Green Alternative, Dgvari is located in the Borjomi district, namely in Tskratskaro Pass, which is recognized as a landslide prone area in condition No. 2 of the Environmental Permit No. 0011¹²⁴⁶ that was issued by the Ministry of Environmental Protection and Natural Resources of Georgia.¹²⁴⁷ According to paragraph a) of condition 2 (“Geohazards”) of the afore mentioned permit, the BTC Co. had an obligation to conduct additional study of the landslide hazard areas, especially of Tskratskaro section.¹²⁴⁸ Condition No. 2 can be seen as a proof of the sensitivity of the circumstances surrounding Dgvari, since it is located in Tskratskaro, which is recognized as a landslide hazard area. And the wording of this condition cannot justify the absence of an assessment of the potential impact of the BTC pipeline on Dgvari village: the impact of the pipeline on Dgvari is not assessed, the village is not even mentioned in this condition.

The complaint states that the BTC Co. several times refused to examine the impact of the BTC pipeline on the village of Dgvari, arguing that it was not among the affected territories.¹²⁴⁹ It should be noted that in August-September 2003, the Georgian State Department of Geology prepared a study and concluded that it was not possible to stabilize the landslides in Dgvari and that the village should be relocated elsewhere.¹²⁵⁰

¹²⁴⁴ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, pp. 3-4.

¹²⁴⁵ *Ibid.*, p. 4.

¹²⁴⁶ Condition 2 (a), Environmental Permit No. 0011 “On the Transport of Oil through the Territory of Georgia”, issued on 30 November, 2002 by the Ministry of Environmental Protection and Natural Resources of Georgia to the BTC Co. The Ministry of Environmental Protection and Natural Resources of Georgia.

¹²⁴⁷ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 4.

¹²⁴⁸ Condition 2 (a), Environmental Permit No. 0011 “On the Transport of Oil through the Territory of Georgia”, issued on 30 November, 2002 by the Ministry of Environmental Protection and Natural Resources of Georgia to the BTC Co. The Ministry of Environmental Protection and Natural Resources of Georgia.

¹²⁴⁹ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 3.

¹²⁵⁰ “Assessment Report: Seven Complaints regarding the Baku-Tbilisi-Ceyhan (BTC) Pipeline Project, Borjomi Region, Georgia”, September 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 5.

The BTC Co. later commenced a study of the existence of the landslide in Dgvari and in February, 2004 presented to the Ministry of Environment a summary of its investigation¹²⁵¹, which proved the long recognized fact of the existence of landslides in Dgvari.¹²⁵² However, the Terms of Reference of this study stated that it aimed to examine the existence of landslides in the village, and failed to mention the aim of the examining of the probable impact of the construction of the pipeline on the village.¹²⁵³ Furthermore, the study did not mention that the construction would take place within 1 km of the landslide area.¹²⁵⁴ Despite all this, the study concluded that “future construction and operational activities associated with the BTC Pipeline would have no impact on the Dgvari village landslide system and, therefore, would have no impact on any further ground movement and building damage that may occur in the village”.¹²⁵⁵ It should be noted that the BTC Pipeline Project Monitoring Group of the Ministry of Environmental Protection of Georgia in July 2004 carried out a field trip to Dgvari village and its surroundings and reported to the Minister of Environmental Protection of Georgia, in its monitoring report, of the existence of dangerous landslides and a possible threat to the residents of Dgvari; however, it abstained from drawing any conclusions about the link between the construction of the pipeline and activated landslides.¹²⁵⁶ This report even failed to recommend to the Minister, as in most other cases of monitoring, any further action with regard to the BTC Co. such as giving a written notice of warning to the BTC Co. or simply writing to the BTC Co. This report considered the afore mentioned study of the BTC, presented to the Ministry in February 2004, as a fulfillment of condition No. 2 of Environmental Permit No. 0011.

According to the complaint to the CAO, residents of the village were afraid that the construction of the BTC pipeline 1 km away from their houses would stimulate

¹²⁵¹ AGT Pipeline Project, Georgia: Dgvari Village – Landslide Study; Final Report by Dr. Marl Lee, Darryn Wise, Ian Champelovier. 13 February, 2004.

¹²⁵² “Baku-Tbilisi-Ceyhan Pipeline, the BTC Company and Social and Environmental Protection Obligations”, May, 2004, Green Alternative, Georgian Young Lawyers Association, CEE Bankwatch Network, p. 15.

¹²⁵³ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 2, available at: <http://bankwatch.org/documents/complaint_ga_ifc_05_04.pdf> [accessed on 15th September 2007].

¹²⁵⁴ *Ibid.*, p. 3.

¹²⁵⁵ *Ibid.*; AGT Pipeline Project, Georgia: Dgvari Village – Landslide Study; Final Report by Dr. Marl Lee, Darryn Wise, Ian Champelovier. 13 February, 2004.

¹²⁵⁶ Monitoring Report of the BTC Pipeline Project Monitoring Group, the Ministry of Environmental Protection of Georgia, 10th July, 2004, p. 3.

landslides and would put the village at serious risk.¹²⁵⁷ The population of the village stated that “the 44-meter Construction Corridor crosses one of the landslide zones near the village . . . [and] two other land-slide sections are at the distance of 150 m from the Corridor”.¹²⁵⁸ Residents of Dgvari had very limited access to information.¹²⁵⁹ There was concern also as to the impact of the operation of the BTC pipeline on landslides, such as vibration and the warming of the surroundings.¹²⁶⁰ Villagers feared that “they could be buried under the landslide as a result of the heavy trucks movement for pipeline construction”.¹²⁶¹ The construction of the BTC pipeline started in April 2003¹²⁶² and in the complaint to the CAO of May 2004, it was stated that people living in the village of Dgvari claimed that landslides had become particularly active in the past few years and during that period landslips had increased and according to them this posed a risk of destruction to their houses.¹²⁶³ These claims were supported by later claims. In December 2004 it was reported that one of the villagers said that a fracture on a wall of his house appeared in autumn 2003 and, after the construction trucks arrived, the crack became a foot wide.¹²⁶⁴ In September 2005, the Georgian Young Lawyers Association (GYLA) and the residents of the village of Dgvari held a press conference where it was stated that conditions had deteriorated since the

¹²⁵⁷ Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 3; “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 39. [accessed on 21st May 2008]; “Baku-Tbilisi-Ceyhan Pipeline, the BTC Company and Social and Environmental Protection Obligations”, May, 2004, Green Alternative, Georgian Young Lawyers Association, CEE Bankwatch Network, p. 14.

¹²⁵⁸ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 3, available at:

<http://bankwatch.org/documents/complaint_ga_ifc_05_04.pdf> [accessed on 15th September 2007]. It should be noted that the complaint to the CAO also included a video material about the state of the village of Dgvari and interviews with local residents.

¹²⁵⁹ Green Alternative, p. 6. available at

<http://bankwatch.org/documents/study_construction_compliance_11_03.pdf> [accessed on 23rd June, 2007].

¹²⁶⁰ *Ibid.*, p. 5.

¹²⁶¹ *Ibid.*, p. 6.

¹²⁶² *BTC Quick Facts*, available at

<http://www.bp.com/liveassets/bp_internet/bp_caspian/bp_caspian_en/STAGING/local_assets/downloads_pdfs/e/00_2006_h1_btc_quick_facts.pdf> [accessed on 12th March, 2008].

¹²⁶³ “Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 2; “*BTC Pipeline – An IFI Recipe for Increasing Poverty*”, Green Alternative, CEE Bankwatch Network, Oxfam, Tbilisi, October 2005, available at <http://bankwatch.org/documents/report_btc_poverty_10_05.pdf>, p. 39. [accessed on 21st May 2008].

¹²⁶⁴ Rondeaux, C. A pipeline to promise, or a pipeline to peril, 1 December, 2004, available at <<http://www.internationalreportingproject.org/stories/detail/a-pipeline-to-promise-or-a-pipeline-to-peril/>> [accessed on 8 August, 2007].

commencement of the construction of the pipeline.¹²⁶⁵ It was argued that in September 2005 there were 87 permanent resident families of Dgvari but they were practically homeless.¹²⁶⁶ One of the villagers claimed at the press conference the following: “day by day more and more houses are wrecked and more land collapses. The majority of houses are unfit for living, which puts our lives and health at risk.”¹²⁶⁷ Residents of Dgvari demanded from the BTC Co. compensation, but these demands were ignored.¹²⁶⁸ In 2006, the BBC wrote an article about the village and quoted one of the villagers as saying “big powers – the oil companies and the government – are destroying our homes and our land.”¹²⁶⁹ According to this article, the whole structure of the house of one of the farmers looked ready to collapse, and villagers claimed that pipeline excavations had resulted in serious destabilization of nearby land.¹²⁷⁰ This article quoted a source as saying “when we protested against the pipeline, the police came and beat people up”.¹²⁷¹ In connection with the seven complaints filed with the CAO, Green Alternative issued a Press Release, which states in the context of the village of Dgvari that: “with no adequate grievance mechanism, affected communities have instead been protesting peacefully along the pipeline route. BTC Co’s reaction has been to try to secure the “high level government assistance to publicize that blocking the pipeline right of way is contrary to the national interest and may result in prosecution.”¹²⁷² As a result, a special armed force and police have been brought in to deal forcibly with peaceful demonstrations.¹²⁷³ This press release further states “the use of special forces against peaceful demonstrators who are already suffering severe economic hardship and are trying to protect their families and homes is not how to implement the BTC project in a socially sustainable manner.”¹²⁷⁴

¹²⁶⁵ Beselia, E. *GyLA condemns government apathy: Dgvari inhabitants given 3 months to leave their houses, but have no money and nowhere to go, advocates state*, The Messenger, Georgia’s English Language Daily, September 30, 2005, #185 (0959)

¹²⁶⁶ *Ibid.*

¹²⁶⁷ *Ibid.*

¹²⁶⁸ “Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts, Georgia Section, Final Report of Fact Finding Mission”, Centre for Civic Initiatives, Committee for the Protection of Oil Workers Rights, CEE Bankwatch Network, Green Alternative, Kurdish Human Rights Project, Platform, Urgewald, 16-18 September, 2005, p. 19,

¹²⁶⁹ Cooke, K. “Power games in the Caucasus: Roman Gogoladze, a farmer living in the village of Dgvari, high up in the mountains of Georgia in the Caucasus, points at the foot wide cracks in the walls of his house”, 7 May, 2006, BBC, available at <<http://news.bbc.co.uk/2/hi/business/4964316.stm>> [accessed on 12 August, 2007].

¹²⁷⁰ *Ibid.*

¹²⁷¹ *Ibid.*

¹²⁷² Press Release, *Ongoing BTC construction abuses provoke fresh complaint to project backer*, May 27, 2004.

¹²⁷³ *Ibid.*

¹²⁷⁴ *Ibid.*

The complaint demanded the following from the CAO; to review compliance of the BTC project with the IFC social and environmental policies, considering the information submitted by the complainant; to require the BTC Co. and the IFC to assess the environmental and social impact of the pipeline on the village; to provide guarantees to the complainants that the BTC project would not adversely affect the village and if the latter were not the case, to resettle complainants.¹²⁷⁵

In response to the seven complaints made by Green Alternative, which included a complaint on behalf of a resident of the village of Dgvari, the CAO Ombudsman issued their “Assessment Report: Seven Complaints regarding the Baku-Tbilisi-Ceyan (BTC) Pipeline Project, Borjomi Region, Georgia”, in September 2004.¹²⁷⁶

According to this assessment document, the CAO investigated each complaint separately and directly with the affected parties, and assessed them by means of a desk review and a field mission to Georgia in July 2004, including to Dgvari.¹²⁷⁷

The CAO made the following conclusions on the complaint: the residents of Dgvari were not directly consulted by the BTC Co. during the preparation of the ESIA report and they were not subject to a targeted communications approach; timely consultation would have provided an opportunity for complainants to express their concerns to the BTC Co; it is unlikely that the construction of the pipeline could have changed the landslip risk.¹²⁷⁸ The CAO recommended the BTC Co. to arrange a public meeting with the residents of the village in Dgvari with the participation of a representative of the BTC Co. together with Georgian experts.¹²⁷⁹

On 8th February, 2005 the IFC CAO wrote a letter to one of the Dgvari villagers and informed him that \$1,000,000 was planned as financial assistance from BP to the government of Georgia for the resettlement of Dgvari villagers. However the government of Georgia turned down this offer¹²⁸⁰ and in 2005 assigned \$443,00, for each villager from the president’s emergency fund, and fixed a six month

¹²⁷⁵ Complaint filed by Green Alternative to the CAO Ombudsmen concerning the BTC pipeline”, Green Alternative, May 2004, p. 14.

¹²⁷⁶ “Assessment Report: Seven Complaints regarding the Baku-Tbilisi-Ceyan (BTC) Pipeline Project, Borjomi Region, Georgia”, September 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency.

¹²⁷⁷ *Ibid.*, p. 2.

¹²⁷⁸ *Ibid.*, p. 5.

¹²⁷⁹ *Ibid.*

¹²⁸⁰ Press Release, Green Alternative, 12.10.05.

deadline to leave Dgvari.¹²⁸¹ This fact aroused anger among the residents and in September 2005 the Georgian Young Lawyers Association (GYLA) and the residents of the village of Dgvari held a press conference on the issue and claimed that this amount was insufficient to enable real resettlement.¹²⁸² The GYLA claimed that “the villagers have been conducting protests in Borjomi from September 26 [2005], but the governmental officials dispersed the demonstration by force. On September 27, 2005 four demonstrators were placed in custody, though they were later released upon the insistence of their neighbours.”¹²⁸³ According to Green Alternative, residents of Dgvari were protesting at the BTC pipeline route offer of inadequate compensation. The police force dispersed the rally and one of the protesters, a woman whose name is known, was badly beaten by the police. She had to receive medical treatment since her injuries were serious.¹²⁸⁴

6.3.3.1 Analysis and Conclusions

6.3.3.1.1 *Violations of Procedural Environmental Rights under the Aarhus Convention and the Domestic Normative Acts of Georgia*

According to the complaint, the villagers did not know until 2003 that the BTC pipeline would pass only 1 km from Dgvari and this seems to suggest that the government failed to inform them of this and did not ensure public participation regarding the BTC project during the decision-making. This calls for an examination of the issue of the implementation of Articles 5 and 6 of the Aarhus Convention, and of the relevant provisions of the domestic normative acts of Georgia, by the government of Georgia.¹²⁸⁵ Based on the examination of the Aarhus Convention in *Chapter Two* and on the examination of the domestic normative acts of Georgia in *Chapter Five*, it can be argued that the residents of Dgvari were members of “the public concerned” under Article 2, paragraph 5 of the Aarhus Convention, and that they had the right of access to environmental

¹²⁸¹ Beselia, E. *GYLA condemns government apathy: Dgvari inhabitants given 3 months to leave their houses, but have no money and nowhere to go, advocates state*, The Messenger, Georgia’s English Language Daily, September 30, 2005, #185 (0959).

¹²⁸² *Ibid.*

¹²⁸³ *Ibid.*

¹²⁸⁴ Green Alternative, A Summary of Dgvari Problem, 2006.

¹²⁸⁵ Again, it should be recalled here that according to the analysis in section 6.2.2 of this chapter, in general the Ministry of Environment of Georgia did not implement Article 6 and Article 5, paragraph 1 (b) and 5 of the Aarhus Convention and the relevant provisions of the domestic normative acts of Georgia, in the context of granting a permit to the BTC Co. for the BTC project.

information and public participation under Article 6 and Article 5, paragraph 1 (b) of the Aarhus Convention and the relevant provisions of the domestic normative acts in the process of decision-making concerning Environmental Permit No. 0011. It should be emphasized that during the interview with a representative of an NGO, the respondent stated that the residents of Dgvari were not informed of the route of the pipeline and nobody consulted them about it. In the interview with a resident of Dgvari, the respondent confirmed that the villagers had not been informed by the government on the route of the pipeline before the construction started and had not been given a chance to express their concern. Thus it can be concluded that the Dgvari case is an additional proof that the government of Georgia did not implement procedural environmental rights when making its decision on granting an environmental permit to the BTC Co.

Considering the planned construction of the pipeline only 1 km from the village, it can be further argued that the government of Georgia did not implement Article 5, paragraph (c) of the Aarhus Convention: Dgvari is located in Tskratskaro Pass, which was recognized as a landslide prone area in condition No. 2 of Environmental Permit No. 0011. It should be emphasized that according to Article 5, paragraph (c), actual harm is not a precondition for the dissemination of information. According to the Implementation Report of Georgia, submitted to the Meeting of the Parties of the Aarhus Convention in 2005, “There is no established procedure for providing timely and reliable information about emergencies to the public. That is why incorrect and outdated information is sometimes disseminated. The mass media disseminate information with their own interpretation. It is necessary to establish a procedure for the prompt dissemination of information to all potential sufferers.”¹²⁸⁶ In the interview with a former employee of the Ministry of Environment, the respondent stated that there was a theoretical possibility that the construction of the pipeline would activate landslides in the village. The respondent acknowledged that no measures were taken by the Ministry to inform the villagers about the threat since a decision was made by the Ministry to trust the competence of the BTC Co.

It can also be argued that the Ministry of Environment did not implement provisions of Article 5, paragraph 2 (a) and (b) of the Aarhus Convention and Article 27 of the Law of Georgia on Environmental Protection in the context of the

¹²⁸⁶ Implementation Report of Georgia, ECE/MP/2005/18/Add. 9, April 8 2005, p. 7.

village of Dgvari. It should be noted that the Implementation Report of Georgia submitted to the Meeting of the Parties of the Aarhus Convention in 2005, states in the context of Article 5 of the Aarhus Convention: “It is difficult to seek the necessary environmental information from the numerous public institutions (it is difficult for both citizens and public institutions to identify who has the information). There is a need to develop a complete environmental database to facilitate the search for information. Unfortunately, the Ministry of the Environment does not have enough resources for this”.¹²⁸⁷ In the interview with a former employee of the Ministry of Environment, the respondent stated in reply to the question concerning the implementation of Article 5, paragraph 2 (b) of the Convention in the context of the Dgvari issue, that the implementation of the provisions of the Aarhus Convention required considerable amounts of money and the Ministry could not afford it.

It should be taken into consideration that, according to the respondent from the village of Dgvari, there were rumours in the village in May 2002 about the proximity of the route of the pipeline to the village and some villagers had travelled to the municipality of the regional centre to make enquiries. They met with local officials of the municipality and demanded details of the route: however they did not obtain the requested information. It should be emphasized here that under Article 4, paragraph 1 of the Aarhus Convention, any request, whether oral or written, should be considered as a “request”. Therefore it can be argued that a) residents of the village of Dgvari were members of “the public” under the meaning of Article 2, paragraph 4 of the Aarhus Convention and also of Article 37 of the General Administrative Code of Georgia; b) they had the right to request environmental information from the public authorities under Article 4, paragraph 1 of the Aarhus Convention, Article 37 of the General Administrative Code of Georgia and Article 41, paragraph 1 of the Constitution of Georgia; c) the requested information on the routing of the pipeline constituted “environmental information” under Article 2, paragraph 3 of the Aarhus Convention; d) the Borjomi Municipality is a “public authority” under Article 2, paragraph 2 of the Aarhus Convention; e) the Borjomi Municipality was obliged to supply the requested information to the residents within certain time limits under Article 4, paragraph 2 of the Aarhus Convention and Article 40, paragraph 1 of the General Administrative Code of Georgia and f) if the Municipality did not hold the

¹²⁸⁷ Implementation Report of Georgia, ECE/MP/2005/18/Add. 9, April 8 2005, p. 7.

information requested, it was obliged under Article 4, paragraph 5 of the Aarhus Convention and Article 80 of the General Administrative Code of Georgia, either to inform the residents of the public authority which might hold such information or transfer the request to the proper public authority and to inform the residents accordingly. However, the residents did not receive the requested information, not even a refusal explaining the reasons for the non-disclosure of information. Thus, based on the additional information obtained through the interview, it can be argued that the government of Georgia did not implement Article 4 of the Aarhus Convention, Articles 37, 40 (1) and 80 of the General Administrative Code of Georgia and Article 41, paragraph 1 of the Constitution of Georgia in the context of the request for information by the residents of the village of Dgvari.

6.3.3.1.2 Violation of Article 1 of Protocol No. 1 and Articles 10 and 11 of the ECHR

A complaint made to the CAO in May 2004, concerning the village of Dgvari is informative in terms of the possible violation of the right to property under Article 1 of Protocol No. 1, the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR.¹²⁸⁸

The causal link between the construction of the pipeline and the activation of landslides in Dgvari is a technical matter of geology and this research cannot claim any expertise in the field of geology. However it should be taken into consideration that the government of Georgia and the BTC Co. tried to avoid the examination of such a causal link in terms of geology.¹²⁸⁹ Based on the examination of Article 1 of

¹²⁸⁸ The complaint to the CAO, as well as other documents, alleged that 1) the construction of the BTC pipeline activated landslides in the village of Dgvari located 1 km away from the pipeline route and caused great damage to the houses of the villagers; 2) residents of the village of Dgvari held a peaceful protest demonstration to express their concern about the pipeline construction but police used force against them and beat them up. This calls for an examination of the following: 1) did the government allow damage to the houses of villagers from the construction activities and therefore, did it violate Article 1 of Protocol No. 1 of the ECHR? 2) did the government violate Articles 10 and 11 of the ECHR by dispersing the peaceful protest of villagers by the use of force?

¹²⁸⁹ The problem of landslides in Dgvari was recognized both by the government and by the BTC Co. It should be emphasized that the BTC Co. did not assess environmental impacts of the construction of the pipeline on the landslides of Dgvari, neither in the ESIA report nor in the specially prepared investigation which was presented to the Ministry of Environment in February 2004. The BTC Pipeline Project Monitoring Group of the Ministry of Environmental Protection of Georgia in July 2004 reported on the existence of dangerous landslides in Dgvari and a possible threat to the residents of Dgvari; however, it did not draw any conclusions about the link between

Protocol No.1 of the ECHR in *Chapter Four*, it can only be argued that if there was a causal link between the construction of the pipeline and the activation of landslides a) the right to property of the villagers of Dgvari under Article 1 of Protocol No. 1 of the ECHR may be violated by the damage to the houses resulting in a decline in value and amounting to *de facto* expropriation; b) the positive obligation required Georgia to take adequate measures for the prevention of damage to the houses and interfering with the rights of the villagers under Article 1 of Protocol No. 1; c) the principle of proportionality was applicable in the situation; d) adequate compensation by the government for the damage to houses would have excluded the violation of Article 1 of Protocol No. 1. It should be emphasized that in the interviews with the resident of the village of Dgvari, the respondent stated that cracks on the walls of his house worsened after the construction started and added that “now nobody will buy my house; its price is zero”. Here again, it should be made clear that the respondent was not an expert of geology to establish such a link and his statements can only attest coincidence. Considering that the government did not take any measures, it can be concluded that, if there was a causal link between the construction and the activation of landslides, Article 1 of Protocol No. 1 of the villagers was violated. It should be noted that only in 2005 did the government offer compensation, but the amount was ridiculously inadequate for resettlement and this resulted in the resentment of the villagers.

Based on the examination of Articles 10 and 11 of the ECHR in *Chapter Four*, it can be argued that a) the villagers had the right to express their concerns under Article 10 regarding the impact of the pipeline; b) the villagers had the right to exercise the freedom of assembly in the form of a peaceful protest demonstration, including picketing; c) the principle of proportionality was applicable in the situation and exceptions under the second paragraphs of Articles 10 and 11 had to be interpreted strictly. However, the protesters were beaten by police. It should be taken into consideration that in the interviews with a resident of Dgvari, the respondent stated that he was among the protesters when the police came and

the construction of the pipeline and activated landslides. It should be noted that the CAO assessment report did not establish a causal link between the construction of the pipeline and the activation of landslides in the village; however it recommended to the BTC Co. to make project aerial photographs to illustrate the areas affected by landslip and to show their relativity with respect to the pipeline. The CAO later recommended the BTC Co. to include Dgvari in the monitoring of landslide risks.

started to beat the protestors, including women. Thus it can be concluded that a fair balance was not struck and that by beating up peaceful demonstrators the rights of the villagers under Article 10 and 11 were violated.¹²⁹⁰

It should be emphasized that in the interviews with a resident of Dgvari, the respondent stated that the villagers were prevented by police through severe forms of intimidation to hold a peaceful protest in front of the Borjomi Municipality building in summer 2002. Here again, based on the information obtained through the interview, it can be concluded that the government of Georgia violated Articles 10 and 11.

6.3.3.1.3 Non-Compliance by the BTC Co. with the Requirements of the Equator Principles and the BTC Project Agreements regarding the Disclosure of Information and Public Consultation

Based on the examination of the Equator Principles and the IFC Environmental Assessment OP4.01 (1998) in *Chapter Three* and on the examination of the HGA and the BTC ESIA in *Chapter Five*, it can be argued that a) considering Sections 7.2 and 1.10.2 of the BTC ESIA, the residents of Dgvari were project affected groups under the meaning of Principle 5 of the Equator Principles, paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998), and Section 3.9 (iii) of Appendix 3 of the HGA; b) the BTC Co. had the obligation regarding the disclosure of information and meaningful public consultation in the context of the residents of Dgvari under Principle 5 of the Equator Principles, paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) and Section 3.9 (iii) of Appendix 3 of the HGA. However, according to the complaint, the villagers did not know until 2003 that the BTC pipeline would pass only 1 km from Dgvari. According to the assessment report of the CAO, “Dgvari residents were not directly consulted during the preparation of the ESIA, nor in the form of a targeted communications approach by the BTC Co. In view of the specific situation of Dgvari, as well as the complexity and sensitivity of the landslide issue, early consultation would have provided an opportunity for villagers to voice their

¹²⁹⁰ Later in 2005, villagers held another peaceful protest demonstration to protest against the offer of inadequate compensation. On both occasions police forcibly dispersed the villagers by beating them. Here again it can be concluded that the government of Georgia violated Articles 10 and 11.

concerns, and for BTC Co. to manage expectations.”¹²⁹¹ It should be noted that since the BTC Co. did not assess the environmental impacts of the project on the village of Dgvari, it is quite logical that the BTC Co. did not hold public consultations with the residents of this village within its ESIA process. It should be again recalled here that the BTC Co. made the following claim in Section 1.6.2 of the ESIA report: “data on existing social and economic conditions, and attitudes to the project, were gathered through interviews and consultation in every community within a 2km either side of the centre of the pipeline corridor . . .”¹²⁹² In the interview with a resident of Dgvari, the respondent confirmed that the villagers had not been informed by the BTC Co. on the route of the pipeline before the construction started and had not been given a chance to express their concern. During the interview with a representative of an NGO, the respondent stated that the BTC Co. did not inform the residents of Dgvari of or consulted with them on the route of the pipeline. According to that respondent, the BTC Co. referred to the fact that Dgvari was not mentioned in the ESIA report in order to justify its inaction with regard to the villagers. A representative of an NGO stated that different NGOs attracted public attention to this issue of Dgvari: otherwise nobody would have known of that village. Thus it can be concluded that in the context of the residents of Dgvari, the BTC Co. did not comply with its requirements regarding the disclosure of information and public consultation under a) Principle 5 of the Equator Principles; b) paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) which was referred to in Principle 3 as a standard to be complied with; c) Section 3.9 (iii) of Appendix 3 of the HGA and various statements made in the ESIA report. It can be further argued that the Equator Banks did not adhere to its requirements under the Equator Principles when making their decision on providing a loan to the BTC Co. The can be said about the IFC with regard to the IFC Environmental Assessment OP 4.01 (1998).

6.3.4 Effectiveness of the CAO Remedy

As noted in section 6.3.1, the CAO Ombudsman does not aim to find fault and cannot make a legally binding judgment on the merits of a complaint; it can only

¹²⁹¹ “Assessment Report: Seven Complaints regarding the Baku-Tbilisi-Ceyan (BTC) Pipeline Project, Borjomi Region, Georgia”, September 2004, Office of the Compliance Advisor/Ombudsmen, the International Finance Corporation/Multilateral Investment Guarantee Agency, p. 5.

¹²⁹² 1. Executive Summary, the BTC Project ESIA, Georgia, Final ESIA, November, 2002, p. 1-12.

identify problems, address reasons that caused these problems and assist parties in finding solutions to the conflict. Therefore it can be argued that demands in both complaints discussed indicate that the complainants had overestimated the scope and competence of the CAO grievance mechanism; for example, Rustavi complainants demanded from the CAO the finding of an alternative route of the BTC pipeline in order to avoid negative impacts from the project. The CAO Ombudsman had a specific and limited mandate to make conclusions in its assessment reports on the complaints concerning the residents of the 18th and 19th subdistricts of Rustavi and the village of Dgvari.

With regard to the complaint of the residents of the 18th and the 19th subdistricts of Rustavi, the CAO concluded that there was a lack of evidence of disclosure of information to and consultations with the residents on the routing of the pipeline, and with regard to the complaint concerning the village of Dgvari, the CAO concluded that the residents of Dgvari were not directly informed and consulted by the BTC Co. during the preparation of the ESIA report. In fact, the CAO acknowledged the claims of the residents of Rustavi and Dgvari that they were not informed and consulted by the BTC Co. prior to the construction. However, as the information collected through interviews suggest, these findings did not meet the expectations of the affected residents. The CAO cannot force project sponsors to change their practices and much did not change for them as a result of the CAO findings. In the interview with the residents of the village of Dgvari, a respondent stated that the complaint to the CAO was just a waste of time and the respondent from Rustavi also stated that the complaint to the CAO was a waste of time and that it had no results except for the local square and road reparations financed by the BTC Co. as a result of the complaint. But this does not mean that the CAO did not fulfill its mandate; the reason for the discontent is that the complainants had overestimated expectations.

The complaint concerning the residents of Rustavi was closed by the CAO on 2 May, 2005 as a result of the increased engagement by the BTC Co. with the community.¹²⁹³ As a result of the CAO assessment report on the complaint concerning Dgvari, the BTC Co. released studies showing consideration by the BTC Co. of landslide risks in the region, and the CAO later recommended the BTC

¹²⁹³ BTC Pipeline: Summary of Complaints 2003 -2006, Compliance Advisor Ombudsman (CAO), 2007, p. 1.

Co. to include Dgvari in the monitoring of landslide risks.¹²⁹⁴ On 8th February 2005, the complaint was closed by the CAO.¹²⁹⁵ It should be emphasized that on the same day, i.e. on 8th February, 2005 the IFC CAO wrote a letter informing that \$1,000,000 was planned as financial assistance from BP to the government of Georgia for the resettlement of Dgvari villagers; however for unexplained reasons the government of Georgia turned down this offer.¹²⁹⁶ It should be noted that there are no sources suggesting that the CAO recommendations on the two complaints discussed were not implemented.

In general terms it can be argued that considering the mandate and competence of the CAO Ombudsmen, the latter served as an efficient mechanism in the context of the two complaints discussed.

6.4 Conclusions

This dissertation aims to make an original contribution to knowledge, *inter alia*, through the drawing up of conclusions in the BTC project context on the non-implementation by Georgia of procedural environmental rights under the Aarhus Convention and the domestic normative acts of Georgia; violation by Georgia of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR; non-compliance by the BTC Co. with the requirements of the Equator Principles and the BTC project agreements regarding the disclosure of information and public consultation.

The analysis of the litigation initiated by Green Alternative concerning Environmental Permit No. 0011 enabled the drawing up of conclusions in the case study on the non-implementation by the government of Georgia of Articles 6, 5 and 9 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection. And the analysis of the litigation initiated by Green Alternative concerning Environmental Permit No. 0122 enabled the drawing up of conclusions on the non-implementation by the government of Georgia of

¹²⁹⁴ BTC Pipeline: Summary of Complaints 2003 -2006, Compliance Advisor Ombudsman (CAO), 2007, p. 3.

¹²⁹⁵ *Ibid.*, p. 4.

¹²⁹⁶ Press Release, Green Alternative, 12.10.05.

Articles 6, 5 and 9 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6 of the Law of Georgia on Environmental Protection.

The CAO Ombudsman had no competence to make judgments on the two complaints discussed regarding violation of the Aarhus Convention, the domestic normative acts of Georgia, the provisions of the ECHR, the Equator Principles or the HGA. However, the two complaints to the CAO, together with other related sources, were informative in terms of a) violations by the government of Georgia of Articles 4, 5 and 6 of the Aarhus Convention, the provisions of the domestic normative acts of Georgia regulating procedural environmental rights; Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR; b) non-compliance by the BTC Co. with its requirements under Principle 5 of the Equator Principles; paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) which was referred to in Principle 3 as a standard to be complied with; and Section 3.9 (iii) of Appendix 3 of the HGA. Therefore the analysis of the two complaints to the CAO, and other sources related to the issues raised in the complaints, enabled the drawing up of conclusions in the case study on a) the non-implementation of procedural environmental rights by Georgia under the Aarhus Convention and the Georgian domestic legislation; b) violations of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR; and b) the non-compliance by the BTC Co. with its requirements regarding the disclosure of information and public participation under the BTC project agreements, the Equator Principles and the IFC Operational Policy OP4.01.

It should be emphasized that the findings in this chapter are crucial for other research questions of this PhD; the existence of links between the proper functioning of democracy and the effective exercise of the rights under the Aarhus Convention; existence of links between the enjoyment of the rights to freedom of expression and to freedom of assembly under the ECHR and the effective exercise of the rights under the Aarhus Convention; the existence of links in the BTC project context between the implementation of the rights under the Aarhus Convention and the protection of the right to respect for private and home life and the right to property under the ECHR.

Chapter Seven: Existence and Proper Functioning of Democracy as a Pre-requisite for the Effective Exercise of the Rights of Access to Environmental Information and Participation in Environmental Decision-making under the Aarhus Convention

7.1 Introduction

Chapter Seven examines whether the existence and proper functioning of democracy can be the necessary pre-requisite for the effective exercise of the rights of access to environmental information and participation in environmental decision-making granted under the Aarhus Convention. It should be noted that this chapter does not aim to examine all the necessary pre-requisites for the effective exercise of the rights under the Aarhus Convention. Section 2 tries, using the example of the BTC pipeline project, to establish whether the existence and proper functioning of democracy is among the necessary pre-requisites for the effective exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention. From the content of the formally adjudicated complaints and of the interviews conducted, the section identifies claims indicating the deficiencies of Georgian democracy. Then the section makes a distinction between normative and descriptive accounts of democracy and examines the literature on normative accounts of democracy. Then there follows descriptive accounts of democracy in Georgia, particularly in the years when the BTC project developments took place. Then the section examines as to whether the deficiencies of Georgian democracy could hinder, in the context of formally adjudicated complaints, the exercise of the rights of access to environmental information and participation in environmental decision-making as granted under the Aarhus Convention. Section 3 draws conclusions on the existence and proper functioning of democracy as being the necessary pre-requisite for the effective exercise of the rights of access to environmental information and participation in environmental decision-making, as granted under the Aarhus Convention.

7.2 Links Between Proper Functioning of Democracy and the Effective Exercise of the Rights of Access to Environmental Information and Participation in Environmental Decision-making under the Aarhus Convention

7.2.1 Claims Indicating the Deficiencies of Georgian Democracy

Formally adjudicated complaints and interviews that are examined in *Chapter six* contain claims that indicate the deficiencies of Georgian democracy.

The examination in *Chapter Six* of the challenges made by the residents of the 18th and the 19th subdistricts of the town of Rustavi suggests that there was a general determination within the authorities of Georgia to ignore and/or suppress concerns of the citizens of Rustavi: the latter unsuccessfully applied several times to public authorities to obtain safety guarantees; they wrote to the executive and legislative bodies explaining their concern but received no reply; they travelled to the capital to meet representatives of the executive and legislative authorities but these attempts were not successful; their peaceful protest demonstration was dispersed by the police and demonstrators who were expressing their concern were beaten up. It should be taken into consideration that in the interview with a citizen of Rustavi, the respondent stated that there was an atmosphere of taboo surrounding the BTC project; the government representatives threatened that any resistance to the pipeline project would be suppressed brutally; some residents were afraid to collect money for a lawyer in order to bring about a lawsuit; even lawyers were afraid to take up the case; the residents could not find a journalist from the local press to write about their problems because of fear; the residents only obtained the attention of the government before elections and after elections politicians were reluctant to meet and listen to the concerns of the residents. It should be noted that the respondent from an NGO stated in the interview that the situation around the residents of the 18th and the 19th subdistricts demonstrated that the government treated the electorate as slaves and not as the source of power.

The examination in *Chapter Six* of the challenges made by the residents of Dgvari also suggests that there was a general atmosphere within the authorities of Georgia

to ignore and/or suppress concerns of the citizens of the village: the concerns of the villagers about the alleged activation of the landslides from the construction of the pipeline and the resulting damage to their homes were not timely and adequately addressed by the public authorities; a peaceful protest of villagers was dispersed on two occasions and demonstrators were beaten up. It should be taken into consideration that in the interview with the resident of Dvari, the respondent stated that the villagers declared to local officials of Borjomi Municipality of their intention to hold a protest demonstration in front of the municipality, but next day police resorted to severe forms of intimidation in order to preclude villagers from holding a demonstration; all information on the route of the pipeline, before the construction started, was kept as top secret by the government; policemen, disguised in civilian clothes and in ordinary cars, were patrolling the village and intimidating village activists; there was no discussion on television or radio of the possible negative impact of the pipeline project and there was a taboo on the problems related to the pipeline that resulted in the failure of the villagers to obtain any information; the mass media reported only on the significance of the project. It should be noted that the respondent from an NGO stated in the interview that the local officials and police were controlling the entrances of the village, were intimidating NGOs and were preventing villagers to voice their concern to NGOs.

It should be noted that information collected in interviews contain other claims in the context of the BTC project that indicate the deficiencies of Georgian democracy. According to the respondent from an NGO, nobody in the government could challenge the BTC pipeline project; newspaper journalists were reluctant to publish critical material on the project through fear of being labelled “Russian spies”; TV journalists had instructions not to show material against the pipeline; some of the members of the affected communities were afraid to speak out when consulted by the BTC Co. in summer 2002. In the interview with a former employee of the Ministry of Environment, the respondent stated that criticism of the project within the Ministry would amount to “treason”, due to the alleged significance of the BTC project for the country and that the general environment was such that it was patriotic to support the project. In the interview with a judge, the respondent stated that he had been proud when giving the green light to the project by the decision made in the court. The respondent also criticised those NGOs which were challenging the project.

7.2.2 Distinction between Normative and Descriptive Accounts of Democracy

“The central tension running through contemporary democratic theory, it is argued, is the tension between theories that purport to offer strictly descriptive accounts of actually existing democracy, and normative accounts that seek to extend our understanding of the ideal form of democracy in the modern nation-state”.¹²⁹⁷ Normative accounts of democracy differ from descriptive and explanatory accounts and concern the moral foundations of democracy and democratic institutions.¹²⁹⁸ For example, the classical theory of democracy, in which participation has a central role, has been criticized due to its normative and “value-laden” nature and attempts were made to advance political theories grounded on the facts of political life.¹²⁹⁹ A description of human situations having an evaluative component is commonly used in the descriptive account of democratic processes.¹³⁰⁰ The descriptive accounts of democracy aim to describe actual democratic systems.¹³⁰¹ A purely descriptive or empirical approach to democracy has also been subjected to criticism.¹³⁰² It has been argued that different models of democracy involve “a shifting balance between descriptive – explanatory and normative statements; that is, between statements about how things are and why they are so, and statements about how things ought or should be”.¹³⁰³ It has been argued that normative accounts of democracy have a double role: “as systematic statements of what democracy should look like and as a discourse which influences empirically the institutional design of democracies”.¹³⁰⁴ A “[n]ormative account of democracy is an action-oriented account to the extent that it asks, ‘What should citizens be expected to *do* in a democratic society?’”¹³⁰⁵ It has been noted that “democratic realities are always infused with ideals, so that normative accounts of democracy are not a theoretical distraction, but a vital component of the study of

¹²⁹⁷ Roux, T. “Democracy” in Woolman, S, Roux, T. Klaaren, J. Stein, A. and Chaskalson, M. (eds.) *Constitutional Law in South Africa* (2006), Chapter 10, p. 10-2.

¹²⁹⁸ *Democracy*, Stanford Encyclopedia of Philosophy, available at <<http://plato.stanford.edu/entries/democracy/>> [accessed on 23 May, 2011].

¹²⁹⁹ Pateman, C. *Participation and Democratic Theory* (London: Cambridge University Press, 1974), p. 3.

¹³⁰⁰ Hermet, G. and Trindade, H. *The Paradoxes of Democracy* (Gian Publishing House, 1988), p. 45.

¹³⁰¹ *Descriptive Democracy and Revisionary Democracy*, Grand Strategy: the View from Oregon, Grand Strategy and Geopolitics from the Perspective of the Pacific Northwest, 2009, p. 2.

¹³⁰² Held, D. *Models of Democracy* (Cambridge: Polity Press, 1987), p. 7.

¹³⁰³ *Ibid.*

¹³⁰⁴ *Democratic Designs*, the Humboldt Center for Social and Political Research (HCSP), p. 1, available at <<https://www2.hu-berlin.de/hcsp/de/>> [accessed on 26 May, 2011].

¹³⁰⁵ Parkinson, J. “Holistic Democracy and Physical Public Space” *British Journal of Political Science Conference*, British Academy, London, 8 June, 2006, p. 3.

democracy”.¹³⁰⁶ It has been argued that irrespective of the proclaimed method applied in analysis, it is possible to find in all models of democracy an intermingling of the descriptive and normative accounts.¹³⁰⁷

7.2.3 Normative Accounts of Models of Democracy

This part of section 2 examines sources of the theory of democracy in order to provide normative accounts of models of democracy. The examination of normative accounts of democracy is followed by descriptive accounts of democracy in Georgia and thus the former should serve as a conceptual framework for drawing conclusions on the possible shortcomings of the latter. A normative approach to models of democracy is important for drawing conclusions as to whether the existence and functioning of certain models of democracy constitute the necessary pre-requisite for the effective exercise of some of the rights under the Aarhus Convention.

Generally speaking, democracy is about public participation and it denotes “rule by the people”.¹³⁰⁸ In a democratic political system, significant decisions on questions of law and policy *must* depend upon public opinion that is expressed by citizens.¹³⁰⁹ Democracy constitutes a political system and is based on the following principle - all members of a society *must* be able to participate in decisions affecting them.¹³¹⁰ It should be noted that the precise nature of democracy has been subjected to ideological debate.¹³¹¹ Democracy is a contrast to those political systems in which the majority of the members of the society has no chance to participate in decisions affecting them: such as an oligarchy¹³¹², an aristocracy¹³¹³, a monarchy¹³¹⁴, a dictatorship¹³¹⁵ or a tyranny¹³¹⁶.

¹³⁰⁶ The Sydney Democracy Initiative, p. 1, available at <<http://www.sydneydemocracyinitiative.net/research/>> [accessed on 26 May, 2011].

¹³⁰⁷ Held, D. *op cit.*, (1987), p. 7.

¹³⁰⁸ This term derives from the ancient Greek word *kratos*, denoting “rule” and *demos*, denoting “the people”. Arblaster, A. *Democracy* (Buckingham: Open University Press, 1991), p. 13.

¹³⁰⁹ Weale, A. *Democracy* (New York: Palgrave, 1999), p. 14.

¹³¹⁰ Beetham, D. *a beginner's guide: democracy* (Oxford: Oneworld, 2005), p. 3.

¹³¹¹ Heywood, A. *Politics* (New York: Palgrave: Macmillan, 2002), p. 68.

¹³¹² Denotes a system in which a wealthy few rule in their own interest. Scruton, R. *A Dictionary of Political Thought* (London: The MacMillan Press, 1982), p. 24, 332.

¹³¹³ Denotes a form of rule by the best but by few and in the interest of many. *Ibid.*

¹³¹⁴ Denotes the form of government in which a monarch is head of state. *Ibid.*, p. 303.

¹³¹⁵ Denotes a system in which one person or party dictates all the country's politics and compels obedience from all other members of the public. *Ibid.*, p. 127.

¹³¹⁶ Denotes rule by an absolute ruler and is often used as synonymous of despotism meaning a form of government which is oppressive, cruel and in which there is considerable concentration of power. *Ibid.*, p. 473.

Public participation is essential to all models of democracy, but the role of participation varies from one model to another. There are a number of competing theories or models of democracy and each offers its own way of how to rule.¹³¹⁷ Heywood lists the following four models of democracy: 1) classical democracy; 2) protective democracy; 3) developmental democracy; 4) deliberative democracy.¹³¹⁸ It should be noted that in the theory of democracy there are other classifications or sub-classification of models of democracy, but the ones mentioned here have been chosen because they all place an emphasis on the role of public participation.

7.2.3.1 Classical Democracy

Classical democracy implies popular self-government that is the direct and continuous participation of citizens in government.¹³¹⁹ Classical democracy was practiced in ancient Athens¹³²⁰ and there all citizens¹³²¹ took part in collective self-government.¹³²² Athenian democracy signified a system of “direct democracy”.¹³²³ Athenian democracy is a descriptive model because it gives an account of the reality of the Athenian political system; however it is viewed as a normative model because for many modern theoreticians it has been an example to be emulated.¹³²⁴ Athenian political system had considerable impact on later thinkers.¹³²⁵ Athenian democracy has become an inspiration for modern political thought.¹³²⁶ It has been argued that “[d]irect democracy nevertheless remains an important form of democracy in political theory, as a normative ideal.”¹³²⁷ It should be emphasized that the legacy of Athens was not accepted without comment by Greek thinkers

¹³¹⁷ Heywood, *op cit.*, (2002), p. 72.

¹³¹⁸ Heywood, A. *Political Theory: an introduction* (New York: Palgrave Macmillan, 2004), p. 222.

¹³¹⁹ *Ibid.*

¹³²⁰ From c.500 BC to c.330 BC. ancient Athens was a democracy. McLean, I. *Concise Dictionary of Politics* (Oxford: Oxford University Press, 1996), p. 129.

¹³²¹ But “all citizens” did not imply “all adults”: only adult male Athenian citizens over the age of 20, constituting around a quarter of the adult population, had the possibility to vote and this excluded slaves, women, foreigners, and even residents from other Greek cities. Held, D. *op cit.*, (1987), p. 23; McLean, I. *op cit.*, (1996), p. 129.

¹³²² Mayo, H. B. *An Introduction to Democratic Theory* (New York: Oxford University Press, 1960), pp. 35-36.

¹³²³ Heywood, A. *op cit.*, (2004), p. 224.

¹³²⁴ Fuchs, D. “*Models of Democracy: Participatory, Liberal and Electronic Democracy*”, Paper at the ECPR Joint Sessions of Workshops, Edinburgh, UK, 28 March – 2 April 2003. Workshop 22: “Bringing Citizens Back in – Participatory Democracy and Political Participation”, p. 2.

¹³²⁵ Heywood, *op cit.*, (2002), p. 72.

¹³²⁶ Held, D. *op cit.*, (1987), p. 14.

¹³²⁷ Roux, T. *op cit.*, (2006), Chapter 10, p. 10-4.

such as Plato¹³²⁸ and Aristotle¹³²⁹ whose writing include criticism of democracy.¹³³⁰ Plato and Aristotle considered democracy as rule by the masses at the expense of wisdom.¹³³¹ According to Plato, only philosopher-kings, who were well educated and well experienced, could be fit to rule.¹³³² In his work *The Republic*, Plato compared democracy to a ship in which inexperienced members of the crew had seized the helm from the captain of the ship, consumed all the existing supplies in a drunken orgy resulting in the ship drifting onto rocks.¹³³³ In response, supporters of democracy argued that moral awareness and recognition of the public interest were common to all citizens, and required no special expertise.¹³³⁴ In the subsequent works *The Statesman*¹³³⁵ and *The Laws*,¹³³⁶ Plato modified the positions set out in *The Republic* and recognized that in an actual state, as opposed to in an ideal state, rule cannot be maintained without some form of popular participation.¹³³⁷ As for Aristotle, he was prepared to acknowledge the virtues of popular participation, but feared that democracy in an unrestricted form, would result in a form of “mob rule”.¹³³⁸ It is noteworthy that until the nineteenth century the idea of democracy was criticized as rule by the ignorant masses and was not widely supported by political thinkers.¹³³⁹ The reformulation of the idea of democracy took place in the late eighteenth and nineteenth centuries and a united support of democracy by political thinkers is a recent phenomenon.¹³⁴⁰ Thus throughout the ages democracy has changed from a pejorative evaluative term to one of commendation.¹³⁴¹

¹³²⁸ Plato (429-347 BC) was a Greek thinker whose dialogues contribute to almost every area of philosophy. Reeve, C.D.C. “Plato” in Boucher, D. and Kelly, P. (eds.) *Political Thinkers: From Socrates to the Present* (Oxford: Oxford University Press, 2003), pp. 54-55.

¹³²⁹ Aristotle (384-322 BC) was a Greek philosopher, a student of Plato and tutor of Alexander the Great. Heywood, A. *op cit.*, (2002), p. 7.

¹³³⁰ Held, *op cit.*, (1987), p. 16.

¹³³¹ Heywood, *op cit.*, (2002), p. 67.

¹³³² “Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils, - no, nor the human race, as I believe, - and then only will this our State have a possibility of life and behold the light of day.” Plato, *The Republic*, 360 BC, 473d.

¹³³³ Plato, *The Republic*, 360 BC, 493a-497a.

¹³³⁴ Beetham, D. *op cit.*, (2005), p. 4.

¹³³⁵ Plato, *the Statesman*, 360 BC.

¹³³⁶ Plato, *The Laws*, 360 BC.

¹³³⁷ Held, D. *op cit.*, (1987), p. 32.

¹³³⁸ Heywood, *op cit.*, (2004), p. 221.

¹³³⁹ *Ibid.*, p. 222.

¹³⁴⁰ Held, D. *op cit.*, (1987), p. 1, 4

¹³⁴¹ Boucher, D. and Kelly, P. “Introduction” in Boucher, D. and Kelly, P. *op cit.*, (2003), p. 5.

7.2.3.2 *Protective Democracy*

Protective democracy is a type of liberal or representative democracy.¹³⁴² Modern democratic theories are dominated by the idea of representation.¹³⁴³ It has been argued that John Locke's¹³⁴⁴ writings prepared the way for popular representative government; however he believed that only property owners should have the right to vote.¹³⁴⁵ Democrats like Thomas Paine¹³⁴⁶ developed the idea of representation as a means of adopting the democratic principle to societies, which were too large for allowing personal participation by all citizens.¹³⁴⁷ Modern theories of democracy focus on the idea of representative or electoral democracy that is often called liberal democracy.¹³⁴⁸ Thus the notion of democracy is qualified by the addition of the concept of "liberal".¹³⁴⁹ Claims have been advanced on the normative superiority of liberal democracy over Athenian democracy as a normative reference point.¹³⁵⁰ Representative or liberal democracy is a system implying elected individuals who commit to represent the interests of the citizens.¹³⁵¹ The central feature of representative democracy is participation through voting.¹³⁵² Thus in a representative model of democracy, there is only choice of the rules instead of self-government.¹³⁵³ Representative democracy is a limited and indirect democracy: limited because popular participation in the form of voting in elections is infrequent and indirect because the elected individuals make decisions on behalf of the public.¹³⁵⁴ Liberal democracy encompasses two elements "liberal" and "democracy".¹³⁵⁵ The liberal element aims to restrict the power of government through human rights.¹³⁵⁶ The "democratic" element in liberal democracy is popular consent through voting in regular, open and

¹³⁴² Held, D. *op cit.*, (1987), p. 4.

¹³⁴³ Heywood, A. *op cit.*, (2004), p. 232.

¹³⁴⁴ John Locke (1632-1704) was an English philosopher and politician. Heywood, A. *op cit.*, (2002), p. 45.

¹³⁴⁵ Held, D. *op cit.*, (1987), p. 54; Heywood, A. *op cit.*, (2002), p. 73.

¹³⁴⁶ Thomas Paine (1737-1809) was an English thinker and revolutionary. Heywood, A. *op cit.*, (2002), p. 226.

¹³⁴⁷ Arblaster, A. *op cit.*, (1991), p. 79.

¹³⁴⁸ Heywood, A. *op cit.*, (2004), p. 221.

¹³⁴⁹ Heywood, A. *op cit.*, (2002), p. 72.

¹³⁵⁰ Kielmansegg, P. G. *Das Experiment der Freiheit. Zur gegenwaertigen Lage des demokratischen Verfassungstates* (Stuttgart: Klett-Cotta, 1988), p. 58; Fuchs, D. *op cit.*, (2003), p. 13.

¹³⁵¹ Held, D. *op cit.*, (1987), p. 4.

¹³⁵² Heywood, A. *op cit.*, (2002), p. 69.

¹³⁵³ Fuchs, D. *op cit.*, (2003), p. 12.

¹³⁵⁴ Heywood, A. *op cit.*, (2004), pp. 224-25.

¹³⁵⁵ *Ibid.*, p. 226.

¹³⁵⁶ Maier, C. S. "Democracy since the French Revolution" in J. Dunn (ed), *Democracy: the unfinished journey* (Oxford: Oxford University Press, 1993), p. 133.

competitive elections.¹³⁵⁷ Government should be in the hands of elected professional politicians who make decisions on behalf of the public.¹³⁵⁸ Political pluralism, competition and parties are deemed to be the essence of liberal democracy.¹³⁵⁹ Liberal democracy involves party competition and regular elections.¹³⁶⁰ The theory of liberal democracy considers political parties as the principal means by which voters are given an effective choice between different policy programmes and ideas; political parties are the means for groups of individuals to display a certain measure of ideological cohesion and to win government power by elections.¹³⁶¹ Political parties are associated with the system of representative government and they are important because they carry out the function of representation.¹³⁶² It should be noted that representative democracy can combine the elements of direct democracy in the form of plebiscitary democracy and the use of referendums, in order to supplement a representative system.¹³⁶³

Protective democracy puts emphasis on the centrality of democratic institutions in order to protect the governed from tyranny and oppression by the state.¹³⁶⁴ Protective democracy is aimed at providing citizens with “the widest possible scope to live their lives as they choose” and is compatible with *laissez-faire*.¹³⁶⁵ Protective democracy is linked to natural rights theory and utilitarianism.¹³⁶⁶ Utilitarians developed their justification for liberal democracy and argued for the need to protect individual interests.¹³⁶⁷ Protective democracy or the protective theory of liberal democracy received its fullest elaboration in the writings of James Madison¹³⁶⁸ and Jeremy Bentham: “the governors *must* be held accountable to the governed through political mechanisms (the secret ballot, regular voting, competition between potential representatives, among other things) which give citizens satisfactory means for choosing, authorizing and controlling political

¹³⁵⁷ Heywood, A. *op cit.*, (2004), p. 226.

¹³⁵⁸ Bobbio, N. *The Future of Democracy* (Cambridge: Polity Press, 1987), p. 47.

¹³⁵⁹ Heywood, A. *op cit.*, (2004), pp. 226-27.

¹³⁶⁰ Heywood, A. *op cit.*, (2002), p. 84.

¹³⁶¹ *Ibid.*, p. 248.

¹³⁶² *Ibid.*, p. 258.

¹³⁶³ *Ibid.*, p. 71.

¹³⁶⁴ Held, D. *op cit.*, (1987), p. 43.

¹³⁶⁵ Heywood, A. *op cit.*, (2002), p. 74.

¹³⁶⁶ Heywood, A. *op cit.*, (2004), p. 222. Utilitarianism was developed by the philosopher Jeremy Bentham (1748-1832) who was a supporter of democracy in later life and who argued that human beings are self-interested creatures and *utility* maximizers. Heywood, A. *op cit.*, (2002), p. 73.

¹³⁶⁷ Held, D. *op cit.*, (1987), p. 67; Heywood, A. *op cit.*, (2002), p. 73.

¹³⁶⁸ James Madison (1751-1836) was a political philosopher and US statesman. Heywood, A. *op cit.*, (2002), p. 320.

decisions.”¹³⁶⁹ Protective democracy is an indirect and limited model of democracy and it aims to protect individuals from government.¹³⁷⁰ Madison argued that “. . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”¹³⁷¹ According to Bentham, “A democracy . . . has for its characteristic object and effect . . . securing its members against oppression and depredation at the hands of those functionaries which it employs for its defence.”¹³⁷² Utilitarian Edmund Burke¹³⁷³ when addressing the electors of Bristol, stated “your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”¹³⁷⁴ These views found reflection in the theory of the mid-twentieth century political scientist Joseph Schumpeter who argued that the voters must know that after they have elected a representative, all political decisions are his business and not theirs.¹³⁷⁵ According to Schumpeter’s theory, liberal democracy has the ability to combine elite rule with a significant scale of popular participation; however in his theory the citizen is isolated and vulnerable in a system characterized by a clash of elites.¹³⁷⁶ It has been noted, however, that such accounts of representative system do not sound particularly democratic.¹³⁷⁷

The need to protect individuals from the government, as well as from each other, justifies the idea of protective democracy.¹³⁷⁸ Protective democracy implies that sovereignty must remain with the people but is vested in elected representatives; state power must be divided among the executive, the legislative and judicial authorities; citizens must enjoy political and civil rights such as the right to vote,

¹³⁶⁹ Held, D. *op cit.*, (1987), p. 61.

¹³⁷⁰ Heywood, A. *op cit.*, (2004), p. 222.

¹³⁷¹ Madison, J. *The Federalist Paper No. 10: The Utility of the Union as a Safeguard against Domestic Faction and Insurrection (continued)*, November 22, 1787.

¹³⁷² Bentham, J. *Constitutional Code*, 1830, Book I, p. 47.

¹³⁷³ Edmund Burke (1729-1797) was an English philosopher, economist and politician. Heywood, A. *op cit.*, (2002), p. 46.

¹³⁷⁴ Bristol, 1774.

¹³⁷⁵ Schumpeter, J. *Capitalism, Socialism and Democracy* (London: Allen and Unwin, 1976), p. 126.

¹³⁷⁶ Heywood, A. *op cit.*, (2004), p. 227; Held, D. *op cit.*, (1987), p. 186.

¹³⁷⁷ Beetham, D. *op cit.*, (2005), p. 6.

¹³⁷⁸ Held, D. *op cit.*, (1987), p. 70.

freedom of expression and freedom from arbitrary arrest; the state should be separate from civil society.¹³⁷⁹

Thus normative accounts of the theory of protective democracy advocate a) protection of citizens from arbitrary and oppressive acts of the state and b) public participation through elections, but they fail to leave a place for public participation other than in elections. In the theory of protective democracy, voters have a passive role between elections. Therefore, in this model of liberal democracy the role of public participation is restricted.

7.2.3.3 *Developmental Democracy*

Developmental democracy is also a type of liberal or representative democracy.¹³⁸⁰ According to Heywood, “although early democratic theory focused on the need to protect individual rights and interests, it soon developed an alternative focus: a concern with the development of the human individual and the community. This gave rise to quite new models of democratic rule that can be broadly referred to as systems of developmental democracy.”¹³⁸¹ The theory of developmental democracy sometimes has also been referred to as a participatory theory of democracy or radical democracy.¹³⁸² Developmental democracy is associated with endeavours to broaden the scale of popular participation through advancing freedom and individual development.¹³⁸³

According to Held, “[i]nterest was shown, by some thinkers at least, in how democracy itself might become a (if not *the*) central mechanism in the development of a people. In this context, the idea of “developmental democracy”, which emphasized the indispensability of democratic institutions for the formation of an active, involved citizenry, received both a radical and a liberal interpretation.”¹³⁸⁴ Jean-Jacques Rousseau¹³⁸⁵ developed a novel account of democracy in the form of radical developmental democracy and John Stuart

¹³⁷⁹ *Ibid.*; Heywood, A. *op cit.*, (2002), p. 74.

¹³⁸⁰ Held, D. *op cit.*, (1987), p. 4.

¹³⁸¹ Heywood, A. *op cit.*, (2002), p. 74.

¹³⁸² Pateman, C. *op cit.*, (1974), pp. 22-44; Heywood, A. *op cit.*, (2002), p. 71.

¹³⁸³ Heywood, A. *op cit.*, (2004), p. 222.

¹³⁸⁴ Held, D. *op cit.*, (1987), p. 72.

¹³⁸⁵ Jean-Jacques Rousseau (1712-78) was a French political philosopher who advocated a radical form of democracy. Heywood, A. *op cit.*, (2002), p. 75.

Mill¹³⁸⁶ developed the liberal expression of developmental democracy.¹³⁸⁷ In *The Social Contract*, Rousseau advocates a radical form of democracy.¹³⁸⁸ Rousseau favoured a clear demarcation of legislative and executive functions and criticized the democratic model of classical Athens on account of its absence of a clear division between the legislative and executive authorities.¹³⁸⁹ Rousseau was in favour of an active citizenry and he insisted that citizens in order to be “free” should be able to participate directly and continuously in the life of their community.¹³⁹⁰ He was critical of the idea of representation and elections developed by the earlier theorists.¹³⁹¹ According to Rousseau, the legislative should belong to the people and the executive to the government; individuals should be directly involved in legislative enactments and the government should execute the people’s laws; and personnel of the government should be selected through elections or by lot.¹³⁹² It is noteworthy that Rousseau excluded women and the poor from “the people” and thus from citizenry¹³⁹³, a position sharply criticized by one of the theorists of developmental democracy - Mary Wollstonecraft.¹³⁹⁴ A more modest form of developmental democracy, which was compatible with representative government, was developed by J.S. Mill.¹³⁹⁵ He largely shaped the modern liberal democratic course; representative government was very important for him because he deemed it as a significant aspect of the free development of the individual.¹³⁹⁶ J.S. Mill advocated a combination of representative democracy with free market economy.¹³⁹⁷ He argued that democratic politics was a major mechanism for moral self-development and that the broad participation of citizens in political life was a basis for informed and developed citizenry, male or female.¹³⁹⁸ According to Mill, active participation in public life strengthens general prosperity “in proportion to the amount and variety of the personal energies enlisted in promoting it”.¹³⁹⁹ Mill advocated independent and strong local

¹³⁸⁶ John Stuart Mill (1806-1973) was a British philosopher and political theorist. Kelly, P. “J.S. Mill on Liberty” in Boucher, D. and Kelly, P. *op cit.*, (2003), p. 324.

¹³⁸⁷ Held, D. *op cit.*, (1987), p. 73.

¹³⁸⁸ Rousseau, J. *The Social Contract*, 1762.

¹³⁸⁹ *Ibid.*, pp. 112-14, p. 136ff.

¹³⁹⁰ Held, D. *op cit.*, (1987), p. 75.

¹³⁹¹ Rousseau, J. *The Social Contract*, 1762, p. 141; Heywood, A. *op cit.*, (2004), p. 223.

¹³⁹² Rousseau, J. *The Social Contract*, 1762, pp. 102, 136-9, 148.

¹³⁹³ Rousseau, J. *Emile*, Book V, 1762.

¹³⁹⁴ Wollstonecraft, M. *Vindication of the Rights of Women*, 1792; Held, D. *Models of Democracy* (Cambridge: Polity Press, 1987), p. 80.

¹³⁹⁵ Heywood, A. *op cit.*, (2002), p. 75.

¹³⁹⁶ Held, D. *op cit.*, (1987), p. 85.

¹³⁹⁷ Mill, J.S. *On Liberty*, 1859, pp. 164-5.

¹³⁹⁸ Held, D. *op cit.*, (1987), p. 86.

¹³⁹⁹ Mill, J.S. *Considerations on Representative Government*, 1861, pp. 207-8, 277-9.

authorities and argued that when individuals participate at the local level, they “learn democracy”.¹⁴⁰⁰ Both Rousseau and J. S. Mill were theorists of participation.¹⁴⁰¹

Developmental democracy is justified based on the following principle; “participation in political life is necessary not only for the protection of individual interests, but also for the creation of an informed, committed and developing citizenry.”¹⁴⁰² According to Held, developmental democracy implies that representative government should be elected by secret ballot and regular election; citizens should be able to be involved in different branches of government by voting, by participation in local government and in public debates; and individual human rights should be respected.¹⁴⁰³ It has been argued that in a developmental or participatory democracy, the right to freedom of expression, the right to freedom of assembly and association, the right to vote, the right to know what parliament and government are doing in the name of the people, should be the foundation of democracy.¹⁴⁰⁴

Ideas of developmental democracy were taken up in the 1960s and 1970s in the form of a modern idea of participatory democracy”.¹⁴⁰⁵ Later democratic theorists, by reference to the writings of Rousseau and J.S. Mill argue for grass-roots democracy implying “the radical decentralization of power and the wider use of activist and campaigning pressure groups rather than bureaucratic and hierarchical political parties”.¹⁴⁰⁶ This calls for a “participatory society” in which citizens achieve self-development through participation in collective decisions that affect their lives.¹⁴⁰⁷

In a modern participatory democracy, individuals should be able to run their own affairs and pursue shared purposes such as in the field of welfare, education, protection of the local environment, and this associational life has been called “civil society”.¹⁴⁰⁸ Civil society means the realm of autonomous groups.¹⁴⁰⁹

¹⁴⁰⁰ Pateman, C. *op cit.*, (1974), p 31; Heywood, A. *op cit.*, (2002), p. 75.

¹⁴⁰¹ Pateman, C. *op cit.*, (1974), p 22.

¹⁴⁰² Held, D. *op cit.*, (1987), p. 102.

¹⁴⁰³ Held, D. *op cit.*, (1987), p. 102.

¹⁴⁰⁴ Beetham, D. *op cit.*, (2005), p. 13.

¹⁴⁰⁵ Heywood, A. *op cit.*, (2004), p. 222; Heywood, A. *op cit.*, (2002), p. 75.

¹⁴⁰⁶ Heywood, A. *op cit.*, (2004), pp. 228-29.

¹⁴⁰⁷ Heywood, A. *op cit.*, (2002), p. 75.

¹⁴⁰⁸ Beetham, D. *op cit.*, (2005), p. 36.

Participatory democracy should allow the association of individuals in an interest or pressure group, or organization that can represent shared views in order to bring about changes in government policy.¹⁴¹⁰ The knowledge and skills of people developed through their groups and associations can enrich the public sphere.¹⁴¹¹ For a government to be democratic, it needs a regular input of direct democracy from active and concerned citizens, and for representative democracy to work democratically, between elections citizens must involve themselves in all kinds of actions to influence their government.¹⁴¹² In a liberal democracy, elected representatives still have to listen to and take notice of the public, because representative democracies depend upon a continuously active citizen body if they are to function in a democratic way.¹⁴¹³ There should be public access to official information about the activities of the government as opposed to the monopolization of information and secrecy of government; access to such information is required for the accountability of the government to the public.¹⁴¹⁴ People must be able to be involved in government at the local level, because the major point, where individuals feel the effects of government policy relating to housing, water supply, sanitation, roads, and the environment, and where the failings of government are most evident, is at the local level.¹⁴¹⁵

Thus, the idea of developmental or participatory democracy is based upon the principle of broad popular participation. The role of public participation plays a significant role in this model of democracy; there are new forms of public participation; citizens can come together, establish pressure groups, engage in campaigning, propose initiatives, participate in decision making at a local level etc.

7.2.3.4 Deliberative Democracy

The last decade of the second millennium evidenced the development of a new and strong theory of a democracy - deliberative democracy.¹⁴¹⁶ Deliberative democracy

¹⁴⁰⁹ Heywood, A. *op cit.*, (2002), p. 402.

¹⁴¹⁰ *Ibid.*, p. 286; Beetham, D. *op cit.*, (2005), p. 39.

¹⁴¹¹ Beetham, D. *op cit.*, (2005), p. 36.

¹⁴¹² *Ibid.*, p. 7, 40.

¹⁴¹³ *Ibid.*, pp. 6-7.

¹⁴¹⁴ *Ibid.*, p. 6, 31.

¹⁴¹⁵ *Ibid.*, p. 134.

¹⁴¹⁶ Dryzek, J.S. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000), p. 1.

is an interesting new political theory.¹⁴¹⁷ The theory of deliberative democracy is essentially normative.¹⁴¹⁸ It has been argued that “deliberative democracy highlights the importance of public debate and discussion in shaping citizens’ identities and interests, and in strengthening their sense of the common good.”¹⁴¹⁹ Deliberative democracy calls for public deliberation in some form.¹⁴²⁰ It should be mentioned that deliberative democracy is also called discursive, reflective or participatory democracy.¹⁴²¹

In the late 1990s, deliberative democracy secured a focal point for much democratic theory.¹⁴²² John Rawls and Jürgen Habermas identified themselves as deliberative democrats in their works.¹⁴²³ Rawls developed the ideas on deliberative democracy in his book *Political Liberalism*¹⁴²⁴ and Habermas discussed it in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*¹⁴²⁵. Rawls developed a theory of overlapping consensus, as part of his theory of deliberative democracy and argues that a space has to be created for citizenry, where there is a new role for political co-inhabitants, that of fellow citizens.¹⁴²⁶ Rawls tries to demonstrate that it is feasible to move from a mere political *modus vivendi* (“way of life”) to a consensus on a set of constitutional essentials, the features of which “all citizens may reasonably be expected to endorse”.¹⁴²⁷ Habermas advocates a version of consent theory; he argues that the results are democratically legitimate only when these results are achieved by free and reasoned consent among citizens.¹⁴²⁸ For Habermas, legitimacy of law also depends on consensus which should be reached based on

¹⁴¹⁷ Bohman J. and Rehg W. (eds.), *Deliberative Democracy: Essays on Reason and Politics* (London: The MIT Press, 1997), p. IX.

¹⁴¹⁸ Parkinson, J. *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford: Oxford University Press, 2006), pp. 7-8.

¹⁴¹⁹ Heywood, A. *op cit.*, (2004), p. 222;

¹⁴²⁰ Bohman, J. *Public Deliberation: Pluralism, Complexity and Democracy* (London: The MIT Press, 2000), p. 4.

¹⁴²¹ Goodin, R. E. *Reflective Democracy* (Oxford: Oxford University Press, 2003); Dryzek, J.S. *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge: Cambridge University Press, 1999); Fuchs, D. *op cit.*, (2003).

¹⁴²² Dryzek, J.S. *op cit.*, (2000), p. 2.

¹⁴²³ *Ibid.*,

¹⁴²⁴ Rawls, J. *Political Liberalism* (New York: Columbia University Press, 1993), Chap. 4.

¹⁴²⁵ Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).

¹⁴²⁶ Martin, R. “Rawls” in Boucher, D. and Kelly, P. *op cit.*, (2003), p. 508.

¹⁴²⁷ Rawls, J. *op cit.*, (1993), Chap. 4.

¹⁴²⁸ Bayness, K. “Habermas” in Boucher, D. and Kelly, P. *op cit.*, (2003), pp. 486-85.

free and open debate.¹⁴²⁹ Both Rawls and Habermas developed explicitly normative accounts of deliberative democracy.¹⁴³⁰

Philosophers, political and legal theorists have contributed to the theory of deliberative democracy.¹⁴³¹ According to the theory of deliberative democracy, the deliberation of citizens is required in order to avoid imposition of decisions, taking into account that consent is the main characteristic of democracy.¹⁴³² It has been argued that majority decision-making that is preceded by deliberation is a more effective method of finding the moral good, than any one person's individual thought.¹⁴³³ In deliberative democracy, deliberators are amenable to changing their views during the course of interactions that involve persuasion rather than coercion or deception.¹⁴³⁴ Deliberative democracy is an ideal of political autonomy that is based on the reasoning of individuals.¹⁴³⁵ In the deliberative theory of democracy, citizens and their representatives can test their interests during public debate before they make decisions.¹⁴³⁶ During deliberation, individuals can exercise their moral powers as free and equal human beings.¹⁴³⁷ The theory of deliberative democracy reconciles democracy and human rights.¹⁴³⁸ It has been argued that deliberative democracy "can embrace difference as well as consensus, the public sphere as well as the state, transnational as well as domestic politics, and nature as well as humanity".¹⁴³⁹

According to the theory of deliberative democracy, "sometimes deliberative democracy can find a home in the state, but a vital civil society characterized by the contestation of discourses is always necessary. The authenticity of democracy requires in addition that these reflective preferences influence collective outcomes, and so both an orientation to the state and discursive mechanisms for the transmission of public opinion to the state are required, so long as the state is the

¹⁴²⁹ *Ibid.*, p. 485.

¹⁴³⁰ Elstub, S. "The Third Generation of Deliberative Democracy", (2010) (8) 3, *Political Studies Review*, p. 291.

¹⁴³¹ Eriksen, E. O. and Weigard, J. *Understanding Habermas: Communicative Action and Deliberative Democracy* (London: Continuum, 2003), p. 112.

¹⁴³² Bohman, J. *op cit.*, (2000) p. 4; Bohman J. and Rehg W. (eds.), *op cit.*, (1997), p 4.

¹⁴³³ Nino, C. *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996).

¹⁴³⁴ Dryzek, J.S. *op cit.*, (2000), p. 1.

¹⁴³⁵ Bohman J. and Rehg W. (eds.), *op cit.*, (1997), p. IX.

¹⁴³⁶ *Ibid.*, p. 5.

¹⁴³⁷ *Ibid.*, p. 7.

¹⁴³⁸ Nino, C. *op cit.*, (1996).

¹⁴³⁹ Dryzek, J.S. *op cit.*, (2000), p. 175.

main (though far from exclusive) locus of collective decision.”¹⁴⁴⁰ Democratic legitimacy has come to be viewed in terms of a chance to participate in deliberation on the part of those who are subject to collective decisions.¹⁴⁴¹ It has been argued that “outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question.”¹⁴⁴² In general terms, deliberative democracy argues that legitimate lawmaking requires the public deliberation of citizens.¹⁴⁴³ Reasoning concerning legitimacy illustrates the normative ideals of deliberative democracy.¹⁴⁴⁴

It has been argued that “deliberative democracy is not only normatively desirable in modern society but also necessary to solve the practical problems of liberal democracy”.¹⁴⁴⁵ The theory of deliberative democracy deepens democracy through focusing on the authenticity of democracy.¹⁴⁴⁶ It should be noted that dissemination and utilization of the electronic media is considered as a factor which can bring us closer to deliberative democracy.¹⁴⁴⁷

7.2.4 Descriptive Accounts of Democracy in Georgia

The phrase “new and emergent democracies” denotes those countries which have undergone a transition from an authoritarian political system to electoral democracy, for example the former Communist countries.¹⁴⁴⁸ Georgia is among such countries. Since the declaration of independence in 1991 from the Soviet Union, Georgia has been considered as a democratic country; however the process of democratic development in Georgia has rarely been smooth.¹⁴⁴⁹ Declaration of independence was followed by a military coup in 1992, separatist wars in two regions of Georgia, a large number of refugees, and poverty resulting from

¹⁴⁴⁰ *Ibid.*, p. 162.

¹⁴⁴¹ *Ibid.*, p. 1.

¹⁴⁴² Dryzek, J.S. “Legitimacy and Economy in Deliberative Democracy” (2001), Vol. 29 (5), *Political Theory*, p. 651.

¹⁴⁴³ Bohman J. and Rehg W. (eds.), *op cit.*, (1997), p. IX;

¹⁴⁴⁴ Moug, P. “*Institutionalizing Deliberative Democracy in Urban Waterways Governance*”, PSA Conference 2011, p. 6.

¹⁴⁴⁵ Fuchs, D. *op cit.*, (2003) p. 29.

¹⁴⁴⁶ Dryzek, J.S. *op cit.*, (2000), p. 175.

¹⁴⁴⁷ Fuchs, D. *op cit.*, (2003), p. 30.

¹⁴⁴⁸ Beetham, D. *op cit.*, (2005), p. 69.

¹⁴⁴⁹ 9. Socio Economic Baseline, The BTC Project ESIA, Georgia, 2002, p. 9-4.

economic stagnation and corruption.¹⁴⁵⁰ In 1995 the Constitution of Georgia was adopted which provides for the division of powers between executive, legislative and judiciary; for regular parliamentary and presidential elections; and for a comprehensive list of human rights and fundamental freedoms.¹⁴⁵¹ According to the Constitution of Georgia the Parliament of Georgia is the supreme representative body of the state, which holds the legislative power and exercises control over the government; members of the Parliament are elected for a term of four years by direct suffrage and secret ballot; the President of Georgia is the head of state and is elected for a term of five years, with a maximum of two consecutive terms, by direct suffrage and secret ballot; the government of Georgia, with the Prime Minister as the head of the government, exercises the executive power and is responsible before the President and the Parliament; the Constitutional Court of Georgia is the judicial body of constitutional review; justice is administered by general courts and the Supreme Court of Georgia is the highest court of cassation.¹⁴⁵² Thus it can be argued that Georgia has adopted a representative or liberal model of democracy. It should be noted that in Georgia a multiparty political system has been developed in which the opposition is free to express its criticism.¹⁴⁵³ Since its independence, Georgia has been trying to develop a market-based economy.¹⁴⁵⁴

Parliamentary and presidential elections held in Georgia were usually deemed *relatively* free and fair by the international community.¹⁴⁵⁵ In 1996 Georgia applied for the membership of the Council of Europe and in 1999, the Parliamentary Assembly of the Council of Europe acknowledged that Georgia was a democratic country, respectful of human rights and the rule of law, and therefore made a positive decision on Georgia's application to accede to the organization.¹⁴⁵⁶ However on the same occasion the Parliamentary Assembly set out a list of

¹⁴⁵⁰ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2000, p. 1, available at <<http://www.state.gov/g/drl/rls/hrrpt/1999/330.htm>> [accessed on 26th June, 2011]; After the Rose Revolution: Trends of economic development and its impact on Georgia, March, 2007, CEE Bankwatch Network and Green Alternative, p. 3.*

¹⁴⁵¹ *The Constitution of Georgia* (1995), Chapters II and III.

¹⁴⁵² Chapters 3-5 of the Constitution of Georgia.

¹⁴⁵³ Davis, T. *Georgia's Application for Membership of the Council of Europe*, Report, Political Affairs Committee, the Council of Europe, 2 December, 1998, paragraph 86.

¹⁴⁵⁴ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2000, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/1999/330.htm>> [accessed on 26th June, 2011].*

¹⁴⁵⁵ 9. Socio Economic Baseline, The BTC Project ESIA, Georgia, 2002, p. 9-4.

¹⁴⁵⁶ Opinion No. 209 (1999), *Georgia's Application for the Membership of the Council of Europe*, Parliamentary Assembly of the Council of Europe, 1999, paragraph 6.

political commitments for Georgia covering various obligations in the field of strengthening of democratic institutions, human rights protection, fight against corruption and reform of the judiciary and the police.¹⁴⁵⁷

Numerous allegations have been made regarding the poor human rights' record in Georgia and of systematic human rights abuses by the security forces of Georgia; however it has been noted that such abuses steadily decreased from the first years of independence.¹⁴⁵⁸ In 2001 the Council of Europe, which established the monitoring of the honouring of obligations by Georgia, stated the following: “[the Council of Europe] expresses its deep concern on allegations of ill-treatment or torture of detainees in police custody and pre-trial detention, cases of arbitrary arrests and detentions, violations of rights under police arrest or in pre-trial detention – in particular the right to consult a lawyer and the right to communicate with the family - , complaints on violation of procedural rights, cases of intimidation, violation of the right to privacy, phone tapping, etc. It is alarmed by the behaviour of police and other law enforcement bodies and condemns any disproportionate violence used by security forces against peaceful demonstrators”.¹⁴⁵⁹ In the years 2002-2004 intimidation of journalists and violent dispersal of demonstrations have been reported.¹⁴⁶⁰ It has been argued that in years 2000-2003 the judiciary in Georgia was subject to executive pressure and corruption.¹⁴⁶¹ Civil society in Georgia, which is in the process of evolution, could

¹⁴⁵⁷ *Ibid.*

¹⁴⁵⁸ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2000, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/1999/330.htm>> [accessed on 26th June, 2011]; *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 25, 2003, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27838.htm>> [accessed on 28th June, 2011].**

¹⁴⁵⁹ *Honouring of Obligations and Commitments by Georgia*, Report No. 9191, 13 September, 2001, Monitoring Committee of the Council of Europe, paragraph 11.

¹⁴⁶⁰ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 25, 2003, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27838.htm>> [accessed on 28th June, 2011]; *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 28, 2004, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41682.htm>> [accessed on 28th June, 2011].**

¹⁴⁶¹ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, March 4, 2002, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8256.htm>> [accessed on 28th June, 2011]; *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2001, p. 1, available at <<http://www.state.gov/g/drl/rls/hrrpt/2000/eur/760.htm>> [accessed on 29th June, 2011]; *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 25, 2003, p. 2, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27838.htm>> [accessed on 28th June, 2011].***

not provide a check on the excesses of the police.¹⁴⁶² It was noted in 2001 that civil society in Georgia was still underdeveloped.¹⁴⁶³ Even at present, the development of civil society in Georgia has been considered as a challenge since the post-communist historical legacy significantly affected Georgia's cultural values and created obstacles to the establishment of a strong civil society.¹⁴⁶⁴

On numerous occasions, elections held in Georgia were criticized by international observers due to the interference by the state authorities in the electoral process and unreliable voter registers.¹⁴⁶⁵ The Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE made a critical assessment of the electoral processes in Georgia.¹⁴⁶⁶ In 2001 the Council of Europe expressed concern about the gap between the formal laws and their practical implementation and about police harassment during the presidential and parliamentary election campaigns in 1999.¹⁴⁶⁷ It also noted violations of electoral legislation during elections.¹⁴⁶⁸ In 2003 the problem of vote buying during election campaigns caused concern.¹⁴⁶⁹ It should be noted that in November 2003 parliamentary elections were held in Georgia which were marred by serious irregularities and that resulted in major opposition parties holding street protests, eventually leading to the resignation of the president and the triumph of the so-called Rose Revolution.¹⁴⁷⁰ The latter, which took place in November 2003, was supposed to bring to an end to corruption and economic stagnation and it brought new hope to the population of Georgia on the strengthening of democracy.¹⁴⁷¹ In 2004, after the revolution, the Parliamentary Assembly of the Council of Europe issued a recommendation to Georgia calling “to put a stop to the excesses which for years accompanied the autocratic exercise

¹⁴⁶² *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2000, p. 3, available at <<http://www.state.gov/g/drl/rls/hrrpt/1999/330.htm>> [accessed on 26th June, 2011].*

¹⁴⁶³ *Honouring of Obligations and Commitments by Georgia, Report No. 9191, 13 September, 2001, Monitoring Committee of the Council of Europe, p. 1, paragraph 90 (Section III).*

¹⁴⁶⁴ *Civil Society Support Program 2009-2011, Open Society Georgia Foundation, 2009.*

¹⁴⁶⁵ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 23, 2001, p. 1, available at <<http://www.state.gov/g/drl/rls/hrrpt/2000/eur/760.htm>> [accessed on 29th June, 2011].*

¹⁴⁶⁶ *Georgia, Elections 1999, Final Report, the ODIHR, the OSCE, 1999.*

¹⁴⁶⁷ *Honouring of Obligations and Commitments by Georgia, Report No. 9191, 13 September, 2001, Monitoring Committee of the Council of Europe, p. 1, paragraph 12 (Section II).*

¹⁴⁶⁸ *Ibid.*

¹⁴⁶⁹ *Honouring of Commitments by Georgia: Report of the visit by the GR-EDS delegation on 8 and 9 July, 2003, Rapporteur Group for Democratic Stability, the Council of Europe, 28 July 2003, paragraph 13.*

¹⁴⁷⁰ *Georgia, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 25, 2003, p. 1, available at <<http://www.state.gov/g/drl/rls/hrrpt/2003/27838.htm>> [accessed on 28th June, 2011].*

¹⁴⁷¹ *After the Rose Revolution: Trends of economic development and its impact on Georgia, March, 2007, CEE Bankwatch Network and Green Alternative, p. 3.*

of power in Georgia, and to demonstrate their willingness to ensure institutional functioning which complies with democratic standards and with the principles and values of the Council of Europe.”¹⁴⁷² Improvements in the holding of democratic elections, fights against corruption and protection of human rights were reported after the Rose Revolution.¹⁴⁷³ It should be emphasized that after the revolution, progress of Georgia in the field of the functioning of democratic institutions, judiciary, police and in the fight against corruption was acknowledged by the Council of Europe; however the necessity for further steps was stressed.¹⁴⁷⁴

It is noteworthy that until the present day, Freedom House considers Georgia as a “partly free country” and as to its democracy, they rank Georgia among “transitional governments or hybrid regimes.”¹⁴⁷⁵ Freedom House, which is an independent watchdog organization, measures freedom according to two categories: “political rights and civil liberties. Political rights enable people to participate freely in the political process through the right to vote, compete for public office and elect representatives who have a decisive impact on public policies and are accountable to the electorate. Civil liberties allow for the freedoms of expression and beliefs, association and organizational rights, rule of law, and personal autonomy without interference from the state.”¹⁴⁷⁶

7.2.5 Links between the Deficiencies of Georgian Democracy and the Exercise of the Rights of Access to Environmental Information and Participation in Environmental Decision-making under the Aarhus Convention in the Context of Formally Adjudicated Complaints

Normative accounts of democracy in section 7.2.3 and descriptive accounts of democracy in Georgia in section 7.2.4 suggest that, particularly in the years when the BTC project development took place, Georgia was far from meeting the

¹⁴⁷² Recommendation 1643 (2004), *Functioning of Democratic Institutions in Georgia*, the Parliamentary Assembly of the Council of Europe, 28 January, 2004, p. 1.

¹⁴⁷³ *Georgia, Country Reports on Human Rights Practices*, Bureau of Democracy, Human Rights and Labor, the U.S. Department of State, February 28, 2005, p. 1, available at <<http://www.state.gov/g/drl/rls/hrrpt/2004/41682.htm>> [accessed on 28th June, 2011].

¹⁴⁷⁴ *Honouring of Commitments by Georgia: Report by the GR-EDS delegation on its visit from 16 to 18 November, 2004*, Rapporteur Group for Democratic Stability, the Council of Europe, 10 December, 2004, paragraph 32.

¹⁴⁷⁵ Democracy Web: Comparative Studies in Freedom, Freedom House and the Albert Shanker Institute, available at <www.democracyweb.org/new-map/> [accessed on 2nd July, 2011]; *Democracy Score Rankings*, Freedom House, 2006 Edition.

¹⁴⁷⁶ *Frequently Asked Questions*, Freedom House, available at <www.freedomhouse.org/template.cfm?page=265> [accessed on 2nd July, 2011].

demands of a modern liberal democracy: the problems existed not only with regard to the non-existence of elements of normative models of developmental and deliberative democracies such as broad public participation between elections by a strong civil society and extensive debates on the issues of common interest, but also with regard to basic necessary elements of a normative model of a liberal democracy such as the holding of free elections and the protection of human rights. Descriptive accounts of democracy in Georgia suggest the existence of significant deficiencies in Georgian democracy. And the examination in section 7.2.1, suggests the existence of serious problems regarding the proper functioning of democracy in Georgia.

The argument for procedural environmental rights assumes that governments that promote openness, accountability, and civic participation are more likely to promote environmental protection than closed, totalitarian, or undemocratic states: for example, East European states had disastrous environmental record pre-1991, and the same can be said about contemporary China; however the case of *Maya Indigenous Community* demonstrates that in democratic states indigenous peoples can be deprived of the possibility to participate in decision-making on the use of natural resources.¹⁴⁷⁷ It has been noted that states should have the political will to create participatory space and to enable public participation in environmental decision-making.¹⁴⁷⁸ Therefore, it is relevant to examine whether deficiencies of Georgian democracy could hinder, in the context of formally adjudicated complaints, the exercise of the rights of access to environmental information and participation in environmental decision-making as granted under the Aarhus Convention.

The analysis in *Chapter Six* suggests that the government of Georgia did not implement the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention in the context of decision-making on the BTC project. According to the complaint to the CAO by the residents of the 18th and 19th subdistricts of the town of Rustavi, before the decision on granting Environmental Permit No.0011 was made on 30 November 2002 there were rumours, that the BTC pipeline would pass close to the

¹⁴⁷⁷ Birnie, P. Boyle, A. and Redgwell, C. *op cit.*, (2009), p. 289; *Maya Indigenous Community Case*, paragraphs 154-5.

¹⁴⁷⁸ Picolotti, R. "Agenda 21 and Human Rights: The Right to Participate" in Picolotti, R. and Taillant, J. D. (eds), *Linking Human Rights and the Environment* (Tucson, Arizona: The University of Arizona, 2003), p. 53.

complainants homes; however their efforts to obtain information on the route of the pipeline from the government was unsuccessful. An examination in *Chapter Six* and in section 7.2.1 of this chapter suggests that the Georgian government knew the route of the pipeline; however it had the policy of secrecy of information on the BTC project and a policy of ignoring and suppressing demands and concerns of the citizens of Rustavi; the general determination within the authorities of Georgia was to suppress all resistance of its citizens to the BTC pipeline. It should be recalled here that normative accounts of democracy argue that the right to know what the authorities are doing in the name of the people, should be the foundation of democracy. According to normative accounts of the developmental model of democracy, there is a necessity of public access to official information concerning the activities of the government as opposed to the monopolization of information and secrecy of the government. It should be stressed that no attempts were undertaken by the Georgian government to subject its decision on the BTC project to deliberative discourse among the affected members of the public; only the positive geopolitical aspects of the pipeline were included in the governmental propaganda. The actions of the government of Georgia did not comply with the requirements of normative models of democracy, as they should in contemporary society. The examination suggests that the government had no political will to disclose environmental information on the BTC project and to create participatory space for public participation in environmental decision-making on the BTC project. Considering that access to environmental information is a pre-requisite for effective public participation, it can be argued that the existence of deficiencies in Georgian democracy in the form of pursuing the general policy of secrecy of information and of ignoring requests and concerns of its citizens, hindered the exercise of the rights of access to environmental information and therefore participation in environmental decision-making under the Aarhus Convention in the context of the BTC project in the case of the residents of the 18th and 19th subdistricts of the town of Rustavi. It should be taken into consideration that according to the interview conducted with the resident of the village of Dgvari, before the decision on granting Environmental Permit No.0011 was made on 30 November 2002, there were rumours that the BTC pipeline would pass close to the village; however the efforts of the villagers to obtain information from the local municipality on the route of the pipeline was unsuccessful and was even followed by intimidation. The examination in *Chapter Six* and in section 7.2.1 of this chapter suggests that there was a general atmosphere within the authorities of

Georgia not to disclose information on the BTC project to the residents of Dgvari and to ignore and suppress the concerns of the citizens of Dgvari. Here again, it can be argued that the existence of deficiencies in Georgian democracy, hindered the exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention, in the context of the BTC project in the case of the residents of the village of Dgvari. Based on the examination in *Chapter Six* and in section 7.2.1 of this chapter it can be further argued that the general determination of the government of Georgia to ignore and suppress concerns of its citizens could have contributed to the failure of the members of the public to exercise the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention, in the context of decision-making on granting Permit No. 0122 to the SPJV.

7.4 Conclusions

It can be concluded that the deficiencies of Georgian democracy hindered in the context of formally adjudicated complaints, the exercise of the rights of access to environmental information and participation in environmental decision-making as granted under the Aarhus Convention.

It can be argued that societies which experience a lack of democracy are inclined to be more closed and heavily centralised, leading to preclusion of the members of the public from being duly informed and being participants of governmental decision-making. In practice, the lack of basic elements of normative models of developmental and deliberative democracies can hinder members of the public in exercising effectively the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention. If the elected government does not practice a developmental model of democracy and has a general policy of secrecy of official information and of ignoring public opinion in between elections, it can be extremely difficult for the public to exercise effectively the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention. In such an environment, it can be difficult to obtain information on controversial projects and to affect those decisions that are politically and/or economically favorable to

government, but that might have a negative environmental impact on some members of the public. And if the elected government does not practice elements of a deliberative model of democracy, it can be difficult for members of the public to get information, in advance, about proposed environmentally controversial decisions, and to assess negative and positive sides of such developments and to participate meaningfully in decision-making concerning them. Moreover, absence of deliberative democracy and due deliberation can ease supporters of environmentally controversial projects to brainwash the public at large by propaganda and this can preclude members of the public from meaningful participation under the Aarhus Convention. A genuinely democratic country must secure the general favorable environment for public participation and information disclosure in between elections that is the necessary pre-requisites for the effective exercise of the rights under the Aarhus Convention. It can be further argued that procedural environmental rights under the Aarhus Convention cannot be exercised effectively, if at all, in the absence of a democratic system of governance. Therefore it can be concluded, based on the examination in this chapter, that the existence and proper functioning of democracy are among the necessary pre-requisites for the effective exercise of the rights of access to environmental information and public participation under the Aarhus Convention.

Chapter Eight: Conclusions

This PhD includes a case study on the BTC project and aims to examine questions related to the implementation and exercise of procedural environmental rights under the Aarhus Convention. It also aims to examine the requirements of business entities with regard to the disclosure of information and public consultation under the Equator Principles. The initial part of the thesis examines the extent of state obligations under the Aarhus Convention; the requirements of private sector borrowers under the Equator Principles regarding the disclosure of information and public consultation; and the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection.

This PhD dissertation seeks to make an original contribution to knowledge through the BTC case study and through the drawing up of conclusions on the legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and the domestic normative acts of Georgia; non-implementation by Georgia of procedural environmental rights under the Aarhus Convention and the domestic normative acts of Georgia in the context of the BTC project; violation by Georgia of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR in the BTC project context; non-compliance by the BTC Co. with the requirements of the Equator Principles and the BTC project agreements regarding the disclosure of information and public consultation, and therefore committing a breach by the “Equator” banks themselves of the Equator Principles; existence of links in the BTC project context between the deficiencies of Georgian democracy and the hindrance to the exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention; existence of links in the BTC project context between the violation of the rights to freedom of expression and to freedom of assembly under the ECHR and hindrance to the exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention; existence of links in the BTC project context between the non-implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention and violation of the right to respect for private and home life and the right to property under the ECHR.

The study seeks also to make an original contribution to knowledge by reaching conclusions as to how to redress the shortcoming of the revised Equator Principles and how to improve the implementation of the Equator Principles on behalf of the “Equator” banks.

The case study includes five interviews as an adjunct, in order to illustrate the points being made in the doctrinal part of the thesis. These interviews attempt to uncover the actual operation of the formal laws in the context of Georgia. By means of interviews primary data was collected. Information collected as a result of interviews generally constitutes unverified information; however this information cannot be considered irrelevant since many other sources used in the analysis of the four formally adjudicate complaints indicate the reliability and the relevance of the stories and positions expressed during the interviews. There are some important details in the interviews that were not provided by other written sources; however the rationale behind the interviews was to collect additional and more detailed information on the issues discussed in the existing sources on the four formally adjudicated complaints. And the attempts of the verification of such information by the researcher might involve the risk of exposing the identity of the respondents and pose a risk regarding the confidentiality and ethical aspects of the interviews conducted. Therefore it can be argued that despite possible question marks on the unverified nature of information collected through the interviews, it nevertheless served as a valuable source of detailed information on the research questions.

8.1 Findings of the Initial Part of the Study

The initial part of the study examines the extent of state obligations under the Aarhus Convention; it concludes that the Convention grants extensive and detailed rights of access to environmental information, participation in environmental decision-making, and access to justice, and thus creates extensive and detailed obligations for the legislative, executive and judicial authorities of Parties for the implementation of the Convention rights. The three procedural environmental rights under the Aarhus Convention are closely interrelated; absence of access to environmental information can result in the lessening of the effectiveness of public

participation, since it requires availability of environmental information to be informed and effective; the public participation provisions provide a certain framework for the disclosure of necessary environmental information for those who enjoy the right of participation; and the enforcement of rights of access to environmental information and public participation depend on the implementation of the access-to-justice pillar. NGOs enjoy the three procedural environmental rights under the Aarhus Convention and they can act on behalf of public interest on environmental issues.

The initial part of the study examines the requirements of private sector borrowers under the Equator Principles regarding the disclosure of information and public consultation; it concludes that the Equator Principles, as a “soft law” initiative, create different requirements for the banks which adopted these principles and for the borrowers which apply for loans to such banks: namely when the principles are adopted, the Equator Banks are required to adhere to these principles by ensuring that they do not provide loans to borrowers which do not comply with the requirements of this document, and the borrowers are required to comply with the principles if they intend to obtain a loan from an Equator Bank. Principle 5 of the Equator Principles addresses the requirements of borrowers regarding disclosure of information and public consultation. Under Principle 3 of the Equator Principles, the borrowers are required, in order to obtain loans from the Equator Banks, to comply with the minimum standards of disclosure of information and public consultation within the EA procedure that are set out in the IFC Environmental Assessment OP4.01 (1998) which provide for the requirements that are multi-tiered and thus more extensive and more detailed than the requirements under Principle 5 of the Equator Principles.

The initial part of the study examines the European Convention on Human Rights (ECHR) in the light of its potential to be used for environmental protection; it concludes that Article 8 and Article 1 of Protocol No. 1 of the ECHR can be violated by environmental harm arising from private industry; the positive obligation requires states to take appropriate measures for the prevention of nuisances arising from private industries; and the principle of proportionality and the doctrine of a margin of appreciation apply to these articles; Article 8 and Article 1 of Protocol No. 1 can be interpreted in certain situations to encompass the right to access to environmental information held by public authorities. Article 8 is

interpreted to include procedural safeguards: when assessing the proportionality of interference of nuisances with the right under Article 8, the ECtHR takes into account whether the government provided access to potentially affected individuals to information on the environmental impact of decisions and whether the government provided the possibility for the individuals concerned to participate in decision-making in environmental matters. The right to property under Article 1 of Protocol No. 1 may be violated when the property declines in value as a result of environmental nuisances which may be grave enough to amount to a *de facto* expropriation. The right to freedom of expression and the right to peaceful assembly under the ECHR may have an impact on the environmental sphere, if environmental changes are promoted through public protest.

8.2 Findings of the Case Study and an Original Contribution to Knowledge

8.2.1 Relationship Between the Aarhus Convention, the BTC Project Agreements and the Domestic Normative Acts of Georgia

The case study examines in *Chapter Five* the legal regime of the BTC project in the light of the relationship between the BTC project agreements, the Aarhus Convention and the domestic normative acts of Georgia; it concludes that the IGA and HGA, similar to the Aarhus Convention, have the status of binding international agreements under international law and, according to the Constitution of Georgia take precedence over the domestic normative acts of Georgia; the Vienna Convention on the Law of Treaties cannot resolve a possible tension between the Aarhus Convention and the BTC project agreements; considering the wording of the HGA, the project agreement may prevail over the Aarhus Convention if a conflict of application arises in relation to the BTC project; tension may arise only between Section 7.3 of the HGA and Article 6 of the Aarhus Convention, however of not great significance; the provisions of the domestic normative acts of Georgia on procedural environmental rights do not contradict the provisions of the Aarhus Convention.

8.2.2 Non-Implementation by Georgia of Procedural Environmental Rights under the Aarhus Convention and the Domestic Normative Acts of Georgia, Violations by Georgia of Articles 8, 1 of Protocol No. 1, 10 and 11 of the ECHR, and Non-Compliance by the BTC Co. with the Requirements of the Equator Principles and the BTC Project Agreements

The case study examines the formal litigation process initiated by Green Alternative concerning Environmental Permit No. 0011 on the construction and operation of the BTC pipeline project by the BTC Co. and concludes the following: Article 6, paragraphs 2, 3, 4, 6, 7, 8 and 9, Article 5, paragraph 1 (b) and 5, and Article 9, paragraph 4 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection were not implemented by Georgia when granting Environmental Permit No. 0011 to the BTC Co.

The case study examines the formal litigation process initiated by Green Alternative concerning Environmental Permit No. 0122 on storage of waste and operation of a waste incinerator by the BTC Co.'s contractor, the SPJV, and concludes the following: Environmental Permit No. 0122 violated Article 6, paragraphs 2, 3, 4, 6, 7, 8 and 9, and Article 5, paragraph 1 (b) of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection; Order No. 55 of the Minister of Environment violated Article 4, paragraph 2 (j), of the Law of Georgia on Environmental Permit and it had a negative impact on the prospect of the implementation of Article 6 of the Aarhus Convention.

The case study examines the complaint to the CAO by the Residents of the 18th and 19th subdistricts of the town of Rustavi and concludes the following: the government of Georgia did not implement Article 4, paragraphs 1, 2 and 3, Article 5, paragraph 1 (b), paragraph 2 (a) and (b) and Article 6 of the Aarhus Convention, Articles 37, 40 (1) and 80 of the General Administrative Code of Georgia, Article 41, paragraph 1 of the Constitution of Georgia, Article 7 of the Law of Georgia on

Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, Article 6, paragraph (f) of the Law of Georgia on Environmental Protection and Article 27 of the Law of Georgia on Environmental Protection; the government of Georgia violated the right to respect for private and home life under Article 8, the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR; the BTC Co. did not comply with its own requirements regarding the disclosure of information and public consultation under a) Principle 5 of the Equator Principles; b) paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) which was referred to in Principle 3 as a standard to be complied with; c) Section 3.9 (iii) of Appendix 3 of the HGA and various statements made in the ESIA report; the Equator Banks did not adhere to its own requirements under the Equator Principles when making their decision on providing a loan to the BTC Co.

The case study examines the complaint to the CAO regarding the village of Dgvari and concludes the following: the government of Georgia did not implement Article 6 and Article 5, paragraph 1 (b), paragraph 1 (c), paragraph 2 (a) and (b), Article 4, paragraphs 1, 2 and 3 of the Aarhus Convention, Article 7 of the Law of Georgia on Environmental Permit, Article 4 of the Law of Georgia on the Preparation of Conclusions by Governmental Ecological Experts, and Article 6, paragraph (f) of the Law of Georgia on Environmental Protection, Article 27 of the Law of Georgia on Environmental Protection, Articles 37, 40 (1) and 80 of the General Administrative Code of Georgia and Article 41, paragraph 1 of the Constitution of Georgia; the government of Georgia violated the right to property under Article 1 of Protocol No. 1, the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR; the BTC Co. did not comply with its own requirements regarding the disclosure of information and public consultation under a) Principle 5 of the Equator Principles; b) paragraphs 12, 14 and 15 of the IFC Environmental Assessment OP4.01 (1998) which was referred to in Principle 3 as a standard to be complied with; c) Section 3.9 (iii) of Appendix 3 of the HGA and various statements made in the ESIA report; the Equator Banks did not adhere to its own requirements under the Equator Principles when making their decision on providing a loan to the BTC Co.

8.2.3 Existence of Links Between Deficiencies of Georgian Democracy and Hindrance to the Exercise of the Rights of Access to Environmental information and Participation in Environmental Decision-Making under the Aarhus Convention

The case study examines the existence of links in the BTC project context between the proper functioning of democracy and the effective exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention and concluded the following: the deficiencies of Georgian democracy hindered in the context of formally adjudicated complaints, the exercise of the rights of access to environmental information and participation in environmental decision-making as granted under the Aarhus Convention and therefore it can be argued that the existence and proper functioning of democracy is among the necessary pre-requisites for the effective exercise of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention.

It should be emphasized here that there is a gap in the literature on the issue of the dependency of the Aarhus Convention on a certain quality of democracy.

8.2.4 Existence of Links Between the Violation of the Rights to Freedom of Expression and to Freedom of Assembly under the ECHR and Hindrance to the Exercise of the Rights of Access to Environmental Information and Participation in Environmental Decision-Making under the Aarhus Convention

Public participation in environmental decision-making under the Aarhus Convention implies expression of opinion on a proposed project which may take place at a public hearing. Therefore it can be argued that the right to freedom of expression under Article 10 and the right to freedom of assembly under Article 11 of the ECHR can protect the content of the participants' views on the environmental impact of the proposed project and also protect the form in which it takes place, for example a public hearing that is a gathering of individuals. However it is another question to which extent the exercise of rights under Articles 10 and 11 of the ECHR can be considered as necessary pre-requisites for the

effective exercise of the right of participation under the Aarhus Convention. It was stated in the interview by the respondent from an NGO, that when consulted by the BTC Co. in summer, some of the stakeholders were afraid to speak out publicly. If the stakeholder is oppressed and intimidated by the government, public participation under the Aarhus Convention will be only a formality.

It can be argued that if stakeholders' to peaceful assembly and demonstration are not guaranteed, and if they cannot demand information disclosure regarding for example an environmentally controversial project, which is not publicized by the government, then how their rights of access to information and public participation under the Aarhus Convention can be exercised? In certain situations, stakeholders might deem it appropriate to hold a demonstration to show their attitude to the proposed project and to draw attention of the government and a wider public, and if they are prevented from doing this, then the hidden information can easily remain undisclosed and no public participation arranged.

The examination in *Chapter Six* suggests that the government of Georgia violated the right to freedom of expression under Article 10 of the ECHR, and the right to freedom of peaceful assembly under Article 11 of the ECHR of the residents of the 18th and 19th subdistricts of the town of Rustavi and of villagers of Dgvari on numerous cases. However it should be emphasized that all these violations of these rights with regard to residents of Rustavi and Dgvari took place after the decision on granting Environmental Permit No.0011 was made on 30 November, 2002. Therefore these violations cannot be considered in the light of circumstances which prevented the effective exercise of the right of access to environmental information and public participation under the Aarhus Convention on decision-making regarding Permit No.0011. Here it should be taken into consideration that, according to additional information collected as a result of the interview with the resident of the village of Dgvari, the villagers were prevented by police through severe forms of intimidation to hold a peaceful protest action in front of the regional municipality building in summer 2002 in order to express their concern on the possible proximity of the pipeline to their homes and in order to demand detailed information on the route of the pipeline. *Chapter Six* concluded, based on the information obtained through the interview, that in this case the government of Georgia violated Articles 10 and 11 of the ECHR. It can be argued that violations of Articles 10 and 11 of the villagers of Dgvari in summer 2002 could hinder the

exercise of the rights of access to information and public participation under the Aarhus Convention in the context of the BTC project. A peaceful assembly can be used for the purpose of demanding environmental information from a government as it could have been the case of the Dgvari villagers if allowed to gather in front of the regional municipality, and freedom of expression can be used to convey concerns on the possible environmental effects of the proposed activity as it could have been the case of the Dgvari villagers if allowed to gather and express views in front of the regional municipality. Thus it can be argued that the enjoyment of freedom of expression and freedom of assembly can be considered as necessary pre-requisites for the effective exercise of the rights of access to environmental information and public participation under the Aarhus Convention.

It should be emphasized here that there is a gap in the literature on the issue of the dependency of the Aarhus Convention on Articles 10 and 11 of the ECHR.

8.2.5 Existence of Links Between the Non-Implementation of the Rights of Access to Environmental Information and Participation in Environmental Decision-Making under the Aarhus Convention and Violations of the Right to Respect for Private and Home Life and the Right to Property under the ECHR.

The examination in *Chapter Four* suggests that the rights under Article 8 and Article 1 of Protocol No. 1 of the ECHR can be violated as a result of environmental harm and the examination in *Chapter Two* suggests that the procedural rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention give possibilities to concerned individuals to prevent potential environmental harm. Additionally it should be noted that the examination in *Chapter One* suggests that the EIA procedure, which serves as a framework for the implementation of procedural environmental rights, provides a mechanism for the prevention of environmental harm. Therefore it can be argued that generally the implementation of the Aarhus Convention can contribute to the protection of the individuals concerned from violation of their rights to respect for private and home life and to property through environmental harm.

It should be also taken into consideration that the examination in *Chapter Four* suggests that the right to respect for private and home life under Article 8 of the ECHR can be violated as a result of the lack of access to environmental information held by public authorities: meaning that Article 8 is being interpreted by the ECtHR to encompass the right to access to environmental information held by public authorities. Article 8 is interpreted by the ECtHR to include procedural safeguards, more specifically when assessing the proportionality of the interference of nuisances with the right under Article 8, the Court takes into account whether the government provided access to potentially affected individuals to information on environmental impacts of the decision and whether the government provided the possibility for potentially affected individuals to participate in decision-making in environmental matters. As already noted in *Chapter Four*, the case law of the ECtHR recognizes the relevance of the principles enshrined in the Aarhus Convention for the ECHR when dealing with cases under Article 8 in matters of environmental protection. Discussion in *Chapter Four* also suggests that the right to property under Article 1 of Protocol No. 1 of the ECHR can be also violated as a result of the lack of access to environmental information. Therefore it can be argued that the implementation of strong and detailed rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention can contribute to the protection of the rights under Article 8 and Article 1 of Protocol No. 1, which imply relatively general requirements in the context of environmental issues regarding access to environmental information and public participation in environmental decision-making.

The analysis in *Chapter Six* concludes that the government of Georgia did not implement rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention, in the context of the four formally adjudicated complaints. And according to conclusions made in *Chapter Six*, the right to respect for private and home life of the residents of the 18th and 19th subdistricts of Rustavi under Article 8 of the ECHR was violated as a result of environmental harm - nuisances in the form of systematic smell and loud noise arising from the construction of the BTC pipeline within 250 metres of the residents' homes -, and as a result of the failure of the government to take adequate measures with regard to these nuisances. Residents of these subdistricts unsuccessfully requested information on the proximity of the pipeline from the

government before the decision on granting Environmental Permit No. 0011 to the BTC Co. was made on 30 November, 2002 and they were not given a chance to participate in the environmental decision-making on the BTC project proposal; they only discovered that the pipeline would pass so close to their homes when the construction works of the pipeline started in January 2004. Therefore it can be argued that the implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention would have enabled the residents of these subdistricts to obtain information on the proximity of the route of the pipeline to their homes and express their concerns, which in fact were expressed through other forms, on possible environmental nuisances: the implementation of Article 6, paragraph 8 of the Aarhus Convention could have resulted in certain measures, for example a temporary resettlement of these residents by the government that would have excluded the violation of Article 8 of the ECHR. Thus it can be concluded, based on the Rustavi case, that the non-implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention, conditioned the violation of Article 8 of the ECHR.

According to conclusions made in *Chapter Six*, provided that there was the causal link between the construction of the pipeline only 1 km from the village of Dgvari and the activation of landslides in Dgvari, the right to property of the villagers of Dgvari under Article 1 of Protocol No. 1 of the ECHR was violated as a result of environmental harm – damage to the houses of the villagers by the activation of the landslides, and as a result of the failure of the government to take adequate measures with regard to this damage. Residents of Dgvari unsuccessfully requested information from the government on the proximity of the pipeline before the decision on granting Environmental Permit No. 0011 to the BTC Co. was made on 30 November, 2002 and they were not given a chance to participate in environmental decision-making on the BTC project proposal; the villagers discovered that the pipeline would pass so close to their homes in 2003. Considering the construction of the pipeline only 1 km from the village, it can be further argued that the government of Georgia did not implement Article 5, paragraph (c) of the Aarhus Convention: Dgvari is recognized as a landslide prone area and the government had to disseminate emergency information to the villagers according to Article 5, paragraph (c) of the Aarhus Convention which does not require actual harm as a precondition for the dissemination of information.

Therefore it can be argued that the implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention would have enabled the villagers to obtain information on the proximity of the route of the pipeline to their homes and express their concerns, which in fact were expressed through other forms, on possible environmental damage to their homes: the implementation of Article 6, paragraph 8 of the Aarhus Convention could have resulted in certain measures for example adequate compensation by the government that would have excluded the violation of Article 1 of Protocol No. 1 of the ECHR. Thus it can be concluded, based on the Dgvari case, that the non-implementation of the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention conditioned the violation of Article 1 of Protocol No. 1 of the ECHR, provided that there was the causal link between the construction of the pipeline and the activation of landslides in the village.

Thus it can be concluded that the non-implementation of the rights of access to environmental information and participation in environmental decision-making in the BTC project context, conditioned the violation of Article 8 and Article 1 of Protocol No. 1 of the ECHR, and that the rights of access to environmental information and participation in environmental decision-making, if successfully implemented in the BTC project context, would have contributed to the protection of the right to respect for private and home life and the right to property. Therefore it can be argued that generally the rights of access to environmental information and participation in environmental decision-making under the Aarhus Convention, when successfully implemented, can benefit the rights under Article 8 and Article 1 of Protocol 1 of the ECHR.

It should be emphasized here that there is a gap in the literature on the issue of the benefits of the implementation of the Aarhus Convention for ECHR rights.

It can be also concluded based on the examination in *Chapter One*¹⁴⁷⁹ that the implementation of the rights of access to environmental information and participation in environmental decision-making granted under the Aarhus Convention can improve the quality of the democratic system involved and develop or strengthen a deliberative democratic process. However it should be

¹⁴⁷⁹ See Chapter One, section 1.7.

emphasized that the nature of the BTC case study does not allow to draw conclusions whether the implementation of the rights of access to environmental information and participation in environmental decision-making contributed to the improved democracy; these rights were not implemented in the BTC project context and it is very difficult to examine in terms of the facts whether the non-implementation damaged democracy in Georgia: only a general assumption can be made that this was the case.

8.3 Equator Principles

The lawsuit filed by Green Alternative in the Tbilisi Regional Court on 23 June, 2004 against the Ministry of Environment, concerning Environmental Permit No. 0122 issued to the SPJV, demonstrates that a project might need a later additional activity which was not initially scrutinised by the authorities of a host country. On 30 November, 2002 the Ministry of the Environment of Georgia issued Environmental Permit No. 0011 to the BTC Co. on the construction and operation of the BTC pipeline in Georgia and the BTC Co. started the construction of the BTC pipeline in April 2003. However, on 6 November, 2003 the BTC Co.'s construction contractor, the SPJV, filed an application at the Ministry of Environment of Georgia requesting a permit for an additional activity of the BTC project concerning storage of waste in special containers and the operation of a waste incinerator.

It can be argued that theoretically, an expansion or upgrade of an existing project might have implications for the Equator Principles. On 3 February, 2004 nine Equator Banks made the decision to provide loans to the BTC Co. for the BTC project. This means that by that time, the additional later activity of the SPJV, on the storage of waste in special containers and the operation of a waste incinerator, had been already elaborated in November 2006. However, a project financed by the Equator Banks theoretically might require an additional later activity with significant environmental impact and, for that activity a private project developer can use a portion of the money initially borrowed from the Equator Banks. The Equator Principles do not state anywhere that if a borrower obtains a loan from the banks, he has to undertake an obligation to act in compliance with the requirements of the Equator Principles, for example with regard to the categorization of the

project under the screening criteria of the IFC, the conduct of an EIA or the disclosure of project related information, for additional activities of those project which was initially financed by the Equator Banks. Such a statement would be very logical because a project sponsor theoretically may use, for additional project related activities, a portion of the money initially received from the Equator Banks.

As already noted in *Chapter Three*, section “scope” of the revised Equator Principles makes the following innovative statement: “while the Principles are not intended to be applied retroactively, we [EPFIs] will apply them to all project financing covering expansion or upgrading of an existing facility where changes in scale or scope may create significant environmental and/or social impacts, or significantly change the nature or degree of an existing impact.” By this statement the revised Equator Principles recognise that a project might require expansion or upgrading. This statement means that when a borrower applies for the financing of an expansion or of an upgrading activity, which was or was not originally financed as part of a major project development by the Equator Banks, the requirements under the Principles must be met by the borrower. Thus the EPFIs may provide loans to borrowers for expansion or upgrading of an existing project, even when the existing project was not initially funded by the EPFIs, if the project developer applies to the EPFIs and if it meets the requirements of the Equator Principles. However this formulation of section “scope” does not address the following hypothetical situation: a borrower can obtain a loan from the EPFIs by meeting the requirements of the Equator Principles and then it can arbitrarily use a portion of the EPFI funds for additional project related activities with significant environmental impacts and not initially scrutinized before the EPFIs, without again approaching the EPFIs for additional funding. In such a situation a project developer would not be required to meet the demands of the Equator Principles with regard to an expansion activity and would even be able to use a small portion of the money borrowed from the EPFIs for its additional later activity. It is also important to note that Principle 8 of the revised Equator Principles contains new covenant requirements for compliance, namely it requires borrowers to covenant in financing documents a) to comply with the relevant host country’s social and environmental legislation and permits in all material respects; b) to comply with the AP; c) to provide periodic reports on their compliance with the AP and with the relevant host country’s social and environmental legislation and permits; and d) to decommission the facilities in accordance with an agreed plan. Provision a) might

mean that a borrower undertakes an obligation to comply with the host country's legislation for an expansion of the project; however not all host countries would have the legislation requiring project developers to meet requirements similar to the Equator Principles, for example with regard to the conduct of the EIA or the disclosure of information and public consultation. This means that under the revised Equator Principles, a company may obtain a loan, then after some time can carry out certain expansion activities with significant impact and with a portion of the money received from the EPFIs, may comply with the host country's laws and regulations but does not ensure the preparation of the EIA report and does not ensure information disclosure and public consultation and finally, even with such actions would still be in compliance with the Equator Principles.

It should be noted that Principle 3 of the revised Equator Principles refers to the IFC Performance Standards on Social and Environmental Sustainability, including Performance Standard 1: Social and Environmental Assessment and Management System, as a standard to be complied with by the borrower. It should be emphasized that Performance Standard 1 does not provide for the obligation of private project developers to undertake the obligation of the conduct of the EIA procedure for later additional activities related to the project.

The statement in section "scope" of the revised Equator Principles can be compared to paragraph 22, annex I of the Aarhus Convention, which regulates the application of Article 6 of the Convention to changes or extensions of existing activities. Paragraph 22 does not provide for the application of Article 6 to all changes and extensions of existing activities; it focuses on the criteria/threshold set out in annex I. The statement in section "scope" of the Equator Principles also focuses on the criteria/threshold: "where changes in scale or scope may create significant environmental and/or social impacts, or significantly change the nature or degree of an existing impact". However, the revised Equator Principles do not contain any provision similar to Article 6, paragraph 10 of the Aarhus Convention, which provides for the application of Article 6 to any reconsiderations or updates to an activity which is subject to the application of Article 6. Thus paragraph 10 focuses on the criteria of the activity to which changes are made and not on the scale of the reconsiderations or updates. Therefore it can be argued that the rationale behind Article 6, paragraph 10 of the Aarhus Convention might have relevance in the context of the Equator Principles.

In order to avoid the use of the money borrowed from the EPFIs for activities incompatible with the aims and spirit of the EPFIs, the following provision should be added to Principle 8 (Covenants) of the revised Equator Principles: “e) to comply with the requirements set out in Principles 1-7 and 9 of the Equator Principles for any expansion or upgrade of the existing project which received funding from the EPFIs, whether a private borrower uses money of the IPFIs or money is received from other sources for those expansions or upgrades”. The last part of this sentence is necessary because it would be difficult to determine, within a private company, the use of funding received from different sources, including the EPFIs.

The EPFIs might also consider the expediency of establishing a common blacklist database to ensure that private project developers who deviate from the covenants undertaken under Principle 8 of the document, do not get the chance of receiving money in the future. The IPFIs might also consider the possibility of other sanctions such as the disclosure of the blacklist to the wider public. Based on the BTC case study, it can be concluded that the IPFIs should undertake an obligation to take extensively into account opinions from NGOs about the projects submitted to these banks. The BTC Co. received a loan in February 2004 and by that time there were many NGO reports of non-compliance of the BTC project with the requirements of the Equator Principles and the IFC OP 4.01 on Environmental Assessment (1998). Therefore, the internal regulation of these banks, should oblige them to take into account information that is alternative to those provided by the private borrower.

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Appendix I “Interviews”

Interviews

1. Resident of the Village of Dgvari

In January 2008 I travelled to the village of Dgvari. It was early afternoon when I arrived. I decided to walk in the narrow streets of the village to find the centre of Dgvari. Usually in Georgian villages, especially in winter when there is not much agricultural work to be done, villagers gather in the centre, near a central shop or cultural club. I found it easily, as a small boy showed it to me and I soon saw about eight men standing near the central shop discussing some issues. I approached them and told them that I was interested in finding someone who would consent to be interviewed about the problem of the village related to landslides and the BTC project. One man asked whether I was from an NGO; I said “no”. I told the purpose of my interview. Then he said that his neighbour would be glad to help out because he was actively involved in village issues. He asked me to follow him. We walked and approached a house where his neighbour was living and who came out and enquired the purpose of my visit. I explained to him the purpose of my visit and of my research. I also asked about his knowledge of the issue. He replied that he was involved in “fighting” for the interests of the village and could tell me many interesting things. Then I gave him a participant information sheet, which he read. Next I gave him a consent form and, after reading it, he signed both copies.

He invited me to his house, but I proposed to hold the interview in his yard. He consented, and we sat on a bench and I started audio recording.

I started with a question regarding his knowledge of the planned construction of the pipeline in spring-summer 2002. He said that he knew about it. I was a little surprised. I told him that according to the materials I had read, people in the village had not been informed of the construction in advance and had had no chance to participate in discussions about the route of the pipeline. He said that there were rumours in May 2002, before the construction started, that the pipeline would pass very close to the village. He said that relatives of the man who lives and works for the municipality of Dgvari informed some villagers about the planned construction, and they even claimed that they had seen a map in his house with the route passing near Dgvari.

I enquired about the steps undertaken by the villagers to get official information. He said that some villagers, including himself, had decided to get information from the man whose relatives were talking about the pipeline. However, that person was very angry upon being asked and said that this would cause him problems and he made no further comment. After several days, the villagers decided to travel to Borjomi, the regional centre, and met there local officials of the municipality, though not the highest. The people expressed their complaints to those officials and demanded details. They even stated that if the information concerning the proximity of the pipeline were correct, they would organise a protest in front of the Borjomi Municipality building. They made it clear that they wanted compensation for any resettlement and left address details with the municipality representatives. None of the local officials confirmed any planned construction near their village and the people left.

The next day, the police arrived from Borjomi, the regional centre, and visited the homes of all the people who had travelled to Borjomi the previous day, including himself. Policemen told him that they would put illegal weapons in his pocket and arrest him should he make any further inquiries. They told him not to interfere in the business of government and to keep to his farming activities! Policemen warned him that if the protesters blockaded the Borjomi Municipality building, they would be shot in the leg. According to the respondent, other villagers reported similar intimidation by the same group of policemen. As a result, my respondent decided to abstain from any further action. He explained this in the following words: “there are hundreds in the village; I did not want to become any type of activist and victim; I still hoped for the best and that the government would not sacrifice the interests of the whole village”. He added that the respondent and others just wanted to gather all the adult residents in the village club and work out a plan of action and details of protest in Borjomi, but the intimidation was too serious to keep these plans.

My next enquiry was about the later developments. I enquired whether officially the government or the BTC Co. had informed them about the route of the pipeline before the construction had started and had given a chance to the people to express their concerns. He replied “no”. He said that it was kept as a “top secret of governmental priority”. He said that later, when it became

clear in 2003, that the pipeline would pass so close, NGOs started to come and visited almost all the families engaged in campaigning against the construction. However, he was not very active. But still, he was there when the police dispersed the demonstration. Villagers blocked the roadway to the construction site with tractors, and then the police came and started to beat protestors, including women. Three people were detained for several hours. He said that it was a peaceful protest. He also said that Green Alternative was very active and they requested “international organizations” to solve the problem, but it was “just waste of a time”. It turned out that he implied the COA when mentioning “international organizations”.

He said that the police was used by the government to intimidate active villagers. Very often policemen were patrolling the village, disguised in civilian clothes and sitting in ordinary cars. They were showing that they wanted “to control the opinions of the people”. According to the respondent, these cars were patrolling the entrances of villages and tracking all cars that were not local, in order to intimidate NGOs that were coming into the village.

Then I asked about the damaged houses. The respondent was eager to show the walls of his house. He said that they were not like that in 2002: they worsened after the construction started causing landslides to be activated. The cracks I saw were really dangerous. He said “now nobody will buy my house; its price is zero”. He said that some houses were in an even worse condition as a result of the pipeline.

I enquired why the villagers did not go to court. He said that they had no trust in the Georgian judiciary and no money to waste on that. Some people tried to collect money, but a lawyer in Borjomi, promised only 1 percent guarantee of success! Therefore, the villagers gave up this idea. The respondent said that “the government would not allow the pipeline to be stopped by the decisions of people [judges] who depend on salaries from the state”.

I enquired whether the respondent had heard on television or the radio of the discussion of the BTC project’s possible negative impacts in Georgia. He said that from what he had learned from the mass media this project would save Georgia and make it stronger, but no mention was made of its negative sides. He said that he and his fellow villagers were the only people who dared to

speak against the pipeline in Georgia and recalled the meeting in Borjomi which was followed by police intimidation. He said that it was a taboo subject, and this was the reason for the villagers' failure.

2. Representative of an NGO

Several NGOs were very active in monitoring the BTC project: for example Green Alternative, and the Georgian Young Lawyers' Association. I selected a representative from one of these organizations for my interview. I found the contact details of the organization on its web site and sent emails to three staff members who were actively involved in the BTC project issues. I was able to obtain their names from various sources that were analyzed by me. One person replied and wrote that she was pregnant and could not attend. In several days another expressed interest. I sent to that person my participation information sheet by email. I received the consent by email. I decided to invite the person to a café for lunch the next day. When we met I gave her hard copies of the participation information sheet and consent forms. They were duly signed by the respondent.

My first question concerned the existence of any evidence that the government of Georgia ensured information disclosure and public participation before the permit for the BTC pipeline was issued by the Ministry of Environment. The reply was "no". According to that person, even representatives of the Ministry of Environmental Protection have verbally recognized that they did not do so for different but for unclear and unexplained reasons.

Then I asked about the village of Dgvari. The respondent smiled and started to tell me that NGOs did their best to solve the problem, but encountered from the government a strong and "stubborn" resistance. The respondent told me that villagers were not informed and nobody consulted them about the routing of the pipeline. Then I asked whether the respondent had information that the BTC Co. had ensured information disclosure and public consultation in Dgvari. The respondent replied that Dgvari was not even mentioned in the ESIA report and the BTC Co. referred to this fact in order to justify its inaction with regard to the villagers. The respondent went into details about the Dgvari case. It appeared that the respondent had travelled

several times to Dgvari in 2003-2004 to help villagers; however they could not do much. But, according to the respondent, it was the brave actions of different NGOs that attracted public attention to this issue: otherwise nobody would know about Dgvari. Local public officials and police officers were controlling entrances of the village and were trying to spot NGO cars and they were always present and in this way they were intimidating NGO staff and preventing villagers to speak to these people.

Then I put a question about the general situation regarding the BTC pipeline and enquired whether NGOs could change much. The reply was “no” and was explained by the following: “the government gave the green light as regards this project and was trying to finish it at all costs; nobody in the government could challenge it; it would be deemed as a conspiracy against Georgia and that person would be considered as a “Russian spy”. The respondent said that even newspapers were reluctant to publish critical material, their journalists saying that they were afraid of being called “Russian spies” and TV journalists had instructions not to show material against the pipeline: it was “a big taboo”. The respondent said that they [the NGOs] could only dare to do so because their finances are transparent and are coming from the West, and it would be difficult to allege their links with the Russian secret police. Nevertheless their staff members were often called “traitors”. I asked whether this situation hampered the implementation of the procedural environmental rights. The reply was positive: the respondent said that affected communities, which he frequently visited, had no belief that they could change anything. Even when consulted by the BTC Co., in summer 2002, some of them were too afraid to speak out publicly and these people were saying in private that they did not want to have problems and therefore did not oppose: very often the BTC Co. consultation with affected communities was just a disclosure of information, as people were too afraid to oppose.

Then I asked questions about the situation in Rustavi 18th and 19th subdistricts and enquired the respondent’s opinion about the violation of procedural environmental rights in that context. The respondent said that the Rustavi case was a clear violation of the IFC OP 4.01 (1998) by the BTC Co., not to mention the violations of obligations by the government of Georgia under the relevant laws. The respondent added that the Rustavi problem had demonstrated how the government treats the electorate, as slaves rather than as the source of their power.

3. Former Employee of the Ministry of Environmental Protection and Natural Resources of Georgia

The Ministry of Environmental Protection and Natural Resources is the primary governmental body responsible for the implementation of procedural environmental rights. In summer 2005 I travelled to Georgia and established some contacts as a PhD student with several representatives of the Ministry of Environment. The main purpose of these contacts, was to obtain copies of documents for my research, for example the monitoring reports of the BTC Monitoring Group at the Ministry of Environment. Later I had only occasional and informal contacts with these people, such as sending emails at Christmas and New Year. In December 2007 I decided to contact one of those persons by mail, in order to enquire about the possibilities of an interview. The person wrote back that he was not working anymore for the Ministry; however he would agree to the idea of an interview. We fixed a date and met in a café for lunch. I gave him a participation information sheet and consent form and the latter was signed and consent expressed. The respondent was working in the Ministry of Environment when the permit was issued in 2002 for the BTC project and when a permit was issued for the SPJV in 2004.

My first question concerned information disclosure and public participation in the process of giving a permit to the BTC Co. for the construction and operation of the pipeline on 30 November 2002. The reply was that the Ministry had failed to do so. I asked for the reasons. The respondent said that it was decided at the highest level of the Ministry not to disclose the project to the public. I enquired for more details. The respondent said that it was the instruction of the president, to his knowledge, to carry on with the project without any hindrance. Then I asked whether these people were not considering the factor of the law, and this was followed by an ironic smile. I was given the following reply: “nobody would suggest in Shevardnadze’s time¹ that judges could challenge the BTC project.” Then I asked whether the respondent could challenge inside the Ministry such an approach. The respondent replied that this would amount to “treason” due to the alleged geopolitical significance of the BTC project and the respondent

¹ Referring to Mr Eduard Shevardnadze, President of Georgia between 1995-2003.

had no desire to become the only victim of free expression of personal ideas, even though this was his responsibility in that situation and not only a right guaranteed by the constitution. The respondent said that the general environment was such that it was patriotic to support the project and nobody would dare to speak against it publicly or among colleagues. The respondent added that it was the minister who was undertaking the main obligation for the project and not anyone else.

Then I enquired whether, in accordance with Article 5 of the Aarhus Convention, there were measures taken to inform the villagers of Dgvari of the threat of landslides that could have been activated by the construction. There was no guarantee from the Ministry that this would not be the case, and I added that there was at least a theoretical possibility of that. I also added that Condition 2 of the permit recognized the area where the village is located as being one of “geohazards”. I also enquired whether public registers or other mechanism were working under Article 5, paragraph 2 (b) of the Aarhus Convention in this respect. The reply was that those provisions of the Aarhus Convention require considerable amount of money for their implementation and the Ministry therefore could not implement them. The respondent also said that Dgvari was an issue within the Ministry, but it was not reflected in the ESIA by the BTC Co. and the Ministry had decided to trust the competence of the BTC Co and its well-known consultants, some of whom were Georgian.

Then I asked a question about the Rustavi case, and whether the Municipality of Rustavi had any obligation to transfer the request for environmental information in November 2002 to the Ministry of Environment. The reply to this was “yes”, but it was the result of the inaction of public officials in Rustavi through incompetence and unawareness of laws in that field. Then I asked the question why the Ministry did not try to change the route of the pipeline in Rustavi. The respondent said that the BTC Co. was drawing up the terms and rules and not the Ministry.

4. Citizen of Rustavi

In December 2007 I travelled to Rustavi and came to the 18th and 19th subdistricts. It was early afternoon. I stopped my car and started to enquire of local people whether they knew people who were actively involved in the campaign against the route of the pipeline near their houses. For this purpose I entered a shop in one of the housing blocks in subdistrict 19. A shopkeeper told me that many people in that housing block were involved in the campaign. Another woman was there shopping and she offered her assistance. She told me that her neighbour would be glad to help me. She made a call on a mobile phone. It appeared that that neighbour had become interested but could meet me only in the evening after getting back from another town. I wrote down her phone number and made a call in the evening. During that period of waiting I had the chance to see on the spot how close to residential houses the route of the pipeline really was. In the evening, I met the woman in the yard of her house and told her of my research showing her the participation information sheet and consent form. An agreement was given easily. We agreed to sit on a bench in the yard of housing block No. 19 and I started putting forward my questions.

I began by enquiring whether the government had informed the residents of the route of the pipeline and whether they were given a chance to speak out and affect the policy. The reply was “no”. The respondent told me that from the window people saw, including herself, when tractors and trucks came and started preparatory work. However, it was stressed by the respondent that in 2002 when there were rumours about the possible proximity of the route to their homes, including that of the respondent, they sent a letter to the BTC CAO and to the local Municipality and enquired for details, but no answer was received. The respondent said that it had been a mistake when residents had decided to wait for the development and had not started their campaign in 2002. The respondent added that there was an atmosphere of taboo surrounding the issue and they could not even file a lawsuit because they had not the necessary information to refer to. They could not get any document indicating the proximity of the route in 2002 and therefore gave up. The respondent was referring to a group of people who sent letters of enquiry when using the word “they”. Then I asked whether the BTC Co. informed the residents and gave them a chance to speak. The reply was “no”. The respondent said that the BTC Co. did not inform anybody of the route and people only found out for themselves. According to the

respondent, no representative of the BTC Co could be seen anywhere before the construction and the route was selected in secret.

Then I asked about the effects of the construction. The respondent said that the situation near subdistrict 19 was worse than in the nearby subdistrict 18. The construction activities lasted 24 hours a day without exaggeration, and loud noise was heard and this lasted for more than one year without interruption. The noise was so loud that the resident and other family members suffered from headaches and could not sleep; schoolchildren in the family could not prepare their homework. This affected their health and caused depression among many residents. Then I asked about the smell. The respondent said that there was a pungent smell for months and it was terrible, when combined with the noise. The respondent and others were refraining from opening windows and in summer this was like being in a Nazi camp. If the family of the resident had money, they would have rented another flat in a different housing block, but they could not afford it. Some neighbours sent children to their grandparents' homes, and some schoolchildren even changed schools and were prepared to travel a long distance.

Then I asked a question about the protest and the use of the police force. It appeared that the respondent was not among the protestors, because of fear of being beaten. According to the respondent, the governmental representatives, including the local police made it clear that all resistance would be suppressed brutally and that is exactly what happened during the demonstration. At the beginning of the year 2004, the respondent and others started collecting money for a lawyer to bring about a legal case. People were afraid to participate because for them it was a declaration of "war" against the government and very little money was collected. However, the respondent and others could not find a lawyer to take up the case; all were afraid due to the position of the government and due to the possible label of being "a traitor and a spy for Russia". Finally one lawyer gave his/her consent but said conscientiously that it would be impossible to win. They gave up. The respondent added that in the local press they could not find anyone to write about the problem; everyone was too afraid. Then I asked about the position regarding the possibility of influencing governmental policy. The respondent said that residents get attention only before elections when officials are coming to them with presents such as one

sack of sugar or flour per family and when elections are over, politicians do not meet us for even two minutes.

Then I asked about the complaint to the CAO and the respondent said that it was a waste of time, because there were no concrete results, except for the square and road reparations financed by the BTC Co. as a result of the complaint.

5 Judge

These are court decisions on the cases related to the implementation of procedural environmental rights.

For the interview, I selected a litigation initiated by Green Alternative on 23 June, 2004 in Tbilisi Regional Court against the Ministry of Environment concerning Environmental Permit No. 0122 “On Temporary Storage of Municipal and Household Waste in Special Containers and Operation of Waste Incinerator”.

This formal litigation process went through many instances of the judiciary and many judges were involved in it. I decided to find a respondent among them. Since I had copies of the decisions, I started to make calls in courts asking to speak to certain judges, in order to get their consent. Mainly secretaries were my contact persons. It appeared that some judges were not available due to busy schedules; however I received a call from one, who appeared to be very interested in scholarly research. The secretary had delivered my general message that I wanted to contact him for research purposes. The judge asked for details and gave me preliminary consent. We arranged a meeting during lunchtime in a café. When we met, I gave him a participation information sheet and consent form. The judge now asked for details of my interview. I told him of the case brought about by Green Alternative involving the BTC and Ministry of Environmental Protection. The judge easily recalled the case and finally gave me his consent and signed the forms.

My first question was why in general NGOs were involved in bringing about claims and not the affected residents. The reply was that fees for bringing cases to court are based on the tariff for public tax rates laid down by the Georgian Law on Public Taxes, and that often people with a low income could not afford it. The judge also added that many lawyers also demand high prices for their services. The judge added that this is not only the case in Georgia and that it is the prerogative of Parliament to enact laws. Then I asked whether these fees could have prevented many individuals affected by the BTC project to protect their procedural environmental rights, the reply was “theoretically speaking - yes”.

Then I asked the question “why did the case take so long?” The reply was that the judiciary is in the process of reform and there are some problems with regard to its efficiency; however these facts are not secret and it is a high priority of the state to solve them by the undergoing reform. The respondent added that most of the judges are young and not experienced as judges are, for example, in the UK, but they should do their best.

Then I asked about the Aarhus Convention and its significance. The judge said that it was a relatively new field for the respondent and sometimes the knowledge of judges in the field of international treaties is not profound. However, the judge added that protection of the environment and individuals from environmental harm is very important in the age of climate change.

Then I asked about the legal arguments and reasoning when making a decision on the legal challenge of Green Alternative. The reply was that the decision itself should be sufficient and the respondent refused to comment critically on the decision in which he personally participated. The respondent added that only a court of higher instance could challenge the decision legally, otherwise it should be considered as competent and to be adhered to. I felt that the respondent was a little irritated by going into details of the legal motivation of the decision.

Then I enquired after the personal position of the judge regarding the importance of the BTC project. The judge said that he was proud when giving the green light to the Project by the decision made in the court, because NGOs obtain money only when they make a lot of noise and very often they do not act according to state interests. Then I dared to enquire whether there was

any pressure from the government to make a decision in favour of the BTC Co and its contractor. The reply was that actually the government was challenged and not the BTC Co. and therefore, in the first instance, the government would pressure for its own interest and not for BTC Co.'s and that the Project was in the government's interest first and foremost and the interest of the BTC Co. was only secondary for Georgia.

Appendix II “Participant Information Sheet”

Participant Information Sheet

(Translated from Georgian)

My name is Irakli Giviashvili and I am conducting a PhD research at Nottingham Trent University (Great Britain). At the moment I am a Director of the International Legal Department at the Ministry of Foreign Affairs of Georgia, however the PhD research I am conducting is personal and not for government purposes.

My PhD is on the questions related to the implementation of procedural environmental rights i.e. those rights defined in the Aarhus Convention as access to environmental information, public participation in environmental decision-making and access to environmental justice.

My research includes a case study on the BTC (Baku-Tbilisi-Ceyhan) Pipeline Project and aims to examine whether procedural environmental rights have been effectively implemented in the context of the BTC project. Therefore, you will be asked questions (in the context of the BTC project) on the following issues: alleged cases of violation of procedural environmental rights; consequences of violation of procedural environmental rights; reasons which impeded implementation of procedural environmental rights; process of environmental impact assessment; problems with regard to bringing cases in courts; efficiency of the judiciary; problems with regard to functioning of democracy; violation of freedom of expression and freedom of assembly and association.

Participation is voluntary and greatly appreciated. If you decide to take part, you will be given this information sheet to keep, and you will be asked to read and sign a consent form. I will provide two copies of consent form to be signed and dated by you, which will be counter signed and dated by me. One copy will be remained by you and one copy will be kept by me. You have the right to withdraw at any time without giving a reason to do so. If you wish to withdraw you should contact me (or my supervisor: Professor. Mary

Seneviratne, The Centre for Legal Research, The Nottingham Law School, Belgrave Centre, Chaucer Street, Nottingham, the UK, Tel: + 44 115 848 6879; Email: mary.seneviratne@ntu.ac.uk).

Your participation in an interview will last approximately one hour to one hour and half. During the interview you can refuse to answer any of the questions put to you. The interview will be arranged during a daytime at a convenient time for you and in a public place such as a coffee shop, an office, a meeting point of local residents etc. Only member of my family - my mother will have information on where and when I am interviewing and only she will know telephone details of my respondents.

Data collected from this interview will be confidential and anonymous. Your responses will be audio recorded. I will ask for your written permission to tape the interview on my audio recorder. The tape of your interview will be transcribed. Then I will analyse the data. Transcripts will be immediately fully anonymised. Any information that identifies your personality will be removed. Laptop containing files of transcripts and audio recorded tapes will be kept separately from each other in locked cabinets. Laptop will have password regime. Once collected data have been analysed and the research completed, all confidential data – transcripts, audio recordings and your contact details, will be destroyed. I will write up the results of interviews in my PhD thesis, which will be available to the public. Although I may use actual quotations from your interview in my thesis, these will be anonymised, and will be used in such a way that they will not be attributable to you. No opinions or information will be attributed to you, either by your name or exact description of your position. I will exercise all possible care to ensure that your personality cannot be identifiable by the way I write up my findings. For this reason, I believe that the risk of harm to you is very low.

If you have any questions or concerns before, during or after your participation in this research my contact details are: Irakli Giviashvili, 2 Griboedovs st, 0108, Tbilisi, Georgia, Tel: 931578, mob: 877507053; office address: Irakli Giviashvili, Director of the

International Legal Department, Ministry of Foreign Affairs of Georgia, 4 Chitadze st,
0118, Tbilisi, Georgia, Tel: 284616. Email: N0030315@ntu.ac.uk.

Appendix III “Consent Form”

Consent Form

(Translated from Georgian)

I confirm that I have read information about the purpose of this research and I understand my part in it.

I have the right to withdraw my data at any point during or after the interview and all materials will be destroyed.

I have asked questions if needed and understand that I can contact the investigator at any time with queries or concerns.

I give permission for the interview to be tape-recorded by a researcher, on the understanding that the tape will be destroyed at the end of the project.

I willingly give my telephone contact details (including mob phone if any) to the researcher.

It was made clear to me by the researcher that he may use actual quotations from my interviews when writing up his thesis, but that these will be anonymised, and will be used in such a way that they will not be attributable to me.

I voluntarily agree to take part in this study.

Signature of participant

Date

Researcher's signature

Date

Contact details of the researcher: Irakli Giviashvili, 2 Griboedovs st, 0108, Tbilisi, Georgia, Tel: 931578, mob: 877507053; Email: N0030315@ntu.ac.uk. office address: Irakli Giviashvili, Director of the International Legal Department, Ministry of Foreign Affairs of Georgia, 4 Chitadze st, 0118, Tbilisi, Georgia, Tel: 284616.

Appendix IV “The Aarhus Convention”

**CONVENTION ON ACCESS TO INFORMATION, PUBLIC
PARTICIPATION IN DECISION-MAKING AND ACCESS TO
JUSTICE IN ENVIRONMENTAL MATTERS**

**done at Aarhus, Denmark,
on 25 June 1998**

The Parties to this Convention,

Recalling principle 1 of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 2

DEFINITIONS

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. "Public authority" means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 3

GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.
2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.
3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.
4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.
5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.
6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.
7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.
8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.
9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

Article 4

ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information

requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

Article 5

COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

- (i) Publicly accessible lists, registers or files;
- (ii) Requiring officials to support the public in seeking access to information under this Convention; and
- (iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

(b) International treaties, conventions and agreements on environmental issues; and

(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. 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, inter alia, of:

- (a) The proposed activity and the application on which a decision will be taken;
- (b) The nature of possible decisions or the draft decision;
- (c) The public authority responsible for making the decision;
- (d) The envisaged procedure, including, as and when this information can be provided:
 - (i) The commencement of the procedure;
 - (ii) The opportunities for the public to participate;
 - (iii) The time and venue of any envisaged public hearing;
 - (iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - (v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
- (e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

- (a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

- (b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

Article 7

PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

Article 8

PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be

fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of

a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 10

MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

Article 11

RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

Article 12

SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

Article 13

ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

Article 14

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.
2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.
3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.
4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.
5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.
6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.
7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 15

REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

Article 16

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
 - (a) Submission of the dispute to the International Court of Justice;
 - (b) Arbitration in accordance with the procedure set out in annex II.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 17

SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

Article 18

DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

Article 19

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.
2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.
3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.
4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.
5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Article 20

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.
2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.
3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

Article 21

WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

Article 22

AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

Annex I

LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)

1. Energy sector:
 - Mineral oil and gas refineries;
 - Installations for gasification and liquefaction;
 - Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW) or more;
 - Coke ovens;
 - Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
 - Installations for the reprocessing of irradiated nuclear fuel;
 - Installations designed:
 - For the production or enrichment of nuclear fuel;
 - For the processing of irradiated nuclear fuel or high-level radioactive waste;
 - For the final disposal of irradiated nuclear fuel;
 - Solely for the final disposal of radioactive waste;
 - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:
 - Metal ore (including sulphide ore) roasting or sintering installations;
 - Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
 - Installations for the processing of ferrous metals:
 - (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
 - (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
 - (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
 - Ferrous metal foundries with a production capacity exceeding 20 tons per day;
 - Installations:
 - (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
 - (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
 - Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 m³.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 m³ and with a setting density per kiln exceeding 300 kg/m³.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

- (i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
- (ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
- (iii) Sulphurous hydrocarbons;
- (iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
- (v) Phosphorus-containing hydrocarbons;
- (vi) Halogenic hydrocarbons;
- (vii) Organometallic compounds;
- (viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
- (ix) Synthetic rubbers;
- (x) Dyes and pigments;
- (xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

- (i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
- (ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
- (iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
- (iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

- (v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;
 - (c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);
 - (d) Chemical installations for the production of basic plant health products and of biocides;
 - (e) Installations using a chemical or biological process for the production of basic pharmaceutical products;
 - (f) Chemical installations for the production of explosives;
 - (g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.
5. Waste management:
- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
 - Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
 - Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
 - Landfills receiving more than 10 tons per day or with a total capacity exceeding 25 000 tons, excluding landfills of inert waste.
6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.
7. Industrial plants for the:
- (a) Production of pulp from timber or similar fibrous materials;
 - (b) Production of paper and board with a production capacity exceeding 20 tons per day.
8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;
- (b) Construction of motorways and express roads; 3/
 - (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.
9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;
- (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.
10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40 000 places for poultry;

(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;

- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;

- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

(b) Treatment and processing intended for the production of food products from:

(i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

(ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
- Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes

1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

Annex II

ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.
2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.
4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.
5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.
6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.
7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.
8. The tribunal may take all appropriate measures to establish the facts.
9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:
 - (a) Provide it with all relevant documents, facilities and information;
 - (b) Enable it, where necessary, to call witnesses or experts and receive their evidence.
10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

Appendix V “The Equator Principles (2003)”

4 June 2003

THE “EQUATOR PRINCIPLES”

AN INDUSTRY APPROACH FOR FINANCIAL INSTITUTIONS IN DETERMINING, ASSESSING AND MANAGING ENVIRONMENTAL & SOCIAL RISK IN PROJECT FINANCING

PREAMBLE

Project financing plays an important role in financing development throughout the world. In providing financing, particularly in emerging markets, project financiers often encounter environmental and social policy issues. We recognize that our role as financiers affords us significant opportunities to promote responsible environmental stewardship and socially responsible development.

In adopting these principles, we seek to ensure that the projects we finance are developed in a manner that is socially responsible and reflect sound environmental management practices.

We believe that adoption of and adherence to these principles offers significant benefits to ourselves, our customers and other stakeholders. These principles will foster our ability to document and manage our risk exposures to environmental and social matters associated with the projects we finance, thereby allowing us to engage proactively with our stakeholders on environmental and social policy issues. Adherence to these principles will allow us to work with our customers in their management of environmental and social policy issues relating to their investments in the emerging markets.

These principles are intended to serve as a common baseline and framework for the implementation of our individual, internal environmental and social procedures and standards for our project financing activities across all industry sectors globally.

In adopting these principles, we undertake to review carefully all proposals for which our customers request project financing. We will not provide loans directly to projects where the borrower will not or is unable to comply with our environmental and social policies and processes.

STATEMENT OF PRINCIPLES

We will only provide loans directly to projects in the following circumstances:

1. We have categorised the risk of a project in accordance with internal guidelines based upon the environmental and social screening criteria of the IFC as described in the attachment to these Principles (Exhibit I).
2. For all Category A and Category B projects, the borrower has completed an Environmental Assessment (EA), the preparation of which is consistent with the outcome of our categorisation process and addresses to our satisfaction key environmental and social issues identified during the categorisation process.
3. In the context of the business of the project, as applicable, the EA report has addressed:
 - a) assessment of the baseline environmental and social conditions
 - b) requirements under host country laws and regulations, applicable international treaties and agreements
 - c) sustainable development and use of renewable natural resources
 - d) protection of human health, cultural properties, and biodiversity, including endangered species and sensitive ecosystems
 - e) use of dangerous substances
 - f) major hazards
 - g) occupational health and safety
 - h) fire prevention and life safety
 - i) socioeconomic impacts
 - j) land acquisition and land use
 - k) involuntary resettlement
 - l) impacts on indigenous peoples and communities

- m) cumulative impacts of existing projects, the proposed project, and anticipated future projects
- n) participation of affected parties in the design, review and implementation of the project
- o) consideration of feasible environmentally and socially preferable alternatives
- p) efficient production, delivery and use of energy
- q) pollution prevention and waste minimization, pollution controls (liquid effluents and air emissions) and solid and chemical waste management

Note: In each case, the EA will have addressed compliance with applicable host country laws, regulations and permits required by the project. Also, reference will have been made to the minimum standards applicable under the World Bank and IFC Pollution Prevention and Abatement Guidelines (Exhibit III) and, for projects located in low and middle income countries as defined by the World Bank Development Indicators Database (<http://www.worldbank.org/data/countryclass/classgroups.htm>), the EA will have further taken into account the then applicable IFC Safeguard Policies (Exhibit II). In each case, the EA will have addressed, to our satisfaction, the project's overall compliance with (or justified deviations from) the respective above-referenced Guidelines and Safeguard Policies.

4. For all Category A projects, and as considered appropriate for Category B projects, the borrower or third party expert has prepared an Environmental Management Plan (EMP) which draws on the conclusions of the EA. The EMP has addressed mitigation, action plans, monitoring, management of risk and schedules.
5. For all Category A projects and, as considered appropriate for Category B projects, we are satisfied that the borrower or third party expert has consulted, in a structured and culturally appropriate way, with project affected groups, including indigenous peoples and local NGOs. The EA, or a summary thereof, has been made available to the public for a reasonable minimum period in local language and in a culturally appropriate manner. The EA and the EMP will take

- account of such consultations, and for Category A Projects, will be subject to independent expert review.
6. The borrower has covenanted to:
 - a) comply with the EMP in the construction and operation of the project
 - b) provide regular reports, prepared by in-house staff or third party experts, on compliance with the EMP and
 - c) where applicable, decommission the facilities in accordance with an agreed Decommissioning Plan.
 7. As necessary, lenders have appointed an independent environmental expert to provide additional monitoring and reporting services.
 8. In circumstances where a borrower is not in compliance with its environmental and social covenants, such that any debt financing would be in default, we will engage the borrower in its efforts to seek solutions to bring it back into compliance with its covenants.
 9. These principles apply to projects with a total capital cost of \$50 million or more.

The adopting institutions view these principles as a framework for developing individual, internal practices and policies. As with all internal policies, these principles do not create any rights in, or liability to, any person, public or private. Banks are adopting and implementing these principles voluntarily and independently, without reliance on or recourse to IFC or the World Bank.

EXHIBIT I: ENVIRONMENTAL AND SOCIAL SCREENING PROCESS

Environmental screening of each proposed project shall be undertaken to determine the appropriate extent and type of EA. Proposed projects will be classified into one of three categories, depending on the type, location, sensitivity, and scale of the project and the nature and magnitude of its potential environmental and social impacts.

Category A: A proposed project is classified as Category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented. A potential impact is considered “sensitive” if it may be irreversible (e.g., lead to loss of a major natural habitat) or affect vulnerable groups or ethnic minorities, involve involuntary displacement or resettlement, or affect significant cultural heritage sites.. These impacts may affect an area broader than the sites or facilities subject to physical works. EA for a Category A project examines the project's potential negative and positive environmental impacts, compares them with those of feasible alternatives (including, the “without project” situation), and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance. A full environmental assessment is required which is normally an Environmental Impact Assessment (EIA)..

Category B: A proposed project is classified as Category B if its potential adverse environmental impacts on human populations or environmentally important areas—including wetlands, forests, grasslands, and other natural habitats—are less adverse than those of Category A projects. These impacts are site-specific; few if any of them are irreversible; and in most cases mitigatory measures can be designed more readily than for Category A projects. The scope of EA for a Category B project may vary from project to project, but it is narrower than that of Category A EA. Like Category A EA, it examines the project's potential negative and positive environmental impacts and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance.

Category C: A proposed project is classified as Category C if it is likely to have minimal or no adverse environmental impacts. Beyond screening, no further EA action is required for a Category C project.

EXHIBIT II: IFC SAFEGUARD POLICIES

As of 4 June 2003, the following is a list of IFC Safeguard Policies:

Environmental Assessment
OP4.01 (October 1998)

Natural Habitats
OP4.04 (November 1998)

Pest Management
OP4.09 (November 1998)

Forestry
OP4.36 (November 1998)

Safety of Dams
OP4.37 (September 1996)

Indigenous Peoples
OD4.20 (September 1991)

Involuntary Resettlement
OP4.30 (June 1990)

Cultural Property
OPN11.03 (September 1986)

Child and Forced Labor
Policy Statement (March 1998)

International Waterways
OP 7.50 (November 1998)*

*Note: The principal requirements relate to the role of IFC as a multi-lateral agency and notification requirements between riparian states which are generally outside the remit of private sector operators or funders. It is referenced for the sake of completeness. The substantive elements of good practice with respect to environmental and social aspects therein are fully covered by OP 4.01.

EXHIBIT III: WORLD BANK AND IFC SPECIFIC GUIDELINES

As of 4 June 2003, IFC is using two sets of guidelines for its projects.

1. IFC is using all the environmental guidelines contained in the World Bank Pollution Prevention and Abatement Handbook (PPAH). This Handbook went into official use on July 1, 1998.
2. IFC is also using a series of environmental, health and safety guidelines that were written by IFC staff in 1991-1993 and for which there are no parallel guidelines in the Pollution Prevention and Abatement Handbook. Ultimately new guidelines, incorporating the concepts of cleaner production and environmental management systems, will be written to replace this series of IFC guidelines. When completed these new guidelines will also be included in the Pollution Prevention and Abatement Handbook.

Where no sector specific guideline exists for a particular project then the World Bank General Environmental Guidelines and the IFC General Health and Safety Guideline will be applied, with modifications as necessary to suit the project.*

The table below lists both the World Bank Guidelines and the IFC Guidelines.

World Bank Guidelines (PPAH)

1. Aluminum Manufacturing
2. Base Metal and Iron Ore Mining
3. Breweries
4. Cement Manufacturing
5. Chlor-Alkali Plants
6. Coal Mining and Production
7. Coke Manufacturing
8. Copper Smelting
9. Dairy Industry
10. Dye Manufacturing
11. Electronics Manufacturing
12. Electroplating Industry
13. Foundries
14. Fruit and Vegetable Processing
15. General Environmental Guidelines
16. Glass Manufacturing
17. Industrial Estates
18. Iron and Steel Manufacturing
19. Lead and Zinc Smelting
20. Meat Processing and Rendering
21. Mini Steel Mills
22. Mixed Fertilizer Plants

23. Monitoring
24. Nickel Smelting and Refining
25. Nitrogenous Fertilizer Plants
26. Oil and Gas Development (Onshore)
27. Pesticides Formulation
28. Pesticides Manufacturing
29. Petrochemicals Manufacturing
30. Petroleum Refining
31. Pharmaceutical Manufacturing
32. Phosphate Fertilizer Plants
33. Printing Industry
34. Pulp and Paper Mills
35. Sugar Manufacturing
36. Tanning and Leather Finishing
37. Textiles Industry
38. Thermal Power Guidelines for New Plants
39. Thermal Power Rehabilitation of Existing Plants
40. Vegetable Oil Processing
41. Wood Preserving Industry

IFC Guidelines

1. Airports
2. Ceramic Tile Manufacturing
3. Construction Materials Plants
4. Electric Power Transmission and Distribution
5. Fish Processing
6. Food and Beverage Processing
7. Forestry Operations: Logging
8. Gas Terminal Systems
9. General Health and Safety
10. Health Care
11. Geothermal Projects
12. Hazardous Materials Management
13. Hospitals
14. Office Buildings
15. Offshore Oil & Gas
16. Polychlorinated Biphenyls (PCBs)
17. Pesticide Handling and Application
18. Plantations
19. Port and Harbor Facilities
20. Rail Transit Systems
21. Roads and Highways
22. Telecommunications
23. Tourism and Hospitality Development
24. Wildland Manage

25. Wind Energy Conversion Systems
26. Wood Products Industries
27. Waste Management Facilities
28. Wastewater Reuse

* Exception (the following are World Bank Guidelines not contained in the PPAH and currently in use)

Mining and Milling - Underground
Mining and Milling - Open Pit

Appendix VI “The European Convention on Human Rights”

Convention for the Protection of Human Rights and Fundamental Freedoms

as amended by Protocols Nos. 11
and 14

with Protocols Nos. 1, 4, 6, 7, 12 and 13

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010.

The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at <http://conventions.coe.int>.

Registry of the European Court of Human Rights
June 2010

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political

democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I

Rights and freedoms

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the

term “forced or compulsory labour” shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in

detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the

right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its

obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 § 1 and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

European Court of Human Rights

Article 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be

re-elected.

2. The terms of office of judges shall expire when they reach the age of 70.

3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

Article 24

Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

Article 25

Plenary Court

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court;
- (e) elect the Registrar and one or more Deputy Registrars;
- (f) make any request under Article 26 § 2.

Article 26

Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in Committees of three judges, in Chambers of seven judges

and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up Committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

Article 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2. The decision shall be final.

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a Committee or to a Chamber for further examination.

Article 28

Competence of Committees

1. In respect of an application submitted under Article 34, a Committee may, by a unanimous vote,

(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the Committee, the Committee may at any stage of the proceedings invite that judge to take the place of one of the members of the Committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1 (b).

Article 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber

raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31

Powers of the Grand Chamber

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46 § 4; and
- (c) consider requests for advisory opinions submitted under Article 47.

Article 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

Article 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols

thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - (a) is anonymous; or
 - (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
 - (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
 - (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36

Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in

the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

Article 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38

Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

Article 39

Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and

the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

Article 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44 § 2.

Article 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a

serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44

Final judgments

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final

(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

Article 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of

interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

Article 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III

Miscellaneous provisions

Article 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

Article 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the

notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

Article 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High

Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),
Have agreed as follows:

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4

Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the

deposit of its instrument of ratification. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March

1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto

Strasbourg, 16.IX.1963

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20 March 1952, Have agreed as follows:

Article 1

Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of

ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3

Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

Article 4

Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

Article 5

Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration

stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

Article 6

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7

Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory States.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty

Strasbourg, 28.IV.1983

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the

Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition

of the death penalty;
Have agreed as follows:

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3

Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declar-

ation, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6

Relationship to the Convention

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7

Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8

Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9

Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of

ratification, acceptance or approval;
(c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;
(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),
Have agreed as follows:

Article 1

Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- (a) to submit reasons against his expulsion,
- (b) to have his case reviewed, and
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence

reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings

under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5

Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declar-

ation, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

Article 7

Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 8

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying

the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- (d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and

reasonable justification for those measures,

Have agreed as follows:

Article 1

General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2

Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

Article 3

Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the

provisions of the Convention shall apply accordingly.

Article 4

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 5

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 6

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both

texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of

Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;
Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");
Noting that Protocol No. 6 to the Convention concerning the abolition of the death penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;
Being resolved to take the final step in order to abolish the death penalty in all circumstances,
Have agreed as follows:

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

Prohibitions of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3

Prohibitions of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4

Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5

Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- (d) any other act, notification or communication relating to this Protocol;

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, this 3rd day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe

Appendix VII “The Intergovernmental Agreement”

**For and on behalf of the
Azerbaijan Republic**

**For and on behalf of
Georgia**

**For and on behalf of the
Republic of Turkey**

**Heydar Aliyev
President**

**Edward Shevardnadze
President**

**Süleyman Demirel
President**

AGREEMENT

**Among
The Azerbaijan Republic, Georgia and The Republic of Turkey**

**Relating to the
Transportation of Petroleum Via the Territories of
The Azerbaijan Republic, Georgia and The Republic of Turkey
Through the
Baku-Tbilisi-Ceyhan Main Export Pipeline**

The Azerbaijan Republic, Georgia and the Republic of Turkey (together the "States" or individually a "State") represented by their respective Governments;

In recognition of the desire, readiness and willingness of each State to attract, promote and protect investment by foreign and domestic investors in Petroleum transportation projects in and/or across its Territory; and

In furtherance of the principles set forth in international trade and investment agreements to which each State is a party, signatory or applicant, as well as the Energy Charter Treaty 1994, and the need to further expand and implement cooperation between and among the States in the energy sector; and

In recognition of the desire of each State to ensure principles of freedom of transit of Petroleum, to provide for exclusive rights to land and Petroleum transportation infrastructure in and/or across the Territory of the others, and to protect its environment; and

Mindful of the fact that projects involving transportation of Petroleum in and/or across their Territories are of a transnational nature requiring uniform, nondiscriminatory application of international law standards protecting investments and nondiscriminatory

treatment of investors as set out in bilateral and multilateral agreements to which each State is a party, signatory or applicant; and

In consideration of the importance of creating and reinforcing an appropriate legal framework, commensurate with the transnational nature of such Petroleum transportation projects and the required private initiative and enterprise, to support Petroleum sector investment opportunities and to establish more firmly favourable conditions to justify the commitment of capital and resources to the Baku-Tbilisi-Ceyhan MEP Project in and/or across their respective Territories.

HEREBY AGREE among themselves as follows:

Article I **DEFINITIONS**

As used throughout this Agreement, the following definitions shall apply:

□Agreement□ means this Agreement, together with its appendices, as it may be hereafter jointly amended or modified in writing by the States.

□Constitution□ means the constitution of a State, as the same may be amended or otherwise modified or replaced from time to time.

□Entity□ means any company, corporation, limited liability company, partnership, limited partnership, joint venture, enterprise, association, trust or other juridical entity or organisation, whether of a governmental or private nature, established or organised under the laws of any state or jurisdiction or by written agreement between two or more Persons.

□Facilities□ means, subject to the terms of the applicable Project Agreements and in respect of each Territory, the pipeline and laterals for the transportation of Petroleum within and/or across the Territory, and all below and above ground or seabed installations and ancillary equipment, together with any associated land as specified in the applicable Project Agreement, all loading, unloading, pumping, measuring, testing and metering facilities, communications, telemetry and similar equipment, all pig launching and receiving facilities, all pipelines, and other related equipment, including power lines, used to deliver any form of liquid or gaseous fuel and/or power necessary to operate pump stations or for other system needs, cathodic protection devices and equipment, all monitoring posts, markers and sacrificial anodes, all port, terminalling, storage and related installations, all marine jetties and similar facilities, and all associated physical assets and appurtenances (including roads and other means of access and operational support) required from time to time for the proper functioning of any and all thereof, constructed, installed, maintained, repaired, replaced, expanded, extended, owned, controlled and/or operated by or on behalf of Project Investors with respect to the MEP Project.

□Foreign Currency□ means any freely convertible currency, including Dollars of the United States of America, that is the lawful currency of a state and is issued other than by the State Authorities of any of the States, and is not subject to general limitations or restrictions of the issuing authority on conversion or exchange.

□Government□ means the central government of a State.

□Host Government Agreement□ means each of those agreements entered into between the Government of a State, on the one hand, and Project Investors and/or other parties authorised by Project Investors, on the other hand, making provision (along with other Project Agreements) for the MEP Project (including, without limitation, a description of the Facilities and Transportation System for the MEP Project), as each such agreement may be hereafter amended, modified or extended in accordance with the terms thereof.

□MEP Project□ means the evaluation, development, design, acquisition, construction, installation, financing, insuring, ownership, operation (including the transportation of Petroleum by or on behalf of Project Investors and the shipment by Shippers of Petroleum through the Facilities or Transportation System), repair, replacement, refurbishment, maintenance, capacity expansion or extension (such as laterals), and protection of the Transportation System from a location near the city of Baku, Azerbaijan Republic and crossing the Azerbaijan Republic-Georgia border at a point to be agreed by the Azerbaijan Republic and Georgia and onward to a location near the city of Tbilisi, Georgia and crossing the Georgia-Republic of Turkey border between 42° 49' East and 43° 18' East and onward to a location near the city of Ceyhan, Republic of Turkey, all as contemplated by this Agreement and as specified in the Host Government Agreements and other Project Agreements.

□Other Project Agreements□ means all written agreements and documented commitments, other than this Agreement and the Host Government Agreements, entered into by a State and/or any State Authority, on the one hand, and any Project Investors, on the other hand, with respect to the MEP Project, as any or all of the foregoing agreements may be hereafter entered into, amended, modified or extended in accordance with their terms.

□Person□ means any physical person or any Entity.

□Petroleum□ means crude mineral oil, condensate, and all other kinds of liquid hydrocarbons regardless of gravity, in their natural condition or obtained from natural gas (being hydrocarbons that are gaseous at standard temperature and pressure) or liquid petroleum by vapourisation, condensation or extraction, including natural gas liquids, as well as any asphalt, bitumen or ozocerite and any incidental amounts of natural gas which may be liberated from the liquid hydrocarbons while in transit, any impurities in solution or suspension with the foregoing or any hydrocarbon product refined or produced from any of the foregoing.

□Project Agreements□ means (i) this Agreement, (ii) the Host Government Agreements and (iii) the Other Project Agreements.

□Project Investor□ means each Person that is a party to a Host Government Agreement (other than the Government of any of the respective States in the capacity of a host government counterparty to any such agreement), and any operating company, branch, office, permanent establishment, affiliate, nominee, agent or representative of such Person, and any successor or assignee of any of the foregoing in respect of the MEP Project.

“Shippers” means, with respect to the MEP Project, those Persons (including, without limitation, Project Investors) that have contracted for, or with respect to, Petroleum transportation services through the Facilities or Transportation System and have the right to tender Petroleum for transit through the Facilities or Transportation System, and their respective successors and assignees in respect of such rights.

“State Authorities” means, with respect to the MEP Project, the Government and each and every aspect thereof at every level in respect of the Territory, including all central, regional and local authorities or bodies (whether or not part of or controlled by any superior legal authority in the governmental hierarchy) and any and all instrumentalities, branches and subdivisions of any of the foregoing, and any State Entity. Without limiting the foregoing, the term shall include any and all executive and regulatory bodies, agencies, departments, ministries, authorities, Entities, officials, agents and representatives in respect of the Territory that have the authority to govern, regulate, implement or enforce the law, levy or collect taxes, duties or other similar charges, grant licenses or permits or approve or otherwise similarly affect, directly or indirectly, the MEP Project or the rights or obligations of Project Investors in respect of the MEP Project, notwithstanding any change at any time or from time to time in structure, form or otherwise.

“State Entity” means any Entity which is directly or indirectly controlled by a State or one or more State Authorities.

“Taxes” means all existing or future taxes, levies, duties, customs, imposts, contributions (such as social fund and compulsory medical insurance contributions), fees, assessments or other similar charges payable to or imposed by a State or State Authority, together with interest, penalties and fines (including financial sanctions and administrative penalties) with respect thereto, and “Tax” means any of the foregoing.

“Territory” means the land territory of a State, its territorial sea and the airspace above them, as well as the maritime areas over which it has jurisdiction or sovereign rights in accordance with international law.

“Transportation System” means, at any time, the pipeline system and related appurtenances owned, controlled and/or operated by or on behalf of Project Investors (including all Facilities located within the Territory of each State), comprising an integrated system necessary for the transportation of Petroleum from a location near the city of Baku, Azerbaijan and crossing the Azerbaijan Republic-Georgia border at a point to be agreed by the Azerbaijan Republic and Georgia and onward to a location near the city of Tbilisi, Georgia and crossing the Georgia-Republic of Turkey border between 42° 49' East and 43° 18' East and onward to a location near the city of Ceyhan, Republic of Turkey for distribution to international Petroleum markets, including the markets of the States.

Article II

MUTUAL REPRESENTATIONS, WARRANTIES AND COVENANTS

(1) The Government of each State hereby covenants to the others that, as of the execution hereof, it shall (i) promptly and properly present this Agreement to its national parliament for ratification and/or adoption in order to make it effective under its Constitution

as the prevailing legal regime of such State in respect of the MEP Project under its domestic law and a binding obligation under international law, (ii) take all steps necessary to promptly and properly present drafts of enabling legislation and other laws as may be necessary to make this Agreement (and in particular, the rights, guaranties, exemptions, grants, privileges and standards, waivers and indemnifications of legal liability applicable to the MEP Project in respect of the State and its Territory and the Project Investors under the applicable Host Government Agreement) effective under its Constitution as the prevailing legal regime of such State in respect of the MEP Project under its domestic law, including, without limitation, all such legislation as required to enact the applicable provisions of this Agreement into law in accordance with such State's authority to enact tax legislation, and (iii) use its best endeavours to secure as soon as practicable any such ratification and/or adoption of this Agreement as well as the enactment of any such legislation prior to or along with such ratification and/or adoption.

(2) In order to carry out the provisions of Section (1) of this Article II, each State has attached as appendices hereto, and thereby made an integral part hereof, accurate, complete and unexecuted forms of the Host Government Agreement between and among the Government of Georgia and the Project Investors (attached hereto as Appendix 1), the Host Government Agreement between and among the Government of the Republic of Turkey and the Project Investors (attached hereto as Appendix 2), the Turnkey Agreement between and among the turnkey contractor and the Project Investors (attached hereto as Appendix 3), the Government Guaranty by which the Government of the Republic of Turkey guarantees the payment and performance obligations of the turnkey contractor under the Turnkey Agreement (attached hereto as Appendix 4), and the Host Government Agreement between and among the Government of the Azerbaijan Republic and the Project Investors (attached hereto as Appendix 5).

(3) The Government of each State further covenants to the others to undertake the procedures set forth in Section (1) of this Article II in respect of any Other Project Agreement to which it is a party whenever the terms thereof call for such ratification, adoption and/or enactment.

(4) In mutual recognition that the MEP Project will involve substantial, capital intensive and environmentally sound infrastructure development within, between and across their respective Territories, each State hereby covenants that, from and after the ratification and/or adoption of this Agreement by such State as provided in Section (1) of this Article II and until its termination pursuant to Article VIII, such State shall fulfill and perform on a timely basis each of its duties and obligations arising under any applicable Project Agreement. Accordingly, without limiting the foregoing, each State hereby covenants to the other that, fully exerting all of its lawful authority, its State Authorities shall at all times:

(i) secure the taking of all steps in addition to the ratification and/or adoption described in Section (1) of this Article II necessary to authorise, enable, and implement the MEP Project, including, without limitation, by all appropriate executive and regulatory action as required to make this Agreement and any other applicable Project Agreement (to the extent required therein) effective under its Constitution as the prevailing legal regime of such State respecting the MEP Project under its domestic law;

(ii) secure full support for the implementation and conduct of the MEP

Project as provided by any applicable Host Government Agreement and any applicable Other Project Agreement and, in furtherance thereof, the taking of all necessary steps to assure compliance by its State Authorities with all obligations imposed on them by this Agreement, any applicable Host Government Agreement and any applicable Other Project Agreements and cooperation with the other States to establish and maintain necessary and favourable conditions as herein contemplated for the construction, ownership and operation of the Facilities within, and the transit of Petroleum in and/or across, its Territory (including, without limitation, in the event of armed conflict involving one or more of the States and/or terrorist attacks or activities on the Territory);

(iii) except as specifically provided in the applicable Host Government Agreement, not interrupt or impede the freedom of transit of Petroleum in, across and/or exiting from its Territory through the Facilities and the taking of all measures and actions which may be necessary or required to avoid and prevent the interruption or curtailment of such freedom of transit;

(iv) except as specifically provided in the applicable Host Government Agreement, secure the granting of exclusive rights to land in its Territory for the MEP Project under clear commercial terms and conditions of usage (including, without limitation, the right of indemnification and release from any and all costs and obligations associated with obtaining such exclusive rights to land);

(v) secure the provision to the other States of information sufficient to keep the recipient States fully informed on a timely basis with respect to the status of its efforts to accomplish all ratifications and adoptions and the prompt furnishing of written evidence of all such actions to the other States;

(vi) except as specifically provided under any applicable Host Government Agreement, secure the taking of all necessary measures to avoid delays and operational difficulties respecting the MEP Project including, in particular, the avoidance of administrative, regulatory or other similar procedural delays which might adversely affect the design, construction, ownership, operation, capacity expansion or extension (such as laterals), and maintenance of the Facilities and the Transportation System;

(vii) secure the authorisation and facilitation of the importing into and exporting or re-exporting from the Territory of Foreign Currency by those Persons involved in the MEP Project and confirmation of those Persons' right to utilise, without restriction by State Authorities, Foreign Currency accounts in the Territory and to exchange any such currency at current market rates;

(viii) except as specifically provided under any applicable Host Government Agreement, secure the right to freely move goods, materials, supplies, technology and personnel to and among the Facilities and in and between each of the Territories, including, without limitation, the right to import into or export or re-export from the Territory (free of all Taxes (including, without limitation, customs duties) and restrictions), all equipment, materials, machinery, tools, vehicles, spare parts, supplies, hydrocarbons (including fuel) and all other goods, works, services or technology necessary or appropriate for the MEP Project;

(ix) secure full cooperation in the conduct of negotiating and entering into

such other intergovernmental or multilateral agreements and treaties as may be appropriate between and among the States and other states, international institutions and authorities to authorise, enable and support the implementation of the MEP Project; and

(x) secure full cooperation and support for all financing efforts and activities by any Project Investor including, upon the request of any Project Investor, the confirmation in writing to any financial institution (including, without limitation, any multi-lateral lending agency or export credit agency) of any representation, warranty, guaranty, agreement or undertaking contained in any Project Agreement.

(5) Each State hereby represents and warrants that the terms and conditions of this Agreement and the undertakings hereunder are in conformity with its Constitution and that, upon the taking of the actions with respect to the ratification and/or adoption provided in this Agreement and any other applicable Project Agreement (to the extent therein required) will be effective as the prevailing legal regime of the State respecting the MEP Project under its domestic law.

(6) With respect to this Agreement, each State hereby represents and warrants that, as of its ratification and/or adoption as herein contemplated, the State is not a party to any domestic or international agreement or commitment or lawfully bound to observe or enforce any domestic law or regulation, or international agreement or treaty, that conflicts with, impairs or interferes with this Agreement or limits, abridges or adversely affects the State's ability to implement this Agreement or enter into and implement any other applicable Project Agreement.

(7) Except as otherwise expressly provided in the forms of applicable Host Government Agreement attached hereto pursuant to Section (2) of Article II and as of the date this Agreement enters into force, each State further represents and warrants that (I) the State's representation and warranty set forth in Section (6) of this Article II remains true and correct respecting the MEP Project and (II) the State is not party to any domestic or international agreement or commitment or, upon fulfillment of the obligations undertaken in Sections (1), (3) and 4(i) of this Article II, lawfully bound to observe or enforce any domestic law or regulation, or international agreement or treaty, that conflicts with, impairs or interferes with the implementation of the MEP Project or limits, abridges or adversely affects the value of the MEP Project, as set forth in the forms of applicable Host Government Agreement attached hereto pursuant to Section (2) of Article II, or any rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under this Agreement or the other applicable Project Agreements.

(8) Each State hereby represents and warrants that (I) the MEP Project shall not involve the provision of services to the public at large in its Territory for purposes of satisfying the general or common needs of the populace, (II) the MEP Project is not intended or required to operate in the service of the public benefit or interest in its Territory, and (III) as such, no applicable Project Agreement shall be characterised or treated, in whole or in part, as a concession contract or a special administrative contract granting a concession.

(9) The provisions of this Agreement shall not limit, abridge, or in any manner affect the right of each State, without the consent or agreement of the others, to enter into any Other Project Agreements and/or to modify, amend, replace, extend or terminate any Project

Agreements, other than this Agreement, all as agreed with the applicable Project Investors.

Article III **SECURITY AND ACCESS**

(1) Before and during the construction, installation and operation of any Facilities including, without limitation, later capacity expansions or extensions thereof (such as laterals), each State shall, if and when deemed necessary by Project Investors in connection with the MEP Project, search the area within its Territory where evaluative or construction work or operations is to be performed with respect to the Facilities for mines, unexploded ordnance or other explosive charges, traps or devices, and safely detonate and/or remove them.

(2) Each State shall ensure the safety and security of all personnel within its Territory associated with the MEP Project, the Facilities, all other assets of Project Investors within its Territory associated with the MEP Project, and all Petroleum in transit within its Territory with respect to the MEP Project; and, without limiting the foregoing, each State shall use the security forces of that State, and/or make provision for such security personnel and services, as may be necessary to satisfy this obligation, to ensure the safety and security of all personnel within its Territory associated with the MEP Project, the Facilities, all other assets of Project Investors within its Territory associated with the MEP Project, and all Petroleum in transit within its Territory with respect to the MEP Project. The extent of any liability arising under this Section (2) of Article III with respect to Georgia shall be reflected in the applicable Host Government Agreement.

(3) Subject only to the enforcement of applicable immigration, customs, criminal laws, and other relevant laws in effect in the Territory and as provided in the applicable Host Government Agreement and/or applicable Other Project Agreements, each State shall (i) ensure the right of access to and from its Territory and the Facilities related to the MEP Project by the applicable Project Investors and those employees, operating companies, contractors, Shippers, agents, representatives or other Persons seeking such access on behalf or with the consent of such Project Investors, and (ii) permit a right of free movement in its Territory for such Persons, their personal property and all assets of any such Persons relating to the MEP Project.

Article IV **TECHNICAL, SAFETY, AND ENVIRONMENTAL STANDARDS**

Each State shall cooperate and coordinate with the others and the applicable Project Investors in the formulation and establishment of uniform technical, safety and environmental standards for the construction, operation, repair, replacement, capacity expansion or extension (such as laterals) and maintenance of the Facilities in accordance with international standards and practices within the Petroleum pipeline industry (which shall in no event be less stringent than those generally applied within member states of the European Union) and the requirements as set forth in the relevant Host Government Agreement, which shall apply notwithstanding any standards and practices set forth in the domestic law of the respective State.

Article V
TAXES

(1) Except as otherwise specifically provided under the applicable Host Government Agreement and without limiting the express terms thereof, no Project Investor, Shipper or Person who provides goods, works, technology or services with respect to all or any part of the MEP Project shall be subject to any Taxes arising from or related, directly or indirectly, to the MEP Project, the Facilities or Transportation System, all Petroleum which is transported through the Facilities or Transportation System or any related assets or MEP Project activities. Each Host Government Agreement shall set forth a legal framework for the imposition of Taxes and/or the granting of Tax exemptions or privileges, as well as for the imposition of and/or the granting of exemptions from Tax compliance and filing obligations, including specific terms and conditions of any such Taxes, exemptions, privileges and/or obligations.

(2) If any Tax is imposed in accordance with the applicable Host Government Agreement on the profit of a Project Investor for a calendar year with respect to the MEP Project, such Tax shall be limited to such Project Investor's profit which is attributable to the Project in the Territory for such calendar year. Any such Tax shall be as set forth in the applicable Host Government Agreement, consistent with the provisions of this Agreement. For purposes of computing such Taxes, (i) any revenues which are attributable to the overall activities of the Transportation System are to be allocated among the States in accordance with any reasonable allocation method which is selected by the Project Investor and applied consistently by the Project Investor from year to year, in a manner such that the aggregate amount of any such revenues reportable to the States for a calendar year is equal to the aggregate actual amount of such revenues of the Project Investor from the MEP Project for such calendar year, and (ii) any costs and expenses which are related to the entirety of the applicable Transportation System are to be allocated among the States in accordance with any reasonable allocation method which is selected by the Project Investor and applied consistently by the Project Investor from year to year, in a manner such that the aggregate amount of such costs and expenses reportable to the States for a calendar year is equal to the aggregate actual amount of such costs and expenses associated with the MEP Project for such calendar year. Any such allocation method selected by a Project Investor shall be based upon the relative length of the Transportation System located in the Territory of each of the States, the relative amount of capital expenditures or expected capital expenditures incurred or to be incurred with respect to the portion of the Transportation System located in the Territory of each of the States or any other method consistent with practices which are generally accepted in the international Petroleum transportation industry. Under each such Tax, each Project Investor with respect to the MEP Project shall be entitled to deductions which provide for the recovery (whether by expensing, amortising or depreciating) of all costs and expenses associated, directly or indirectly, with the MEP Project, wherever incurred, which are attributable to the revenues of the Project Investor upon which such Tax is imposed. For purposes of this Section (2) of Article V, costs and expenses shall include, without limitation, capital expenditures.

(3) Notwithstanding the foregoing, except as otherwise specifically provided under the applicable Host Government Agreement and without limiting the express terms thereof, no Taxes shall be imposed or withheld with respect to payments or deemed payments

to any entity organised outside the Territory by all or any of the Project Investors, Shippers or Persons who provide goods, works, technology or services (including, without limitation, credit, financing, insurance or other financial accommodations) with respect to all or any part of the MEP Project, or any branch or permanent establishment thereof, to the extent such payments or deemed payments are associated, directly or indirectly, with the MEP Project or any related assets or activities.

(4) The first sentence of Section (1) of this Article V and all of Section (3) of this Article V shall apply to the MEP Project only if the applicable Host Government Agreement contains provisions relating to Taxes.

Article VI

IMPLEMENTATION COMMISSION

(1) The States hereby establish a commission consisting of two (2) representatives from each State to oversee compliance with and facilitate the implementation of this Agreement. Within thirty (30) days after the date hereof each State shall designate in writing to the others its representatives to such commission, which representatives shall be fully authorised and empowered by the respective State to act on its behalf with regard to any matter properly brought before the commission in respect of the MEP Project. Each State shall similarly provide notice in writing to the Project Investors of its current representatives to the commission for the MEP Project within thirty (30) days after its entry into a Host Government Agreement. Each State may change its representative(s) effective upon delivery of written notice to the other States and to the Project Investors.

(2) The commission described herein shall meet at the written request of any State or the Project Investors and, in response to such a request, the States shall promptly consult each other and the pertinent Project Investors in order to provide prompt and effective assistance on the implementation of the MEP Project as well as to resolve in good faith any complications, issues, problems or disputes that may arise in connection with this Agreement, or to discuss any matter relating to the interpretation, application or enforcement of this Agreement.

(3) In addition to other matters which may be considered from time to time, the commission shall take all appropriate action to facilitate the following with respect to the MEP Project:

(i) in accordance with Section (3) of Article III, the unimpeded movement of goods, materials, supplies, technology and personnel to and among the Facilities and in and between each of the Territories including, in particular, instances where the periodic and recurring crossing of the international boundaries is involved in the MEP Project; and

(ii) in accordance with the relevant legislation of the particular State, the use by the Project Investors of exclusive and common radio and telecommunication frequencies in each Territory, the operation by the Project Investors of aircraft to fly over the Facilities and Transportation System during route evaluation, construction, installation, operation, capacity expansion or extension (such as laterals) and maintenance and other measures to facilitate and allow the uniform and efficient operation of the Transportation

System in, across, between and among the Territories of the States.

Article VII
FURTHER ACKNOWLEDGMENTS AND AGREEMENTS

(1) Each State acknowledges that it has received and reviewed copies of this Agreement and, upon execution of the Project Agreements referred to in Section (2) of Article II, represents and warrants that it finds those agreements acceptable for purposes of implementing the MEP Project and agrees to fulfill and perform all obligations and commitments imposed on it thereby.

(2) Each State acknowledges and agrees that title to all Petroleum transported through the Transportation System shall remain vested in the Project Investors and/or Shippers in accordance with their commercial agreements, from time to time, and except to the extent the State or any State Authority is acting in the role of a commercial participant in the MEP Project, the State shall not claim, nor allow others to claim on its behalf, title to or ownership of any Petroleum in the Transportation System.

(3) Each State (i) acknowledges, as of the date this Agreement enters into force, that the rights, grants, exemptions, waivers, indemnities and privileges as well as obligations, commitments and undertakings and other terms and provisions set forth in this Agreement and the other applicable Project Agreements are or may be inconsistent with, not contemplated by or provided for under, or require amendments to or exemptions from, existing law in such State and (ii) confirms its intention and the mutual interest of each State to have its law support, authorise and conform to all such terms and provisions and to have such terms and provisions prevail over any conflicting laws in order to facilitate the implementation and operation of the MEP Project in accordance with the applicable Project Agreements.

(4) Each State acknowledges that if a State takes any action, fails to take any action or suffers or permits the taking of any action or occurrence of an event which interrupts or otherwise impedes, or threatens to interrupt or impede, the MEP Project, including, without limitation, the flow of Petroleum through the Facilities or Transportation System, such State shall use all lawful and reasonable endeavours, taking into account democratic, economic and commercial principles, to eliminate the threat and rectify any interruption or impediment and promote restoration of all MEP Project activities at the earliest opportunity.

(5) Each State acknowledges, consents and agrees that, without limiting the duty of each State to use all lawful and reasonable endeavours to fully perform hereunder, any failure by or refusal by a State to fulfill or perform promptly all of its obligations, take all actions and grant all rights as provided in any applicable Project Agreement (other than this Agreement) shall constitute a breach for which any injured Project Investor or other Person permitted under any applicable Project Agreement (other than this Agreement) shall be entitled to such remedies, including, without limitation, prompt, adequate and effective compensation for any economically assessable damages sustained, inclusive of interest, as are set forth in any applicable Project Agreement (other than this Agreement).

Article VIII
EFFECT, INTERPRETATION AND DISPUTE RESOLUTION

(1) This Agreement shall enter into force upon the submission to the depositary referred to in Article IX of the last of the instruments of ratification by each State of this Agreement and shall be effective as of the date hereof with respect only to Section (1) of Article II. Upon the entry into force of this Agreement, all matters relating to Taxes shall become effective as of the date hereof. This Agreement shall terminate upon the termination or expiration of all Project Agreements and the conclusion of all activities thereunder in accordance with their terms.

(2) The States shall endeavour to settle disputes concerning the application or interpretation of this Agreement through the commission formed under Article VI or through diplomatic channels. If, in the sole discretion of a State, and regardless of the status of consultations undertaken by any commission or similar body established pursuant to this Agreement or through diplomatic efforts, a dispute has not been settled, that State may, upon written notice to the other State(s), submit the matter for final and binding resolution to an *ad hoc* tribunal under this Article VIII. Such an *ad hoc* tribunal shall be constituted and shall conduct proceedings in accordance with the dispute resolution provisions contained in Article 27(3) of the Energy Charter Treaty 1994, applying those dispute resolution provisions *mutatis mutandis* to this Agreement.

(3) Each State acknowledges, consents and agrees that any dispute between a State and a Project Investor related to the MEP Project under an applicable Project Agreement (other than this Agreement) shall be subject to private international arbitration in accordance with the provisions of such Project Agreement.

Article IX
DEPOSITARY

The Government of the Republic of Turkey shall serve as depositary under this Agreement and shall receive an original of this Agreement upon its execution by the States. Upon ratification and/or adoption of this Agreement by a State, such State shall promptly deposit with the depositary an instrument of ratification of this Agreement and the depositary shall promptly notify each of the other States of such deposit. The depositary also shall, promptly upon the deposit of the last of such instruments of ratification, notify each of the States of the date of entry into force of this Agreement. Following such entry into force, each State shall cause to be prepared a certified translation of the executed Agreement into its official language and shall deposit such translation with the depositary. Each State shall deposit with the depositary a copy of any Host Government Agreement or Other Project Agreement which it has executed as well as a copy of the ratified text of any such agreement and a certified translation of any such agreement into its official language. In respect of any amendments or modifications to any existing Project Agreement and/or any new Project Agreement to which a State or any of its State Authorities is a party, the State shall deposit with the depositary a copy of the ratified text of any such amended or new Project Agreement as well as a fully executed copy of such agreement and a certified translation of any such agreement into its official language.

Article X
ACCESSION

From the date this Agreement enters into force, this Agreement shall be open for accession by another state, if all States then party to this Agreement consent to the accession, by signature and ratification and/or adoption of appropriate documentation as may then be agreed among the parties to this Agreement and the acceding state, so that all obligations contained in this Agreement shall thereafter exist among all States party to this Agreement. No acceding state may make any reservations to this Agreement without the consent of all States then party to this Agreement.

Article XI
ENTIRE AGREEMENT

This Agreement supersedes and nullifies any prior protocol or other agreement or treaty between or among any of the States with respect to the transportation of Petroleum through the Transportation System to the extent such prior protocol, agreement or other treaty is inconsistent with this Agreement.

AGREED AND EXECUTED this 18th day of November, 1999 at Istanbul, Republic of Turkey in four (4) originals in the English language.

FOR
THE AZERBAIJAN
REPUBLIC

FOR
GEORGIA

FOR
THE REPUBLIC
OF TURKEY

Appendix VIII “The Host Governmental Agreement”



APPENDIX 1

This Appendix 1, as amended and restated 28 April 2000, is attached to and made part of the Intergovernmental Agreement dated 18 November 1999.

**HOST GOVERNMENT AGREEMENT
BETWEEN AND AMONG
THE GOVERNMENT OF GEORGIA
AND
[THE MEP PARTICIPANTS]**

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HOST GOVERNMENT AGREEMENT

THIS AGREEMENT, made and entered into in the city of Tbilisi in Georgia as of this ____ day of _____, 2000, between:

THE GOVERNMENT OF GEORGIA

and

[THE MEP PARTICIPANTS]

all the foregoing named signatories being legal persons in accordance with the legislation of the jurisdictions of their formation and organisation as confirmed by appropriate documentation thereof;

WITNESSETH:

WHEREAS, the MEP Participants are considering the development of a secure and efficient pipeline system for the transportation of Petroleum to, within and across the territories of the Azerbaijan Republic, Georgia and the Republic of Turkey for export to international markets, including markets in Georgia;

WHEREAS, based on the agreed terms and conditions of the Project Agreements and other commercial arrangements consistent with the Project Agreements, the MEP Participants shall have the right to implement the Project and construct (or cause to be constructed), own and/or operate the MEP System, including the Facilities, and utilise the resulting capacity in the MEP System and Rights to Land;

WHEREAS, the Government acts on behalf of the State and the State Authorities in matters such as those provided in this Agreement;

WHEREAS, the Azerbaijan Republic, the Republic of Turkey and Georgia have entered into the Intergovernmental Agreement to give the Project's legal and commercial terms and conditions the support and framework of international law;

WHEREAS, this Agreement is entered into based on and in furtherance of the Intergovernmental Agreement;

WHEREAS, the Government, acting on behalf of the State and the State Authorities, enters into this Host Government Agreement empowered with the authority under Georgian Law to direct and make commitments on behalf of the State and all State Authorities;

WHEREAS, the State Authorities wish to facilitate and support the Project and, in furtherance thereof, the State Authorities recognise the need to create the necessary framework of legal and commercial protections and intend to provide to, or for the benefit of, the Project and the relevant Project Participants, among other things, rights in and to certain facilities owned or controlled by the State Authorities, direct government guaranties,

indemnities and other representations, authorisations, exemptions and assurances, as well as the required land in Georgia comprising the pipeline routes as specified herein and in the applicable Project Agreements; and

WHEREAS, in connection therewith and as provided therein, the Intergovernmental Agreement and attached form of this Agreement shall become effective (with respect to the subject matter thereof) as the prevailing legal regime of Georgia (other than the Constitution) and the terms of such agreement shall be the binding obligation of Georgia under international law and shall be made effective under the Constitution as the prevailing legal regime respecting the Project under Georgia's domestic law; and this Agreement and any other Project Agreements, once executed, shall be binding instruments, enforceable in accordance with their respective terms.

NOW, THEREFORE, for and in consideration of the premises, the Parties hereby agree as follows:

ARTICLE 1

DEFINITIONS

Capitalised terms used in this Agreement (including the recitals), and not otherwise defined herein, have the meanings given to them in Appendix 1.

ARTICLE 2

AUTHORITY

- 2.1 With respect to this Agreement, the Government is empowered with the authority under Georgian Law to direct and to make the commitments provided herein on behalf of the State and all State Authorities. All obligations of the State Authorities under this Agreement shall be, and for all purposes shall hereby be conclusively deemed to be, the obligations of the State. All obligations of the State Authorities under this Agreement shall be obligations to be observed and performed by each relevant constituent element thereof, including the Government, each of the relevant Local Authorities and each relevant State Entity.
- 2.2 In order to ensure that the obligations of the State Authorities set forth in this Agreement are discharged in a timely manner and otherwise to facilitate and coordinate the conduct of Project Activities, the Government shall appoint by written notice to the MEP Participants an authorised representative, agency or other body (the [Government MEP Representative]) by or through which the MEP Participants may request and secure (i) issuance of any and all rights, licenses, visas, permits, certificates, authorisations, approvals and permissions provided in this Agreement, (ii) information, documentation, data and other materials specified by this or any other Project Agreement or appropriate to evidence any grants of rights hereunder, (iii) the submission and receipt of notifications, certifications and other communications provided herein, and (iv) the taking of such other actions with respect to the State

- Authorities appropriate to facilitate the implementation of the Project.
- 2.3 The MEP Participants recognise the fundamental importance of discharging their obligations and of facilitating and coordinating the conduct of Project Activities under this Agreement in a timely and efficient manner. Accordingly, the MEP Participants shall use Best Endeavours to adopt procedures by not later than one hundred eighty (180) days from the Effective Date (which procedures shall include, inter alia, the appointment of one or more representatives, committees, or other organisational or functional bodies by or through whom the MEP Participants may act) which will facilitate the method and manner of the MEP Participants' timely and efficient exercise of their rights, benefits, privileges and exemptions and/or performance of their obligations hereunder (the "MEP Representative(s)"), subject at all times to (i) the terms and conditions of the business structure among, and/or the business activities of, the MEP Participants and (ii) the requirement that all matters in respect of Taxes for an MEP Participant shall be addressed by that MEP Participant (or its designated agent). Upon the appointment of the MEP Representative(s), the State Authorities shall be entitled to rely upon the communications, actions, information and submissions of an MEP Representative, in respect of that MEP Representative's notified area of authority, as being the communications, actions, information and submissions of the MEP Participants. The Parties further acknowledge that the MEP Participants shall have the right, upon reasonable notice to the State Authorities, to remove, substitute or discontinue the use of one or more specific MEP Representative(s).
- 2.4 The MEP Participants and the State Authorities shall, at the request of either of them, review from time to time the status of MEP Activities and confer respecting any issues arising with respect thereto.

ARTICLE 3

AGREEMENT, TERM AND DURATION

- 3.1 This Agreement shall be effective and binding from the date it has been fully executed by all Parties hereto (the "Effective Date"), shall continue for a primary term of forty (40) years from the date of first shipment of Petroleum through the custody transfer meter at the Point of Terminus (the "Primary Term") and, subject to all other provisions of this Agreement, shall continue in full force and effect after the Primary Term for two (2) successive ten (10) year rollover terms (each, a "Rollover Term"); provided, however, that in order to continue this Agreement in effect into the next Rollover Term the MEP Participants shall be obligated to provide written notice to the Government of their election to continue this Agreement into the next Rollover Term (the "Rollover Notice") no earlier than three hundred sixty (360) days and no later than one hundred eighty (180) days prior to the end of the Primary Term and the first Rollover Term (each a "Notice Period"); and provided, further, (1) if the date of first shipment of Petroleum through the custody transfer meter at the Point of Terminus is a date in a calendar year on or before June 30, the Primary Term shall consist of (i) a first year, which shall be deemed to be all days remaining in the calendar year, plus (ii) the thirty-nine (39) calendar years next following such first

year; and (2) if the date of first shipment of Petroleum from the Point of Terminus is a date in a calendar year on or after July 1, the Primary Term shall consist of (i) a first year, which shall be deemed to be all days remaining in such calendar year as well as all days in the next succeeding calendar year, plus (ii) the thirty-nine (39) calendar years next following such first year of the Primary Term, and provided, finally, that during each Notice Period, the Parties shall identify and resolve any Additional Commercial Issues applicable to the next Rollover Term. The term "Additional Commercial Issues" means those commercial issues (other than pertaining to Taxes) relating to the Project which either Party, by written notice to the other (given by not later than thirty (30) days following the Rollover Notice), submits for resolution and inclusion as additional contractual element(s) of this Agreement. In the event of any failure by the MEP Participants to give the Rollover Notice during the Primary Term or during the first Rollover Term, this Agreement shall terminate and the provisions of Section 3.7 shall apply. For the avoidance of doubt, if the Parties are unable to resolve the Additional Commercial Issues during the Notice Period, this Agreement nevertheless shall continue during the Rollover Term and, in accordance with Article 17 hereof, the dispute shall be submitted to arbitration for final determination. For purposes of any such arbitration, the arbitrators, in determining whether and to what extent such additional contractual element(s) for the Additional Commercial Issues should be included in this Agreement, shall take into account: (A) the existing terms and conditions of this and other Project Agreements; (B) changed circumstances, if any, occurring since this Agreement and other Project Agreements were entered into (or later modified) which are asserted to be causing the Party material detriment or harm under or in respect of this Agreement; (C) the effects, if any, of inflation or deflation in respect of this Agreement; (D) the relative benefits enjoyed and burdens borne by the Parties under this Agreement and the other Project Agreements in the context of governmental agreements encouraging and supporting direct foreign investment in the Project; (E) the maintenance of the Project as a viable commercial enterprise for the transportation of Petroleum to international markets (including markets in the Territory); and (F) such other matters as are, under the circumstances, relevant to fairly resolving the particular dispute over the Additional Commercial Issues.

- 3.2 Notwithstanding the foregoing Section 3.1 and subject to Section 3.7, this Agreement may be terminated at any time by the MEP Participants giving their written notice of termination to the Government and shall be of no further force or effect for any purpose as of the date specified by the MEP Participants in said notice.
- 3.3 If the MEP Participants have not taken material steps to commence the construction phase respecting the Facilities by not later than thirty-six (36) months after the Effective Date, then for a period of one hundred twenty (120) days thereafter the Government shall have the right to give written notice to the MEP Participants of the termination of this Agreement. Such termination shall become effective thirty (30) days after actual receipt by the MEP Participants of said termination notice unless within said thirty day period the MEP Participants take steps to commence the construction phase respecting the Facilities. If the above-referenced one hundred twenty (120) day period expires without the Government giving any such termination notice, the Government's right to terminate hereunder shall expire and this

Agreement shall continue in full force and effect in accordance with its terms. In addition, the above-referenced thirty-six (36) month period shall be extended if and to the extent of any delays caused by the failure or refusal of any State Authorities to perform timely any obligations they may have respecting MEP Activities.

- 3.4 In addition to the termination right of the Government set forth in Section 3.3, the Government shall have the right to terminate this Agreement under the circumstances and in accordance with the procedures set forth in this Section 3.4. If the Government concludes that the MEP Participants have committed a material breach of any of their joint and several obligations (as those obligations are set forth in Section 10.3), then the Government shall have the right to give written notice to the MEP Participants of such breach in detail sufficient for the MEP Participants to undertake cure. During the pendency of any discussions to attempt resolution and/or any subsequent arbitral proceedings, the MEP Participants may, but shall have no obligation to, undertake to address and/or cure the alleged breach; provided, however, in the event the MEP Participants do not commence efforts to effect cure of a disputed breach, the Government may undertake cure. If and to the extent the MEP Participants do not dispute or, after discussions to attempt resolution, agree with the Government that such breach has occurred, the MEP Participants shall promptly undertake efforts to effect cure. If any such breach remains uncured for ninety (90) days after receipt of any undisputed notice or confirmation of resolution, as the case may be (the "Cure Period"), the Government shall have the right to give the MEP Participants written notice of termination of this Agreement, which termination shall be effective thirty (30) days after the Government's giving of the termination notice to the MEP Participants. If the cure is effected by the MEP Participants within the Cure Period, the Government's right to give a termination notice in respect of the earlier noticed breach shall end and this Agreement shall continue in full force and effect. If the breach is one that cannot be effectively cured within the Cure Period, the MEP Participants shall nevertheless have the right to cure the breach and avoid termination hereunder by commencing efforts to cure the breach within the Cure Period and thereafter diligently pursuing efforts to cure. Any cure so effected beyond the Cure Period shall nonetheless be deemed to have occurred within the Cure Period, any cure so effected shall serve to end the Government's right to give a termination notice in respect of the earlier noticed breach, and this Agreement shall continue in full force and effect. In the event that, pursuant to the provisions of this Section 3.4, the Government effects cure of a disputed breach, which disputed breach is later determined pursuant to Article 17 to have been a material breach, the MEP Participants shall pay all costs incurred by the Government in effecting such cure.

For purposes of this Section 3.4, "material breach" means a breach which:

- (i) constitutes the knowing and continuous, repeated or persistent failure or refusal by the MEP Participants to take appropriate action to assure that:
 - (a) their Project Activities in the Territory comply with the standards and practices set forth in this Agreement; or
 - (b) their activities in the Territory related to the Project do not pose

a threat to the national security of Georgia; or

(ii) is tantamount to the frustration of the entire Agreement;

and, in the case of (i) above, the nature and extent of the breach reasonably supports the conclusion that termination is an appropriate remedy under the circumstances, it being further agreed that nothing in this Section 3.4 shall preclude an award in arbitration of a remedy other than termination. Termination hereunder shall be without prejudice to the Government's right to any other remedies available under this Agreement. Notwithstanding the foregoing, the Government shall have no right of notice and/or termination hereunder if any such material breach is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority.

- 3.5 If this Agreement has not been earlier terminated pursuant to this Article 3, this Agreement shall terminate and be of no further force or effect on the date on which all Project Activities have permanently ceased, as such date is notified by the MEP Participants in writing to the Government.
- 3.6 Subject to Section 3.7, it is expressly understood by the Parties that by entering into this Agreement or undertaking Project Activities, no MEP Participant or other Project Participant is committed, or is in any manner obligated to any of the State Authorities, to undertake any other Project Activities or otherwise to implement or carry out the Project, or to continue any Project Activities that it may have begun, in reliance on this or any other Project Agreement, or otherwise.
- 3.7 Termination of this Agreement shall be without prejudice to (i) the rights of the Parties (including those which are no longer Parties) respecting the full performance of all obligations accruing prior to termination and (ii) the survival of all waivers and indemnities provided herein in favour of a Party (or former Party).

ARTICLE 4

GRANT OF RIGHTS

- 4.1 For purposes of the Project and subject to the terms hereof (including any applicable Application Requirements), and the other Project Agreements, the State Authorities hereby grant:
- (i) to the Project Participants, the absolute and unrestricted right and privilege to implement and carry out the Project, conduct all Project Activities, and enjoy all other rights and privileges provided to any or all of them by the State Authorities under the Project Agreements;
 - (ii) to the MEP Participants and such other Project Participants as the MEP Participants may designate to implement Project Activities, the exclusive and unrestricted Rights to Land in respect of State Land as set forth in

Appendix 2;

- (iii) to each of the MEP Participants, such status and powers of taking, compulsory acquisition, eminent domain, expropriation, or other similar delegated powers of the State to enable each of the MEP Participants for the duration of the Project to secure, maintain and pay reasonable compensation to affected Persons for all Rights to Land in respect of Nonstate Land as set forth in Appendix 2;
 - (iv) subject to any private arrangements entered into by the MEP Participants in respect of Nonstate Land, to each of the MEP Participants, the exclusive and unrestricted property right to use, possess, control and construct upon and/or under the Permanent Land, and to restrict or allow (at the MEP Participants' sole discretion) the use, occupation, possession and control of, and construction upon and/or under, the Permanent Land by any other Persons;
 - (v) to each of the MEP Participants, the exclusive and unrestricted right and privilege to construct, own, use, possess and control the Facilities;
 - (vi) to the Project Participants, subject to Sections 18.2 and 18.3, the absolute and unrestricted right and privilege to employ or enter into contracts with, for the purpose of conducting Project Activities, such Persons and their respective personnel (including citizens of the State and, subject to Section 7.2, of countries other than the State) who, in the opinion of such Project Participant, demonstrate the requisite knowledge, qualifications and expertise to conduct such activities; and
 - (vii) to the MEP Participants and their designated Contractors free of charge, readily available surface water not subject to prior restriction of sufficient quality and quantity located proximate to the Facilities in order to perform hydrostatic and other testing of the Facilities, together with the right to dispose of same at location(s) proximate to said Facilities upon completion of such testing.
- 4.2 The rights, exemptions and/or privileges granted or made available under this Agreement are granted by the State Authorities in relation to the carrying out of the Project and Project Activities by the MEP Participants and other Project Participants engaged to participate in and carry out the Project and Project Activities by the MEP Participants. The State Authorities hereby acknowledge that the MEP Participants intend to do business with and/or engage Project Participants in the carrying out of the Project and Project Activities, and agree that these Project Participants, by their participation in the Project, shall have the benefit of all rights, exemptions and privileges as are provided under any Project Agreement. In this regard, to facilitate the administration of any Project Agreement, the MEP Participants will notify the State Authorities, from time to time, of those Persons who are Project Participants and/or furnish said Persons with written evidence of such status with respect to the Project, it being further understood that no such failure to notify and/or furnish written evidence of Project Participant status will have the effect of denying such status (either retroactively or prospectively) but may cause a delay under particular

circumstances (for example, immediate grant of customs clearances) until such status is confirmed by the MEP Participants. If any rights, exemptions, grants or privileges are not already vested in any such Project Participant by operation of Georgian Law, the State Authorities hereby grant to each of the MEP Participants the further right and authority to (i) make such rights available by sub-grant to such Project Participants or (ii) transfer, assign or share such rights to or with such Project Participants pursuant to Article 16. In addition, the State Authorities agree that, if requested by any MEP Participant, the State Authorities shall evidence the grant of rights to any Project Participants in a written instrument to such effect in form sufficient and appropriate to facilitate the carrying out of the Project or Project Activities or any part thereof.

ARTICLE 5

GOVERNMENT GUARANTIES

- 5.1 In addition to affirming that the following obligations are primary obligations of the State Authorities, the Government hereby guarantees to each of the MEP Participants the validity and effectiveness of the acknowledgments, representations and warranties made by it on behalf of and committing the State Authorities as set forth in this Agreement, the rights and privileges provided (and to be provided) to any and all Project Participants by the State Authorities under all Project Agreements and the complete and timely satisfaction and performance of all State Authorities' obligations in accordance with the terms of the Project Agreements.
- 5.2 Without limiting the breadth and scope of the foregoing, the Government hereby commits the State Authorities to perform and, in respect of all State Authorities other than itself, guarantees to each of the MEP Participants:
- (i) that the State Authorities shall not interrupt or impede the freedom of transit of Petroleum in, across and/or from the Territory except in accordance with the provisions of clause (iii) below;
 - (ii) that the State Authorities shall perform and take all actions and make all decisions required of the State Authorities in accordance with the terms of all Project Agreements;
 - (iii) that the State Authorities shall not act or fail to act in any manner that could hinder or delay any Project Activity or otherwise negatively affect the Project or impair any rights granted under any Project Agreement (including any such action or inaction predicated on security, health, environmental or safety considerations that, directly or indirectly, could interrupt, impede or limit the flow of Petroleum in or through the Facilities, except under circumstances in which continued operation of the Facilities without prompt corrective action creates an unreasonable threat to public security, cultural heritage, health, safety or the environment (using, for such purposes in

respect of the environment, the applicable standards and practices of Appendix 3 of this Agreement and, in respect of health, safety, public security and cultural heritage, the applicable provisions of Georgian Law) that renders it reasonable to take or fail to take, as the case may be, such action and, then, only to the extent and for the period of time necessary to remove that threat);

- (iv) that, in accordance with the applicable Project Agreements, the State Authorities shall give their full cooperation in connection with Project Activities;
- (v) that the State Authorities shall not claim or demand title to or possessory rights over the Petroleum, the Facilities, or the Nonstate Land;
- (vi) that the State Authorities shall not claim, demand or restrict any of the Rights to Land granted by the State Authorities to the MEP Participants under Section 4.1 (ii), (iii) and (iv); and
- (vii) that the State Authorities shall make the payment of any and all sums of money which may become due and owing by the State Authorities under or pursuant to any Project Agreement, including compensation payments under Article 9 of this Agreement and pursuant to the indemnification provisions of any Project Agreement.

5.3 The guaranties made by the Government in this Article 5:

- (i) are several, independent, absolute, irrevocable and unconditional and each constitutes an independent covenant and principal obligation of the Government, separately enforceable from all other obligations of the State Authorities under the Project Agreements, without regard to the non-performance, invalidity or unenforceability of any of those other obligations;
- (ii) are enforceable, jointly and severally, against the constituent elements of the State Authorities and, regardless of against whom enforcement is sought, any award or claim for payment in respect thereof shall be submitted to the Ministry of Finance of Georgia and such award or claim for payment (granted, with respect to a claim for payment, such claim is not disputed by the State Authorities) shall be paid to the MEP Participants on or before thirty (30) days after receipt by the Ministry of Finance of Georgia of the related award or claim for payment; and
- (iii) shall not be modified, impaired or rendered unenforceable by any defense available to the State Authorities under any Project Agreement or otherwise as a result of the occurrence of any event that, but for this Section 5.3(iii), would discharge that guaranty other than by the full performance thereof in accordance with the relevant Project Agreement.

5.4 In furtherance of the commitments and guaranties made by the Government in this Article 5, the Government (i) hereby affirms the obligations set forth herein of the

State Authorities and consents to the performance of all obligations of the State Authorities under the Project Agreements and (ii) shall, in a timely fashion, issue, give or cause to be given, in writing, all decrees, orders, regulations, rules, interpretations, authorisations, approvals and consents necessary or appropriate to evidence further the foregoing affirmation and consent to enable the State Authorities to perform in a timely manner all of their obligations as provided by the Project Agreements.

ARTICLE 6

REPRESENTATIONS AND WARRANTIES

6.1 The Government hereby represents and warrants to each of the MEP Participants that as of the Effective Date:

- (i) all ratifications and all parliamentary, legislative and executive actions and enactments required by Georgian Law to cause the Intergovernmental Agreement, together with the attachments thereto, to be effective and otherwise endow the Intergovernmental Agreement, together with the attachments thereto, as binding on the State under international law and Georgian Law have been completed; and
- (ii) all parliamentary, legislative and executive actions and enactments required of the State Authorities by Georgian Law, to cause the terms of the Intergovernmental Agreement, together with the attachments thereto, and the various grants and obligations of the State Authorities thereunder in favour of the MEP Participants and/or other Project Participants to become effective in Georgia as the prevailing legal regime under Georgian Law with respect to the Project and all Project Activities as the binding obligations of the State Authorities have been completed.

6.2 The Government hereby represents and warrants to each of the MEP Participants that as of the Effective Date and throughout the term of this Agreement:

- (i) the Government is duly authorised under Georgian Law to execute this Agreement and to bind, commit and impose obligations on itself, the State and all State Authorities hereunder, subject only to fulfillment of the obligations of the State Authorities under Section 7.1;
- (ii) the State Authorities have, or have the legal authority to obtain in a timely manner, exclusive jurisdiction respecting Rights to Land in respect of State Land and the full power, authority and right under Georgian Law to grant the rights and privileges provided in Article 4, which rights are transferable by an MEP Participant in accordance with this Agreement;
- (iii) the obligations of the State Authorities under this Agreement (including the

Government's guaranties under Article 5) and the other Project Agreements are valid, binding and enforceable against the State and State Authorities in accordance with the terms of this Agreement and the other Project Agreements;

- (iv) the representations, warranties and covenants made in respect of the Government under the Intergovernmental Agreement (including, but not limited to, the representation and warranty set forth in Section (5) of Article II thereof) apply *mutatis mutandis* under this Agreement and are enforceable hereunder by the MEP Participants; and
- (v) the State Authorities have not granted and are not obligated to grant to any Person any rights or privileges that are inconsistent or conflict, or that may limit or interfere, with the exercise and enjoyment of the rights and privileges held by any Project Participant under any Project Agreement.

6.3 Each of the MEP Participants hereby represents and warrants that as of the Effective Date:

- (i) it is duly organised, validly existing and in good standing in accordance with the legislation of the jurisdiction of its formation or organisation, has the lawful power to engage in the business it presently conducts and contemplates conducting, and is duly licensed or qualified and in good standing as a foreign corporation in each jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary;
- (ii) it has the power to make and carry out this Agreement and to perform its obligations under this Agreement and all such actions have been duly authorised by all necessary procedures on its part;
- (iii) the execution, delivery and performance of this Agreement will not conflict with, result in the breach of, constitute a default under or accelerate performance required by any of the terms of its formation or organisational documents or any agreement, decree or order to which it is a party or by which it or any of its assets is bound or affected;
- (iv) this Agreement has been duly and validly executed and delivered by it and constitutes a legal, valid and binding obligation upon it, enforceable in accordance with its terms, except and to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganisation or other similar legal process affecting the rights of creditors generally or, where applicable, by general principles of equity;
- (v) there are no actions, suits, proceedings or investigations pending or, to its knowledge, threatened against it before any court, arbitral tribunal or any governmental body which individually or in the aggregate may result in any materially adverse effect on its business or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations under this Agreement. Such Party has no knowledge of any violation or

default with respect to any order, decree, writ or injunction of any court, arbitral tribunal or any governmental body which may result in any such materially adverse effect or such impairment;

- (vi) it has complied with all laws applicable to it such that it has not been subject to any fines, penalties, injunctive relief or criminal liabilities which in the aggregate have materially affected or may materially affect its business operations or financial condition or its ability to perform its obligations under this Agreement; and
- (vii) no representation or warranty by it contained in this Agreement contains any untrue statement of material fact or omits to state a material fact necessary to make such representation or warranty not misleading in light of the circumstances under which it was made.

ARTICLE 7

CERTAIN COVENANTS AND CONSENTS OF THE GOVERNMENT

- 7.1 The Government hereby covenants and agrees that it shall promptly ensure the taking of all actions within its power to achieve the ratification, enactment and promulgation of all laws and decrees that are or may become necessary under Georgian Law to continue in force and fully implement the terms of this Agreement and all other Project Agreements and to authorise, enable and support the activities and transactions contemplated by all Project Agreements. In this regard, the Government shall consult with and keep the MEP Participants informed respecting the development of any necessary laws or decrees and the status of all actions which are or may be necessary in order to comply with the foregoing.
- 7.2 The Government hereby covenants and agrees (on its behalf and acting on behalf of and committing the State Authorities) that throughout the term of this Agreement:
- (i) from time to time after the date hereof the State Authorities shall accomplish all notifications and complete all actions within their power to enable the taking of all parliamentary, legislative or other actions, ratifications and enactments required to cause any written extension, renewal, replacement, amendment or other modification of the terms of this Agreement or the Intergovernmental Agreement to become effective as, and the terms of all other Project Agreements to be added as an effective part of, the prevailing legal regime of Georgia with respect to the Project and as the binding obligation of the State Authorities under Georgian Law, and with respect to the Intergovernmental Agreement, under international law. In this regard, the Government shall consult with and keep the MEP Participants informed respecting the development of any necessary laws or decrees and the status of all actions which are or may be necessary in order to comply with the foregoing;

- (ii) subject to the terms hereof and any other Project Agreement, or with the prior written consent of all of the MEP Participants, the State Authorities shall not grant any rights to use the Facilities or respecting the Rights to Land or grant to any Person any other rights that are inconsistent or conflict, or that may interfere, with the full exercise or enjoyment by any of the Project Participants of their rights under any Project Agreement;
- (iii) subject to the terms hereof and any other Project Agreement, the State Authorities shall not reduce, condition or limit (whether by termination or amendment of the respective Project Agreement, or otherwise) any right, interest or benefit accruing under the Project Agreements to any Project Participant without the prior written consent of all of the MEP Participants;
- (iv) subject only to the enforcement of immigration (including visa and residence permit regulations), customs, criminal and other relevant laws of the State and any applicable Application Requirements, the State Authorities shall not cause or permit to exist any restriction on the ingress or egress of any personnel with respect to the Project;
- (v) except in the manner and under the circumstances provided in Section 9.4 (but in all cases, whether or not Section 9.4 is complied with, subject to the payment of compensation for Expropriation as provided in Section 9.2 (iii)), the State Authorities shall not carry out any act of Expropriation in respect of the Project;
- (vi) if any domestic or international agreement or treaty; any legislation, promulgation, enactment, decree, accession or allowance; or any other form of commitment, policy or pronouncement or permission, has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, privileges, exemptions, waivers, indemnifications or protections granted or arising under this Agreement or any other Project Agreement, it shall be deemed a Change in Law under Article 7.2(x).
- (vii) the State Authorities shall:
 - (1) perform all obligations and otherwise assist the MEP Participants and any designated Contractors in respect of the acquisition of, grant to and exercise of the Rights to Land as and when necessary, from time to time, during the life of the Project, all as further provided herein and in Appendix 2 of this Agreement;
 - (2) bear full responsibility and liability for the identification of any and all Persons having or claiming any form of ownership or other property, occupancy, construction or possessory interest in the Rights to Land for all State Land and all Nonstate Land required by the MEP Participants in respect of the Project;

(3) bear full responsibility and liability for the prior notification to those Persons described in the foregoing clause (2) of each of the MEP Participant's Rights to Land and the authorisation from the State Authorities for any of the MEP Participants, and any designated Contractors, to be present thereon to conduct Project Activities;

(4) exercise such powers of taking, compulsory acquisition, eminent domain or other similar sovereign powers to enable each of the MEP Participants and their designees to receive and exercise the Rights to Land in respect of the State Land and, in particular, to fulfill the grant by the State Authorities to the MEP Participants of the exclusive and unrestricted right to the State Land as specified in Section 4.1(ii) and (iv) of this Agreement and the exclusive and unrestricted right of ownership of the Facilities as specified in Section 4.1(v) of this Agreement;

(5) assist the MEP Participants in respect of their exercise of the powers of taking, compulsory acquisition, eminent domain or other similar powers of the State in respect of the Nonstate Land necessary for the Project, including with respect to all judicial and procedural filings and requirements associated with the MEP Participants exercise of the rights granted to each of them in Section 4.1(iii) of this Agreement;

(6) in respect of the State Land only, settle with, or pay such compensation to, those Persons as may be required by Georgian Law to authorise the State Authorities to grant to and vest in each of the MEP Participants the rights obtained in accordance with the foregoing clause (4);

(7) furnish to each of the MEP Participants written evidence of all rights of entry and/or discharges (including, if applicable, the written acknowledgment by those Persons who have been dispossessed of any ownership, occupancy, possessory, construction and/or usage rights), other than in respect of the Construction Corridor and Permanent Land to the extent either previously was Nonstate Land;

(8) ensure that the Rights to Land, including, in particular, the rights obtained in accordance with the foregoing clause (4), and all necessary documents related thereto, are properly and timely registered or recorded in favour of each of and specifically naming the MEP Participants as property rightsholders and owners of the Facilities in accordance with Georgian Law in order to satisfy any applicable requirements of Georgian Law and to provide public notice of the rights of each of the MEP Participants to the Rights to Land;

(9) protect, defend and indemnify each of the MEP Participants and other affected Project Participants from and against any Loss or Damage in respect of the Rights to Land (other than in respect of the Construction Corridor and Permanent Land to the extent either previously was Nonstate

Land) and any and all third-party claims or demands, including any claims or demands by, or arising out of the use by, those adjacent landowners who may be granted the right by the MEP Participants (at their sole discretion) to enter upon and use the surface of the Construction Corridor and the Permanent Land to the extent either previously was State Land and any Loss or Damage in respect of the Facilities and MEP Activities caused by such landowners and/or Persons (other than Persons involved in Project Activities) such landowners allow to use any State Land or otherwise related to the MEP Participants' exercise of their Rights to Land (other than in respect of the Construction Corridor and Permanent Land to the extent either previously was Nonstate Land) or the State Authorities' obligations under this Section 7.2(vii); and

(10) protect, defend and indemnify each of the MEP Participants and other affected Project Participants from and against any Loss or Damage in respect of any environmental pollution or contamination, damage, or other conditions of or associated with the Rights to Land if and to the extent the same were in existence on the Effective Date;

- (viii) the State Authorities expressly authorise and agree that the Project may be implemented by the MEP Participants using whatever legal or business structure or structures, including an unincorporated joint venture of co-owners, a limited partnership, a limited liability company, corporation, branch[es] or any other structure or arrangement, as the MEP Participants may elect from time to time;
- (ix) except as may be expressly provided therein, the State Authorities shall not amend, rescind, terminate, declare invalid or unenforceable, or otherwise seek to avoid or limit this Agreement, the Intergovernmental Agreement or any other Project Agreement without the prior written consent of the MEP Participants and/or any other Project Participants which are parties to such agreements; and
- (x) the State Authorities shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in Georgian Law (including any Georgian Laws regarding Taxes but excluding any Georgian Law(s) affecting Pipeline Activities (as defined in Appendix 3) and the Facilities with respect to cultural heritage, health, safety and the environment which are enacted, promulgated, adopted, decreed, amended, re-enacted or otherwise issued or effected (including the enforcement, exercise of authority, and judicial interpretation of Georgian Law in respect of such matters) if and to the extent such Georgian Laws do not impose on the Project, the Facilities, Project Activities and/or the Project Participants legal terms or conditions more onerous than those generally observed by the member states of the European Union respecting cultural heritage, health,

safety or the environment, as the case may be, and, in any event, specifically excluding any provision for punitive or exemplary damages) occurring after the Effective Date, including changes resulting from the amendment, repeal, withdrawal, termination or expiration of Georgian Law, the enactment, promulgation or issuance of Georgian Law, the interpretation or application of Georgian Law (whether by the courts, the executive or legislative authorities, or administrative or regulatory bodies), the decisions, policies or other similar actions of judicial bodies, tribunals and courts, the State Authorities, jurisdictional alterations, and the failure or refusal of judicial bodies, tribunals and courts, and/or the State Authorities to take action, exercise authority or enforce Georgian Law (a "Change in Law"). The foregoing obligation to take all actions available to restore the Economic Equilibrium shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of the grant of an exemption, the introduction of legislation, the issuance of a decree and/or the taking of other authoritative acts, any conflict or anomaly between any Project Agreement and such Georgian Law.

- 7.3 Upon request by an MEP Participant or such other Project Participants as the MEP Participants may designate, the relevant State Authority shall provide a complete and proper list of all documentation and requirements necessary to obtain a specific license, visa, permit, certificate, authorisation, approval or permission (the "Application Requirements") on the part of the MEP Participants and such other Project Participants as the MEP Participants may designate in order to carry out Project Activities. The MEP Participant or other Project Participants may rely on such listing of the particular Application Requirements as complete and proper, and the same shall be the only Application Requirements required for the relevant request. Subject only to the submission and/or satisfaction of the Application Requirements therefor, the State Authorities shall, on a priority basis within thirty (30) days, but in no event later than sixty (60) days (which sixty-day period shall be appropriate only under extraordinary circumstances), provide all licenses, visas, permits, certificates, authorisations, approvals and permissions necessary or appropriate in the opinion of the MEP Participants to enable them and all other designated Project Participants to carry out all Project Activities in a timely, secure and efficient manner and/or to exercise their rights and fulfill their obligations in accordance with the Project Agreements, including:
- (i) use and enjoyment of the Rights to Land (subject to the provisions of Appendix 2);
 - (ii) customs clearances;
 - (iii) import and export licenses;
 - (iv) visas and residence permits;
 - (v) rights to open and maintain bank accounts;

- (vi) rights to lease or, where appropriate, acquire office space and employee accommodations;
- (vii) rights and licenses, in accordance with relevant Georgian Law, to operate communication and telemetry facilities (including the dedication of a sufficient number of exclusive radio and telecommunication frequencies as requested by the MEP Participants to allow the uniform and efficient operation of the MEP System within and without the Territory) for the secure and efficient conduct of Project Activities;
- (viii) rights to establish such branches, permanent establishments, offices and other forms of business or presence in the Territory as may be reasonably necessary in the opinion of any Project Participant to properly conduct Project Activities, including the right to lease or, where appropriate, purchase or acquire any real or personal property required for Project Activities or to administer the businesses or interests in the Project;
- (ix) rights to operate vehicles and other mechanical equipment, and in accordance with relevant Georgian Law, the right to operate aircraft, ships and other water craft, in the Territory; and
- (x) environmental, health and safety approvals (subject to the provisions of Appendix 3).

With respect to all such rights, licenses, visas, permits, certificates, authorisations, approvals and permissions, including those customarily issued by the State Authorities, and all renewals and extensions thereof, the Project and all Project Participants shall be exempt, directly and indirectly, from all costs, fees, charges or assessments therefor and from all requirements for any certification, opinion or other evidence of authority or expertise in connection with the issuance thereof and from any other conditions or requirements, except as otherwise expressly provided in Section 8.9(i) or 14.4 hereof or in the Project Agreements.

- 7.4 The State Authorities shall exert their Best Endeavours to make available to the Project Participants on Best Available Terms all goods, works and services as may be necessary or appropriate for the Project in the opinion of the requesting Project Participant that are owned or controlled by the State Authorities (including raw materials, electricity, water (other than the water referred to in Section 4.1(vii), which is granted to the MEP Participants free of charge), gas, communication facilities, other utilities, onshore construction and fabrication facilities, supply bases, vessels, import facilities for goods and equipment, warehousing and means of transportation). In respect of any written contract(s) with State Entities as described in this Section 7.4, the relevant Project Participant(s) will use Best Endeavours in respect of any written contract to be entered into with a State Entity for goods, works or services under this Section 7.4, to timely and reasonably notify the Government MEP Representative in writing pursuant to the terms of Article 22 hereof of the particulars of the proposed transaction not less than twenty (20) days prior to entering into such written contract. If the Government MEP Representative objects in writing pursuant to the terms of Article 22 hereof to such proposed transaction by not later than fifteen

(15) days after receipt of such notification, the State Entity may nevertheless enter into said written contract, but neither the Government nor any State Authority (other than the State Entity which entered into the written contract) shall have any liability or obligation under this Agreement in respect of such written contract. The failure of the Government MEP Representative to provide timely written objection to a notified transaction pursuant to the terms of Article 22 hereof shall be deemed approval of such transaction. For the avoidance of doubt, any failure of the relevant Project Participant(s) to provide the requisite advance written notice of proposed transaction pursuant to the terms of Article 22 hereof, as aforesaid, shall mean that only the subject State Entity, and not the Government or any other State Authority, shall have any liability or obligation under said written contract or this Agreement.

7.5 The State Authorities shall exert their Best Endeavours to assist the Project Participants in obtaining on Best Available Terms:

- (i) all goods, works, services and technology as may be necessary or appropriate for the Project in the opinion of the requesting Project Participant that are not owned, controlled or customarily provided by the State Authorities (including raw materials, electricity, water (other than the water referred to in Section 4.1(vii), which is granted to the MEP Participants free of charge), gas, communication facilities, other utilities, onshore construction and fabrication facilities, supply bases, vessels, import facilities for goods and equipment, warehousing and means of transportation); and
- (ii) with respect to jurisdictions and authorities outside the Territory, those rights, licenses, visas, permits, approvals, certificates, authorisations and permissions necessary or appropriate for the Project, including in respect of (1) storage and staging of Petroleum, lines of pipe, materials, equipment and other supplies destined for or exiting from the Territory; (2) all marine vessels sailing to or from the Territory in connection with the export of Petroleum; (3) the import and/or export or re-export of any goods, works, services or technology necessary for the Project; and (4) exemptions from national, local and other taxes, duties, customs, levies, imposts, assessments, contributions, transit fees and other fees and charges in relation to Petroleum which is transported through the MEP System.

7.6 Subject to Section 7.3, the State Authorities hereby consent to all actions on the part of any of the Project Participants necessary or appropriate (i) to implement the Project, including the transportation and shipment of Petroleum for export, (ii) to ensure the full and effective use and enjoyment of the Facilities and the Rights to Land, and (iii) to enable each of the MEP Participants and any other Project Participants to satisfy their respective obligations under all Project Agreements.

7.7 Subject to Section 7.3, the State Authorities hereby consent to any Project Activities or actions taken preparatory to or in connection with the Project by the MEP Participants and their designated Contractors that comply with the Code of Practice

set forth in Appendix 3 of this Agreement or any of the principles or standards set forth therein.

ARTICLE 8

TAXES

8.1 General.

- (i) Except as otherwise specifically provided in this Agreement, no Project Participant shall be subject to any Taxes or any Tax compliance or filing obligations arising from or related, directly or indirectly, to MEP Activities, the MEP System, the Facilities, the Rights to Land, Petroleum that is transported through the Facilities or the MEP System or any related assets or activities, whether before, on or after the Effective Date.
- (ii) It is acknowledged that, notwithstanding any other provisions in this Agreement to the contrary, Double Tax Treaties shall have effect to give benefits with respect to Taxes. Moreover, any Person that is not entitled to the benefits of such a treaty shall be entitled to the benefits that would have been available if a treaty equivalent to the Organisation for Economic Co-operation and Development Model Tax Convention on Income and Capital, updated as of 1 November 1997 (the "OECD Treaty"), were applicable. In either event, no further administrative action shall be necessary to enable the Person to take advantage of such benefits. The provisions of this Section 8.1(ii) shall not affect the liability of an MEP Participant for Profit Tax pursuant to Section 8.2 or the amount of such liability.
- (iii) The provisions of this Article 8 shall at all times prevail over all conflicting provisions of the Tax Code of Georgia, including the provisions of Articles 3(2), 4(3), 4(5), 4(7), 6(6), 6(7) and 6(8) thereof, or other Georgian Law.
- (iv) To the extent any provisions of this Article 8 are or could be construed as being inconsistent with the other provisions of this Agreement (including Sections 4.2 and 10.1), the provisions of this Article 8 shall govern.
- (v) For purposes of Taxes, the MEP System (whether before or after its completion), the Rights to Land, Petroleum that is transported through the Facilities or the MEP System or assets or activities in connection with any other Petroleum transportation system in existence on the Effective Date shall not be regarded as a permanent establishment of an MEP Participant, Affiliate of an MEP Participant, Interest Holder or Shipper.

8.2 MEP Participants.

- (i) Each of the MEP Participants is subject to profit tax in accordance with the Tax Code of Georgia, as amended by the provisions of this Article 8, in

respect of its Project Activities (the "Profit Tax"). The Profit Tax shall apply individually to each MEP Participant. The Profit Tax shall consist of a Base Profit Tax and a Profit Tax Surtax. Subject to Section 8.2(iii), the amount of the Base Profit Tax liability of an MEP Participant for a Year shall be equal to such MEP Participant's taxable income related to Project Activities for the Year multiplied by a tax rate of thirty percent (30%), which consists of the general profit tax rate in force in the Territory on 1 January 1999 (twenty percent (20%)) and an additional branch-profits tax rate of ten percent (10%). For this purpose, the MEP Participant's taxable income related to Project Activities shall be based on the MEP Participant's separate share of any income, expenses and other taxable items related to Project Activities for the Year as determined in accordance with the Tax Code of Georgia.

- (ii) The amount of the Profit Tax Surtax imposed on an MEP Participant for a Year shall be equal to the excess, if any, of such MEP Participant's total Profit Tax liability over such MEP Participant's Base Profit Tax liability for the Year.
- (iii) An MEP Participant's total Profit Tax liability for a Year shall be equal to the Profit Tax Amount per Barrel of Petroleum transported, as measured at the Point of Terminus, through the capacity owned by such MEP Participant in the Facilities during such Year. In the event an MEP Participant's Base Profit Tax liability for a Year as determined under Section 8.2(i) exceeds such MEP Participant's total Profit Tax liability for the Year, the amount of such MEP Participant's Base Profit Tax liability for the Year shall be reduced to an amount equal to such MEP Participant's total Profit Tax liability for the Year (and no Profit Tax Surtax shall be imposed on such MEP Participant for the Year). Any such reduction shall be applied first to the portion of the Base Profit Tax liability attributable to the branch-profits tax rate and then to the portion of such liability attributable to the general profit tax rate.
- (iv) The Profit Tax imposed on each MEP Participant for a Year shall fully satisfy such MEP Participant's liability for Georgian profit tax or any other Taxes which may be imposed on or with respect to income or profit of such MEP Participant in connection with MEP Activities for the Year.
- (v) Notwithstanding the foregoing, in the event of an assignment by more than one of the MEP Participants of all or any of their interests in the Project to an assignee which is an Entity that is a partnership pursuant to the law under which the Entity was established (the "Partnership") in exchange for partnership interests in the Partnership, the Profit Tax (consisting of the Base Profit Tax and the Profit Tax Surtax) shall apply individually to each of the partners in the Partnership (the "Partners") as if each of the Partners was a separate MEP Participant. The individual liability of a Partner for Profit Tax (consisting of the Base Profit Tax and the Profit Tax Surtax) shall be based on the Partner's share of the profits of the Partnership and the

Barrels of Petroleum transported by the Partnership through the Facilities as measured at the Point of Terminus. The Partnership, notwithstanding any contrary provision in this Article 8, shall not itself be liable for Profit Tax or have any Profit Tax compliance or filing obligations. Principles comparable to those described in this Section 8.2(v) shall apply in the event the Project is owned by all of the investors through a single Entity (whether a partnership, company or any other form of Entity).

- (vi) Each MEP Participant shall file a Profit Tax return for each Year for which it is liable for Profit Tax and shall submit such Profit Tax return to the State Tax Department, and pay the Profit Tax for such Year to the State Tax Department on behalf of the State, not later than first (1st) April of the following Year. The Profit Tax return shall set forth general information regarding the MEP Participant, the amounts of the total Profit Tax, Base Profit Tax and Profit Tax Surtax for the Year and such additional information as may be provided for in any agreement described in Section 8.9(iii). There shall be attached to such return an annex which contains the following summary information with respect to the MEP Participant's Project Activities for the Year: the MEP Participant's gross income from tariffs, depreciation deductions, other deductions, total taxable income, Base Profit Tax liability, the number of Barrels of Petroleum transported, as measured at the Point of Terminus, through the capacity owned by such MEP Participant in the Facilities during the Year, the Profit Tax Amount, Profit Tax Surtax liability, total Profit Tax liability and such additional information as may be provided for in any agreement described in Section 8.9(iii). There shall also be attached to the Profit Tax return of each MEP Participant for each Year a copy of a statement (the "Allocation Statement") prepared and signed by the Operating Company which sets forth (a) the total number of Barrels of Petroleum transported, as measured at the Point of Terminus, through the Facilities during such Year and (b) the number of Barrels transported, as measured at the Point of Terminus, through the capacity owned by each MEP Participant in the Facilities during such Year, the sum of which for all MEP Participants shall be equal to such total measured quantity at the Point of Terminus as set forth in clause (a). The original Allocation Statement for each Year shall be provided by the Operating Company to the State Tax Department not later than first (1st) April of the following Year. Each MEP Participant shall maintain its books and records with respect to Project Activities in accordance with accounting standards which are generally accepted in the international Petroleum transportation industry, and shall have the right to maintain such books and records and prepare its Profit Tax returns exclusively in Dollars. Estimated Profit Tax returns shall not be filed, and estimated Profit Tax payments shall not be made, by the MEP Participants. All payments of Profit Tax shall be made in Dollars.
- (vii) (1) The filing of the Profit Tax return for a Year and payment of Profit Tax thereunder shall be deemed to be a final and conclusive settlement of the amount of the Profit Tax liability of an MEP Participant for

the Year, provided that (a) the amount of the Profit Tax liability as shown on such return is equal to the Profit Tax Amount for the Year multiplied by the number of Barrels transported, as measured at the Point of Terminus, through the capacity owned by such MEP Participant in the Facilities during the Year as set forth on the Allocation Statement for the Year and (b) the State Tax Department shall have the authority to conduct an examination (a [Technical Examination]) to verify the technical accuracy of the measurement at the Point of Terminus of the total number of Barrels of Petroleum transported through the Facilities during such Year, which examination must be concluded within twelve (12) months from the due date for filing Profit Tax returns for such Year.

(2) On completion of a Technical Examination, if any, with respect to a Year, the State Tax Department shall discuss any proposed adjustments with the Operating Company and any affected MEP Participants and, where appropriate, issue to one or more of the MEP Participants a notice of additional Profit Tax due or a notice of refund. Any agreed underpayments or overpayments of Profit Tax shall be paid within ten (10) days following receipt by the MEP Participant of the appropriate notice. If the Operating Company and any affected MEP Participants and the State Tax Department are unable to agree on the technical accuracy of the measurement at the Point of Terminus of the total number of Barrels of Petroleum transported through the Facilities during the Year, the issue shall be submitted to arbitration under Article 17.

(3) If an MEP Participant fails to pay the Profit Tax for a Year on or before the date it is due, or on a final determination that there has been an underpayment (or overpayment) of Profit Tax by the MEP Participant on its Profit Tax return for a Year as a result of a Technical Examination, interest shall accrue and be paid by the MEP Participant (or, in the case of a refund of an overpayment, shall be paid to the MEP Participant) in Dollars on the unpaid, underpaid or overpaid amount from the date the Profit Tax was due (or, in the case of an overpayment, the date the Profit Tax was paid) at the Agreed Interest Rate.

- (viii) Each MEP Participant shall make its Profit Tax payments to the large taxpayers inspectorate of the State Tax Department located in Tbilisi (or any successor thereto). Any such Profit Tax payment may be made on behalf of such MEP Participant by an agent thereof (including an Operating Company).
- (ix) The agency of the State Tax Department to which an MEP Participant makes any Profit Tax payment will issue to such MEP Participant separate official tax receipts evidencing the amounts of such payment that are attributable to Base Profit Tax and to Profit Tax Surtax, if applicable, within ten (10) Business Days after such payment is made. Such tax receipts shall state the date and relevant Dollar amount of such payment, whether the amount relates to Base Profit Tax or Profit Tax Surtax, the currency (Dollars) in

which such payment was made and any other particulars customary in the State for such receipts.

- (x) Notwithstanding the other provisions of this Section 8.2, solely in the case of the first (1st) Year and the second (2nd) Year for which each MEP Participant is liable for Profit Tax, (a) Profit Tax returns shall be filed and Profit Tax shall be paid on the basis of the six (6)-month periods ending thirtieth (30th) June and thirty-first (31st) December in each such Year and (b) the due date for submitting the Profit Tax returns, providing the original Allocation Statements and making Profit Tax payments for each such six (6)-month Profit Tax period shall be first (1st) October or first (1st) April next following the end of such period. Except as provided in the preceding sentence, the provisions of this Section 8.2 (and other applicable provisions of this Agreement) shall apply for Profit Tax purposes for each six (6)-month Profit Tax period in each such Year, and any reference therein to a Year shall instead be deemed to be a reference to the relevant six (6)-month Profit Tax period.

8.3 Contractors.

- (i) No Taxes shall be imposed on, or withheld with respect to payments to, any Contractor in connection with MEP Activities, and Contractors shall have no Tax compliance or filing obligations arising from or related, directly or indirectly, to MEP Activities.
- (ii) The MEP Participants and their Affiliates and Interest Holders, and their respective employees, shall have no liability or responsibility to the State Authorities for any failure of Contractors to comply with Georgian Law regarding Taxes.
- (iii) No Taxes (other than profit tax, if applicable) shall be imposed on, or withheld with respect to payments to or by, a Joint Operating Company within the meaning of the PSA in respect of any supply of goods, works, services or technology (including all related or reimbursable expenses) to or by the MEP Participants or an Operating Company. No Taxes shall be imposed or withheld with respect to such payments if the goods, works, services or technology (including all related or reimbursable expenses) are charged at cost.
- (iv) No Taxes (including Taxes on income, revenue or profit) shall be imposed on any of the MEP Participants, their Affiliates or the Shippers with respect to any Petroleum to be used as fuel in connection with the Project (including the ownership, importation, transportation, transfer of ownership, or use thereof). The supply of any such Petroleum shall be exempt with credit (zero percent (0%) rate) from VAT.

8.4 Payments to Certain Persons. No Taxes shall be imposed with respect to payments or deemed payments made in connection with MEP Activities by all or any of the

Project Participants or their respective Affiliates, or any branch or permanent establishment thereof, to any Entity established outside the Territory, and no Taxes shall be withheld with respect to payments or deemed payments made in connection with MEP Activities by all or any of the Project Participants or their respective Affiliates, or any branch or permanent establishment thereof, to any Entity or to any physical person who is not an employee of the payor. For purposes of the preceding sentence, (i) Taxes on payments shall include any Taxes on interest, royalties, fees for services and dividends or other distributions or other remittances of profit, and (ii) Taxes on deemed payments shall include any Taxes on undistributed profit after imposition of any Taxes on profit. No Taxes shall be imposed on or with respect to payments made by an MEP Participant or an Operating Company to an Affiliate thereof, or to an Interest Holder or an Affiliate thereof, in reimbursement of costs incurred on behalf of the payor.

8.5 Employee Taxes.

- (i) All Foreign Employees shall be liable to pay Taxes only on their income earned as a direct result of their employment in the Territory, subject to any applicable Double Tax Treaty (or the OECD Treaty in accordance with Section 8.1(ii)); provided, however, such a Foreign Employee shall be liable for such Taxes for a Year only if he or she is present in the Territory for one hundred eighty-three (183) or more days during the Year. Any Project Participant whose employee(s) is subject to Taxes for any Year pursuant to this sub-section (i) shall be obligated to withhold and pay to the State Tax Department any Taxes which are due with respect to such employee following the time in such Year when the employee becomes subject to such Taxes pursuant to this sub-section (i).
- (ii) The Project Participants, their Affiliates and their respective Foreign Employees shall not be required to make payments of State social tax (including payments to the Unified State Fund for Social Security and the Unified State Fund for Employment and compulsory medical insurance contributions) and other similar payments with respect to their Foreign Employees.
- (iii) Except as otherwise provided in this Article 8, the MEP Participants and Contractors shall be subject to any Taxes and Tax compliance and filing obligations applicable to them under Georgian Law with respect to their employees.

8.6 No Taxes on Transfers, Contributions, Loans, Etc. No Taxes shall be imposed on or with respect to any assignment, transfer or pledge of, or any other adjustment in, all or any of the rights or obligations of an MEP Participant, an Operating Company, an Interest Holder or a predecessor or Affiliate of any of the foregoing arising under any Project Agreement or in connection with the Project or the MEP System; an Interest Holder's interest in an MEP Participant or an Operating Company; an MEP Participant's interest in an Operating Company; or any rights or obligations of an MEP Participant, an Operating Company or any Interest Holder, Shipper or other

Person with respect to the transportation of Petroleum in and/or through the Facilities or the MEP System. No Taxes (including any import Taxes) shall be imposed on or with respect to any contribution of assets or any loan to or by any Project Participant or any payment or other transfer to any Project Participant in connection with the Project. The provisions of this Section 8.6 shall apply to any assignment, transfer, pledge, adjustment, contribution or loan described above, whether made before, on or after the Effective Date.

8.7 Operating Companies. Any Operating Company shall be entitled to all the exemptions and privileges accorded to the MEP Participants under this Article 8 and shall have no Profit Tax liability or compliance or filing obligations.

8.8 VAT; Certificates.

(i) Each of the MEP Participants, Interest Holders, Contractors, Operating Companies, Shippers and their respective Affiliates shall be exempt with credit (taxable at a zero percent (0%) rate) from VAT on all (1) goods, works, services and technology supplied, directly or indirectly, to or by it in connection with MEP Activities, (2) its imports and exports of Petroleum which is transported through the Facilities, (3) imports of goods, works, services and technology acquired by it in connection with MEP Activities and (4) exports and re-exports of goods, works, services and technology by it in connection with MEP Activities. In addition, every supplier of goods, works, services and technology to each of the MEP Participants, Interest Holders, Contractors, Operating Companies, Shippers and their respective Affiliates in connection with MEP Activities shall treat those supplies for VAT purposes as being exempt with credit (taxable at a zero percent (0%) rate). For the avoidance of doubt, a similar exemption with credit (taxable at a zero percent (0%) rate) from VAT shall apply, and no other transfer Taxes or notarial or other fees shall apply, in the case of any transfer of Rights to Land, directly or indirectly, to the MEP Participants. Notwithstanding the foregoing, notarial fees may be imposed in accordance with Georgian Law on transfers to the MEP Participants of Rights to Land with respect to Nonstate Land to the extent they are of a non-discriminatory nature, but in no event shall such notarial fees with respect to such transfers on or before the date ten (10) years after the date of commencement of the construction phase respecting the Facilities exceed the amounts that would be imposed pursuant to the Law of Georgia on Fees for Notary Services dated 11 June 1998, as enacted and generally applicable and in force in the Territory on 1 January 2000.

(ii) The appropriate agency of the State Tax Department or other appropriate tax or customs authority shall provide each Person, as well as each successor or permitted assignee of such Person, that is entitled to the exemptions and/or VAT zero percent (0%) rate as provided in this Agreement with a certificate or other legally valid documentation confirming such exemptions and/or VAT zero percent (0%) rate as provided in this Agreement within thirty (30) days of its requesting such certificate or documentation. In the event VAT is

paid by an MEP Participant, Operating Company or Contractor, such MEP Participant, Operating Company or Contractor shall be entitled to offset the amount of such VAT against any Taxes (including Profit Tax or income tax withheld from payments to employees) which it otherwise would be required to pay. Such MEP Participant, Operating Company or Contractor shall notify the State Tax Department or other appropriate tax or customs authority in writing of any such offset (including the amount thereof). In the case of any such offset against Profit Tax liability of an MEP Participant, the amount of such offset shall be treated as payment by such MEP Participant of such Profit Tax for purposes of Section 8.2 (including the requirement that a tax receipt be issued in accordance with Section 8.2(ix)).

- (iii) For the avoidance of doubt, in the case of any value added tax or similar tax imposed by any state in the former Soviet Union and paid or incurred by an MEP Participant or Operating Company in respect of the acquisition of goods, works, services or technology used in connection with the Project, the MEP Participant or Operating Company shall be entitled to such remedies as may be provided for under Georgian Law and applied in current practice.

8.9 Other.

- (i) The MEP Participants shall pay any registration or similar fees, other than customs service/documentation fees (covered by Section 14.4), which may be imposed by the State Authorities, but only to the extent they are nominal and of a non-discriminatory nature.
- (ii) An MEP Participant shall not be subject to any interest, penalties and fines (including financial sanctions and administrative penalties) with respect to Taxes, except (a) interest payable as computed under clause (3) of Section 8.2(vii) and (b) if the amount of Profit Tax of the MEP Participant for a Year was underpaid due to a knowing and intentional/deliberate failure to pay Profit Tax (which failure did not result from mistake or other good faith action or inaction), the MEP Participant shall, absent a demonstration of evidence that there was no such knowing and intentional/deliberate failure (or of evidence of such mistake or other good faith action or inaction), be liable for interest in Dollars on the amount of the underpayment due to such knowing and intentional/deliberate failure from the date thirty (30) days after such Profit Tax was due until the date it is paid at a rate per annum equal to thirty percent (30%) (in lieu of interest at the Agreed Interest Rate).
- (iii) The State Tax Department and the MEP Participants may enter into one or more agreements, which may not be amended without the written consent of each of them, containing detailed rules regarding the administration and application of the provisions of this Article 8.
- (iv) The provisions of this Article 8 shall survive the termination of this Agreement. If an MEP Participant is no longer a Party to this Agreement,

the provisions of this Article 8 shall continue to apply to Taxes or any Tax compliance or filing obligations arising from or related, directly or indirectly, to the MEP Participant's assets or activities pursuant to this Agreement for all periods in which the MEP Participant was a Party to this Agreement.

ARTICLE 9

COMPENSATION FOR LOSS OR DAMAGE

9.1 Without prejudice to the right of the MEP Participants to seek full performance by the State Authorities of the State Authorities' obligations under any Project Agreement, the Government shall provide monetary compensation as provided in this Article 9 for any Loss or Damage which is caused by or arises from:

- (i) any failure of the State Authorities, whether as a result of action or inaction, to fully satisfy or perform all of their obligations under all Project Agreements;
- (ii) any misrepresentation by the State Authorities in any Project Agreement;
- (iii) any failure by the State Authorities, whether as a result of action or inaction, to maintain Economic Equilibrium as provided in Section 7.2(x);
- (iv) any requisitioning by Governmental security forces or authorities of the assets of any Project Participant or any damage or destruction by Governmental security forces or authorities, to the extent it was not required by the necessity of the situation, of the assets of any Project Participant during any event of war (declared or undeclared); or
- (v) any act of Expropriation by the State Authorities.

Without limiting the foregoing but subject to Section 7.4 of this Agreement, the obligation of the Government to provide monetary compensation also applies with respect to any such Loss or Damage caused by or arising from any of the foregoing by any Person which was a State Entity at the time the applicable Project Agreement was executed by it.

9.2 In the event and to the extent any Project Participant suffers any Loss or Damage of the kind described in Section 9.1, the Government shall provide prompt, adequate and effective compensation for all such Loss or Damage. Solely for purposes of this Article 9, any reference to Project Participants shall not include Lenders or Insurers; provided, however, nothing contained herein shall alter, amend, waive, condition or release (i) any State Authority from any claims, causes of action or rights of Lenders or Insurers which may exist independent of this Agreement or which may arise independent of this Agreement or (ii) step-in rights, rights of subrogation or other similar rights, and the exercise of same, which Lenders and/or Insurers may have in

respect of any other Project Participant in respect of the Project. In respect of the adequacy of compensation, if the Loss or Damage:

- (i) is of the kind described in Section 9.1(i) through (iv), the Government shall accord as among the monetary remedies of (1) money damages, (2) restitution, (3) reimbursement, (4) indemnification and (5) other forms of monetary relief (excluding punitive or exemplary damages), that monetary remedy or combination of monetary remedies as the MEP Participants may elect to the end that all Project Participants shall be fully and fairly compensated and kept whole by the State Authorities respecting all such Loss or Damage;
- (ii) is, notwithstanding the monetary remedies set forth in Section 9.2(i), applicable to the events described in Section 9.1(iv), a result of any event of war (declared or undeclared), armed conflict or similar event in the Territory, the Government shall accord to the MEP Participants for themselves and/or any other Project Participants the most favourable treatment (including such remedies as restitution, money damages, indemnification or other settlement) of those treatments accorded any other Person affected by such event; and
- (iii) results from or relates to any act of Expropriation by the State Authorities (as described in Section 9.1(v)), the Government shall pay Fair Market Value.

9.3 With respect to all monetary relief under this Article 9, all amounts shall be expressed and paid in a currency that is widely traded in international foreign exchange markets and widely used in international transactions, on the basis of the market rate of exchange for that currency at the close of business of the London Stock Exchange on the date of payment, and shall be paid together with interest at the Agreed Interest Rate from the date of breach by the State Authorities of a Project Agreement, the date of misrepresentation by the State Authorities in any Project Agreement, the date of change in Economic Equilibrium, the date of requisitioning, loss or damage of assets during war or the date of Expropriation, as the case may be, to the date of payment to the MEP Participants by the State Authorities.

9.4 In the event the State Authorities should ever carry out any act of Expropriation with respect to the Project, the State Authorities shall do so only where such Expropriation is (i) for a purpose which is an overriding public purpose, (ii) not discriminatory, (iii) carried out under due process of law and (iv) accompanied by the payment of compensation as provided in Section 9.2(iii). For purposes of the foregoing, due process respecting any claim of Expropriation shall include the MEP Participants' right to resort to the arbitration provisions of this Agreement for purposes of establishing that an Expropriation has taken place (both as to themselves and on behalf of any Project Participants) and for the assessment through arbitration of the amount owed by the State Authorities to the MEP Participants as adequate compensation as provided in Section 9.2(iii) for all Loss or Damage suffered by the MEP Participants and/or all other Project Participants caused by or arising from such

Expropriation.

- 9.5 The Government's obligation to provide monetary compensation to the MEP Participants under this Article 9:
- (i) is several, independent, absolute, irrevocable and unconditional and constitutes an independent covenant and principal obligation of the Government, separately enforceable from all other obligations (including monetary compensation obligations) of the State Authorities under the Project Agreements, without regard to the invalidity or unenforceability of any such other obligations;
 - (ii) is enforceable, jointly and severally, against the constituent elements of the State Authorities and, regardless of against whom enforcement is sought, any award or claim for payment due under this Article 9 may be submitted to the Ministry of Finance of Georgia and such award or claim for payment (granted, with respect to a claim for payment, such claim is not disputed by the State Authorities) shall be paid to the MEP Participants on or before thirty (30) days after receipt by the Ministry of Finance of Georgia of the related award or claim for payment;
 - (iii) shall not be modified, impaired or rendered unenforceable by any defense available to the State Authorities or as a result of the occurrence of any event that, but for this Section 9.5(iii), would discharge that obligation other than by the full performance thereof in accordance with this Agreement.
- 9.6 The Government shall compensate the MEP Participants for any Loss or Damage set forth in this Article 9 suffered by the MEP Participants and/or another Project Participant. In no event shall the Government's obligation to provide compensation under this Article 9 include any punitive or exemplary damages.

ARTICLE 10

LIMITATION OF LIABILITY

- 10.1 The MEP Participants shall be liable to the State Authorities for Loss or Damage caused by or arising from any breach by them of (i) any Project Agreement or (ii) applicable Georgian Law; provided, however, that the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority. Notwithstanding the foregoing, (i) the MEP Participants shall not be liable to the State Authorities for any punitive or exemplary damages and (ii) nothing herein is intended to or shall limit the rights of the MEP Participants against any third parties in respect of such Loss or Damage.
- 10.2 The MEP Participants shall be liable to a third party (other than the State Authorities and any Project Participant) for Loss or Damage suffered by such third party as a

result of the MEP Participants' breach of the standards of conduct set forth in the Project Agreements; provided, however, that (i) the MEP Participants shall have no liability hereunder if and to the extent the Loss or Damage is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority and (ii) nothing herein is intended to or shall limit the rights of the MEP Participants against any other Person in respect of such Loss or Damage.

- 10.3 The MEP Participants shall have no joint and several liability under this Agreement except in respect of liability arising from their failure to comply with applicable law in the conduct of Pipeline Activities (other than liability in respect of any matters relating to Taxes) and with the terms of Article 12 and Appendix 3.
- 10.4 Except as set forth in Section 3.4 hereof, it is understood and agreed that under no circumstances whatsoever shall the Government or any State Authorities have the right to seek or declare any cancellation or termination of this or any other Project Agreement as a result of any breach by the MEP Participants or any other Project Participants.

ARTICLE 11

SECURITY

- 11.1 Commencing with the initial Project Activities relating to route identification and evaluation and continuing throughout the life of the Project, the State Authorities, at their sole cost and expense, shall take all reasonable and prudent measures determined by the State Authorities (i) to safeguard and secure the Rights to Land, the Facilities and all Persons within the Territory involved in Project Activities and (ii) to provide protection for the Rights to Land, the Facilities and those Persons from all Loss or Damage resulting from civil war, sabotage, vandalism, blockade, revolution, riot, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organised crime or other similar destructive events.
- 11.2 In order to avoid or mitigate harm to the Project of the kind described in Section 11.1, the State Authorities shall, on reasonable request by and in consultation with the MEP Participants, take all reasonable and prudent measures determined by the State Authorities consistent with Appendix 3 to enforce any relevant provisions of Georgian Law relating to threatened and/or actual instances of loss or damage caused by third parties (other than Project Participants) to the Rights to Land or the Facilities, or loss or injury to Persons within the Territory involved in Project Activities.
- 11.3 In order to effect the obligations and without limiting the State Authorities' obligations under Sections 11.1 and 11.2, the Government, at its sole cost and expense, but in regular consultation with the MEP Participants, shall use the security forces of the State. As among the Parties, the Government shall be solely liable for the conduct of all operations of the security forces of the State and neither the MEP Participants nor any other Project Participants shall have any liability or obligation to any Person for any acts or activities of the security forces of the State or be obligated to reimburse the Government for the cost and expense of providing security as

contemplated hereby.

ARTICLE 12

ENVIRONMENT, HEALTH, SAFETY AND SOCIAL IMPACT

- 12.1 The applicable environmental, health and safety standards and practices for the Project shall be as set forth in Appendix 3 attached hereto and shall be applicable notwithstanding any conflicting standards and practices otherwise required or approved by Georgian Law. The Parties hereby agree to the standards and practices set forth in Appendix 3 and the State Authorities hereby consent to any action taken by or on behalf of the MEP Participants and other Project Participants in conformity therewith. If a spillage or release of Petroleum occurs from the Facilities or in conducting Project Activities, or any other event occurs which is causing or likely to cause material environmental damage or material risk to health and safety, the MEP Participants shall take all necessary action as set forth in Appendix 3 and, on request by or on behalf of the MEP Participants, the State Authorities shall, in addition to any indemnification obligations the State Authorities may have under the Project Agreements, make available under Section 7.4 any goods, works or services available to the State Authorities and not otherwise readily available to the MEP Participants or their Contractors to assist in any remedial or repair effort.
- 12.2 The applicable social impact standards and practices for the Project shall be effected as set forth in Appendix 3 attached hereto. The Parties hereby agree to the standards and practices set forth in Appendix 3 and the State Authorities hereby consent to any action taken by or on behalf of the MEP Participants and other Project Participants in conformity therewith.
- 12.3 Notwithstanding the provisions of Article 10 or any other term of any Project Agreement, solely in respect of any loss or damage arising from or related to any adverse environmental, health or safety event or occurrence, the MEP Participants shall be obligated, regardless of fault or causation, to take all action necessary to remedy the harm and to restore the land and other harmed matter(s) to the maximum practicable extent to their prior condition and use, all in accordance with and as required by the standards and practices set forth in this Article 12 and Appendix 3, and incur all expenses necessary to so remedy the harm, it being further agreed that if and to the extent that any harm cannot be so fully remedied, the MEP Participants shall pay full, adequate and fair compensation in respect of any such unremedied harm; provided, however, that if and to the extent any such loss or damage relating to the environment, health or safety is caused by or arises from any breach of any Project Agreement and/or breach of duty by any State Authority, the State Authorities shall indemnify and hold the MEP Participants and other Project Participants harmless with respect thereto, including for all costs and liabilities incurred by the MEP Participants or Project Participants for third-party loss or damage. Notwithstanding the foregoing, (i) the MEP Participants shall not be liable to the State Authorities for

any punitive or exemplary damages and (ii) nothing herein is intended to or shall limit the rights of the MEP Participants against any third parties in respect of any loss or damage arising from or related to adverse environmental, health or safety events or occurrences.

ARTICLE 13

CURRENCY

- 13.1 The State Authorities confirm that the MEP Participants and all other Project Participants shall have the right for the duration of and in order to conduct Project Activities:
- (i) to bring into or take out of the Territory Foreign Currency and to utilise, without restriction, Foreign Currency accounts in the Territory and to exchange any currency at market rates;
 - (ii) to open, maintain and operate Local Currency bank and other accounts inside the Territory and Foreign Currency bank and other accounts both inside and outside the Territory;
 - (iii) to purchase and/or convert Local Currency with and/or into Foreign Currency at the market exchange rate legally available or, if applicable, at a rate of exchange made available in respect of similar sums of money by the central bank of the State or any successor organisation to foreign Entities doing business in the Territory, without deductions or the imposition of fees other than usual and customary banking charges;
 - (iv) to transfer, hold and retain Foreign Currency outside the Territory;
 - (v) to be exempt from all mandatory conversions, if any, of Foreign Currency into Local Currency or other currency;
 - (vi) to pay abroad, directly or indirectly, in whole or in part, in Foreign Currency, the salaries, allowances and other benefits received by any Foreign Employees;
 - (vii) to pay Contractors and Foreign Contractors abroad, directly or indirectly, in whole or in part, in Foreign Currency, for their goods, works, technology or services supplied to the Project; and
 - (viii) to make any payments provided for under any Project Agreement in Foreign Currency.
- 13.2 All payments to be made by the State Authorities under any Project Agreement shall be made in Dollars and on the basis of the market rate of exchange at the time of payment, except that any such payments with respect to Taxes that have been paid

shall be made in the currency in which such Taxes were paid. The State Authorities shall take all steps and measures required to ensure that all such payments shall be made without any withholdings or other deductions whatsoever.

ARTICLE 14

IMPORT AND EXPORT

- 14.1 At any time and from time to time, each Project Participant has the right to import into or export or re-export from the Territory, free of Taxes and restrictions, whether in its own name or on its behalf, all equipment, materials, machinery, tools, vehicles, spare parts, supplies, Petroleum, fuels and lubricants to be used in connection with the Project and all other goods (other than natural gas), works, services or technology necessary or appropriate for use in connection with the Project. At any time and from time to time, each Project Participant has the right to import into the Territory, free of Taxes and restrictions, whether in its own name or on its behalf, natural gas to be used as fuel in connection with the Project. Provided, however, that no Project Participant shall be exempt from VAT on any import, export or re-export described in this Section 14.1 except to the extent specified in Section 8.8, 14.2 or 14.3, or in Article 13.
- 14.2 Each Foreign Employee of each Project Participant, each Contractor who is a physical person and is not a citizen of the State, each family member of any such employee or Contractor and each Project Participant on behalf of any such employee, Contractor or family member shall have the right at any time and from time to time to import into or export or re-export from the Territory, free of Taxes and restrictions, whether in its own name or on its behalf, all goods, works, services or technology for its own use and personal consumption or for the use and personal consumption of such employees, Contractors and family members; provided, however, that subject to Article 8, all sales by any such Person within the Territory of any such imported goods to any other Person will be taxable, and, in the case of sales of automobiles, furniture and professional tools and instruments, will result in liability for customs import tariff, in accordance with Georgian Law. The authorisations and exemptions granted under this Section 14.2 may be restricted by Georgian Laws generally applicable for the protection of public health, safety and public order.
- 14.3 Petroleum transported, or to be transported, by any of the MEP Participants for any Shipper or for its or their own account through the Facilities shall be considered goods-in-transit for all purposes of the customs laws of the State and shall be exempt from all Taxes. Except as may otherwise be provided in this Agreement, the MEP Participants and each such Shipper shall have the right at any time and from time to time to import and export, free of all Taxes and restrictions, all Petroleum which is, or is to be, transported through and exported from the Facilities.
- 14.4 All imports to and exports from the Territory in connection with the Project shall be subject to the procedures and documents required by applicable customs laws and regulations; provided, however, such imports and exports shall be subject to the exemptions from Taxes set forth in Articles 8 and 13 and Sections 14.1, 14.2 and

14.3, except that, in the case of any such imports and exports of goods by an MEP Participant other than those described in Section 14.3, the MEP Participant shall pay any customs service/documentation fees to the extent they are nominal and consistent with the actual costs of providing such customs service/documentation and are of a non-discriminatory nature, but in no event shall the customs service/documentation fees exceed the following:

Declared Value of Shipment	Fees
\$0 to \$100,000	0.15% of value
\$100,001 to \$1,000,000	\$150 plus 0.10% of value over \$100,000
\$1,000,001 to \$5,000,000	\$1,050 plus 0.07% of value over \$1,000,000
\$5,000,001 to \$10,000,000	\$3,850 plus 0.05% of value over \$5,000,000
More than \$10,000,000	\$6,350 plus 0.01% of value over \$10,000,000

14.5 Each Project Participant shall be exempt from the provisions of any foreign trade regulations of the State Authorities relating to any goods, works, services or technology acquired or performed, directly or indirectly, in connection with the Project or otherwise relating to Petroleum in the Facilities, including those purporting to prohibit, limit or restrict the import or export thereof or relating to determinations of country of origin or destination.

ARTICLE 15

BINDING EFFECT

15.1 This Agreement and the rights, obligations and other provisions of this Agreement and any other Project Agreement shall bind and apply to the Parties and:

- (i) in the case of the State Authorities, shall continue to bind the Government, all State Entities and all Local Authorities notwithstanding any change in the constitution, control, nature or effect of all or any of them and notwithstanding the insolvency, liquidation, reorganisation, merger or other change in the viability, ownership or legal existence of the State Authorities; provided, however, for all purposes of the Project Agreements, that if the State or any State Authority sells, assigns, transfers or otherwise privatises by whatever means, including by management contract or operations contract or conditional sale, all or part of its equity and/or other economic interest in any State Entity to a Person which is not a State Authority, such equity and/or other economic interest (or pertinent portion thereof, as well as such State Entity itself (unless such State Entity continues to be controlled, directly or indirectly, by the Government or its duly appointed representatives)) shall no longer, directly or indirectly, be liable under, or

bound by, or subject to, the terms of this Agreement or any other Project Agreement, other than any other Project Agreement which such State Entity has itself executed and entered into; and

- (ii) in the case of any MEP Participant, shall bind and apply to the benefit of all and any successors and permitted assignees and transferees of such MEP Participant from time to time in respect of this Agreement or any of the rights, obligations and other provisions of this Agreement (as the case may be).

- 15.2 Except as otherwise provided in Article 16 and Section 15.1(i), above, the State Authorities shall not assign, transfer or otherwise deal with (or carry out or permit any act inconsistent with their continued retention of) their interests under this Agreement or any other Project Agreement and all or any of the rights, obligations and other provisions on their part set out in this Agreement or any other Project Agreement.

ARTICLE 16

SUCCESSORS AND PERMITTED ASSIGNEES

- 16.1 Each MEP Participant shall be entitled to transfer, assign, share or otherwise deal with all or any of its rights under this Agreement, with binding effect on the State Authorities, subject only to the prior notification by the MEP Participant transferor to the State Authorities of details of such transferred rights and the recipient thereof, and if the MEP Participant transferor so elects, delivery to the State Authorities of an agreement duly executed by the MEP Participant and the recipient of such rights; provided, however, that the State Authorities shall have the right, within twenty (20) days of receipt of such notification, to disapprove such transfer, assignment, sharing or dealing if the proposed transferee, assignee or other party poses a threat to national security, defense and/or public safety in violation of Georgian Law. Upon delivery of the form of agreement as contemplated by this Section 16.1, the Government shall promptly execute the agreement and return same to the MEP Participant transferor.
- 16.2 Each MEP Participant shall be entitled to transfer, assign or otherwise deal with all or any of its obligations under this Agreement, with binding effect on the State Authorities, subject to the requirement that the MEP Participant transferor provide to the State Authorities not less than twenty (20) days[□] prior notification of:
- (i) the details of the proposed transaction with respect to obligations proposed to be retained and those transferred;
 - (ii) the details of the recipient in the context of the proposed transaction and, in particular, the obligations proposed to be assumed; and
 - (iii) certified financial statements, disclosure documents and other relevant information reasonably demonstrating to the State Authorities that the transferee has the financial and (to the extent it may be required in the

circumstances) technical capability to observe and perform such obligations.

The State Authorities shall have the right, within twenty (20) days of receipt of the foregoing, to disapprove such transfer, assignment, sharing or other dealing on the basis that the proposed transferee has not reasonably demonstrated that (i) it has the financial or (to the extent it may be required in the circumstances) technical capability to observe and perform such obligations or (ii), except when the proposed recipient of the obligation is an MEP Participant, the proposed recipient poses a threat to national security, defense and/or public safety in violation of Georgian Law. If the State Authorities have not provided notice of disapproval of such proposed transaction to the MEP Participant transferor within twenty (20) days after receipt of transaction notification and supporting information, such transaction shall be deemed approved. Unless the MEP Participant transferor and the recipient of obligations otherwise agree, the terms of their agreement of transfer shall provide, in form and substance satisfactory to the MEP Participant transferor, (1) that the transferor shall cease to be a Party to this Agreement and is released from any obligations hereunder, (2) that the recipient shall become a party to this Agreement in succession to the transferor and shall observe all obligations and assume any liabilities as if it had at all times been a Party to this Agreement, (3) that the recipient shall indemnify the transferor and all other Parties from and against obligations and liabilities that otherwise would have been the responsibility of the transferor and (4) the effective date of the transfer and such other matters that the transferor shall reasonably require.

Upon delivery of such agreement, the Government shall promptly execute the agreement and return same to the MEP Participant transferor. Notwithstanding the foregoing in this Section 16.2 or anything else contained in this Agreement, no MEP Participant shall have the right to assign all or any portion of its obligation to pay Taxes except when such transfer of obligation is in conjunction with a transfer of all or a corresponding portion of its rights under Section 16.1.

- 16.3 Without releasing the MEP Participant from its obligations under this Agreement, each MEP Participant shall be entitled to undertake the Project and/or discharge all or any of its obligations hereunder by causing or procuring that such obligations are performed on its behalf by any Person; provided, however, that if the Person acting on behalf of the MEP Participant is a State Authority, then unless and to the extent the applicable Project Agreement provides to the contrary such State Authority shall bear responsibility under this Agreement for any failure or nonperformance of such obligations and the MEP Participant shall have no responsibility under this Agreement with respect thereto.
- 16.4 Without prejudice to the provisions of Section 16.1, each MEP Participant shall be entitled to create security interests in relation to its rights and obligations under this Agreement and any other Project Agreement in favour of banks or other financing entities (providing for, among other things, enforcement of such security by means of succeeding to the interests of the MEP Participant under this Agreement and any other Project Agreement); provided, however, that the Government shall have the right within fifteen (15) days receipt of notification to disapprove any assignment, lien creation, charge or security interest hereunder if the proposed assignee, lien holder,

charge beneficiary or secured party or other party poses a threat to national security, defence, and/or public safety in violation of Georgian Law). Except as set forth in the preceding sentence, such creation of security interests and the exercise of such security interests shall be made without any requirement of consent or permission of the State Authorities and such security interests shall be binding on the State Authorities upon the MEP Participant notifying to the Government details of such security interests and the beneficiary of such security interests and the State Authorities shall, if requested by the MEP Participant, enter into such agreements or other arrangements with such banks or other financing entities as may be required by such banks or other financing entities to give effect and business efficacy to the security interests so created including, among other things:

- (a) advance notice by the State Authorities of any default by the MEP Participant and any intention of the State Authorities to take action in respect thereof; and
- (b) an acknowledgment of the existence and potential exercise of rights to remedy or cure any such default and rights to acquire or otherwise step into the position of the MEP Participant under this Agreement and any other Project Agreements pursuant to such security interests.

16.5 Without prejudice to any rights or exemptions which may have vested in the Project Participants by operation of Georgian Law (including the ratification and enactment of Project Agreements into Georgian Law as provided herein), it is acknowledged by the State Authorities that the implementation of the Project may result in circumstances in which Project Participants other than the MEP Participants are to be subject to some or all of the obligations, or are to enjoy some or all of the rights, set out in this Agreement for such Project Participant (other than in circumstances of transfer, assignment or other dealing) by the MEP Participants, and the State Authorities agree that, in such circumstances, they will, upon receipt of a duly executed agreement in form and substance satisfactory to the relevant MEP Participant or Participants to the effect that such other Project Participant shall become a contracting party and shall have the rights, exemptions and/or privileges of the applicable Project Agreements and in that respect, the State Authorities shall promptly execute such form of agreement and return it to the relevant MEP Participant or Participants. For the avoidance of doubt, the provisions of this Section 16.5 shall not operate to (i) make the subject Project Participant an MEP Participant or (ii) cause the Tax treatment of any Project Participant to be other than as set forth in Articles 8 and 14 and the other provisions of this Agreement relating specifically to Taxes.

16.6 The State Authorities expressly acknowledge that both assignments of rights and transfers of obligations by the MEP Participants pursuant to this Article 16 are foreseeable and intended by the Parties to the Agreement. In accordance with the foregoing, the State Authorities agree and commit at the request of an MEP Participant to promptly provide, receive and/or execute any further or other documentation as may be necessary in order to effect a legally enforceable assignment of rights or novation of obligations hereunder or to allow Project Participants to

become contracting parties as contemplated by Section 16.5 above.

ARTICLE 17

DISPUTE RESOLUTION AND APPLICABLE LAW

- 17.1 The provisions of this Article 17 shall be valid and enforceable notwithstanding the illegality, invalidity, or unenforceability under the law specified in Section 17.12 of any other provisions of this Agreement. Arbitration pursuant to this Article 17 shall not be subject to the condition of exhaustion of local remedies such as that referred to in Article 26 of the ICSID Convention. In order to provide prior notice and a reasonable opportunity for the Parties to resolve disputes without resorting to arbitration, as a condition to any Party or Parties submitting a dispute to arbitration under this Article 17, the Party or Parties shall provide written notice of the dispute to all other Parties and shall submit the dispute to arbitration only after the passage of thirty (30) days from the date of delivery of such notice on all Parties pursuant to Article 22 of this Agreement; provided, however, that where a Party has given notice of dispute(s) it shall not be necessary for any other Party to give a similar notice in order to participate in the arbitration of such dispute(s); and provided, further, that once a dispute is submitted to arbitration no additional notice of dispute(s) shall be required in order for any Arbitrating Party to add, to modify or to redefine those disputes which it seeks to resolve in such arbitration. Any dispute arising under this Agreement, or in any way connected with this Agreement (including its formation and any questions regarding arbitrability or the existence, validity or termination of this Agreement), between (i) the Government (which shall be the sole proper party to represent the State, and all State Authorities) and (ii) one or more of the MEP Participants, may be submitted to arbitration pursuant to this Article 17. The MEP Participants may submit any dispute to arbitration jointly and may assign rights granted under this Agreement among themselves for purposes of arbitration, it being further understood and agreed that the foregoing shall not require that, in an arbitration to which more than one MEP Participant is a party, the MEP Participants must take a joint position on any or all disputed issues. In addition, any MEP Participant that demonstrates to the reasonable satisfaction of the arbitral tribunal that it has a genuine interest in the issues in dispute and agrees to be bound by any award in respect of any fact or matter determined in the proceeding may intervene in any arbitration proceeding in which it is not already a party, subject only to its willingness to accept the record as previously established in the proceeding prior to its notice of intervention.
- 17.2 Except as otherwise expressly provided in the State's reservation to the ICSID Convention, the Government and all other Parties hereby consent to arbitrate any such dispute pursuant to the ICSID Convention and the ICSID Arbitration Rules. The Government shall take any actions or decisions as may be necessary to ensure the effectiveness of the State Authorities' consent to ICSID jurisdiction for all disputes arising under this Agreement or in any way connected with this Agreement. In the event of any conflict between the ICSID Arbitration Rules and the arbitration provisions of this Agreement, this Agreement shall govern. For purposes of Article

25(1) of the ICSID Convention and for any other purposes related to this Agreement, any dispute among the Parties shall be considered a legal dispute arising directly out of an investment. As of the Effective Date any dispute among the Parties shall be considered a legal dispute arising directly out of investment activities which have [effectively started] and which have obtained all necessary permissions and authorisations in accordance with the relevant legislation of the State on foreign capital. If and to the extent the State's reservation to the ICSID Convention is later modified or rescinded such that any disputes heretofore not subject to arbitration under the ICSID Convention become eligible for ICSID arbitration, the Government and all other Parties consent to arbitrate all such eligible disputes pursuant to the ICSID Convention and the ICSID Arbitration Rules.

- 17.3 If, for any reason, and notwithstanding the consent granted in Section 17.2, ICSID arbitration is not available for the resolution of any such dispute (including by reason of the State's reservation to the ICSID Convention), then the dispute shall be finally resolved under the Rules of Arbitration of the International Chamber of Commerce ([ICC Rules]). In the event of any conflict between the ICC Rules and the arbitration provisions of this Agreement, this Agreement shall govern.
- 17.4 An arbitral tribunal constituted pursuant to this Agreement shall consist of three (3) arbitrators, one of which shall be appointed by the Arbitrating Party or Arbitrating Parties first requesting arbitration, and one of which shall be appointed by the opposing Arbitrating Party or Arbitrating Parties. The third arbitrator, who shall be the presiding arbitrator of the arbitral tribunal, shall be appointed by agreement of the first two arbitrators appointed. If either of the first two appointments are not made within thirty (30) days after the request for arbitration, or if the first two arbitrators fail to agree on a third arbitrator within thirty (30) days after the later of them shall have been appointed, the unfilled appointment will be made, upon the request of any Arbitrating Party, by the International Chamber of Commerce, acting in accordance with the provisions addressing appointment of arbitrators in the ICC Rules. With respect to arbitration proceedings held under the ICSID Convention and ICSID Arbitration Rules, the Parties agree that the period of time to which reference is made in Article 38 of the ICSID Convention shall be extended to ninety (90) days after the submission of a request by an Arbitrating Party to the International Chamber of Commerce to appoint a third and presiding arbitrator. The Parties agree that, regardless of the payment scales otherwise prescribed by any institution administering an arbitration under this Agreement, the Arbitrating Parties shall compensate the members of the arbitral tribunal at rates sufficient to secure their service as arbitrators.
- 17.5 With respect to any arbitration proceedings arising under this Agreement, additional or alternative procedural rules may be adopted at any time by written agreement of the Arbitrating Parties.
- 17.6 The Parties agree that the seat of any arbitration held pursuant to this Agreement shall be Geneva, Switzerland, unless the Arbitrating Parties agree in writing to hold the arbitration in another country that has ratified or acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The language used during any arbitration proceeding shall be the English language and the

English language text of this Agreement will be used and relied upon for all purposes by the arbitral tribunal. Interpretation of any live proceedings of the arbitration and translation of written arguments and documentation shall be provided if requested by any Arbitrating Party, at the expense of such requesting Arbitrating Party.

- 17.7 The Parties shall provide the arbitral tribunal with reasonable opportunity to inspect the Facilities as may be necessary for the determination of a dispute. Each Arbitrating Party shall, at the request of an opposing Arbitrating Party or the arbitral tribunal, make available to the arbitral tribunal and the opposing Arbitrating Party all documents and witnesses substantially relevant, as determined by the tribunal, to the dispute.
- 17.8 An arbitral tribunal's award issued pursuant to this Article 17 shall be final and binding on the Arbitrating Parties upon being rendered, and the Arbitrating Parties undertake to comply with any such award without delay. Judgment on the award may be entered and execution had in any court having jurisdiction, or application may be made for a judicial acceptance of the award and an order of enforcement and execution, as applicable.
- 17.9 Subject to Section 9.2(i), if monetary damages are included in a final award, the award shall be rendered and payment shall be made in Dollars and, in accordance with the terms of this Agreement as relate to amounts due and payable, shall include interest calculated at the Agreed Interest Rate from the date of the event, breach, or other violation giving rise to the dispute to the date when the award is paid in full. The arbitral tribunal may also order any interim or conservatory measures it deems appropriate.
- 17.10 With respect to arbitration proceedings held under the ICSID Convention and ICSID Arbitration Rules, the Parties agree any *ad hoc* committee appointed in accordance with Article 52 of the ICSID Convention shall not stay enforcement of an award unless the Arbitrating Party requesting annulment posts an irrevocable and unconditional bank guaranty in the full amount that the award directs the Arbitrating Party requesting annulment to pay. With respect to arbitration proceedings held under the ICC Rules, the Arbitrating Parties hereby waive the right to judicial intervention in the proceedings themselves and also waive the right to have any interim or conservatory order or any final award annulled or set aside by the courts of any jurisdiction other than the jurisdiction in which the arbitration is held.
- 17.11 Each State Authority hereby waives any claim to immunity in regard to any proceedings to enforce this Agreement or to enforce any interim or conservatory order or any final award rendered by an arbitral tribunal constituted pursuant to this Agreement, including immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from pre-judgment attachment based on an interim or conservatory order or from execution based on a final award; provided, however, that notwithstanding anything to the contrary in this Agreement, the waiver of immunity with respect to property in this Section 17.11 shall not apply to (i) property to the extent used or intended for use for the exercise of diplomatic rights, including the State's diplomatic missions, consular posts, special missions,

missions to international organisations or to international conferences and including their furnishings, means of transportation and funds held in bank accounts for use in funding such missions, posts, organisations and/or conferences; (ii) property of a military character or used or intended for use for military purposes; (iii) property constituting or forming part of the essential cultural heritage of the State or part of its archives and not placed or intended to be placed on sale, including museums, archaeological sites and artifacts, libraries and related historical preservation and research facilities, cemeteries, monuments and other similar property; (iv) property forming part of an exhibition of objects of scientific or historical interest which is outside the Territory and not placed or intended to be placed on sale; (v) ships and aircraft to the extent used for governmental service; (vi) physical assets being used to perform the essential government functions, such as Parliament and governmental buildings and their furnishings; (vii) property of the judiciary, such as court buildings and their furnishings; and (viii) property of public health care, welfare and educational, as well as that of the police and other law enforcement, systems.

- 17.12 Nothing in this Article 17 shall preclude the agreement to use other dispute resolution procedures (including use of internationally recognised independent experts) for any particular (or particular type of) dispute (including, in particular, any dispute respecting the EIA and/or the final design of the Facilities under Appendix 3 of this Agreement), but in the absence of such separate written agreement the provisions of this Article 17 shall control.
- 17.13 This Article 17 shall be governed in accordance with the substantive law of England, but excluding any rules or principles of English law that would (i) prevent adjudication upon, or accord presumptive validity to, the transactions of sovereign states or (ii) require the application of the laws of any other jurisdiction to govern this Article 17.

ARTICLE 18

OPERATING COMPANY

- 18.1 Subject only to any requirement under Georgian Law that any Operating Company register to conduct business within the Territory, and taking into account the applicable principles of facilitation and coordination set forth in Section 2.3 hereof, the MEP Participants shall have the right to establish, own and control one or more Operating Companies, and/or appoint or select one or more Operating Companies, that have been organised in any jurisdiction, whether inside or outside the Territory (provided that such organisation in a jurisdiction outside the Territory does not pose a threat to national security, defense and/or public safety). The MEP Participants shall have the right to appoint jointly any Operating Company (i) to enforce on behalf of the MEP Participants any or all obligations of the State Authorities under any Project Agreement and (ii) to exercise on behalf of the MEP Participants any or all rights of the MEP Participants arising under any Project Agreement. To the extent authorised by the MEP Participants, any and all Operating Companies may act as the MEP Participants' agent or independent contractor, as the MEP Participants may indicate,

in respect of any and all Project Activities.

- 18.2 The MEP Participants and any Contractor (including any Operating Company) are hereby authorised to select and determine the number of employees to be hired by it or them in connection with Project Activities. All citizens of the State hired in respect of the Project shall be hired pursuant to written employment contracts that specify the hours of work required of the employees and the compensation and benefits to be paid or furnished to them and other material terms of employment. Consistent with their respective employment contracts, such employees may be located wherever deemed appropriate in connection with their employment. Subject to requirement that no Project Participant shall be required to follow any employment practices or standards that (i) exceed those international labor standards or practices which are customary in international Petroleum transportation projects or (ii) are contrary to the goal of promoting an efficient and motivated workforce, all employment programmes and practices applicable to citizens of the State working on the Project in the Territory, including hours of work, leave, remuneration, fringe benefits and occupational health and safety standards, shall not be less beneficial than is provided by the Georgian labor legislation generally applicable to its citizenry.
- 18.3 In respect of their procurement of services, equipment, materials, machinery and tools, vehicles, spare parts, goods and supplies necessary for the proper conduct and achievement of Project Activities, the MEP Participants and any Contractor (including any Operating Company) shall give preference to Georgian suppliers in those cases in which such Georgian suppliers are in all material respects competitive in price, quality and availability with those available from other sources. For purposes of this Section 18.3, a Georgian supplier shall mean any production, economic or other Entity (including a State Entity) which has validly represented and warranted to the procuring Project Participant before it tenders to supply any of the above-referenced services or items that (i) it is registered, incorporated and legally operating in the Territory and (ii) not less than twenty percent (20%) of the control of such supplier is held, directly or indirectly, by citizens of the State.
- 18.4 In respect of the operation of the Facilities, no later than two (2) years prior to the planned commencement of commercial operation of the Facilities the Government shall have the right to notify the MEP Participants in writing of the authorisation and appointment of a State Authority (the "Georgian Operations Entity") with appropriate qualifications and relevant experience and capabilities to participate in or with the business organisation or venture to be formed or designated to serve as operator of the Facilities. Subject always to the requirement that each successor State Authority have appropriate qualifications and relevant experience and capabilities to assume and perform its obligations in respect of Facilities operations, the Government shall have the right to authorise and appoint another State Authority to replace the preexisting State Authority as the Georgian Operations Entity. The manner and degree of participation by the Georgian Operations Entity respecting Facilities operations shall be determined by mutual agreement of the Georgian Operations Entity, the MEP Participants and their Lenders and Insurers, and any other relevant parties involved in the organisation or venture. It is the intent of the Parties that the Georgian Operations Entity will initially have the right to a substantial, but not controlling, level of such

participation. Facilities operations shall be governed by an operating agreement to be agreed with the MEP Participants as soon as practicable following the Government's appointment of the Georgian Operations Entity and the formation or designation of said organisation or venture. The operating agreement shall contain those terms and conditions typically found in agreements for the operation of international Petroleum pipelines of similar size and complexity, modified as mutually agreed with the MEP Participants to address the particular circumstances of the Project.

ARTICLE 19

FORCE MAJEURE

- 19.1 Nonperformance or delays in performance on the part of any Party respecting any obligations or any part thereof under this Agreement, other than the obligation to pay money, shall be suspended if caused or occasioned by Force Majeure, as defined in this Agreement.
- 19.2 Force Majeure with respect to State Authorities shall be limited to (i) natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences), (ii) wars between sovereign states where Georgia has not initiated the war under the principles of international law, and (iii) international embargoes of sovereign states other than Georgia.
- 19.3 Force Majeure with respect to the MEP Participants shall be limited to those events or causes and any resulting effects that prevent the performance by the MEP Participant(s) of its (or their) obligations or any part thereof, are beyond its (or their) control and, concerning events or causes which are reasonably foreseeable, are not caused or contributed to by the negligence of the MEP Participants or by its (or their) breach of this Agreement or any other Project Agreement. Force Majeure under this Section 19.3 shall include the following events and causes to the extent they otherwise satisfy the requirements of this Article 19: natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences), wars, strikes or other labor disputes, rebellions, acts of terrorism, international embargoes, the inability to obtain necessary goods, materials, services, or technology, the inability to obtain or maintain any necessary means of transportation, the application of laws, treaties, rules, regulations, and decrees, the actions or inactions of the State Authorities and other events or causes, whether of the kind enumerated or otherwise, which are beyond the control of the MEP Participants.
- 19.4 If a Party is prevented from carrying out its obligations or any part thereof under this Agreement as a result of Force Majeure, other than the obligation to pay money, it shall promptly notify in writing the other affected Party or Parties to whom performance is owed. The notice must:

- (i) specify the obligations or part thereof that the Party cannot perform;
- (ii) fully describe the event of Force Majeure;
- (iii) estimate the time during which the Force Majeure will continue; and
- (iv) specify the measures proposed to be adopted by it (or them) to remedy or abate the Force Majeure.

Following this notice, and for so long as the Force Majeure continues, any obligations or parts thereof which cannot be performed because of the Force Majeure, other than the obligation to pay money, shall be suspended.

- 19.5 Any Party that is prevented from carrying out its obligations or parts thereof as a result of Force Majeure shall take such actions as are available to it and expend such funds (and in the case of a State Authority, the actions and funds of other State Authorities) as necessary to remove or remedy the Force Majeure and resume performance of its obligations and all parts thereof as soon as reasonably practicable.
- 19.6 Any State Authority that is prevented from carrying out its obligations as a result of Force Majeure shall take, and shall seek to also procure that other appropriate State Authorities take, all such action as may be reasonably required to mitigate any loss suffered by any MEP Participant or other Project Participant during the continuance of the Force Majeure and as a result thereof.
- 19.7 In respect of the obligation of the State Authorities to provide compensation for Loss or Damage as a result of the events or causes specified in Section 9.1, the State Authorities shall have no right to declare Force Majeure under this Agreement in respect of subsections (ii), (iii), (iv) and (v) of said Section 9.1.

ARTICLE 20

ACKNOWLEDGMENTS

- 20.1 The State Authorities hereby acknowledge that they have received and reviewed this Agreement and the Intergovernmental Agreement and hereby declare them to be acceptable.
- 20.2 The Parties hereby acknowledge that it is their mutual intention that no Georgian Law now or hereafter existing (including the interpretation and application procedures thereof) that is contrary to the terms of this Agreement or any other Project Agreement shall limit, abridge or affect adversely the rights granted to the MEP Participants or any other Project Participants in this or any other Project Agreement or otherwise amend, repeal or take precedence over the whole or any part of this or any other Project Agreement.

ARTICLE 21

COOPERATION AND COORDINATION MECHANISMS

- 21.1 The Government shall use its Best Endeavours to negotiate and enter into such other intergovernmental or multilateral agreements or treaties as may be necessary or appropriate between or among it and the other governments and states in the region to authorise, enable, support and facilitate the Project. Without limiting the foregoing, the Government shall consult with the MEP Participants concerning those measures by which the State Authorities, in conjunction with other governments, may make crossborder Project Activities more effective, timely and efficient, including streamlined and coordinated customs and transit procedures and practices and the use of common measurement and metering facilities within or without the Territory to monitor the transportation of Petroleum.
- 21.2 On the request of any or all of the MEP Participants, solely for the purpose of assisting in any attempt to finance all or any part of the Project or all or any part of its or their Project Activities or to insure against risks to the Project, the Government, on its own behalf and on behalf of the State Authorities, shall confirm in writing, or, as appropriate, execute such documents as are necessary or appropriate to extend directly to any and all applicable Lenders and Insurers (including multilateral lending agencies and export credit agencies) the representations, warranties, guarantees, covenants and undertakings of the State Authorities as, and to the extent, set forth in this Agreement.

ARTICLE 22

NOTICES

All notices given under this Agreement by any Party shall be given in writing in the English language and may be given by telex, fax or letter to the address set forth below for each Party (or such other address as a Party may notify in advance to the other Party from time to time in accordance with this Article 22). A notice given by telex or fax sent to the correct address as set forth below or as notified pursuant hereto shall be deemed to be delivered on the first Business Day following the date of dispatch. A notice sent by letter shall not be deemed to be delivered until the first Business Day following receipt.

THE STATE AUTHORITIES:

The Government of Georgia

Fax:

Attention: The Office of [_____]

[EACH OF THE MEP PARTICIPANTS]:

Fax: _____
Attention: _____

and copied for information to:

ARTICLE 23

MISCELLANEOUS

- 23.1 Interest shall accrue at the Agreed Interest Rate on any amount, if any, payable under or pursuant to this Agreement from the time that amount is payable through the date on which that amount, together with the accrued interest thereon, is paid in full.
- 23.2 This Agreement, together with all appendices attached hereto, shall constitute the entire agreement of the Parties with respect to the matters addressed herein. This Agreement may not be amended or otherwise modified, except by the written agreement of the Parties. Without limiting the generality of the foregoing, no Article (including any Section thereof) may be amended or otherwise modified, except by a written agreement of the Parties that specifically provides for such amendment or modification and references the Article and any Section thereof intended by the Parties to be so amended or otherwise modified. In no event shall any Article (including any Section thereof) be considered amended or otherwise modified by compromise or negotiation between the Parties or purported amendments or modifications to this Agreement that do not so specifically provide for such amendment or modification and reference the subject Article and any applicable Section thereof. No waiver of any right, benefit, interest or privilege under this Agreement shall be effective unless made expressly and in a writing referencing the Article (including any applicable Section thereof) providing that right, benefit, interest or privilege. Any such waiver shall be limited to the particular circumstance in respect of which it is made and shall not imply any future or further waiver.
- 23.3 The table of contents to and the topical headings used in this Agreement are inserted for convenience only and are not intended by the Parties to have, and are not to be

construed as having, any substantive significance or as indicating that all provisions of this Agreement relating to any particular subject matter are to be found in any particular Article or Section.

- 23.4 Unless the context otherwise requires, references to all Articles, Sections and Appendices are references to Articles and Sections of, and Appendices to, this Agreement. The words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. The words "includes" and "including" and words of similar import shall neither limit that which precedes it in the text nor be interpreted as making exclusive that which succeeds it, but instead shall always mean "including without limitation" or "including but not limited to" whenever used in this Agreement. Unless the context otherwise requires, reference to the singular includes a reference to the plural, and *vice-versa*, and reference to either gender includes a reference to both genders.
- 23.5 All references in this Agreement to "rights," "rights and privileges," "rights and entitlements," "exemptions," and other similar references are to be construed, as the context may require, to include rights, privileges, guaranties, entitlements, exemptions, benefits, protections, assurances, authorisations, approvals, consents, waivers, indemnities and other similar matters. Similarly, all references in this Agreement to "obligations" or "requirements" and other similar references are to be construed, as the context may require, to include obligations, requirements, undertakings, commitments, promises, guaranties, agreements, waivers, indemnities and other similar matters.
- 23.6 The rights and remedies of a State Authority or a Project Participant, as the case may be, provided in any Article (including any Section thereof) shall apply cumulatively and shall not apply to the exclusion of any other right or remedy that a State Authority or Project Participant may have under any other provision of this Agreement or any provision of any other Project Agreement.
- 23.7 The State Authorities, on the one hand, and the other Parties to this Agreement, on the other hand, shall maintain or cause to be maintained the confidentiality of all data and information of a non-public or proprietary nature that they may receive, directly or indirectly, from the other or pertaining to any of the Project Participants or the Project.
- 23.8 Each Party shall, on the request of the other Party, exert its Best Endeavours to execute and deliver, or cause to be executed and delivered, such written agreements, documents and instruments as are necessary or appropriate to enable the Party making such request to fulfill its obligations under any Project Agreement.
- 23.9 Notwithstanding anything to the contrary in this Agreement or any other Project Agreement, no MEP Participant shall be required to act or refrain from acting if to do so would render that MEP Participant or any of its Affiliates subject to demonstrable risk of liability for civil or criminal penalties under the laws of any jurisdiction applicable to such Person.

- 23.10 This Agreement (including the provisions concerning arbitration set forth in Article 17) shall be governed in accordance with the substantive law of England, but excluding any rules or principles of English law that would (i) prevent adjudication upon, or accord presumptive validity to, the transactions of sovereign states or (ii) require the application of the laws of any other jurisdiction to govern this Agreement.
- 23.11 This Agreement is executed in multiple counterparts in the English and Georgian languages. In the event of any conflicting interpretations of any provisions of this Agreement or any notices hereunder as between the language counterparts, the English language counterpart version shall prevail.
- 23.12 The Government, on the one hand, and each of the other Parties to this Agreement, on the other hand, reserves to itself all rights, counterclaims and other remedies and defenses which such Party has under or arising out of this Agreement. All obligations of the Government to make payments which have been properly notified and are properly due and payable to an MEP Participant under this Agreement may be set off or recouped out of any amounts otherwise properly notified and properly due and payable hereunder to the Government by such MEP Participant. All obligations of an MEP Participant to make payments of Profit Tax may be set off or recouped out of any amounts otherwise properly notified and properly due and payable hereunder to such MEP Participant by the Government, in which case the amount of such set-off or recoupment shall be treated as a payment by such MEP Participant of such Profit Tax for purposes of Section 8.2 (including the issuance of tax receipts in accordance with Section 8.2(ix)). In the case of any such offset or recoupment against Profit Tax, the MEP Participant shall notify the State Tax Department in writing of such offset or recoupment (including the amount thereof). Notwithstanding anything in this Section 23.12 to the contrary, all rights of set off or recoupment hereunder shall be subject to five (5) Business Days prior notice in accordance with Article 22 of this Agreement by the Party intending to effect such offset or recoupment as provided herein.
- 23.13 If and for so long as any provision of this Agreement shall be deemed or be judged illegal, invalid or unenforceable for any reason whatsoever under the law specified in Section 23.10, such illegality, invalidity or unenforceability shall not affect the legality, validity, enforceability or operation of any other provision of this Agreement except only insofar as shall be necessary to give effect to the construction of such illegality, invalidity or unenforceability, and any such illegal, invalid or unenforceable provision shall be deemed severed from this Agreement without affecting the legality, validity and enforceability of the balance of this Agreement.
- 23.14 This Agreement, together with the other Project Agreements, constitutes the entire agreement between the Parties relating to the subject matter of those agreements and no Party has given any warranty, representation, statement, assurance, covenant, agreement, undertaking, indemnity or commitment of any nature whatsoever other than as are expressly set out in this Agreement and any Project Agreements.
- 23.15 Any reference to [Persons acting as agent and/or representative of a State Authority] or as [duly appointed representative of a State Authority] or similar references is not

intended, and shall not be construed as, imposing personal liability on any such Person except and to the extent such Person is otherwise liable and/or obligated to perform under the terms of this Agreement.

[SIGNATURE BLOCKS]

APPENDIX 1

CERTAIN DEFINITIONS

The capitalised terms used and not otherwise defined in the Host Government Agreement to which this Appendix 1 is attached shall have the following meanings:

“Affiliate” means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with that Person. For purposes of this definition, “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of a majority or other controlling interest in the voting securities or other equity ownership interest in an Entity, by law, or by agreement between Persons conferring such power or voting rights.

“Agreed Interest Rate” means, for each day of an Interest Period with respect to any amount due and payable under or pursuant to this Agreement, interest at the rate per annum equal to three and one-half percent (3.5%) plus LIBOR in effect on the Business Day immediately preceding the first day of the initial applicable Interest Period and, thereafter, as in effect on the Business Day immediately preceding the first day of each succeeding Interest Period.

“Agreement” means this Host Government Agreement, including all Appendices attached hereto, together with any written extension, renewal, replacement, amendment or other modification hereof signed by all the Parties, all of which by this reference are incorporated herein.

“Allocation Statement” is defined in Section 8.2(vi).

“Application Requirements” is defined in Section 7.3.

“Arbitrating Parties” means the Party or Parties that submit a dispute to arbitration or which intervene or are added to the arbitral proceeding pursuant to the provisions of this Agreement, on the one hand, and the Party or Parties against whom that dispute is submitted, on the other hand, and “Arbitrating Party” means any one of them.

“Barrel” means U.S. barrel, *i.e.*, 42 U.S. gallons (158.987 litres) measured at the standard temperature and atmospheric pressure of sixty degrees Fahrenheit/fifteen point five six degrees Centigrade (60°F/15.56°C) and 1.01325 bars.

“Best Available Terms” means, at any time with respect to any goods, works, services or technology specified by a Project Participant to be rendered or provided at any location, the prevailing rates then existing in the ordinary course of business between unrelated Persons for goods, works, services or technology which are of a similar kind and quality provided at the same location and under terms and conditions comparable to those applicable to the subject goods, works, services or technology.

□Best Endeavours□ means the taking by the relevant Person of all lawful, reasonable steps in such Person's power which a prudent and determined man acting in his own interest and anxious to achieve what is required would have taken under the circumstances.

□Business Day□ means any day that is not a Saturday, Sunday or legal holiday in Georgia and, with respect to the determination of LIBOR, days on which clearing banks are customarily open for business in London, England.

□Code of Practice□ means those codes and regulations regarding the construction, installation, operation and maintenance of the Facilities, as well as such other provisions, as set forth in Appendix 3.

□Constitution□ means the constitution of the State, as the same may be amended or otherwise modified or replaced from time to time.

□Construction Corridor□ is defined in Article 6 of Appendix 2.

□Contractor□ means any Person supplying, directly or indirectly, to or for the benefit of all or any of the MEP Participants or their Affiliates goods, works, services or technology related to the MEP System, and any successors or permitted assignees of such Person. The term includes an Interest Holder, Affiliate of an MEP Participant, Shipper or Operating Company, but does not include an MEP Participant, that is supplying such goods, works, services or technology. The term does not include a physical person acting in his or her role as an employee of any other Person.

□Corridor of Interest□ is defined in Article 6 of Appendix 2.

□Cure Period□ is defined in Section 3.4.

□Dollars□ or □\$□ means the currency of the United States of America.

□Double Tax Treaty□ means any applicable or relevant treaty or convention with respect to Taxes that is in force in Georgia.

□Economic Equilibrium□ means the economic value of the relative balance established under the Project Agreements at the applicable date between the rights, interests, exemptions, privileges, protections and other similar benefits provided or granted to a Project Participant and the concomitant burdens, costs, obligations, liabilities, restrictions, conditions and limitations agreed to be borne by that Project Participant under the applicable Project Agreement(s).

□Effective Date□ is defined in Section 3.1.

□Entity□ means any company, corporation, limited liability company, partnership, limited partnership, joint venture, enterprise, association, trust or other juridical entity, organisation, whether of a governmental or private nature, established or organised under the laws of any state or jurisdiction or by written agreement between

two or more Persons.

“Expropriation” means any nationalisation or expropriation, or any measure having an effect equivalent to nationalisation or expropriation, and for the avoidance of doubt, the term includes:

- (i) expropriating the assets of a Person;
- (ii) the taking of property or rights, or the limiting of the use, enjoyment or exercise thereof, in a manner which is equivalent to expropriation, including expropriating through the ownership of equity or equivalent interests therein;
- (iii) measures or effects which individually or separately may not constitute expropriation but when taken together are equivalent to expropriation; and
- (iv) measures or effects in relation to any tax, levy, duty or charge which whether alone or in aggregate are equivalent to expropriation.

“Facilities” means one or more pipelines and laterals for the transportation of Petroleum within and/or across the Territory and all above and below ground installations and ancillary equipment, all loading, unloading, pumping, compressing, measuring, testing and metering facilities, communications, telemetry and similar equipment, all pig launching and receiving facilities, all pipelines, power lines and other related equipment used to deliver any form of liquid or gaseous fuel and/or power necessary to operate pump stations or for other system needs, cathodic protection devices and equipment, all monitoring posts, markers and sacrificial anodes, all terminaling, storage and related installations, and all associated appurtenances required from time to time for the proper functioning of any and all thereof, constructed, installed, maintained, repaired, replaced, expanded, extended, owned, controlled and/or operated by or on behalf of the MEP Participants within the Territory.

“Fair Market Value” means the value of a Project Participant’s interests, investments, property, commercial arrangements, rights, privileges and exemptions which are taken, diminished, devalued, damaged or otherwise detrimentally affected as a result of the Expropriation, taking into account that Project Participant’s business and investments, all as related to or affected by the Project, and determined on the basis of an ongoing concern utilising the discounted cash flow method, assuming a willing buyer and willing seller in a nonhostile environment and disregarding all unfavourable circumstances (including any diminution of value) leading up to or associated with the Expropriation. In determining said value the principle of indemnification shall apply, with value determined as of the time immediately prior to the Expropriation.

“Foreign Currency” means any freely convertible currency, including Dollars, that is the lawful currency of a state and is issued other than by the State Authorities, and is not subject to general limitations or restrictions of the issuing authority on conversion

or exchange.

“Foreign Employee” means any employee of any Person who is involved in MEP Activities and is not a citizen of the State.

“Georgian Law” means the laws of Georgia binding and legally in effect from time to time and forming the organic law constituting the entire legal regime of the Georgia, including the Constitution, all other laws, codes, decrees with the force of law, decrees, by-laws, regulations, official declarations, principle decisions, orders, normative acts and policies, all international agreements to which Georgia is or may be a party together with all domestic enactments, laws and decrees for the ratification or implementation of such international agreements, and prevailing judicial interpretations of all such legal instruments.

“Government” means the central government of the State, including any and all instrumentalities, branches and administrative and other subdivisions thereof or therein, and any and all executive and regulatory bodies, agencies, departments, ministries, authorities and officials thereof or therein that have the authority to govern, regulate, levy or collect taxes, duties or other charges, grant licenses or permits or approve or otherwise affect (whether financially or otherwise), directly or indirectly, Project Activities or any Project Participant’s rights or obligations in respect of the Project (excluding Local Authorities and State Entities), notwithstanding any change at any time or from time to time in structure, form or otherwise.

“Government MEP Representative” is defined in Section 2.2.

“ICSID” means the International Centre for the Settlement of Investment Disputes established by the ICSID Convention.

“ICSID Convention” means the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

“Insurer” means any insurance company or other Person providing insurance covering all or a portion of MEP System risks, the Project, or other risks to any Project Participant, and any successors or permitted assignees of such Person.

“Interest Holder” means, at any time, any Person holding any form of equity interest in an MEP Participant or an Operating Company, together with all Affiliates, successors and permitted assignees of that Person.

“Interest Period” means, for purposes of the definition of “Agreed Interest Rate,” a period of thirty (30) days, beginning the first day after the date on which any such amount becomes due and payable and ending thirty (30) days thereafter, with each succeeding Interest Period beginning on the first day after the last day of the Interest Period it succeeds.

“Intergovernmental Agreement” means that certain “Agreement between the Azerbaijan Republic, the Republic of Turkey and Georgia Relating to the Transportation of Petroleum via the Territories of the Azerbaijan Republic, Georgia and the Republic of Turkey” dated 18 November 1999, together with its appendices as set forth therein as such agreement may be acceded to, extended, renewed, replaced, amended or otherwise modified from time to time in accordance with its terms.

“Lender” means any financial institution or other Person providing any loan, financial accommodation, extension of credit or other financing to any MEP Participant or any of its Affiliates or any Interest Holder in connection with the MEP System (including any refinancing thereof), and any successor or assignee of any of them.

“LIBOR” means, for any day on which clearing banks are customarily open for business in London, the London interbank fixing rate for three-month Dollar deposits, as quoted on Reuter’s LIBO page on that day or, if the Reuter’s LIBO page ceases to be available or ceases to quote such a rate, then as quoted in the London Financial Times, or if neither such source is available or ceases to quote such a rate, then such other source, publication or rate selected by the Parties.

“Local Authorities” means any and all local and municipal authorities of the State and all their constituent elements, notwithstanding any change at any time or from time to time in structure, form or otherwise, including any and all instrumentalities, administrative bodies and other subdivisions thereof or therein, and any and all executive, regulatory, municipal and local bodies, agencies, departments or ministries, authorities and officials thereof or therein that have the authority to govern, adjudicate, regulate, levy or collect taxes, duties or other charges, grant licenses or permits or approve or otherwise impact (whether financially or otherwise), directly or indirectly, Project Activities or the rights or obligations of any Project Participant in respect of the Project.

“Local Currency” means any freely convertible currency issued by the State.

“Loss or Damage” shall mean any loss, cost, injury, liability, obligation, expense (including interest, penalties, attorneys’ fees and disbursements), litigation, proceeding, claim, charge, penalty or damage suffered or incurred by a Person. Solely in the case of an act of Expropriation by a State Authority, Loss or Damage may include indirect, incidental or consequential losses (including, for the avoidance of doubt, any loss of profits, reliance losses, costs of mitigation or third party costs).

“MEP Activities” means any and all activities relating to or arising out of, directly or indirectly, the evaluation, development, design, acquisition, construction, installation, financing, insuring, ownership, operation (including the transportation by any or all of the MEP Participants and the Shippers of Petroleum through the Facilities), repair, replacement, maintenance, capacity expansion, extension (such as laterals) and protection of the MEP System, whether or not such activities are conducted inside the Territory (as Project Activities) or outside the Territory.

“MEP Participants” means any one or more, or all, of the Parties to this Agreement (including by novation and/or accession as an MEP Participant pursuant to any Project Agreement), other than the State Authorities, and any successors and permitted assignees of any of the foregoing.

“MEP Representative(s)” is defined in Section 2.3.

“MEP System” means, at any time, the Baku-Tbilisi-Ceyhan Petroleum pipeline system (commencing at the Sangachal terminal facilities) and all related appurtenances owned or used in connection therewith, including the Facilities located within the Territory and all other such related facilities located outside the Territory.

“Nonstate Land” means those lands in the Territory, and all rights and privileges of every kind and character, however arising and however characterised with respect thereto, other than State Land. For the avoidance of doubt, all lease, license and other non-ownership rights held as of the Effective Date by any Person (other than a State Authority) for State Land shall be classified as Nonstate Land for purposes of this Agreement, including Appendix 2.

“OECD Treaty” is defined in Section 8.1(ii).

“Operating Company” means one or more Persons appointed or selected by the MEP Participants or their Affiliates to implement, manage, coordinate and/or conduct for or on behalf of the MEP Participants or their Affiliates all or any portion of the day-to-day MEP Activities, including serving as an operator of all or any portion of the MEP System, whether as an agent for or independent contractor to the MEP Participants or their Affiliates, and any successors or permitted assignees of any such Person.

“Parties” means the Government as signatory to this Agreement and its successors, as well as other signatories to this Agreement and their respective successors and permitted assignees.

“Partners” is defined in Section 8.2(v).

“Partnership” is defined in Section 8.2(v).

“Permanent Land” is defined in Article 6 of Appendix 2.

“Person” means any physical person or any Entity.

“Petroleum” means crude mineral oil, condensate, and all other kinds of liquid hydrocarbons, regardless of gravity, in their natural condition or obtained from natural gas (being hydrocarbons that are gaseous at standard temperature and pressure) or liquid petroleum by vaporisation, condensation or extraction, including natural gas liquids, as well as any asphalt, bitumen or ozocerite, and any incidental amounts of natural gas which may be liberated from the liquid hydrocarbons while in transit, any impurities in solution or suspension with the foregoing or any hydrocarbon product refined or produced from any of the foregoing.

□Point of Entry□ is defined in Article 6 of Appendix 2.

□Point of Terminus□ is defined in Article 6 of Appendix 2.

□Preferred Route Corridor□ is defined in Article 6 of Appendix 2.

□Primary Term□ is defined in Section 3.1.

□Profit Tax□ is defined in Section 8.2(i).

□Profit Tax Amount□ means (1) for each year beginning with the first year of the Primary Term to and through the fifth (5th) year of the Primary Term, an amount per Barrel equal to zero point twelve Dollars (\$.12), (2) for each year beginning with the sixth (6th) year of the Primary Term to and through the sixteenth (16th) year of the Primary Term, an amount per Barrel equal to zero point fourteen Dollars (\$.14), (3) for each year beginning with the seventeenth (17th) year of the Primary Term to and through the twenty-fifth (25th) year of the Primary Term, an amount per Barrel equal to zero point seventeen Dollars (\$.17), (4) for each year beginning with the twenty-sixth (26th) year of the Primary Term to and through the thirtieth (30th) year of the Primary Term, an amount per Barrel equal to zero point twenty Dollars (\$.20), (5) for each year beginning with the thirty-first (31st) year of the Primary Term to and through the thirty-fifth (35th) year of the Primary Term, an amount per Barrel equal to zero point two hundred and twenty five Dollars (\$.225), (6) for each of the remaining five (5) years of the Primary Term, an amount per Barrel equal to zero point twenty five Dollars (\$.25), and (7) a revised amount per Barrel for each Rollover Term. Not later than one (1) year prior to the end of the Primary Term and the first Rollover Term, the Government and the MEP Participants shall agree a revised Profit Tax Amount which shall be applicable for the next applicable Rollover Term. Each such revised Profit Tax Amount shall take into account the amount of the Profit Tax Amount that was previously in effect, the prevailing and forecasted regional market conditions respecting the Petroleum production and transportation industries and the desire to maintain the relative economic positions of the Parties. If the Government and the MEP Participants are unable to reach agreement on the revised Profit Tax Amount by not later than one hundred eighty (180) days prior to the first day of the Rollover Term for which such amount will be applicable, either Party may, by written notice to the other Party of its election, refer the matter to arbitration in accordance with Article 17. If for any reason the revised Profit Tax Amount for a Rollover Term has not been determined prior to the due date of the Profit Tax return of each MEP Participant for any year during such Rollover Term, the total amount of the Profit Tax liability of each of the MEP Participants for such year shall be based provisionally upon the Profit Tax Amount previously in effect. Within thirty (30) days after the revised Profit Tax Amount for such year has been determined, the total amount of Profit Tax liability of each of the MEP Participants shall be redetermined, and each MEP Participant shall either pay additional Profit Tax or receive a refund of the Profit Tax previously paid, as the case may be, to reflect the difference between the provisional Profit Tax Amount and the revised Profit Tax Amount as so determined, and shall file an amended Profit Tax return and annex, in accordance with Section 8.2(vi), which reflect such redetermined amount. Such adjustment payment shall be

treated as a payment or refund of Base Profit Tax and/or Profit Tax Surtax as appropriate in accordance with Section 8.2, and shall include interest at the Agreed Interest Rate from the due date for the payment of Profit Tax for such year to the date the adjustment payment is made. In the event of any such provisional or additional Profit Tax payment by an MEP Participant, the MEP Participant shall be entitled to tax receipts in accordance with Section 8.2(ix). The Government shall take any action necessary to cause the Profit Tax, based upon any revised Profit Tax Amount which may be established for a Rollover Term in accordance with the procedures described above, to be valid and effective as tax legislation of the State.

□Project□ means, in relation to the MEP System, the evaluation, development, design, acquisition, construction, installation, financing, insuring, ownership, operation (including the transportation by any or all of the MEP Participants and the shipment by Shippers of Petroleum through the Facilities), repair, replacement, refurbishment, maintenance, capacity expansion, extension (such as laterals) and protection of the Facilities, from time to time, in the Territory.

□Project Activities□ means any and all activities conducted in the Territory relating to or arising out of, directly or indirectly, the Project, including any and all activities of the MEP Participants in respect of their rights or obligations under any Project Agreement and any such activities conducted in the Territory prior to the Effective Date.

□Project Agreements□ means this Agreement, the Intergovernmental Agreement and all other existing and future agreements, contracts and other documents to which, on the one hand, any of the State Authorities and, on the other hand, any MEP Participant are or later become a party relating to the Project, as such agreements, contracts or other documents may be extended, renewed, replaced, amended or otherwise modified from time to time in accordance with their terms.

□Project Participants□ means any and all of the MEP Participants and any Affiliates thereof, the Interest Holders, the Operating Companies, the Contractors, the Shippers, the Lenders and the Insurers.

□PSA□ means Agreement on the Joint Development and Production Sharing for the Azeri and Chirag Fields and the Deepwater Gunashli Field in the Azerbaijan Sector of the Caspian Sea dated 20 September 1994.

□Rights to Land□ means those rights of examination, testing, evaluation, analysis, inspection, construction, use, possession, occupancy, control, assignment and enjoyment with respect to land in the Territory as set forth in Appendix 2 to this Agreement. The term is used in its broadest sense to refer not only to the Permanent Land within, over or under which the Facilities, as completed, will be located, but also such other and additional lands and land rights (encompassing both State Land and Nonstate Land) within the Territory as the MEP Participants and their designated Contractors may require and designate for purposes of evaluating and choosing the particular routing and location(s) desired by the MEP Participants for the Permanent Land in respect of the Facilities.

“Rollover Term” is defined in Section 3.1.

“Shippers” means those Persons (including the MEP Participants) that have contracted, directly or indirectly, for Petroleum transportation services through all or a portion of the MEP System and have the right to tender Petroleum for transit through the MEP System within and beyond the Territory, and their respective successors and permitted assignees.

“Specified Corridor” is defined in Article 6 of Appendix 2.

“State” means the sovereign state of Georgia.

“State Authorities” means, as the context and jurisdiction of the various governmental elements requires, (i) the Government, (ii) any and all State Entities, (iii) any and all Local Authorities, and (iv) any Persons to the extent acting as duly appointed representatives of, and all successors or permitted assignees of, any or all of the foregoing.

“State Entity” means any Entity in which, directly or indirectly, the State or the Government has an equity or similar economic interest and which is, directly or indirectly, controlled by the Government, including duly appointed representatives of the Government. For purposes of this definition, “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, by law, or otherwise; provided, however, that any State Entity which may also be an MEP Participant shall not be a State Entity whenever it is acting in the role of MEP Participant.

“State Land” means those lands in the Territory, and any and all rights and privileges of every kind and character, however arising and however characterised with respect thereto, which are owned, controlled, used, possessed, enjoyed or claimed by any State Authority and which are included within the Rights to Land as provided herein and in Appendix 2. For the avoidance of doubt, those ownership, reversionary, lessor, licensor and other similar rights of the State Authorities respecting land in the Territory which, as of the Effective Date, was leased, licensed, or otherwise granted to any Person (other than a State Authority) shall be classified as rights in relation to State Land and shall be included within the grant of State Land to the MEP Participants under this Agreement, including for purposes of Appendix 2.

“State Tax Department” means the State Tax Department of Georgia and any successor thereto.

“Taxes” means all existing or future taxes, levies, duties, customs, imposts, contributions (such as social fund and compulsory medical insurance contributions), assessments or other similar fees or charges payable to or imposed by the State Authorities, together with interest, penalties and fines (including financial sanctions and administrative penalties) with respect thereto, and “Tax” means any of the

foregoing.

□Technical Examination□ is defined in Section 8.2(vii).

□Territory□ means the land territory of the State, its territorial sea and the air space above them, as well as the maritime areas over which it has jurisdiction or sovereign rights in accordance with international law.

□VAT□ means value added Tax and any other similar Tax applicable to the provision of goods (including Rights to Land), works, services or technology.

□Year□ means a Gregorian calendar year.

APPENDIX 2

RIGHTS TO LAND IN THE TERRITORY ASSOCIATED WITH THE PROJECT

1. RIGHTS TO LAND

- 1.1 This Appendix 2 sets forth and provides for the rights to land in the Territory and associated rights (including rights of exclusive use, possession and control, rights of ingress and egress, rights of construction upon and/or under, licenses to enter and perform Project Activities, and all other similar rights in the Territory) which are to be notified by the MEP Participants to the State Authorities as the phased implementation of the Project (including later repairs, replacements, capacity expansions and extensions of the Facilities) requires.
- 1.2 Subject to any private arrangements entered into by the MEP Participants (including in respect of Nonstate Land), the Rights to Land granted to or obtained by the MEP Participants shall be enforceable by the MEP Participants against all State Authorities and against all third parties.
- 1.3 Except for State Land, the MEP Participants shall exercise those powers granted to each of them pursuant to Section 4.1(iii) of the Agreement to which this Appendix is appended to obtain the Construction Corridor and to obtain and maintain the Permanent Land as necessary, in the sole opinion of the MEP Participants, to undertake Project Activities for the duration of the Project and shall be responsible for compensating all landowners and occupiers of such lands which are part of the Construction Corridor or become part of the Permanent Land in accordance with such grant and applicable Georgian Law.
- 1.4 It is the mutual intent of the Parties that, on and after the Effective Date and continuing thereafter for a period of fifteen (15) months, no interest in State Land shall be classified as Nonstate Land by reason of any leasing, licensing or other conveyance of a nonownership interest by the State Authorities to any Person who is not a State Authority. If, however, the MEP Participants have not designated the Preferred Route Corridor by the end of such fifteen-month period, then notwithstanding the definitions of State Land and Nonstate Land (which otherwise fix the classification at the Effective Date), any nonownership interest (including leases and licenses) so conveyed by the State Authorities after said fifteen-month period shall be classified as Nonstate Land pursuant to the definitions applicable to the Agreement to which this Appendix is attached.
- 1.5 Except for the obligation to make the reimbursements of actual, verifiable costs as provided in Article 2 hereof, the MEP Participants shall have no obligation to pay to the State Authorities any compensation in respect of any land or Rights to Land; provided, however, that in respect of any State Land which is made subject to this Agreement as part of the Construction Corridor and/or Permanent Land and, as of the Effective Date, was used for agricultural purposes, the MEP Participants shall be obligated to the extent that any such land is disabled from use for agricultural

purposes as a result of Project Activities, to pay the designated State Authority that amount, determined by reference to and in accordance with Chapter II of the Law of Georgia [On Compensation of Compensatory Land Cultivation Costs and Sustained Damages in Case of Allocation of Agricultural Land for Nonagricultural Purposes] (adopted on October 2, 1997, and as in effect on the Effective Date), for costs of substituting compensatory parcels of land for agricultural purposes.

- 1.6 The State Authorities shall use Best Endeavours to cause all landowners and occupiers of affected properties and/or land rights to observe and respect all of the Rights to Land held by the MEP Participants, whether permanently, temporarily and/or from time to time, as the case may be, to enable the construction and operation of the Facilities and the conduct of all other Project Activities. Without limiting the foregoing and that which is provided in the Agreement to which this Appendix is appended, the State Authorities shall assist the MEP Participants in avoiding and in rectifying any interference by third parties, including landowners and occupiers of affected properties and/or land rights, with the MEP Participants' exercise and enjoyment of the Rights to Land, including any encroachments on the areas constituting Permanent Land or affecting the Facilities.
- 1.7 Subject to the foregoing and without limiting that which is provided in the Agreement to which this Appendix is appended, the Rights to Land shall include all of the rights as hereinafter provided for the phased development of the Project.

2. PHASE 1 - PRECONSTRUCTION PHASE (ROUTE SELECTION)

2.1 Corridor of Interest.

Without limiting the rights which may be necessary and shall be granted in order to accomplish route selection, during the preconstruction phase the following rights will be required and (subject to relevant provisions of Georgian Law with respect to matters such as national security, defense, public safety and civil aviation and other similar matters) shall be obtained and secured by the State Authorities and, subject to reimbursement of actual, verifiable costs incurred in respect of Nonstate Land, granted to the MEP Participants respecting the Corridor of Interest:

- (i) Rights to fly and land fixed wing or helicopter surveillance craft within and across the borders of the Territory.
- (ii) Rights to record and map any property within the Corridor of Interest by video tape and by photographs.
- (iii) Rights of access to and use of detailed maps and photographic records of the Corridor of Interest for, among other evaluations, desktop route study exercises.
- (iv) Rights of free and safe access and passage from time to time on and off the public highways and other roadways and offshore areas within and across the borders of the Territory for vehicles and vessels to perform reconnaissance, including rights to make video/photographic records of said area.

If the MEP Participants determine in their sole discretion that construction and installation of the Facilities is not viable within any previously designated Corridor of Interest or portion thereof, the MEP Participants will have the right to so notify the State Authorities and the MEP Participants will have the further right to modify the existing or designate a new Corridor of Interest and (subject to relevant provisions of Georgian Law with respect to matters such as national security, defense, public safety and civil aviation and other similar matters) be granted such rights for further study as aforesaid, subject to reimbursement of actual, verifiable costs incurred for the necessary rights for any Nonstate Land within such modified or new Corridor of Interest.

2.2 Preferred Route Corridor

Once the Corridor of Interest has been assessed and confirmed by notice to the State Authorities, and without limiting the rights which may be necessary and shall be granted in order to conduct Project Activities, the State Authorities shall review the Corridor of Interest in respect of the relevant provisions of Georgian Law concerning matters such as national security, defense, public safety and civil aviation, cultural heritage, public projects (being projects declared under Georgian Law to involve public necessity), and other similar matters in order to determine and notify the MEP Participants of any areas where the requested grant of Rights to Land for the Preferred Route Corridor, and any Specified Corridor and Construction Corridor contained within said Preferred Route Corridor, must be conditioned, limited or denied based on such considerations, recognising that the EIA as provided for in Appendix 3 of the Agreement to which this Appendix is appended may subsequently further condition the Rights to Land for the Preferred Route Corridor, Specified Corridor or Construction Corridor, as applicable. Subject to the foregoing, the following rights as requested by the MEP Participants with respect to the entire Corridor of Interest will be required and shall be obtained and secured by the State Authorities and, subject to reimbursement of actual, verifiable costs incurred in respect of Nonstate Land, granted to the MEP Participants for the selection by the MEP Participants of the Preferred Route Corridor:

- (i) All rights defined in Section 2.1 hereof and, in addition, vehicular access (including the right to create temporary and/or permanent access roads) at the MEP Participants' discretion on and off the public highways within and across the borders of the Territory for detailed route reconnaissance.
- (ii) Full access to all relevant and nonclassified information held at the central, regional, district and local levels of the State Authorities respecting:
 - (1) - geology
 - (2) - hydrology and land drainage
 - (3) - archaeology and areas of cultural or historical significance
 - (4) - ecology
 - (5) - mining, mineral deposits and waste disposal

- (6) - urban and rural planning and development, including relevant topographical standards and criteria of the State
 - (7) - the environment
 - (8) - seismology
 - (9) - highways and navigations
 - (10) - utility and commercial service apparatus records, including pipeline crossings
 - (11) - areas under current or former restriction by the State
 - (12) - Local Authorities' structure and administration requirements
 - (13) - agricultural, forestry and park lands
 - (14) - current and prior land development, ownership, use and occupation
 - (15) - meteorology
 - (16) - oceanography
- (iii) Based upon the foregoing, the MEP Participants shall notify the State Authorities respecting their selected Preferred Route Corridor. If the MEP Participants later determine in their sole discretion that construction and installation of the Facilities is not viable within any previously designated Preferred Route Corridor or portion thereof, the MEP Participants will have the right to so notify the State Authorities and the MEP Participants will have the further right to modify the existing or designate a new Preferred Route Corridor for further study, as aforesaid, subject to reimbursement of actual, verifiable costs incurred for the necessary rights for any Nonstate Land within such modified or new Preferred Route Corridor.

2.3 Specified Corridor

- (i) From the information gained in Sections 2.1 and 2.2 above, the Specified Corridor will be defined by the MEP Participants and notified to the State Authorities. Within this Specified Corridor the MEP Participants and their Contractors will conduct further detailed studies as provided herein.
- (ii) In respect of the Specified Corridor and subject to the avoidance of areas of cultural or historic significance, the State Authorities shall obtain and secure in addition to the rights defined in Sections 2.1 and 2.2 above, the necessary additional Rights to Land and, subject to reimbursement of actual, verifiable costs incurred, grant to the MEP Participants such rights so that the MEP Participants will possess the full right of access to and passage within the Specified Corridor for the following activities:

- (1) Topographical survey in accordance with relevant topographical standards and criteria of the State requiring pedestrian and on/off highway vehicular access within and across the borders of the Territory at the MEP Participants' discretion. These rights shall extend over the area necessary to undertake the survey and could extend outside the Specified Corridor, as notified by the MEP Participants.
 - (2) Geotechnical survey-rights for vehicles, vessels, equipment and service personnel to enter on to land and offshore areas to excavate trenches or boreholes and record information, including the right of removal of such material from the site as is necessary.
 - (3) Cathodic protection resistivity and soil sample surveys requiring vehicular and pedestrian access onto land to take and remove soil samples for further analysis.
 - (4) One or more land use surveys.
- (iii) The right to undertake surveys shall include the right to leave monitoring equipment on site to collect necessary data.
- 2.4 Subject to the provisions of Section 23.7 of the Agreement to which this Appendix is appended, the MEP Participants shall have the right to use, publicise and export any data and information obtained by the MEP Participants and their Contractors in connection with the activities described in this Appendix 2.
- 2.5 If the MEP Participants determine in their sole discretion that construction and installation of the Facilities is not viable within any previously designated Specified Corridor or portion thereof, the MEP Participants will have the right to so notify the State Authorities and the MEP Participants will have the further right to modify the existing or designate a new Specified Corridor for further study, as aforesaid, subject to reimbursement of actual, verifiable costs incurred for the necessary rights for any Nonstate Land within such modified or new Specified Corridor.

3. PHASE 2 - FACILITIES CONSTRUCTION AND INSTALLATION PHASE

- 3.1 If the MEP Participants determine in their sole discretion that the construction and installation of the Facilities is viable within any previously designated Specified Corridor, the MEP Participants will have the right to so notify the State Authorities and designate the Construction Corridor. At the earliest practicable date after such designation the State Authorities will obtain, secure and grant to the MEP Participants the following Rights to Land:
- (i) Right to transport all construction material, plant and equipment within the Territory and cross border by land or air without hindrance, including the right to construct and maintain temporary and permanent roads and to use such airfields as are designated, from time to time, by the MEP Participants.

- (ii) Right to designate and use other areas of land, both in the vicinity of the proposed Facilities and remote from the Facilities, for the conduct of all Project Activities, including for pipe storage dumps, site compounds, construction camps, fuel storage dumps, parking areas, roads and other activity sites.
- (iii) Right to install generation and transmission equipment and to connect to any existing electricity supply and, where necessary, the right to lay cables from such supply to the Construction Corridor.
- (iv) Right of entry onto such land and offshore areas with all necessary materials and equipment to lay and construct and thereafter use, maintain, protect, repair, alter, renew, augment, expand, inspect, remove, replace or render unusable the Facilities as is required for construction and installation of the Facilities and right to commence and undertake construction and installation.
- (v) Receipt from the State Authorities of details of land ownership and use, including names and addresses of landowners and occupiers and details of land holding defined on plans showing all such details for all property falling within two hundred fifty (250) metres either side of the Construction Corridor.
- (vi) All rights of access over any land as required by the MEP Participants and their Contractors for the purposes of conducting Project Activities, including rights of access (including the right to construct and use temporary or permanent roads) over other land between the public highway and the Construction Corridor, not affected by the construction or operation of the Facilities, such routes to be defined by notice from the MEP Participants prior to road construction and/or use.
- (vii) The right to the exclusive use, possession and control, and the right to construct upon and/or under, and peaceful enjoyment of, these Rights to Land without hindrance or interruption, subject to the provisions of this Appendix 2, the Agreement to which this Appendix is appended and to any agreements with the relevant party or parties in respect of the Permanent Land.
- (viii) The right, in accordance with Georgian Law, to extract and source appropriate local materials for construction purposes and to dispose of waste arising from Project Activities, including during the construction and any later repair, replacement, capacity expansion or extension process.
- (ix) Any additional regulatory and other administrative compliance requirements.

Notwithstanding the foregoing, the State Authorities shall have no obligation to obtain, secure or grant any of the foregoing Rights to Land as to Nonstate Land if doing so would require the exercise of the State Authorities' powers of expropriation, which Rights to Land as to Nonstate Land shall be acquired and paid for by the MEP Participants using the powers granted to them under Section 4.1(iii) of the Agreement to which this Appendix is appended.

3.2 Without prejudice to any contractual arrangement entered into between the MEP Participants and any landowner or occupier, and except as part of Project Activities,

no Person shall have the right to do any of the acts set forth in this Section 3.2 without the prior authorisation of the designated State Authority. No authorisation shall be granted by the designated State Authority without the prior written consent of the MEP Participants, which consent may not be unreasonably withheld. Any such withholding of consent may only be on grounds that such action would be unsafe, compromise Project security or unreasonably interfere with Project Activities.

- (i) Use explosives within an area of five hundred (500) metres either side of the Facilities.
- (ii) Undertake any pile-driving within fifty (50) metres either side of the Facilities.
- (iii) Encroach on the Construction Corridor or other areas where the MEP Participants are conducting Project Activities.
- (iv) Cross or otherwise interfere with the MEP Participants' Rights to Land with any road, railway, power line, utility, pipeline or other project declared under Georgian Law to involve public necessity ("Crossing Project") and the MEP Participants shall in no event be required to consider a request for consent to such Crossing Project unless and until the State Authorities have approved the proposed Crossing Project and the party proposing the Crossing Project has provided to the MEP Participants (1) details of the proposed Crossing Project sufficient to enable the MEP Participants to assess the practicability of conducting the Crossing Project safely and securely, and without unreasonably interfering with Project Activities, and (2), in the case of a Crossing Project undertaken by any State Authority, a creditworthy commitment to provide compensation to the MEP Participants for any costs, or Loss or Damage, incurred by the MEP Participants to accommodate the Crossing Project and, in the case of a Crossing Project undertaken by any Person who is not a State Authority, a creditworthy commitment to provide compensation to the MEP Participants for any cost, loss, claim, damage or expense incurred by the MEP Participants to accommodate the Crossing Project.

4. PHASE 3 - POST CONSTRUCTION PHASE

4.1 Following the completion of the Facilities, the MEP Participants will require the following Rights to Land, all of which shall either be obtained and secured by the State Authorities and granted to the MEP Participants or, in respect of Permanent Land which previously was Nonstate Land, obtained by the MEP Participants through the rights of taking granted to them in Section 4.1(iii) of the Agreement to which this Appendix is appended:

- (i) The exclusive use, possession and control of, as well as the right to construct upon and/or under, the Pipeline Corridor and other Permanent Land.
- (ii) All rights previously described to the extent applicable to the use and enjoyment of the Facilities once constructed (including, but not limited to, temporary and permanent roads), the construction and use of additional Facilities within the Pipeline Corridor and other Permanent Land and the future maintenance, protection, repair,

alteration, renewal, augmentation, capacity expansion, extension, inspection, removal, replacement or the rendering unusable of any such Facilities.

- (iii) The right to add any equipment as the MEP Participants deem necessary.
- (iv) The right to fly along the route of the Facilities within and across the borders of the Territory, in accordance with relevant provisions of Georgian Law, to inspect it and to land wherever it is deemed necessary to ensure the safe and efficient operation of the Facilities.
- (v) The right to erect and thereafter maintain the Facilities, including SCADA, marker posts, cathodic protection test posts and aerial marker posts or signaling equipment and any other equipment or installations necessary for the Project in such locations and positions as deemed necessary by the MEP Participants.
- (vi) The right of access over any land between the public highway and Pipeline Corridor and other Permanent Land without prior notice in cases of emergency; provided however, that notice is given to the affected landowner(s) or occupant(s) as soon as reasonably practicable and subject to the payment of reasonable compensation for any Loss or Damage occurring as a direct result of such emergency access.
- (vii) The right to allow use of the Facilities by third parties for Project Activities under such terms and conditions as the MEP Participants may elect.

5. GOVERNMENTAL NOTIFICATIONS

- 5.1 Within fifteen (15) days after the Effective Date of the Host Government Agreement of which this Appendix is a part, the MEP Participants and the Government will designate to each other in writing those persons, agencies and regulatory bodies which each will be entitled to communicate with and rely on in giving the various notices and securing and confirming the various rights described herein. Such notified contact persons or bodies shall be subject to change, from time to time, on not less than fifteen (15) days prior written notice (except for emergencies).

6. DEFINITIONS

- 6.1 In this Appendix, all capitalised terms not otherwise defined shall have the same meaning as specified in the Agreement to which this Appendix is appended. Additionally, the following terms shall have the following meanings:

□Corridor of Interest□ means an area of land ten (10) kilometres wide and extending from the Point of Entry to the Point of Terminus, all as notified by the MEP Participants to the State Authorities.

□Preferred Route Corridor□ means an area of land within the Corridor of Interest five hundred (500) metres wide and extending from the Point of Entry to the Point of Terminus, all as notified by the MEP Participants to the State Authorities.

“Specified Corridor” means an area of land within the Preferred Route Corridor one hundred (100) metres wide and extending from the Point of Entry to the Point of Terminus, all as notified by the MEP Participants to the State Authorities.

“Construction Corridor” means an area of land (including exclusive control of the area above such land and rights to the land’s subsurface, in each case to be specified upon designation of the Construction Corridor by the MEP Participants), within the Preferred Route Corridor twenty-two (22) metres wide and extending from the Point of Entry to the Point of Terminus, within which the centreline of the Pipeline Corridor will be located, and such other areas determined by the MEP Participants in their sole discretion as reasonably necessary for the conduct of Project Activities within which Rights to Land required for the construction and installation phase as set forth under Phase 2 of this Appendix shall be exercised, all as notified by the MEP Participants to the State Authorities.

“Pipeline Corridor” means an area of land (including exclusive control of the area above such land and rights to the land’s subsurface, in each case to be specified upon designation of the Construction Corridor by the MEP Participants), within the Construction Corridor eight (8) metres wide extending from the Point of Entry to the Point of Terminus.

“Permanent Land” refers to the grants described in Section 4.1(ii), (iii) and (iv) and the procedures set forth in Section 7.2(vii) and in this Appendix 2 of this Agreement, and means in respect of State Land and Nonstate Land (i) the Pipeline Corridor and (ii) those other areas of land (contiguous or noncontiguous) designated in the MEP Participants’ sole discretion and acquired by and/or granted to the MEP Participants in accordance with this Appendix and the Agreement to which this Appendix is appended for use as the locations upon or under which the Facilities exist, from time to time, throughout the life of the Project.

“Point of Entry” means the entry point of the MEP System into Georgia at a point on the Azerbaijan Republic-Georgia land border.

“Point of Terminus” means the terminus of the Facilities at a point to be selected by the MEP Participants on the land border between Georgia and the Republic of Turkey.

7. MISCELLANEOUS

7.1 Any reference to any access from a public highway means an access of not less than seven (7) metres in width suitable for use by construction plant and equipment.

7.2 All trial borings required to be made by the MEP Participants prior to the commencement of construction work will be carried out with as little disturbance as is reasonably practicable after consultation with the landowner and the occupier of the land.

7.3 Subject to Section 3.1(v) of this Appendix 2, the MEP Participants will use Best

Endeavours to give the landowners and occupiers of the land which is adjacent to the Construction Corridor and/or Permanent Land notice of intention to commence the construction works on the Construction Corridor and/or Permanent Land. All movement of pipes, vehicles and machinery for construction purposes will be carried out as far as it is reasonably practicable in accordance with a programme of which such adjacent landowners and occupiers will be made aware.

- 7.4 All reasonably necessary means of access will be maintained by the MEP Participants with the construction of such suitably agreed temporary crossings as may be reasonably required by the affected landowners and occupiers of land which is adjacent to the Construction Corridor and/or Permanent Land which have been granted to, and/or acquired by, the MEP Participants in accordance with the Agreement. Such temporary crossings will be agreed where possible prior to commencement of construction. Following construction and to the extent reasonably practicable, private roads and footpaths will be reinstated to a condition equivalent to that subsisting before the commencement of the works and made available for use pursuant to terms agreed with such landowners and occupiers, but consistent with the need to maintain the security of the Facilities and conduct Project Activities.
- 7.5 The MEP Participants will provide facilities for maintaining and affording means of communication and access between parts of any land which is adjacent to the Permanent Land granted to the MEP Participants in accordance with the Agreement and which is temporarily or permanently severed by reason of the construction of any works by the MEP Participants, said facilities being such as will enable the adjacent land to be properly worked having regard to the purposes for which communication and access may be required and the period for which and the time of year at which it may be expected to be used. If and to the extent that adjacent land is by necessity permanently severed in connection with Project Activities and Project Activities (including security of the Facilities) do not allow such communication and access, the Project Participants shall not be responsible for same and the Government shall defend and indemnify all claims made against any Project Participant.

APPENDIX 3

CODE OF PRACTICE

This Code of Practice sets forth the agreed technical, environmental, health, safety and social standards and practices to be complied with and relied upon by the MEP Participants, any Operating Company, and any Person acting for or on behalf of any of them with respect to the Facilities and the conduct of Pipeline Activities. The term "Pipeline Activities" means the design, planning, construction, reconstruction, expansion, extension, relocation, repair, replacement, maintenance, operation, use, decommissioning, dismantling, removal or abandonment of the Facilities. Any reference herein to "comparable projects" or projects which are "comparable to the Project" means those involving the trunkline transmission of Petroleum through large diameter (twenty (20) inches or greater) pipe and corresponding operating throughput of three hundred thousand (300,000) barrels per day or greater, with recognition given to the fact that the Facilities are planned to be new built. In identifying, harmonising, and complying with all such standards and practices, the MEP Participants, any Operating Company, and any Person acting for or on behalf of any of them shall act as a prudent operator and shall have the right and obligation to take any action that a prudent operator would take under the same or similar circumstances. The order of priority for actions shall be protection of life, environment, and property. All capitalised terms not otherwise defined shall have the same meaning as specified in the agreement to which this Code of Practice is appended (the "Agreement").

1. AGREED ACTIONS

1.1 In conducting Pipeline Activities, the MEP Participants and any Operating Company or Person acting for or on behalf of them shall:

- (i) install as part of the Facilities and maintain (a) at the Point of Entry and (b) at the Point of Terminus, in accordance with applicable API codes and ASTM standards, metering and calibration equipment capable of continuous measurement of Petroleum, and devices for sampling to determine the basic sediment and water content of any Petroleum, which equipment shall be tested and calibrated to operating conditions by the MEP Participants at least once each calendar month during the first two (2) years after the completion of construction and after such time in accordance with generally accepted practices and standards and any procedures specified by the vendors of such equipment (or more often if necessary to insure continuing accuracy); provided, however, that unless the MEP Participants and the Government agree otherwise, at least one of the metering and measurement facilities shall be in the Territory;
- (ii) continuously measure and periodically sample all Petroleum transported through the Facilities;
- (iii) maintain a true and complete monthly record of the volumes from meter readings, meter correction factors, temperature, pressure, gravity, basic sediment and water content and other necessary characteristics of the flow

stream; and

- (iv) on or before the tenth (10th) day of each calendar month, provide a statement to the State Authorities of the aggregate quantity of Petroleum transported through the Facilities as measured at the Point of Terminus or, in the event that such quantity is unavailable, a best good-faith estimate thereof, subject to prompt correction if and when such information may later become available.

1.2 The State Authorities shall have the right, at their sole risk and expense, subject to observation of all safety rules applicable to the relevant workplace, and the avoidance of disruption to Project Activities:

- (i) with the requirement that the Operating Company shall give not less than forty-eight (48 hours) prior notice of such activities so that a representative(s) of the State Authorities may be present to observe all operations to install, repair, prove or calibrate the metering and sampling equipment at the Point of Terminus;
- (ii) subject to the provisions of Section 3.2 of this Appendix 3, on not less than twenty-four (24) hours prior notice to the Operating Company, to inspect the Facilities (or portions thereof) and to observe Pipeline Activities; and
- (iii) on not less than forty-eight (48) hours prior notice to the Operating Company, to inspect the books and records of Operating Company with respect to measurement, metering, calibration and other related matters.

1.3 Where an error in measurement of Petroleum (a [Mismeasurement]) occurs, the following will be applied, as available, to correct the Mismeasurement and in the following order:

- (i) data from backup, verification or substitute devices or procedures; failing which,
- (ii) where applicable, data from calibration tests; failing which,
- (iii) estimates based on periods when similar conditions applied; failing which,
- (iv) estimates based on best available technical and scientific evidence.

When the exact date of the start of the Mismeasurement is known, the full correction shall be applied from that date to the date on which the Mismeasurement ceased.

When the exact date of the start of the Mismeasurement cannot be determined with certainty, the most recent date on which there is an auditable trail demonstrating that the appropriate parameter was correct shall be ascertained. The period from that date to the date that the Mismeasurement ceased shall be halved. No correction shall be applied for the first half of the period. The appropriate correction shall be made in

full for the second half of the period.

- 1.4 API standards and procedures will be used to measure Petroleum flowing through the custody transfer meters at all custody transfer points and entry and exit points, including any marine terminal. The API standards and procedures will be taken from or provided by the API's Standard Method of Sampling and Manual of Petroleum Measurement Standards.

2. TECHNICAL STANDARDS

- 2.1 In conducting Pipeline Activities, it is agreed that those of the technical standards and practices specifically set forth below in Section 2.2 of this Appendix 3 (the "Specified Technical Standards") which are appropriate under the circumstances or, to the extent the Specified Technical Standards are silent or are inapplicable under the circumstances, then the then-current technical standards and practices generally used by the international community (within Canada, the United States or Western Europe) with respect to Petroleum pipeline projects comparable to the Project, shall be applied, including in any instance in which a different technical standard or practice is included in, referenced by, or otherwise relied upon in any Environmental Standards or any Health and Safety Standards (as defined in Section 3.1, below). The relevant technical standard or practice shall be determined by the MEP Participants based on the foregoing from time to time, as the needs of the Project require, and notified to the Government. Such notification shall briefly explain the purpose of the new technical standard or practice and shall either cite where such standard or practice may be found (if readily available) or be accompanied by a copy thereof (if not otherwise readily available). The technical standards and practices set forth in Section 2.2, as augmented by technical standards and practices determined under this Section 2.1, shall be referred to herein as the "Applicable Technical Standards."
- 2.2 Subject to Section 3.1(iii) of this Appendix 3, it is agreed that for purposes of conducting Pipeline Activities the standards, and the practices required by or associated with such standards, from time to time in effect as the Universal Building Code (or "UBC") as well as those of the following organisations shall be acceptable for all purposes of technical compliance as well as in the context of and for purposes of achieving compliance with the Environmental Standards and the Health and Safety Standards:

API	-	American Petroleum Institute
ANSI	-	American National Standards Institute
ASME	-	American Society of Mechanical Engineers
ASNT	-	American Society of Non-destructive Testing
ASTM	-	American Society for Testing and Materials
AWPA	-	American Wood Preservers' Association
AWS	-	American Welding Society
GBE	-	British Gas Code of Practice
BSI	-	British Standards Institution
DIN	-	Deutsche Institut für Normung

IEC	-	International Electrotechnical Commission
IEEE	-	Institute of Electrical and Electronics Engineers (USA)
IP	-	Institute of Petroleum (UK)
ISA	-	Instrument Society of America
ISO	-	International Standards Organisation
NACE	-	National Association of Corrosion Engineers (USA)
NEMA	-	National Electrical Manufacturers Association (USA)
NFPA	-	National Fire Prevention Association (USA)
SSPC	-	Steel Structures Painting Council

- 2.3 If and to the extent the Specified Technical Standards in respect of Pipeline Activities and the Facilities are not readily available through other means, including electronically through the Internet, the MEP Participants will secure and maintain either a paper and/or electronic copy of such standard (in the English language) at their offices in Georgia. Upon written request for same by the Government, and solely as an accommodation, the MEP Participants will furnish another such paper and/or electronic copy, as the case may be, to the designated State Authority at no charge.
- 2.4 In order to confirm compliance of the final design of the Facilities with the Applicable Technical Standards and the requirements imposed on the Facilities as a result of the approved EIA (as defined herein), the MEP Participants shall use Best Endeavours to consult periodically with the Government during the design phase and, in any event, shall provide for Government review and approval of the final design of the Facilities before commencement of construction activities. In the event of any disagreement regarding Facilities compliance, the MEP Participants and the Government shall endeavour, in good faith, to agree on a plan to proceed. In the absence of objection to the final design of the Facilities within thirty (30) days after the Government's receipt of same, the Facilities design shall be deemed approved. Any disagreement on compliance and/or how to proceed will be resolved in accordance with the dispute resolution provisions set forth in Article 17 of the Agreement. In respect of the foregoing final design of the Facilities and in order that the Government may be prepared to review promptly such proffered design information, the MEP Participants shall provide the Government at least twenty (20) days' prior notice before their submission of the final design of the Facilities.
- 2.5 Promptly after the completion of the Facilities, the MEP Participants shall provide to the Government (i) as-built drawings of the Facilities, (ii) final alignment sheets and (iii) operating manuals for the essential components and systems of the Facilities.
- 2.6 During the construction phase for the Facilities, the MEP Participants will provide to the Government monthly reports of the status of the Project and forecasted activities for the upcoming month.
- 2.7 If any regional or intergovernmental authority having jurisdiction enacts or promulgates technical standards or practices relating to Pipeline Activities or the Facilities, the MEP Participants and the Government will confer respecting the

possible impact thereof on the Project, but in no event shall Pipeline Activities or the Facilities be subject to any such technical standards or practices to the extent they are different from, in addition to, or more stringent than the Applicable Technical Standards.

3. ENVIRONMENTAL STANDARDS

3.1 With respect to minimising potential disturbances to the environment, including the surface, subsurface, sea, air, watercourses and reservoirs, lakes, flora, fauna, landscapes, ecosystems and other natural resources and property, the MEP Participants shall, in conducting all Pipeline Activities and with respect to the Facilities, conform to the environmental standards and practices set forth in this Appendix 3 as well as those generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project, but in no event shall such environmental standards and practices be less stringent than the relevant standards and practices applied in the Netherlands (and, with respect to mountainous and earthquake-prone terrain as well as whenever the Netherlands has no relevant standard or practice, the relevant standards or practices, if any, of Austria) in respect of comparable projects (the "Environmental Standards"). For the avoidance of doubt, whenever the Environmental Standards refer to or are drawn from the standards and practices of any particular country or jurisdiction (such as the Netherlands or Austria), those environmental standards and practices:

- (i) do not include the laws of that country or jurisdiction defining or establishing the legal standard of liability (such as negligence, strict liability or the like) of Persons for harm arising from any environmental events, occurrences or noncompliance, it being agreed that the provisions of the Agreement (including, in particular, Articles 10 and 12) relating to what constitutes, and the consequences of, the MEP Participants' breach of obligations shall apply;
- (ii) do not include the regulatory administrative structure or procedures (including those for licensing, permitting and regulatory approvals) of that country or jurisdiction, it being agreed that the regulatory administrative structure and procedures, including environmental permitting as set forth in Section 7.3 of the Agreement, of Georgia shall apply;
- (iii) in those instances in which the particular environmental standard or practice assumes or is based upon technical standards or practices of a country or jurisdiction which are not identical or comparable to the Applicable Technical Standards, the MEP Participants shall either (a) follow those standards and practices which are compatible with the Applicable Technical Standards in order to achieve environmental protections substantially comparable to those of the country or jurisdiction or (b) comply with such country or jurisdiction's environmental standard or practice to the extent reasonably practicable under the circumstances, taking into account the use of the Applicable Technical Standards; and

- (iv) do not include environmental standards and practices beyond those applicable to Petroleum pipelines and pipeline operations.
- 3.2 The MEP Participants shall promptly notify the Government of all emergencies and other events (including explosions, leaks, and spills) occurring in relation to Pipeline Activities that result in or threaten serious personal injury, loss of life, or significant damage to the environment or property. Such notice shall include a summary description of the circumstances, and steps taken and planned by the MEP Participants to control and remedy the situation. The MEP Participants shall provide such additional reports to the Government as are necessary to keep it apprised of the effects of such events and the course of all actions taken to prevent further loss and to mitigate deleterious effects. At the Government's sole cost, risk and expense, and in a manner which does not interfere with the MEP Participants' activities undertaken in response to an emergency or other event as herein described, the designated representative(s) of the Government shall have the right to visit the scene and monitor the responsive or remedial activities of the MEP Participants to confirm compliance with this Code of Practice and the Agreement to which this Code of Practice is appended.
- 3.3 If any regional or intergovernmental authority having jurisdiction enacts or promulgates environmental standards or practices relating to the Facilities, Pipeline Activities or areas where Pipeline Activities occur, the MEP Participants and the Government will confer respecting the possible impact thereof on the Project, but in no event shall the Project be subject to any such environmental standards or practices to the extent they are different from, in addition to, or more stringent than the Environmental Standards.
- 3.4 Prior to the selection of the general location of the Facilities, a review of environmental conditions and the potential risks to the environment associated with Pipeline Activities shall be completed. This will consist of a scoping study and a risk assessment. The scoping study will be the basis for the environmental impact assessment ("EIA") further described in Section 3.6 hereof. The risk assessment will serve to highlight potential risks and costs impacts to the engineering design requirements of the Project.
- 3.5 After completion of the scoping study and risk assessment described in Section 3.4, the MEP Participants shall cause to be conducted a contaminated land baseline study (the "Baseline Study") to provide a qualitative assessment of the existing pollution and contamination in the areas within the Territory relevant to Pipeline Activities as of the Effective Date. The Baseline Study shall include:
 - (i) a desk study review of the relevant and available information;
 - (ii) an audit of relevant existing operations and practices and the collection of relevant environmental data from the areas surrounding the location of the Facilities, including information on:
 - (a) surface and subsurface geology;

- (b) geomorphology;
- (c) rock permeability and the presence of aquifers;
- (d) assessment of existing quality of surface waters;
- (e) the effect of any existing contamination on flora, fauna, landscapes and ecosystems; and
- (f) a qualitative assessment of any pollution, environmental damage and contamination in respect of the Facilities.

3.6 Upon completion of the Baseline Study, the MEP Participants shall cause an EIA of Pipeline Activities and associated operations to be conducted with respect to potential environmental impacts to the Territory (whether from Pipeline Activities within or without the Territory). The EIA shall include:

- (i) a project description;
- (ii) an environmental and socio-economic description of the relevant areas of possible impact;
- (iii) an evaluation of impact to the environment of the proposed construction and operation of the Facilities, including an estimate of those emissions and discharges into the environment (*e.g.*, associated air emissions, aqueous discharges and solid waste produced) that are reasonably foreseeable;
- (iv) a plan for the identification and implementation of practicable mitigation measures for each identified impact;
- (v) an assessment of the environmental risks associated with Pipeline Activities; and
- (vi) the formulation of a monitoring programme to verify that mitigation measures are effective, and in the event that additional impacts are identified to ensure that additional appropriate mitigation measures are effected; provided, however, that said monitoring programme shall provide for Government participation at the Government's sole cost, risk and expense, which participation shall not interfere with Project Activities; and provided further, that in recognition that the Government will be conducting its own monitoring of the Project to assure environmental compliance, the MEP Participants will cooperate with the Government in respect of such Project monitoring, but the foregoing general duty of cooperation shall not vary any terms of the Agreement (including its Appendices).

3.7 Prior to the completion of the Facilities and in relation to Pipeline Activities, a plan for Petroleum spill response capability ("Spill Response Plan") as to spills within or that could affect the Territory will be created and implemented by the MEP

Participants. The Spill Response Plan will include:

- (i) environmental mapping of habitats vulnerable to potential Petroleum spills in the entire MEP System;
- (ii) situational scenarios of potential spillages and responses, taking into consideration local circumstances;
- (iii) plans for the provision of relevant Petroleum spill clean up equipment, materials and services;
- (iv) plans for the deployment of relevant equipment and emergency response notification details of the organisation required to handle Petroleum spill response; and
- (v) plans for the treatment and disposal of resulting contaminated materials.

3.8 Each of the scoping study, risk assessment, Baseline Study, EIA and Spill Response Plan (collectively, the "Environmental Strategy Product") shall be prepared by one or more recognised independent international environmental consulting firms selected by the MEP Participants and approved by the Government, such approval not to be unreasonably withheld or delayed. In this regard, the MEP Participants' choice for the recognised independent international environmental consulting firm shall be deemed approved by the Government if, by not later than twenty (20) days after such choice is notified to the Government, the MEP Participants have received no written objection (with the reason(s) for any such objection fully set forth) to their choice. The costs of the items constituting the Environmental Strategy Product, and implementation of the environmental strategy reflected in the EIA and the Spill Response Plan, shall be borne by the MEP Participants except that the Government shall be liable for all costs associated with its official and technical representatives.

3.9 The development and completion of the Baseline Study, the EIA and the Spill Response Plan shall be subject to the following procedures to ensure that they represent implementation of an appropriate environmental strategy with respect to the Project:

- (i) The consulting firm(s) involved and representatives of the MEP Participants shall, at the request of the Government, consult with the official and technical representatives of the Government, at reasonable times and places, during the preparation of the Baseline Study, the EIA and the Spill Response Plan.
- (ii) The Baseline Study, the EIA and the Spill Response Plan shall each be subject to approval of the Government in accordance with the following procedures:
 - (a) The Baseline Study, the EIA (with executive summary demonstrating adequate response to public concerns, as described below) and the

Spill Response Plan shall each be submitted to the Government upon its completion, which completion of the Baseline Study and EIA shall be prior to commencement of construction activities and provided that the MEP Participants shall provide the Government no less than thirty (30) days prior notice before making any such submission(s). The Government shall approve each such item if it satisfies the requirements of this Appendix 3.

- (b) If the Government requires clarification of any portion of the Baseline Study, the EIA or the Spill Response Plan, or determines that it has not satisfied the requirements of this Appendix 3, it shall submit its specific concerns or questions to the MEP Participants in writing within thirty (30) days of receipt of the item in question.
 - (c) The Baseline Study, the EIA or the Spill Response Plan, as the case may be, shall be deemed approved by the Government if, within thirty (30) days after having been submitted to the Government, the MEP Participants have received no written submission of additional concerns or questions. If the Government submits specific concerns or questions, the item in question shall be deemed approved if, within thirty (30) days after the response to such concerns or questions is submitted to the Government, the MEP Participants have received no written submission of concerns or questions with respect to such response.
 - (d) If the Government disapproves of any of the Baseline Study, the EIA or the Spill Response Plan and the MEP Participants believe that the Government has unreasonably withheld its acceptance, then the MEP Participants shall so notify the Government and the Parties shall attempt to amicably resolve any dispute. Failing resolution of any such dispute within fifteen (15) days of the receipt of such notice by the Government, the MEP Participants may cause the dispute to be resolved in accordance with the provisions of Article 17 of the Agreement.
- (iii) The EIA shall be subjected to public review and comment in accordance with the following procedures:
- (a) Affected public and non-governmental organisations will be notified about the nature of the operation of the Facilities during the development of the EIA through dissemination of information to these organisations through meetings and exhibitions.
 - (b) Following the completion of the EIA, the public will be provided with information on the environmental aspects of the Project to enable it to comment with respect thereto. To facilitate this process the EIA and an executive summary (in the Georgian language) will be made available in a public place for review and comments; additionally an

information copy of the executive summary shall be submitted simultaneously to the Government.

- (c) A maximum of sixty (60) days will be allowed for public comments, which will be provided to the Government by the MEP Participants within thirty (30) days after the expiration of said sixty (60)-day period. Demonstration that the MEP Participants have reasonably addressed public concerns (through modification of the EIA, if necessary) will be included in a final executive summary that will be submitted to the Government.
- 3.10 Creation of the Environmental Strategy Product shall include and take account of and implementation of the environmental strategy reflected therein shall be in accordance with, the Environmental Standards and shall take into account the Applicable Technical Standards, as appropriate. Creation of the EIA shall also be in accordance with the principles of EC Directive 85/337/EEC (as amended by EC Directive 97/11/EC) and its conclusions will be based upon the following general environmental principles:
 - (i) there shall be no discharging of Petroleum;
 - (ii) waste Petroleum, sludge, pigging wastes, polluted ballast waters and other wastes will either be recycled, treated, burned, or buried employing the best practicable environmental option;
 - (iii) all waste streams will be disposed of in an acceptable manner and concentration; and
 - (iv) emission monitoring programs will be developed to ensure environmental compliance.
- 3.11 Once approved by the Government, the MEP Participants shall implement the mitigation and monitoring activities specified in the EIA. The results shall be published in reports available to the public and submitted to the appropriate State Authorities. The EIA monitoring programme shall be updated as required on an informal basis. Any disputes respecting the contents or implementation of the EIA monitoring programme shall be resolved in accordance with the provisions of Article 17 of the Agreement.
- 3.12 Any dispute as to implementation of the environmental strategy reflected in the Environmental Strategy Product shall be resolved in accordance with the provisions of Article 17 of the Agreement.
- 3.13 Without limiting the generality of Article 10 or Article 12 of the Agreement, the MEP Participants shall not be liable for any environmental pollution or contamination, damage, or other conditions if and to the extent the same were in existence on the Effective Date, which shall be deemed to include all conditions identified in the Baseline Study. The foregoing shall not preclude the MEP Participants from later establishing, through one or more subsequent studies prepared under the procedures

applicable to the Baseline Study, the existence as of the Effective Date of other such conditions not identified by the Baseline Study, it being recognised that no study can be expected to identify all conditions that may exist.

- 3.14 By not later than thirty (30) days after any termination of this Agreement, the MEP Participants shall provide to the Government a written plan describing the proposed actions to be taken by them associated with the abandonment or other disposition of the Facilities (the "Abandonment Plan"). The Abandonment Plan shall address, among other things:
- a) the removal of all surface installations;
 - b) the clearance of all waterways and marine areas of material and equipment posing a navigational hazard;
 - c) the drainage and proper disposition of any remaining Petroleum in the Facilities;
 - d) to the extent the MEP Participants do not plan to remove and salvage said pipelines, the disconnection from all sources and supplies of Petroleum to those buried pipelines or similar underground installations and either abandonment of same in place or removal of same in those areas where abandonment in place poses a substantial risk of harm to the environment which is not reasonably susceptible to other remediation techniques, all as determined in accordance with the Environmental, Health and Safety Standards and/or Applicable Technical Standards, as applicable;
 - e) to the extent the MEP Participants do not plan to remove and salvage said pipelines, the filling of all abandoned pipeline located offshore or underwater with water or inert material, the sealing of such pipelines at the ends and the taking of such other action as may be reasonably necessary in order to result in any abandoned facilities being left in an environmentally safe condition;
 - f) the filling of all trenches, holes, and other surface depressions left by the removal of surface installations and such underground pipelines and installations as are removed by the MEP Participants for salvage;
 - g) the revegetation of the Pipeline Corridor consistent with the terrain features and other prevailing conditions in the subject area; and
 - h) the manner and techniques to be employed in accomplishing the foregoing activities consistent with the Environmental, Health and Safety Standards and/or Technical Standards, as applicable.

The Abandonment Plan shall be subject to approval by the Government, which approval shall not be unreasonably withheld or delayed. The Abandonment Plan shall be deemed approved by the Government if, within ninety (90) days after having been

submitted to the Government, the MEP Participants have received no written submission of concerns or questions. If the Government submits specific concerns or questions, the MEP Participants shall respond to same in writing and the Abandonment Plan, as same may have been adjusted or modified by said response, shall be deemed approved if, within thirty (30) days after the response to such concerns or questions is submitted to the Government, the MEP Participants have received no written submission of concerns or questions with respect to such response. If the Government disapproves of the Abandonment Plan and the MEP Participants believe that the Government has unreasonably withheld its acceptance, then the MEP Participants shall so notify the Government and the Parties shall attempt to amicably resolve any dispute. Failing resolution of any such dispute within thirty (30) days of receipt of such notice by the Government, the MEP Participants may cause the dispute to be resolved in accordance with the provisions of Article 17 of the Agreement. Once the Abandonment Plan has been approved or all disputes respecting same resolved, by not later than thirty-six (36) months after the later of the date of termination of this Agreement or approval by the Government of the Abandonment Plan, the MEP Participants shall be obligated to accomplish the abandonment of the Facilities in accordance with the Abandonment Plan. Said abandonment obligations are hereinafter referred to as the "Abandonment Obligations."

- 3.15 Within thirty (30) days after the Government's approval of the Abandonment Plan, as provided in Section 3.14 of Appendix 3, in order to financially secure their Abandonment Obligations hereunder and without impairing their obligation to perform same, the MEP Participants shall provide the Government one or more irrevocable direct pay letters of credit (collectively, the "Letter of Credit"). The Letter of Credit shall (i) be in an aggregate amount to be reasonably agreed by the MEP Participants and the Government as a component of the Abandonment Plan, (ii) be issued to the Government by a financial institution(s) having a long-term unsecured senior debt rating of at least "A" or its equivalent by Standard & Poor's Corporation, a division of the McGraw-Hill Companies, or "A2" or its equivalent by Moody's Investors' Service, Inc. at the time of issuance, or be otherwise acceptable to the Government (the "Issuer"), (iii) be in form and substance reasonably acceptable to the Government, (iv) have a minimum term of one (1) year, (v) be for the benefit of the Government, (vi) automatically extend for a term of at least one (1) year or until the full performance in all material respects by the MEP Participants of the Abandonment Obligations and (vii) provide that the Issuer shall provide at least thirty (30) days prior written notice to the Government of any termination or non-renewal of the Letter of Credit. In the event the Abandonment Obligations remain unperformed and any existing Letter of Credit is not replaced by the MEP Participants in accordance with the foregoing procedures (but in an aggregate amount that reflects any reduction of the Letter of Credit for any previous drawings or for any reduction in the amount of estimated remaining Abandonment Obligations) by not later than fifteen (15) days prior to the termination of the existing Letter of Credit, then, in order to assure completion of any Abandonment Obligations which remain outstanding, the Government shall be entitled to draw upon the Letter of Credit as of said fifteenth day prior to the notified termination date thereof up to an amount that is the Government's good faith estimate of the remaining Abandonment Obligations for

which the MEP Participants are liable under the Abandonment Plan, subject, however, to reimbursement by the Government to the MEP Participants of the amount, if any, by which the funds so withdrawn by the Government exceed the actual costs incurred by the Government to complete any unfulfilled Abandonment Obligations.

3.16 The following provisions shall apply with respect to the obligations of the MEP Participants for environmental matters after termination of this Agreement and performance of the Abandonment Obligations:

- (i) After completion of the Abandonment Obligations the MEP Participants shall cause an environmental assessment similar in scope to, and prepared in accordance with the same standards as are applicable to, the Baseline Study (the "Preliminary Exit Study") to be prepared by a recognised independent international environmental consulting firm selected by the MEP Participants and approved by the Government, such approval not to be unreasonably withheld or delayed. In this regard, the MEP Participants' choice for the recognised independent international consulting firm shall be deemed approved by the Government if, by not later than twenty (20) days after such choice is notified to the Government, the MEP Participants have received no written objection (with the reason(s) for any such objection fully set forth) to their choice. If the Preliminary Exit Study is prepared at the request of the Government as contemplated above, it shall be delivered to the Government within one hundred eighty (180) days after performance of the Abandonment Obligations.
- (ii) Once such study is prepared and delivered to the Government, it shall be subject to approval by the Government, which approval shall not be unreasonably withheld or delayed. The Preliminary Exit Study shall be deemed approved by the Government if, within thirty (30) days after having been submitted to the Government, the MEP Participants have received no written submission of concerns or questions. If the Government submits specific concerns or questions, the Preliminary Exit Study shall be deemed approved if, within thirty (30) days after the response to such concerns or questions is submitted to the Government, the MEP Participants have received no written submission of concerns or questions with respect to such response. If the Government disapproves of the Preliminary Exit Study and the MEP Participants believe that the Government has unreasonably withheld its acceptance, then the MEP Participants shall so notify the Government and the Parties shall attempt to amicably resolve any dispute. Failing resolution of any such dispute within thirty (30) days of the receipt of such notice by the Government, the MEP Participants may cause the dispute to be resolved in accordance with the provisions of Article 17 of the Agreement.
- (iii) Once the Preliminary Exit Study is approved or all disputes respecting same are resolved, the MEP Participants shall be obligated to continue to monitor those areas where Pipeline Activities occurred in order to identify and

remediate those adverse environmental impacts related to Pipeline Activities which may subsequently become evident. Such monitoring and remediation obligation shall continue for a period of two (2) years, at which time the above-stated provisions of this Section 3.16 respecting the Preliminary Exit Study shall apply for purposes of preparing a Final Exit Study. Once the Final Exit Study is prepared, submitted for Governmental approval and it has been approved by the Government, then from and after the end of said two-year period and completion of the activities, if any, called for in the Final Exit Study, the MEP Participants shall be released from any liability for environmental impacts with respect to or resulting from the Project and the Government shall indemnify, defend and hold harmless the Project Participants with respect to any claims of any third parties with respect thereto.

- (iv) If a Final Exit Study is performed and if said Final Exit Study, as approved by the Government, indicates that there have been no environmental impacts of Pipeline Activities that have not been remediated or otherwise appropriately addressed in accordance with this Appendix 3, or if impacts that are identified are remediated or otherwise appropriately addressed in accordance with such standards and this is reflected in an update to the Final Exit Study, then from and after delivery of the Final Exit Study (as so updated) to the Government, the MEP Participants shall be released from any liability for environmental impacts with respect to or resulting from the Project and the Government shall indemnify, defend and hold harmless the Project Participants with respect to any claims of any third parties with respect thereto.

3.17 In addition to their applicability to the MEP Participants, the provisions of this Appendix 3 shall apply with respect to each Project Participant other than an MEP Participant, and all of its actions, to the extent such actions constitute conduct or performance of Pipeline Activities.

4. HEALTH AND SAFETY STANDARDS

4.1 With respect to promoting health and safety in respect of the Facilities and Project Activities, including those related to Persons involved in Project Activities, the MEP Participants shall conform to the health and safety standards and practices generally observed by the international community with respect to Petroleum pipeline projects comparable to the Project (the "Health and Safety Standards"). For purposes hereof, "comparable" shall have the same meaning as "comparable projects" as defined and used in Section 3.1 of this Appendix 3.

4.2 If any regional or intergovernmental authority having jurisdiction enacts or promulgates health and/or safety standards or practices relating to the Facilities, Pipeline Activities or areas where Pipeline Activities occur, the MEP Participants and the Government will confer respecting the possible impact thereof on the Project, but in no event shall the Project be subject to any health and/or safety standards or practices to the extent they are different from, in addition to, or more stringent than

the Health and Safety Standards.

5. SOCIAL IMPACT ASSESSMENT

- 5.1 In conducting the Project Activities the MEP Participants shall use Best Endeavours to minimise potential disturbances to surrounding communities and the property of the inhabitants thereof.
- 5.2 If any regional or intergovernmental authority having jurisdiction enacts or promulgates social regulations or guidelines applicable to areas where Project Activities occur, the MEP Participants and the Government will confer respecting the possible impact thereof on the Project, but in no event shall the Project be subject to any such standards to the extent they are different from or more stringent than the standards and practices generally prevailing in the international Petroleum pipeline industry for comparable projects.
- 5.3 Prior to the selection of the general location of the Facilities, a general review of social conditions in the applicable areas shall be completed, consisting of a scoping study and a risk assessment. These will together form the basis of the content and structure for a social impact assessment of Project Activities and associated operations ("SIA") to be conducted by the MEP Participants with respect to social impacts to the Territory (whether from Project Activities within or without the Territory).
- 5.4 During the course of Project Activities, the MEP Participants shall from time to time confer with the State Authorities as to the impact of ongoing Project Activities in light of the SIA.

6. MISCELLANEOUS

- 6.1 Subject to the provisions of Article 10 of the Agreement, the MEP Participants will use Best Endeavours to take all reasonably practicable steps to prevent the straying of animals during such time as construction work is in progress and, after completion of the Facilities in regard to the land which due to the presence and use of the pipeline will or is likely to become subject to additional risk of the straying of animals, will provide and maintain suitable and adequate barriers wherever and to the extent reasonably practicable for the purpose of preventing or minimising the risk of such straying; therefore, necessary fences, lights and barriers will be provided as reasonably practicable. Unless otherwise agreed in writing by the MEP Participants with the affected landowners and occupiers of adjacent properties, the method of fencing the working width will be a fence adequate for the purpose of excluding any stock typically kept on adjoining land.
- 6.2 Where any work requiring the use of explosives for blasting rock is carried out, notice will be given to all persons who may in the opinion of the MEP Participants be affected. Appropriate precautionary measures will be taken. Any use of explosives will be confined to the hours of daylight.

- 6.3 Whenever an area has been declared an infected area on account of a notifiable human disease requiring quarantine or other similar measures, all Project Activities involving entry on the land will be suspended unless there are exceptional circumstances in which case the approval of the relevant Governmental ministry will first be obtained. Nothing in this clause shall prevent the MEP Participants entering on the land forthwith and without giving notice or obtaining any approval in order to address any emergency situation, including to remedy a breach or leak in the pipeline.
- 6.4 The MEP Participants in conjunction with the adjacent landowners and occupiers directly affected by Project Activities will take such reasonable precautions as may be necessary to avoid the spreading of notifiable soil borne pests and diseases or other soil borne pests and diseases as may be notified to the MEP Participants by such landowners or occupiers prior to entry.
- 6.5 During the course of construction works and the exercise of Rights to Land, fossils, coins, any antiquities or other articles of value may be discovered. Ownership of such objects will be determined in accordance with Georgian Law.

**GEORGIA HOST GOVERNMENT AGREEMENT --
DOCUMENT NUMBER: HOU03:648165.19, THIS
DRAFT IS DATED 28 APRIL 2000. THIS IS THE
SIGNED VERSION.**