**ADVANCE DRAFT**

**UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE**

Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters

**Task Force on Access to Justice**

**ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS:
AVAILABLE REMEDIES, TIMELINESS AND COSTS**

(ANALYTICAL SUMMARY, PROPOSALS AND RECOMENDATIONS)

**Eastern Europe, Caucasus and Central Asia**

**2011**

*Translation from Russian*

**1. ANALYTICAL SUMMARY**

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| The draft has been prepared by the experts Ms. Elena Laevskaya and Mr. Dmytro Skrylnikov and distributed to the respective National Focal Points and stakeholders for comments. The paper was revised taking into consideration the comments received. |

**I. Purpose and methodology of the research**

1. The purpose of this study is to identify the impediments faced by the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and other EECCA countries in ensuring public access to justice in environmental matters, especially concerning costs and remedies (see Article 9, paragraph 4 of the Aarhus Convention), and to make recommendations to eliminate them.

The study is based on the provisions of the Aarhus Convention and is conducted within the framework of the Task Force on Access to Justice to assist in the implementation of its powers conferred on it by the third meeting of the Parties to the Aarhus Convention (ECE/MP.PP/2008/2/Add.5).

Objects of the study are the national legislation and law enforcement practice (as of February the 1st, 2011) in 12 countries: Armenia, Azerbaijan, Belarus, Kazakhstan, Georgia, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine.

2. In order to gather the necessary information for the study, a questionnaire was developed and distributed to the national experts in Russian, as well as made available to fill out by any interested persons on the webpage of the Aarhus Convention (see [http://unece.org/env/pp/ a.to.j.htm).](http://unece.org/env/pp/a.to.j.htm)

Information on the countries was provided by the national experts: Matanat Asgerova (Azerbaijan), Gore Movsisyan (Armenia), Natalia Greckaya (Belarus), Vladimir Borisov (Kazakhstan), Malkhaz Dzneladze (Georgia), Oleg Pechenuk (Kyrgyzstan), Natalia Zamfir (Moldova), Yulia Yakel (Russia), Umidjon Ulugov (Tajikistan), Ashir Orazdurdyev (Turkmenistan), Timur Tillyaev (Uzbekistan), Yelizaveta Alekseyeva (Ukraine). Synthesis of the provided materials was carried out by consultants Elena Laevskaya (for Azerbaijan, Belarus, Georgia, Moldova, Russia, and Ukraine) and Dmytro Skrylnikov (for Armenia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan) under supervision of the Secretariat of the Aarhus Convention and the Chairman of the Task Force on Access to Justice Jan Darpo. Preliminary outcomes of the study were discussed at the expert meeting and presented at the fourth meeting of the Task Force on Access to Justice, February 7-8, 2011 in Geneva, Switzerland.

In April 2011 a draft report on the results of the study prepared by the consultants of the project was sent for review and comments to the national experts, national focal points of the Aarhus Convention and other experts with a view of its revision and further submission to the fourth meeting of the Parties to the Aarhus Convention.

3. It should be noted that this study is primarily based on analysis of the existing legislation, its implementation, as well as examples provided by the national experts as part of the questionnaire. The study used the results of the similar studies on legislation and practice of EECCA countries, the legislation of the countries, decisions of the Compliance Committee, as well as existing case-law of the European Court of Human Rights in respect of the countries.

**II. Key issues and trends**

4. The experts have ascertained that in some countries there is practically no practice of court cases initiated by the public in environmental matters, or it is insufficient for the analysis of implementation of the existing legislation. In some cases, the national experts indicated that a legal norm exists, but due to lack of practice it is difficult to assert whether it is effective and whether its application (misapplication) creates obstacles in access to justice.

5. This study suggests that in most of the countries, lack of practice of court cases initiated by the public in environmental matters, and problems with access to justice on these matters are directly related to legal / institutional barriers to access to justice as well as to low awareness of the public, public authorities and courts on these matters. Some national experts also noted lack of systematic development of legislation, lack of support of active non-governmental organizations (NGOs) promoting environmental protection, and other socio-economic factors.

6. Analysis of the legislation allows to emphasize the problems of public access to justice in environmental matters which are common to all the countries:

* "Narrow" standing (especially in the context of the capacity of the public to ask for the judicial review of violations of environmental laws and to bring claims in the public interest);
* Delays in processing of cases, long-term review of cases;
* Significant financial litigation costs / expenses (court fees on material claims[[1]](#footnote-1), costs of expertise and expert services, costs of legal aid);
* Lack of access to qualified legal and expert assistance;
* Application of the "loser pays" principle in judicial procedures (including compensation of damages caused to a defendant relating to granted injunctive relief);
* Lack of awareness of judges in the field of legislation on environmental protection (especially international agreements) and the rights of citizens and NGOs in this field.

7. Imposition of injunctive relief on activities that violate legislation on environmental protection, both temporary and permanent, is provided by legislation of most of the countries, but its application in environmental cases in many countries is more an exception rather than a rule. Moreover, temporary bans as security for claims are often closely associated with a significant financial risk for a plaintiff (a citizen / NGO), if a plaintiff loses his/her case. *See also para 30-33*

8. In many countries jurisprudence on cases initiated by the public is shaping toward the claims (complaints) of a non-material nature (appeals against decisions, construction permits, decisions of state ecological expertiza, etc.

Based on the study, it can be noted that appeals against decisions, actions or omissions of public officials in both administrative and judicial review procedures, as well as other non-material claims are more accessible to the public. First of all, this is due to a simpler and clearly regulated procedure, shorter processing terms, less burdening process of proving, lower costs for filing and processing claims / complaints, and lower risk related to reimbursement of the costs by a loser.

 Lawsuits for damage compensation caused by violation of environmental legislation to the nature, property or health are often associated with the burdening process of proving a causal relation, which, in turn, requires involvement of qualified experts, and remuneration of their expert services. In addition, in cases of compensation for material damage in all the countries there is a principle that a court fee constitutes a certain percentage of an amount claimed (from 0.5 to 15%), which is often an obstacle for plaintiffs who have suffered significant material damage. For these reasons, there are a very limited number of cases initiated by the public and related to compensation of damage caused to property or health (except the cases on compensation of a direct damage caused in a result of an accident).

9. Significant role in shaping practice of public access to justice in environmental matters in the region is played by NGOs and lawyers working in the field of environmental protection in the public interest and / or providing legal assistance to the public. In those countries where such organizations / lawyers operate, there are a considerable number of practical examples. In turn, this practice helps to identify issues related to access to justice in environmental matters, and contributes to improvement of national legislation.

10. Execution of court decisions constitutes a separate problem, but in this study the question of execution of court decisions has not been fully addressed.

**III. Environmental legislation, system of regulatory and supervisory authorities, and judiciary**

11. The system of environmental legislation exits in all the countries. Legislation relating to the environment is a complex integrated system of regulations at different levels (codes, laws, acts of government, ministries and agencies), which regulate relations in the field of natural resources use, environmental protection, waste and chemicals, genetically modified organisms, species protection, nature reserves etc. Norms of environmental legislation in the studied countries are also contained in legislation on urban planning and construction activities, legislation on sanitary and epidemiological well-being, legislation on local administration and local self-government, legislation in the field of nuclear energy, in civil, criminal, and administrative laws.

Adoption of the Environmental Code (Kazakhstan)and drafting of concepts of such codes (Ukraine, Russia, Belarus, and Tajikistan) is a recent trend in development of legislation relating to the environment.

International treaties relating to the environment, ratified / approved in accordance with the national legislation, including the Aarhus Convention, in the studied countries become a part of the national system of the legislation and as a rule are subject to direct application.

12. Systems of regulatory and supervising authorities in the field of environmental protection in the countries are based on the principles of political systems of these countries: federal state - Russia, unitary states - all the other studied countries. The systems consist of bodies of general competence (President, Government, local authorities / municipalities) and bodies of a special competence – relevant ministries (committees, agencies) on environmental protection and natural resources, which in most of the countries have their local departments.

For the time being systems of public authorities in general and in the field of environmental protection in some countries are in the process of reforming (Ukraine, Georgia, and Kyrgyzstan). In some countries within a system of environmental authorities, a special governmental body that conducts supervision in the field of environmental protection is created - State Environmental Inspectorate (Ukraine, Moldova), Inspection of Environmental Protection (Georgia), State Inspectorate for Nature Protection (Armenia), Committee on Environmental Regulation and Control (Kazakhstan). Environmental Police operates in Russia (a body within the Ministry of Internal Affairs) and Tajikistan (Ministry of Internal Affairs jointly with the Committee of Environmental Protection carries out state control over compliance with the regulations of pollutants’ emissions into the atmosphere from vehicles), in Georgia an investigating department within the Ministry of Environment and Natural Resources works on combating crimes and violations in the field of environmental protection and natural resource use.

13. Prosecutor's Office, as an authority that oversees compliance with legislation, including in the field of environmental protection and natural resources use, is created and operates in all of the countries. Specialized Environmental Prosecutor's Offices operate in Ukraine, Russia, and Uzbekistan.

14. Judicial systems of the countries differ in some features. Most of the countries have constitutional courts (except for Moldova, Kazakhstan, Kyrgyzstan and Turkmenistan). In Kyrgyzstan, the Constitutional Court has recently been abolished as a separate institution of the judiciary, but Constitutional Chamber of the Supreme Court was created instead.Virtually all of the countries have courts of general jurisdiction/ general courts. In addition, in most of the countries a system of business / economic courts is in place (Ukraine, Belarus, Moldova, Tajikistan, and Uzbekistan), administrative-economic courts (Azerbaijan), arbitrary courts (Russia, Turkmenistan), to consider economic disputes and other disputes involving legal entities and individual entrepreneurs.

As a general rule citizens do not have the right to file complaints with the Constitutional Court (Ukraine, Belarus, Uzbekistan), but only apply to it regarding the necessity of the official interpretation of the Constitution or laws (Ukraine), or petition the authorities and persons empowered to address the Constitutional Court with a motion on the constitutionality of a normative act (Belarus). At the same time citizens of Azerbaijan have the right to appeal to the Constitutional Court any normative acts of legislative and executive authorities, municipal and judicial acts that violate their rights and freedoms with the purpose to restore infringed human rights and freedoms. In Armenia, individuals and legal entities can appeal to the Constitutional Court in a particular case, when there is a final court decision, all the judicial remedies are exhausted, and the constitutionality of the applied act is challenged. In Tajikistan, physical and legal persons have the right of a direct appeal to the Constitutional Court regarding the violations of constitutional rights and freedoms associated with the applied or applicable law, as well as regarding conformity with the Constitution of Tajikistan of laws and other legal acts applied by the court against them in a particular case.

In Ukraine and Armenia there are administrative courts, to which one can challenge any decision, action or omission of public authorities, including in matters relating to the environment. These courts consider cases relating to the protection of the right to access to environmental information and to participation in decision-making in environmental matters. Decisions in matters relating to the environment are challenged in these courts. In other countries, where there are no administrative courts, these types of disputes are considered by the general courts (Belarus).

In all of the countries general courts also consider criminal cases, including those relating to the environment. As a rule such cases are initiated by the Prosecutor’s Office. In most of the countries the public can not initiate consideration of criminal cases in courts. Yet, the public can notify prosecutors or other authorities on certain facts, who, after an inspection, decide whether to initiate a criminal investigation or to take other measures in response. However, in some countries there is a possibility to initiate criminal prosecution of certain crimes as a private-public prosecution (a victim or another person files a claim directly to the court). For example, in Tajikistan and Turkmenistan claims related to a negligently caused serious and moderate injury can be filed by victims. However, the cases related to damage caused by an environmental offense initiated as a private-public prosecution are unknown.

In all of the countries, the higher courts review decisions of the lower courts on the grounds established by law. Review of decisions which have not become legally binding -and of final decisions is possible. National legislation allows establishment of specialized courts, but such courts in the matters relating to the environment in the countries, whose legislation and practices were studied, are not created.

15. Ombudsman or Commissioner for Human Rights functions in several countries on the basis of a special law (Ukraine, Moldova, Armenia, Azerbaijan, Georgia, Kyrgyzstan, Russia, Tajikistan, Uzbekistan) or Presidential Decree (Kazakhstan), and considers claims of human rights violations, including environmental. However, the Ombudsman is not vested with the function of protection or redress of infringed rights, and does not have an appropriate authority. In Russia, the Ombudsman, in particular, is authorized: to apply to the court to protect the rights and freedoms infringed by decisions or actions (omissions) of public authorities, local self-government or public officers, to apply to the court or prosecutor's office with a request to scrutinize decisions, verdicts, court rulings or orders or decisions of judges which have become effective; to appeal to the Constitutional Court with the complaint of a violation of constitutional rights and freedoms of citizens by law, applied or applicable in a particular case. Turkmenistan has created and operates the Turkmen National Institute for Democracy and Human Rights under the President of Turkmenistan. One of the main activities of the Institute is to organize the consideration of applications, complaints and appeals of citizens, their analysis and to submit proposals to the President of Turkmenistan periodically.

**IV. Decision-making procedures on specific activities relating to the environment**

16. Analysis of information on decision-making procedures on specific activities relating to the environment, in relation to Article 6, paragraph 1 (a) and (c), paras 10, 11, and Annex I, paragraph 22, of the Aarhus Convention (hereinafter - the decisions) provided by the national experts, leads to several general conclusions:

* according to legislation of the countries the decision-making process on specific activities relating to the environment is divided into several stages (decision on planning, decision on allocation of land, permission for construction works, licenses, permits for emissions / discharges, permit for use of natural resources, conclusion of state ecological expertise, etc.);
* decision-making in different stages is vested in various government bodies - the President, Parliament / Supreme Council, Government, special governmental bodies in the field of environmental protection and natural resource use, ministries and agencies, local governments / municipalities. This circumstance affects the possibilities of using remedies. In particular, in case a decision is made by the President, Parliament / Supreme Council, the Government, as a general rule, it is drawn up as a normative act (law, decree)[[2]](#footnote-2). In this event, as a general rule, the public is deprived of an opportunity to appeal / challenge such an act both in administrative and judicial review procedures (the exception - one can challenge decisions of the Cabinet of Ministers of Ukraine (the Government) to an administrative court). In most of the countries, that have established constitutional courts, the public is denied the right to directly appeal to the Constitutional Court.
* given the complexity and multi-leveling of the decision-making process the legislation of the countries often does not allows the public to define with a sufficient accuracy a legally significant moment of decision-making (when final decision is made); moreover, the system of effective public notification of appropriate decision-making is either absent in the countries, or inefficient (information is communicated sporadically, on individual decisions, information is not complete);

**V. Administrative review**

*Appeals against decisions, actions / omissions of public authorities*

17. As a general rule the public (individuals and NGOs) can appeal against decisions, actions / omissions of public authorities in administrative way by filing complaints to higher authorities or a superior officers (administrative review). The legislation usually prohibits forwarding complaints addressed to a higher authority / official, to the body / person, whose decisions, actions / omissions are challenged (Belarus, Russia, Ukraine). In practice this still happens.

18. Legislation of the countries does not provide for establishment and operation of independent and impartial administrative bodies responsible for reviewing decisions of public authorities (In Georgia, legislation provides for such an administrative body, but these norms are not implemented yet). Authorities, considering complaints filed for administrative review, are established by law, but their impartiality is questionable due to the fact that they make decisions on complaints filed against their subordinate bodies or officials.

19. In most of the countries, administrative review of a decision does not automatically suspend execution of this decision. In Kazakhstan, filing of a claim for cancellation, modification or suspension of a legal act by persons concerned to a higher state body or to the court suspends the validity of the act until the appropriate decision is made. In Armenia, when a decision is subjected to administrative review the validity of the challenged administrative act (actions / omission) is suspended (except for the cases when a requirement for the immediate execution is established by law or when it is necessary for the public interest). *Also see figure 2*

20. In some countries the public has the right to file a complaint either for an administrative, or a judicial review (Ukraine, Azerbaijan, and Russia). In these countries application of an administrative review does not preclude from a subsequent judicial review. In Belarus, Georgia, and Turkmenistan it is mandatory to apply for administrative review of decisions / actions / omissions, and only after that for a judicial review. Also in some countries the legislation in certain cases requires an appellant to recourse directly to a decision-making body\official with a request to cancel its decision (Moldova), and only after that to the court. The court will not find a complaint admissible unless the pre-trial procedure was followed. In this case administrative review is considered ineffective and thus it constitutes an additional barrier in access to justice. Administrative review as an obligatory pre-trial procedure is conducted by authorities which are not fully independent and impartial administrative bodies; administrative review is lasting (up to 3 month) and it does not suspend execution of challenged decisions. As a result an irreparable harm can be caused to the environments even before the public can get a right to file a claim to the court. In some countries certain decisions cannot be subject to administrative review, only to a judicial review (e.g. conclusion of state ecological expertise in Russia).

*Challenging violations of the legislation relating to the environment*

21. The public can challenge violations of the legislation relating to the environment by public authorities or private persons to competent authorities (prosecutors, environmental inspectorates, and other supervisory authorities).

22. Within administrative review procedure, supervisory authorities (in Ukraine, Belarus, Azerbaijan, Georgia, Moldova, Russia, Tajikistan, Kyrgyzstan, Armenia), local government (Belarus) receiving claims/complains regarding violations of the legislation, have the right to suspend / terminate an activity that violates legislation relating to the environment. In some countries (e.g. Tajikistan, Ukraine) suspension of an activity can be imposed by supervisory authorities, but only court can cease an activity permanently. In Kazakhstan, only court can impose both suspension and termination of an activity. *See figure 2*

 Different reasons (criteria) for restriction, suspension, and termination of activities exist in the countries:

* exceeding the limits of natural resources use, violations of environmental standards, or requirements of environmental safety (Ukraine);
* causing environmental harm, the risk of causing environmental harm in the future, violations of the requirements in the field of environmental protection or failure to comply with requirements of the public authority exercising state supervision in the field of environmental protection (Belarus);
* activity contradicts the legislation on the protection of the environment and causes irreparable damage to the environment notwithstanding whether business entities will suffer direct damages, or not (Moldova);
* violations of environmental requirements (Azerbaijan);
* activity of an enterprise is carried out illegally, or (and) as a result of this activity a serious and imminent threat to public safety, life or health of the person (and) or a threat to evidences is posed (Georgia);
* activity has an adverse impact on the environment (Russia);
* non-compliance with technical and metrological requirements for nature protection, emission of polluting substances and other impacts on nature (Turkmenistan);
* in case of environmental violations (Armenia);
* violation of environmental legislation, exceeding of the limits of emissions of polluting substances (Kyrgyzstan);
* in case of two or more violations of environmental requirements or conditions and if it is impossible to preclude these violations by other means (Tajikistan).

*Costs and terms of review*

23. In accordance with the legislation of the countries, appeals against decisions within administrative review, in most cases, do not require financial expenses. Deadline for handling appeals/complaints in administrative review in most of the countries is 1 month (30 days in Armenia). The deadline can be extended, for example:

* if the issue is complicated – up to 45 days (in Ukraine and Turkmenistan);
* for 1 month (in Belarus, Kyrgyzstan, Uzbekistan, and Tajikistan););
* for 1-2 months (in Georgia);
* for 10 -30 days, and in exceptional cases - up to 60 days (in Russia);
* twice for 10 days (in Armenia).

In practice the deadlines are not always respected.

*Information on the results of review*

24. Decisions of non-judicial/administrative bodies on the results of appeals against decisions relating to the environment are disclosed only to complainants. No system of public access to such decisions (e.g., registry accessible via the Internet) exists. In some countries it is problematic to obtain such documents upon a request.

**VI. Judicial review**

*Standing*

25. The right of individuals to address the court for the protection of their infringed rights, freedoms and legitimate interests / interests protected by law is provided by the legislation in all the countries (in Uzbekistan, only the rights and freedoms). According to the legislation of the EECCA countries, NGOs can also apply to the court in the case of infringement of the rights or legitimate interests of the organization and / or its members. *See figure 1*

26. The situation with the ability of going to court in the case of violation of law that does not directly affect the rights and legitimate interests of individuals or entities is ambiguous. In most of the countries, this right is not explicitly enshrined in the legislation. However, in some countries, such ability exists on the basis of law or existing national jurisprudence based on the Aarhus Convention (e.g. Ukraine). Unfortunately, these practices are inconsiderable in number and do not provide for a complete picture of implementation of this standard. *See figure 1*

While in some countries the possibility to challenge actions violating the laws relating to the environment is established in environmental legislation, appropriate provisions are still missing in procedural legislation. For example, in Belarus the Law On Environmental Protection provides for the right of civic associations operating in the field of environmental protection, and citizens “to file claims to the court for complete or partial suspension or termination of economic and other activities adversely affecting the environment, if in a result of such activities the violations of the requirements in the field of environmental protection occur, damage is caused to the environment or a risk of causing damage to the environment in the future is created". However, Civil Procedural Code establishes the rights of public associations (organizations) to appeal only for the protection of the rights and interests of members of an association and only if these rights conform to the statutory purposes of the association (Article 86 of the Civil Procedural Code).

27. The concept of going to court for the protection of the public interests or on behalf of an indefinite number of persons[[3]](#footnote-3) exists in the legislation of most of the countries, but is mainly applicable to protection of consumers’ rights.

In some countries, provisions on the ability to apply on behalf of an indefinite number of persons have been enshrined in the legislation concerning the environment, but were not included in the procedural legislation (e.g. Azerbaijan). In some other countries, the procedural legislation contains the provisions establishing the right of individuals or legal entities to apply for the benefit of others or on behalf of an indefinite number of persons, if provided by law, but this provision is missing in the appropriate legislation relating to the environment.

For example, in Tajikistan, the Civil Procedural Code provides that in cases stipulated by the Code and other laws, a civil proceeding can be initiated upon a claim of a person acting on its own name in the defense of the violated or disputed rights, freedoms and legitimate interests of the other persons involved in the case, in the defense of the rights, freedoms and interests of an indefinite number of persons, or in the defense of interests of the Republic of Tajikistan. However, the environmental legislation does not contain a direct provision establishing the right to apply on behalf of an indefinite number of persons.

In some countries the right to go to court to protect the public interest or on behalf of an indefinite number of persons is granted only to NGOs.

According to the legislation of Russia, NGOs acting in the public interest in matters relating to the environment during consideration of a specific case before the court shall provide the court with a by-law of the NGO, according to which one of the activities of the NGO is the protection of the environment, and (or) judicial protection of the public interests (such a rule is contained in the legislation of Moldova). In Kazakhstan, within the meaning of Article 14 of the Environmental Code and the provisions of the Aarhus Convention, environmental NGOs can apply to court to protect the interests of an indefinite number of persons. *See figure 1*

Figure 1

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Standing** | **Azerbaijan** | **Armenia** | **Belarus** | **Georgia** | **Kazakhstan** | **Kyrgyzstan** | **Moldova** | **Russia** | **Tajikistan** | **Turkmenistan** | **Uzbekistan** | **Ukraine** |
| **Judicial review** |
| **NGOs** |
| infringement of the rights of the organization and / or its members | + | + | + | + | + | + | + | + | + | + | + | + |
| infringement of the interests of the organization and / or its members | + | + | + | + | + | + | + | + | + | + | - | + |
| violation of the law | - | - | (+) | - | - | - | - | + | (+) | - | - | (+) |
| on behalf of an indefinite number of persons (actio popularis) | (+) | - | - | - | + | + | + | + | + | - | - | (+) |
| **Individuals** |
| infringement of the rights | + | + | + | + | + | + | + | + | + | + | + | + |
| infringement of the interests | + | + | + | + | + | + | + | + | + | + | - | + |
| violation of the law | - | - | (+) | - | - | - | - | + | (+) | - | - | - |
| on behalf of an indefinite number of persons (actio popularis) | - | - | - | - | - | + | + | + | + | - | - | - |

\* (+) *-* Not fully, or requires a further study

*Automatic suspension*

28. In some countries (Armenia, Kazakhstan, and Tajikistan), there is an automatic suspension of decisions in case they are subject to judicial review. In other countries a mere fact of an appeal of a decision does not suspend its validity. *See also para 19 and Figure 2*

*Remedies (overall review)*

29. The legislation of the countries provides for the different judicial remedies available to the public, including restoration of the state that existed before the violation, preclusion of actions that violate or might violate the rights, declaring decisions of public authorities illegal, compensation of material and non-pecuniary damages, etc., as well as suspension or termination of an environmentally harmful activity violating environmental legislation by a court decision, suspension of an activity as a security for a claim (hereinafter – injunctive relief).

*Injunctive relief*

30. The legislation of the countries provides for the following types of injunctions:

* permanent, by a court decision;
* temporary, until certain conditions \ regulations are fulfilled, by a court decision;
* temporary, for a period of a trial, as a security for a claim (preliminary injunction).

31. In most of the countries it is possible to terminate an activity in both administrative and judicial procedures. In many countries the law establishes the right of the public to apply for termination of environmentally harmful activities, the activity adversely affecting the environment and human health, or resulting in a breach of environmental legislation (Armenia, Azerbaijan, Belarus, Tajikistan, Ukraine, Kazakhstan, Russia, Uzbekistan and Moldova). However, the cessation of activity (a permanent ban) is rarely used in practice. The main reasons for that are the underlying economic interests, as well as lack of clear criteria based on which the court determines the need to prohibit an activity. *See also para 22 and Figure 2*

 For example, when considering a claim for termination of an environmentally harmful activity, the court may deny a claim, if termination of such activity "contradicts the national interests" (Azerbaijan), "contradicts the national and public interests" (Belarus). Such a standard, as enshrined in the Civil Code, allows, using judicial discretion, in the overwhelming majority of cases to give preference to such national interests as the economic interests.

Also, lack of qualified and independent experts shall be noted. According to the national experts, due to political, economic and social reasons judges or experts sometimes are reluctant to take responsibility to cease activities of operating enterprises. Also participation of experts in the proceedings often involves significant costs.

 In many countries, it is possible to get a permanent ban both from the authorized bodies (in administrative review) and courts (in judicial review). In Azerbaijan, Georgia, Kazakhstan and Tajikistan, cessation of activity is only available under a court order.

32. In all the countries, courts also can temporarily restrict or suspend operations until they are brought into conformity with the standards or until certain requirements are fulfilled.

33. Temporary bans as security for claims exist in all countries. However, motions for preliminary injunction are often associated with a risk for plaintiffs, as in the case of their loss of a case, a defendant may claim damages related to the termination of activity. Provisions for damage compensation in the case of a negative outcome for a plaintiff exist in most of the countries. Procedural legislation in most of the countries enshrines provisions, according to which the court, granting a security of a claim, may require a plaintiff to provide a security of possible damages to a defendant. When the decision (by which a claim is denied) has become effective, a defendant has the right to claim compensation for damages from a plaintiff caused to him by measures securing a claim made at the request of a plaintiff. The national experts identified this as an effective threat discouraging the public from using temporary bans as security for claims.

Figure 2

|  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Injunctive relief**  | **Azerbaijan** | **Armenia** | **Belarus** | **Georgia** | **Kazakhstan** | **Kyrgyzstan** | **Moldova** | **Russia** | **Tajikistan** | **Turkmenistan** | **Uzbekistan** | **Ukraine** |
|  **Non-judicial (administrative) review** |
| automatic suspension of decisions in the case of review | - | + | - | - | + | - | - | - | + | - | - | - |
| temporary | + | + | + | + | + | + | + | + | + | + | + | + |
| permanent | - | + | + | - | + | + | + | + | - | + | + | + |
| **Judicial review** |
| automatic suspension of decisions in the case of review | - | + | - | - | + | - | - | - | + | - | - | - |
| temporary | + | + | + | + | + | + | + | + | + | + | + | + |
| permanent | + | + | + | + | + | + | + | + | + | + | + | + |

*Compensation of damages*

34. In all the countries the right to compensation for damage caused to property and health as a result of an adverse impact on the environment or as a result of the violation of legislation on environmental protection is enshrined in the constitutions and/or environmental legislation. Usually, compensation for damages is made to a person who or whose property was injured. In some countries there are provisions that indicate a possibility to initiate cases on compensation for damages caused to the environment or individual natural resources. For example, in Ukraine, according to the Water Code, citizens and their associations can apply to court with claims for damage compensation caused to the State and citizens as a result of pollution and depletion of waters. In Russia, citizens, civic and other nonprofit associations operating in the field of environmental protection, have the right to bring claims for compensation for [damage caused to the environment,](#sub_142) caused to health and (or) property. The appropriate jurisprudence exists.

In Turkmenistan, according to the Law on Nature Protection associations have the right to sue for compensation for damage caused to the nature. However, currently the examples of the practical implementation of this provision are unknown.

In many countries there is also a practice of compensation of a non-pecuniary damage in cases of infringement of non-material rights.

*Other remedies*

35. Other remedies may also include cancellation of permits, licenses, and decisions of state ecological expertise, or a ban of the right to engage in certain activities, which also automatically results in suspension or termination of the activities. For example, the practice of challenging and cancellation of decisions of state ecological expertise is widely used in Ukraine and Russia.

*Costs*

36. The main financial costs in the countries generally include court fees and other charges for proceedings before the court (e.g. fee for information and technical support - Ukraine, costs of publications and announcements on the case - Kazakhstan), cost of examinations, experts or witnesses, bonds and damage compensation in the case of suspension of activities as a measure of securing a claim.

Some national experts indicated that the court fees do not constitute a significant barrier to access to justice. A deeper analysis of legislation and practices shows that this assertion can be considered valid only to some extent. *See figure 3*

In most of the countries, the court fees in cases of appeals against decisions, actions or omissions of public officials, as well as court fees for other non-material claims are usually fixed and low. In most of the countries plaintiffs filing claims for compensation for damage caused to health are exempt from payment of the court fees. However, in cases of compensation for material damage in all the countries there is a principle that the court fees constitute a certain percentage of a claim (from 0.5 to 15%), which is often an obstacle for plaintiffs who have suffered significant material damage. In addition, there is also a risk of losing a significant amount in case you lose the case. For example, in Turkmenistan, when a lawsuit amounts to or less than the minimum wage, the court fee is 5 percent, and when it is above the minimum wage - 15 percent. On the contrary, in Tajikistan, with an increase of a claimed amount the percentage (and thus the court fee) decreases: when the price of a claim is below 50 parameters for calculation (approximately U.S. $ 450) - 3 percent, and when it is more than 500 (about U.S. $ 4500) - 0.5 percent. In Armenia, the court fee for material claims is 2 percent of the amount claimed. The amount of the court fee may also depend on the type of proceedings (civil, commercial / economic) and on a plaintiff. For example, in Kazakhstan, for claims of material nature filed by individuals - 1 percent of the claimed amount, and for legal entities - 3 percent. In most of the countries the court fee is paid prior to filing a lawsuit. In Kyrgyzstan, the court fee and other court costs are charged at the end on the judicial review of claims. In Russia, Belarus, the costs are significant and constitute an obstacle to access to justice for citizens and NGOs that have non-profit status.

Thus, it can be argued that in claims for compensation for material damage the court fee is a significant obstacle. In this regard, it is observed in the countries that the jurisprudence is shaping toward claims (complaints) of a non-material nature.

37. In most of the countries in the cases relating to the environment, free government legal assistance is not provided. In the countries where NGOs and lawyers working in the field of environmental protection in the public interest and carrying out legal assistance pro-bono (free of charge) operate, the public has an opportunity to take advantage of free legal aid. However, there are very few of these NGOs / lawyers and for the time being their resources are limited. The costs of lawyers working on a fee basis usually are determined by agreement, and in most cases it is also a financial barrier.

38. The costs of involvement of experts and expertise in some of the countries, are pre-paid by a party who requested it or by other party, which was charged by the court with this responsibility (e.g., Kazakhstan, Ukraine, Belarus), or are borne by the judicial authorities (Armenia). In both cases, as a rule, after a decision is rendered the costs are paid by a losing party. This type of costs can be a significant constraint in claims for compensation for material damage and damage caused to health (often due to the necessity to involve a few experts and prove a causal relationship). Also, involvement of experts may be necessary in cases of termination of environmentally harmful activity.

39. Bond and / or damage compensation in the case of suspension of activity as a measure of securing a claim can also be a significant obstacle. Most often, such injunctions might be necessary in the cases of termination of environmentally harmful activity, and sometimes in judicial appeals against decisions, actions or omissions of public officials. In most of the countries, after the entry into force of the decision by which a claim was denied, a defendant may bring an action for damage compensation caused to him by measures ensuring a claim, made at the request of a plaintiff. For example, in Russia, in arbitrary courts, a defendant may request a person filing a motion for a preliminary injunction, or invite him on his own initiative to provide security for compensation for any possible damages to a defendant (the counter-security) by making a cash deposit on an account of the court in the amount proposed by the court, or by providing a bank guarantee, a bail or other financial security of the same amount.

40. In all the countries the "loser pays" principle applies in court procedures, and thus constitute a significant constraint on cases relating to the environment.

Figure 3

*Costs and other financial factors affecting the judicial practice (generic scheme)*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Costs** | **Court fees** | **Experts / expert studies costs** | **Injunction***security for a claim* | **Legal aid** |
| State | Non-statePaid Pro-bono |
| **Appeals against decisions \ actions \ omissions** |  |  |  |  |  |  |
| **Claims for termination of environmentally harmful activity** |  |  |  |  |  |  |
| **Material / property claims (damage compensation)** |  |  |  |  |  |  |
| **Claims for compensation for damage caused to health** |  |  |  |  |  |  |
| **Claims for compensation for non-pecuniary damages** |  |  |  |  |  |  |
| a significant obstaclean obstaclenot an obstacle |

*Information on the results of review*

41. Members of the public in all the countries have access to full texts of court decisions rendered in cases relating to the environment to which they were parties of the process. In some countries the legislation provides for operation of the Unified State Register of Court Decisions (Ukraine), which can be accessed twenty-four-hour via the Internet, although its search for specific decisions has defects; access to all judicial decisions on the sites of the courts (Moldova). In Azerbaijan all decisions of the courts of cassation and appellate courts, as well as all repealed or amended decisions of lower courts are subject to mandatory publication and dissemination through electronic media. At the same time, publicly accessible registry of decisions of courts of the first instance does not exist. Only individual court decisions are published in Georgia and Belarus. In Russia, the decisions rendered by the Supreme Court and High Arbitration Court are available through Internet sites of the courts, and through specialized publications of the courts, and open electronic legal systems. In Armenia, a system datalex [(www.datalex.am),](http://www.datalex.am/) allows the public to get access to all court decisions in electronic form. In Kazakhstan, a unified publicly available database of electronic texts of judicial decisions exists and is regularly updated on the official website of the Supreme Court <http://www.supcourt.kz/>(www.supcourt.kz). Currently, the database of judicial acts of the Internet resource of the Supreme Court contains more than 466,000 documents. All the regional courts have their official sites. Work continues on installation in the courts of the electronic monitoring system, allowing participants to the process, without actually coming to the court, to get acquainted with the advancement of their documents in the court via the Internet. The Supreme Court also carries out a monitoring of judicial decisions on disputes relating to the environment, initiated by the public.

**VII. Legal aid**

42. Virtually in none of the countries the organized national system of legal aid for the public in cases relating to the environment exists. Due to the problems associated with financial costs for filing material claims, and the trends shaping the jurisprudence in most cases by lawsuits (complaints) of a non-material nature, cases relating to the environment often are not of a particular interest to attorneys (lawyers) providing paid (commercial) services. Significant role in shaping the practice of public access to justice in environmental matters, is played by NGOs and lawyers working in the field of environmental protection in the public interest and / or carrying out legal assistance to the public pro-bono (free of charge). Such assistance is provided both for NGOs and individual. While individuals tend to apply for compensation of damage caused to their property and/or health, as well as challenge a neighboring illegal activity, NGOs often go for strategic litigation in public interest.

In most cases, NGOs and lawyers working in the field of environmental protection in the public interest exist and operate on grants and other types of donations. The greatest number of such lawyers / NGOs exists in Russia, Ukraine and Kazakhstan. Similar NGOs used to exist in Moldova, Armenia and Uzbekistan, but at the present time, according to the national experts, they virtually do not operate.

In those countries where such organizations / lawyers operate, there are a greater number of practical examples (including the decisions of the European Court of Human Rights[[4]](#footnote-4), Compliance Committee[[5]](#footnote-5)). In its turn, these examples help to identify problems related to access to justice in environmental matters, and contributes to improvement of national legislation.

However, it should be noted that in some countries, NGOs / lawyers specializing in providing legal assistance in matters relating to the environment, are practically absent (Belarus, Azerbaijan). In other countries, according to the national experts, there are very few of those (Kyrgyzstan, Moldova).

**2. ISSUES REQUIRING FURTHER CONSIDERATION AND RECOMMENDATIONS**

***Decision-making process***

Legislation of the countries divides the process of decision-making on specific activities relating to the environment into several stages. Different public authorities make decisions on different stages. The existing legislation of the countries often does not allow the public to identify a legally significant moment of the final decision-making, as well as the stage when public participation shall take place and public opinion be taken into account. See Analytical summary para 16 and Chapters on particular countries

There is a need to improve national legislation in the field of decision-making in matters relating to the environment, particularly in relation to Article 6, paragraph 1 (a) and (c), paras 10, 11, and Annex I, paragraph 22 of the Aarhus Convention to insure a clear identification of the moment when a decision is considered to be taken. This would allow to eliminate uncertainty in this matter that currently exists in legislation of some of the countries and enable the public to file complains for administrative / judicial review procedures not missing deadlines for appeals of such decisions.

***Administrative review***

As a general rule the public can appeal against decisions, actions / omissions of public authorities in administrative way by filing complaints to higher authorities or superior officers. The legislation of the countries does not provide for establishment and operation of independent administrative bodies responsible for reviewing decisions of public authorities. See Analytical summary paras 17,18.

It is recommended to take legislative and institutional measures to create a system of "independent and impartial" bodies in order to ensure adequate administrative review of complaints filed by the public.

For these purposes, it is recommended to reconsider practice of forwarding complaints to the authorities / officials, whose actions / omissions are challenged in the countries where such practices exist.

***Standing***

The right of individuals to address the court for the protection of their infringed rights, freedoms and legitimate interests / interests protected by law is provided in all of the countries. NGOs also can apply to the court in case of infringement of the rights or legitimate interests of an organization and / or its members. However, the situation with the ability of going to court in case of violation of law relating to the environment that does not directly affect the rights and legitimate interests of individuals or entities as well as on behalf of an indefinite number of persons is ambiguous. See *Analytical summary paras 25-27.*

While in some countries the possibility to challenge actions / omissions violating the laws relating to the environment is established in environmental legislation, appropriate provisions are still missing in procedural legislation. It is needed to improve the legislation in order to resolve these conflicts and insure possibility to challenge actions / omissions of private parties or public authorities violating the laws relating to the environment.

The concept of lawsuits on behalf of an indefinite number of persons exists in the legislation of most of the countries. However, it is mainly applicable to protection of the consumers’ rights. It would be expedient to extend the application of this concept to the cases relating to the environment by improving and amending legislation and practices.

***Competence of courts to consider claims filed by NGOs***

The legislative approaches of some countries determining competence of courts of general jurisdiction should be specified: general and economic / arbitrary - to insure a clear indication in the law as to which court should an NGO address with a claim of termination / suspension of environmentally harmful activity and other similar lawsuits / claims.

***Automatic suspension of decisions in case of its judicial review***

In most of the countries a mere fact of an appeal against a decision in court does not automatically suspend its validity. *See also Analytical summary para 28*

It is recommended to improve the procedural legislation in order to provide for an automatic suspension of decisions challenged in courts.

***Injunctive relief***

Injunctive relief on activities that violate legislation relating to the environment, both temporary and permanent, is provided by legislation of most of the countries. However, its application in environmental cases in many countries is more an exception rather than a rule. The main reasons for that are the underlying economic interests in considered disputes, as well as lack of clear criteria based on which a public authority or a court can determine a need to suspend or terminate an activity. Legislation of the countries uses different approaches in determining reasons (criteria) for injunctive relief on activities. *See Analytical summary paras 22, 23, 30-32*

It is recommended to establish detailed and clear criteria for granting permanent and temporary injunctions for both administrative and judicial review procedures.

Temporary bans on activities as security for claims exist in all of the countries. Attention should be paid to the fact that motion for a preliminary injunction is associated with a significant risk for a plaintiff to compensate damages caused by the suspension of an activity in case he\she loses a case. This is an effective threat discouraging the public from using temporary bans as security for claims. *See Analytical summary paras 33*

***Costs***

Lawsuits on compensation for damage caused by violation of legislation relating to the environment, the nature, property or health is often associated with the complicated process of proving a causal relationship, which, in turn, requires involvement of qualified experts, and remuneration of their services. In addition, in cases of compensation for material damage in all of the countries there is a principle that a court fee constitutes a certain percentage of an amount claimed (from 0,5 to 15%), which is often an obstacle for plaintiffs who have suffered significant material damage. *See Analytical summary paras 36*

It is recommended to establish the national lists of qualified experts / institutions offering expertise in the environmental field, as well as to insure they work professionally and independently.

Often violations of environmental legislation and environmental pollution cause significant damage to property of citizens (for example, it can even lead to deterioration of housing or inability to use the land). In most cases, citizens are unable to pay the court fees required to file claims to the court for compensation for damages. Attention should be paid to the court fees for material claims, associated with compensation for damage caused by violation of environmental legislation. It is recommended to reconsider the principle of the percentage correlation of the court fee and a claimed amount in this category of cases.

It is deemed appropriate to reconsider the application of "a loser pays" principle for claims brought in the public interest or on behalf of an indefinite number of persons.

***Legal aid***

Significant role in shaping practice of public access to justice in environmental matters is played by NGOs and lawyers working in the field of environmental protection in the public interest and / or providing legal assistance to the public pro-bono (free of charge). In most cases, these organizations exist and operate through grants and other types of donations.

Support for lawyers / NGOs working in the public interest and providing legal assistance to the public contributes to improvement of legislation and judicial practice, and also provides opportunities for citizens to get qualified legal aid.

Development of a network of lawyers / NGOs, improvement of their skills and exchange experiences of different countries in this area, as well as development of mechanisms ensuring sustainability of these lawyers / NGOs are critical to development of justice in matters relating to the environment in EECCA region.

***Awareness raising and capacity building***

It is recommended to fully encourage and support development and constant replenishment of publicly accessible electronic registers / registries of judgments in cases relating to the environment.

Awareness of judges, prosecutors, lawyers and NGOs in the field of legislation and case law relating to the environment, especially regarding application of international agreements, including the Aarhus Convention, should be raised. These issues should be reflected in the programs and courses for trainings of judges, prosecutors, judicial workers, in the lists of questions for the qualifying examinations, as well as in the teaching materials used for these purposes.

1. In the studied countries all the claims brought to courts are usually divided into two big groups: material claims and non-material claims. In material claims a sum in dispute can be determined (the value of a property in dispute, the amount of damage claimed, e.g.). Court fees for filing such claims as a rule are determined as a percentage of the sum in dispute. When claims have no economic value and\or a sum in dispute cannot be determined (a claim to declare a normative act\decision illegal, a claim to stop environmentally hazardous activity, a claim for restoration of the rights etc.) such claims are considered to be non-material claims. For these claims the rates of court fees are fixed. [↑](#footnote-ref-1)
2. Including some decision on activities listed in Annex I of the Aarhus Convention. For instance, in Ukraine the decision on placement and construction of a nuclear facility shall be adopted by the Parliament in the form of a law. [↑](#footnote-ref-2)
3. The expression “a lawsuit on behalf of an indefinite number of persons” is used in the legislation of most of the countries and for the purpose of this study shall be considered an “actio popularis”. [↑](#footnote-ref-3)
4. #  Dubetska and others v. Ukraine, Application no. 30499/03 (2011.02.10) (ECHR) (Judgment) (Vilshyna coal pollution case, award of non-pecuniary damages), at <http://echr.coe.int/echr/en/hudoc>

 [↑](#footnote-ref-4)
5. Findings and recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case construction of high-voltage power line (Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan), adopted by the Aarhus Convention’s Compliance Committee on 18 February 2005 [www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf](http://www.unece.org/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.2.e.pdf) [↑](#footnote-ref-5)