

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

STUDY ON STANDING FOR INDIVIDUALS, GROUPS AND ENVIRONMENTAL NON-GOVERNMENTAL ORGANIZATIONS BEFORE COURTS IN CASES IN ENVIRONMENTAL MATTERS

(Preliminary findings)¹

v. 12.06.2013

Eastern Europe, the Caucasus and Central Asia

Selected countries:

Armenia, Azerbaijan, Belarus, Kazakhstan, Republic of Moldova and Tajikistan



2013

¹ The document was not formally edited

I. Purpose and methodology of the study

1. The purpose of this study is to identify criteria for standing for individuals, groups and environmental non-governmental organizations before courts or other review bodies competent to decide cases in environmental matters. The study aims to identify best practices and challenges in implementing the relevant provisions of article 9, paragraphs 1, 2 and 3, of the Convention based on the overview of the legislation and practice in six selected countries of Eastern Europe, the Caucasus and Central Asia (EECCA countries). It will also provide recommendations on how the identified challenges may be overcome.

2. 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 mandate set out in decision IV/2 of the Meeting of the Parties to the Aarhus Convention adopted at its fourth session.

3. Objects of the study are national legislation and law enforcement practice (as of 1 April 2013) in 6 countries: Armenia, Azerbaijan, Belarus, Kazakhstan, Republic of Moldova and Tajikistan.

4. In order to gather the necessary information for the study, a questionnaire was developed and distributed to the national experts in Russian.

5. Information on the countries was provided by the national experts: Matanat Asgerova (Azerbaijan), Gore Movsisyan (Armenia), Elena Laevskaya (Belarus), Svetlana Kovlyagina (Kazakhstan), Natalia Zamfir (Republic of Moldova) and Tatyana Khatiukhina (Tajikistan). A synthesis of the provided materials was carried out by Mr. Dmytro Skrylnikov under supervision of the the Chairman of the Task Force on Access to Justice Mr. Jan Darpo and the UNECE Aarhus Convention Secretariat and.

6. In April 2013, the questionnaires filled out by the national experts were sent to national focal points of the Aarhus Convention for multi-stakeholder consultations and comments.

7. 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 results of the study on "Access to justice in environmental matters in Eastern Europe, Caucasus and Central Asia: available remedies, timeliness and costs"² were also taken into account.

II. Key issues and trends

General issues

8. In all countries the standing rules are generally applicable and there are no specific standing rules for environmental cases.

9. Usually there are two main types of court proceedings which can be initiated when the case relating to the environment is filed by an individual and (or) an ENGO:

a) civil court proceedings in the court of general jurisdiction for civil cases, and

² The study is available from

http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/EECCA_study_AJ/EECCA_study_EN_Final.pdf

b) administrative court proceedings in the administrative court (Armenia, Azerbaijan, Republic of Moldova) or in the court of general jurisdiction (Belarus, Kazakhstan, Tajikistan) for appeals against decisions, actions or omissions of public authorities and officials.

10. In some countries (e.g. Belarus and Kazakhstan), cases between legal entities (e.g. ENGO, which is registered as legal entity, and public authority or private legal entity) shall be filed to economic (commercial) courts.

11. "Narrow" treatment of the legal 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) is common to all the countries.

12. As a rule, the legislation in all participating countries provides the right of individuals to address the court for the protection of their infringed rights, freedoms and legitimate interests / interests protected by law. According to the legislation of the selected EECCA countries, ENGOs can also apply to court in the case of infringement of the rights or legitimate interests of the organization and / or its members.

13. In all countries, for groups not registered as legal entity, the general standing rules as for individuals apply.

14. In some countries (*See also figure 1*), there is the theoretical possibility for ENGOs to apply for the protection of the public interests or on behalf of an indefinite number of persons³ mentioned in the legislation (Republic of Moldova and Tajikistan). The court practice, however, is not known.

15. Usually the legitimate interests / interests protected by law for individuals or ENGO are not clearly defined in the legal systems of countries and therefore the infringement or protection of the legitimate interest can be interpreted differently.

16. In most countries to prove sufficient interest ENGOs also may need to provide the court with statutory documents of the NGO, according to which one of the activities of the NGO is the protection of the environment. The territorial scope of activity could be also an issue in some countries (since in many countries NGOs are divided on this basis into national, local (regional) and international public associations). No examples where the cases were rejected by court because of these criteria were reported.

17. Sometimes a conflict of norms of environmental legislation and civil procedural legislation (and/or administrative or economic procedural legislation) could be found in the countries. While the provisions of environmental legislation provide "wider" standing in case of protection of public interest or challenging acts or omissions which contravene provisions of its national law, the procedural legislation provides standing in case of infringed rights, freedoms and legitimate interests / interests protected by law only. Moreover, in countries where some court practice already exists (Armenia), it shows that courts usually interpret such conflicts in the legislation in a way that is more restrictive for the public, and in favor of the procedural laws.

18. The experts ascertained that in some countries there was practically no practice of court cases initiated by the public in environmental matters, or it was 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 the lack of practice it was difficult to assert whether it was effective and whether its application created obstacles in access to justice and, specifically, whether certain criteria for standing were interpreted in a restrictive way or whether it provided wide standing.

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".

Challenging the refusal of access to environmental information

19. In all countries, the individual and ENGO have the right to challenge the refusal of access to environmental information directly to the court. There are no any specific criteria in these cases and general rules on infringement of rights are applied.

Challenging the legality of decisions, acts and omissions with regard to 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

20. In all participating countries, individuals and ENGOs usually have a right to challenge the substantive and procedural legality of the decisions as well as acts or omissions with regard to specific activities relating to the environment in court. As a rule, the legislation provides the right of individuals to address the court in case such decisions, acts and omissions infringed rights, freedoms and legitimate interests / interests protected by law. In Armenia, it relates to rights and freedoms only.

21. In most countries in order to be able to go to court, ENGO also may need to prove the interest by providing the court with its statutory documents, according to which one of the activities of the NGO is the protection of the environment or the statutory purposes of the ENGO are related to the sphere in which the decision was taken.

22. In some countries, the public has the right to file a complaint either for an administrative, or a judicial review (Armenia, Azerbaijan, Kazakhstan, and Tajikistan). In these countries application of an administrative review does not preclude from a subsequent judicial review. In Belarus the complaints against acts can be filed to the court after their administrative review by the higher authority. There are also different views in Belarus whether and what outcomes of the administrative review can be appealed to the court (e.g. there is an opinion if the appeal body agrees with the appealed decision and does not adopt a new decision, this situation cannot be challenged in court). 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 (Republic of Moldova), and only after that to the court.

Challenging acts or omissions “which contravene provisions of its national law”

23. The situation with regard to 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 but the lack of practice do not provide for a complete picture of implementation of this standard. *See figure 1.*

24. 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 civil procedural legislation (and/or administrative or economic 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 as a result of such activities 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, the 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).

Claim for pause/stop of the activity

25. In most of the countries, it is possible to terminate an activity in both administrative and judicial procedures. In many countries, it is possible to get a permanent ban from the courts (in judicial review). 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. 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, Kazakhstan, the Republic of Moldova and Tajikistan).

26. In fact, such provisions usually do not directly envisage the need to prove the infringement rights and legitimate interests / interests protected by law but in most countries it might be still applied together with more conservative civil procedure legislation. (See also paras. 23 and 24). The lack of court practice does not allow evaluating the implementation of such provisions.

Actio popularis

27. The concept of going to court for the protection of the public interests or on behalf of an indefinite number of persons⁴ exists in the legislation of most of the countries, but it is mainly applicable to protection of consumers' rights.

28. In some countries, the right to apply on behalf of an indefinite number of persons have been enshrined in the legislation relating to the environment, but was not included in the procedural legislation. 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 laws 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 defence of the violated or disputed rights, freedoms and legitimate interests of the other persons involved in the case, in the defence 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.

29. 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 (Azerbaijan, Kazakhstan and the Republic of Moldova).

Claiming for damage to environment

30. In all countries, individuals and ENGOs are not entitled to initiate actions claiming for damage caused to the environment. Usually, this is the competence of the prosecutor or competent authorities (e.g. environmental inspectorate).

Figure 1

⁴ 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”.

Standing	Azerbaijan	Armenia	Belarus	Kazakhstan	Republic of Moldova	Tajikistan
ENGO						
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 further research

III. Recommendations

1. While applying or interpreting of legitimate interests / interests protected by law for individuals or ENGO in cases related to the environment wide access to justice in environmental matters should be considered and as a minimum the requirements of article 9 of the Aarhus Convention should be taken into account.
2. It is recommended to consider improvement of the legislation in order to address the existing conflicts between environmental legislation and civil procedural legislation (economic procedural or administrative procedural legislation) as appropriate and insure possibility to challenge actions / omissions of private persons or public authorities violating the laws relating to the environment.
3. The concept of lawsuits on behalf of an indefinite number of persons that exists in the legislation of all participating countries in relation to the consumers' rights could be extended to the cases relating to the environment by improving and amending legislation and practices.
4. 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.