Answers on question list of Cartagena IASAJ Congress (2013)

The administrative judge and environmental law

I. The sources of the environmental law

1) What are the national sources of environmental law? Which authorities are competent for enacting them?

National sources of environmental law have some peculiarities caused by the nature of the branch itself as a complex part of the national law system. Legal provisions of this law branch contain at the same time legal provisions of other law branches. So this law branch has a complex nature. In addition to special environmental legislation constitutional, civil, criminal etc. legal acts also contain environmental legal provisions.

National sources of environmental law can be classified in compliance with the criterion of legal act validity. Due to this national sources of environmental law are laws which are superior validity acts and subordinate legislation.


Current legislation provides that environmental subordinate legislation acts are acts adopted by the President of Ukraine, the Cabinet of Ministers of Ukraine, central executive authorities (in particular, Ministry of ecology and natural resources), local authorities.

2) What are the supranational sources (general public international law, regional conventions) concerning environmental law that judges must enforce ?

Article 9 of the Constitution of Ukraine and article 19 of the Law of Ukraine “On international treaties of Ukraine” provide that international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine and are applied in order provided for the national legislation of Ukraine. After independence of Ukraine had been proclaimed the Verkhovna Rada of Ukraine adopted important international environment treaties. Ukraine is a member to more than 40 global and regional environmental treaties and...
agreements as well as bilateral agreements. Ukraine is an active party to the negotiations on environmental issues.

3) Does the administrative judge enforce the general principles of environmental law? Has he/she contributed to developing them?

According to article 9 of the Code of Administrative Justice of Ukraine (further – CoAJ) when deciding a case, the Court is guided by the principle of lawfulness, according to which the court decides cases according to the Constitution and laws of Ukraine and to the international treaties ratified by the Verkhovna Rada of Ukraine. This article also provides that the court applies other legal-regulatory acts adopted by a respective authority on the grounds, within the powers and in the manner envisaged by the Constitution and laws of Ukraine.

Still when adjudicating cases of this category courts rare apply both environmental law principles and international environmental legislation as well.

4) Is the environmental law considered as a human right or a fundamental right in a constitutional or conventional sense?

The right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right is one of the basic natural human rights. This right is envisaged by the article 50 of the Constitution of Ukraine, this fits with the right to life. The right to life has close connection to the right to an environment that is safe for life and health; this connection is closely related to the state of environment a human being is living in.

The right to an environment that is safe for life and health provides for possibilities to live safety in the environment in compliance with international and national standards, to become a party to preparation, discussion and making environmentally important decisions, to control their implementation, to receive corresponding environmental information as well as right to compensation because of the damage of this right.

II The competence of the administrative judge in the environmental field

1) Do the environmental cases fall totally or partially within the competence of the administrative judge? Are the judiciary courts also competent? Are there specialized courts?

In Ukraine, according to article 125 of the Constitution, the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation. Due to the principle of specialisation recently there are general courts adjudicating civil and criminal cases, economic courts and administrative courts adjudicating economic and administrative cases, respectively.

2) What are the criteria of competences between administrative courts, judiciary courts and specialized courts?
In response to the above-mentioned and depending on the parties of the dispute and its subject-matter environmental cases can be adjudicated in administrative, economic and general courts.

Article 2 of the CoAJ provides that the objective of the administrative justice is to protect the rights, freedoms and interests of natural persons, rights and interests of legal persons in the public law relationships against violations by the public authorities, local self-governments, their officials and employees and other agents, which are performing their public authority’s functions on the basis of the legislation, including the exercise of delegated powers by means of fair, impartial and prompt consideration of administrative cases.

The administrative courts are the courts to appeal against any decisions, actions or omissions of any power entities, except for cases when the Constitution or laws of Ukraine set forth a different type of judicial proceedings with regards to such decisions, actions or omissions.

Part 1 of the Article 17 of the CoAJ provides that jurisdiction of administrative courts applies to public law disputes, in particular:

1) Disputes of natural persons or legal entities with a power entity concerning appeals against decisions (regulatory-legal acts or legal acts of specific application), actions or omissions thereof;
2) Disputes concerning admission of the citizens to public service, service with the public service, discharge from the public service;
3) Disputes between power entities with regard to implementation of their competence in the area of governance, to include delegated powers;
4) Disputes arising from conclusion, execution, suspension, termination or declaration of nullity of administrative agreements;
5) Disputes based on application of a power entity in the events established by the Constitution and by laws of Ukraine;
6) Disputes concerning legal relations related to electoral or referendum process.

In accordance with paragraph one of the part one of the Article 3 of the CoAJ case of administrative jurisdiction means a public law dispute referred for settlement to an administrative court, where at least one of the parties is an executive authority, local self-government, official or staffer or another agent thereof, which is performing its governance functions on the basis of the legislation, including in order to exercise its delegated powers.

Article 3 also provides notion “Power entity” that means a public authority, local self-government, official or officer or agent thereof when performing their governance functions on the basis of the legislation, including in order to perform their delegated powers.

It means that a dispute between two (several) certain subjects of the society concerning their rights and obligations in certain legal relations in which at least one party is legally entitled to rule authoritatively the behaviour of other (others) parties and these parties therefore are obliged to answer demands and instructions of such authoritative party, may be issued to the administrative court through the case of the administrative jurisdiction.
Part 3 of the Article 22 of the Law of Ukraine “On Judiciary and Status of Judges” provides that commercial courts shall adjudicate cases arising from economic/commercial legal relations, as well as other cases within their jurisdiction under procedural law.

The Commercial and Procedural Code of Ukraine provides that enterprises and organizations shall have the right to apply to the commercial court, in keeping with set jurisdiction of commercial cases [disputes], in order to defend their transgressed or challenged rights and legally protected interests, as well as for taking the measures envisaged by this Code, which are aimed at preventing the misdemeanor. Government and other bodies, and individuals other than business entities shall have the right to apply to the commercial court in cases stipulated by legislative acts of Ukraine.

Competence to adjudicate civil cases is envisaged by the Article 15 of the Civil Procedural Code of Ukraine. According to this article courts view on civil process cases concerning the protection of affected, unrecognized or disputed rights, freedoms or interests arising from civil, housing, land, family, labour relations and other legal relations, except when reviewing of such cases is performed under the rules of other legal proceedings (e.g. administrative, commercial etc). Usually general courts adjudicate civil cases between individuals. Still the law may provide the review of other cases under the rules of civil procedure.

3) In cases of administrative courts competence, which is the competent court in the first instance? And on appeal?

Environmental cases cognizance is stipulated in Articles 18-20 of CoAJ. It depends on the status of the power entity whose decision, action or inaction is challenged, and on case-mater.

Therefore article 18 of the CoAJ provides that local general courts as administrative courts have jurisdiction over:

1) Administrative cases, where one of the parties is a body or official of local self-governance, official or staffer of a local self-governance body, except for those, which are within the jurisdiction of district administrative courts;

2) All administrative cases concerning decisions, acts or omissions of power entities in the cases concerning application of administrative liability;

District administrative courts have jurisdiction over administrative cases, where one of the parties is a public authority, other public body, authority of Autonomous Republic of Crimea, Oblast Council, City Council of Kyiv or Sevastopol, officials or staffers thereof, except for cases contemplated by this Code and except for cases concerning their decisions, acts or omissions in proceedings on administrative misdemeanours and cases within the jurisdiction of local common courts as administrative courts.

Cases concerning appeals against acts or omissions of officials or staffers of local executive authorities are considered and decided by a local common court as administrative court or by a District Administrative Court by claimant’s choice.
The High Administrative Court of Ukraine as the court of first instance has jurisdiction over cases concerning appeals against deeds, acts or omissions of the Verkhovna Rada of Ukraine, the President of Ukraine.

Territorial jurisdiction of administrative cases is provided in the Article 19 of the CoAJ. According to this article administrative cases are decided by an administrative court at the defendant’s locality, except for the cases contemplated by this Code.

Administrative cases concerning appeals against legal acts of specific application, as well as of actions or omissions of power entities, which were adopted (committed, allowed) with regard to a specific natural person or legal entity (associations thereof) are decided by the claimant’s choice by an administrative court in locality of claimant’s domicile (residence, stay) registered according to the statutory procedure, or by an administrative court of the claimant’s locality, except for the cases envisaged by this Code. If such person does not have any domicile (residence, place of stay) in Ukraine, the case is decided by an administrative court at the claimant’s locality.

Administrative cases concerning appeals against legal-regulatory acts of the Cabinet of Ministers of Ukraine, the Ministry or another central executive authority, the National Bank of Ukraine or another power entity having powers over the whole territory of Ukraine, except for the cases contemplated by this Code, administrative cases concerning appeals against decisions of the Anti-Monopoly Committee of Ukraine resulting from consideration of complaints on violations of the legislation on public acquisitions, administrative cases where the defendant is a diplomatic or consulate body of Ukraine abroad, official or staffer thereof, as well as administrative cases concerning cancellation of registration certificate of a political party, prohibition (compulsory dissolution, liquidation) of a political party are decided by a district administrative court having territorial jurisdiction over the city of Kyiv.

Instance jurisdiction of administrative cases is provided in the Article 20 of the CoAJ. Due to this Article local administrative courts (local common courts as administrative courts and district administrative courts) and the High Administrative Court of Ukraine in the events identified by this Code solve administrative cases as courts of first instance.

Appellate administrative courts review judicial decisions of the local administrative courts (local common courts as administrative courts and district administrative courts) located within their territorial jurisdiction by procedure of appeal as courts of appeals.

Therefore environmental cases can be adjudicated by local general courts and district administrative courts, by the High Administrative Court of Ukraine as courts of first instance. Decisions of first instance courts in environmental cases can be reviewed by administrative courts of appeal.

III The proceedings

1) Access to justice
1.1 Which are the admissibility criteria of the proceedings initiated by a natural person (infringement of a subjective right or an own interest, action popularis, ...)?

1.2 What are the admissibility criteria of the proceedings initiated by legal persons (in particular for associations, the NGO and public persons having competence in the environmental field)? Do presumptions of interest exist for prompting legal action?

Part 2 of the Article 55 of the Constitution of Ukraine provides that everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers.

The Constitutional Court of Ukraine in its decision of 28.06.1996 № 254 has interpreted part 1 of the above-mentioned Article of the Constitution. The Court said that everyone is guaranteed the protection of his/her rights and freedoms in a judicial proceeding, and that court can not refuse the justice if citizen of Ukraine, foreigner, a person without citizenship consider their rights and freedoms to be violating or had been violated, to have interferences in their realization or have other infringements. Therefore court’s refusal to admit a claim or other application which are drawn up according to the law is a violation of the court protection right; the Article 64 of the Constitution of Ukraine provides that this right can not be limited.

Therefore individual or legal entity have right to bring before the court to protect only his/her rights, freedoms or legitimate interests if he/she consider them to be violating or had been violated. This right comes from the principle of the free exercise of material and procedural rights by the parties to legal proceedings. In case such his/her rights, freedoms and legitimate interests do not belong to such individual or legal entity he/she has no right to go to the law.

Also Ukrainian legislation makes a difference between notion “violation of rights and legitimate interests” and notion “interest existence”.

2) The procedure

2.1 Is there a preliminary administrative appeal procedure (optional or mandatory)?

Pre-trial dispute settlement namely disputing of decisions, actions or inactions of the power entity to the body or officials of higher level is applied only at pleasure of administrative legal relations participants. In case a complaint is rejected person can always apply to the administrative court for her protection.

2.2 Within what period after the enactment of the administrative decision does a legal action have to be taken? (common law time limits, specific time limits depending on the applicant, ...)?

The Article 99 of the CoAJ provides terms of bringing an action before administrative court. Due to part 2 of this Article an action concerning protection of the person’s rights, freedoms and interests, can be brought before the court in six months, which, if nothing provides for otherwise, is counted from the day when such
person became aware or was supposed to become aware of violation of such person’s rights, freedoms or interests. This Code and other laws can establish other terms for bringing action before administrative court by power entity.

Also to bring an action before an administrative court concerning appeal against a decision of a power entity, which may constitute grounds for such entity to claim for recovery of any money, the term of one month is established.

2.3 Does the appeal have a suspensive effect? If not, are there any summary proceedings (suspension, provisional measures, ...)?

The CoAJ envisages securing of the claim as a guarantee of natural persons and legal entities’ rights protection. According to part one of the Article 117 of this Code by request of a claimant or by the court’s own initiative, the court may make a ruling on taking measures to secure an administrative claim, if there is an evident threat to the claimant’s rights, freedoms and interests before the decision in the administrative case has been passed, or if protection of such rights, freedoms and interests will become impossible unless such measures are taken, or if significant effort and cost will be required for reinstatement thereof, and also if unlawful elements of a decision, action or omission of the power entity are evident.

The ruling on taking measures to secure an administrative claim may be made by a court of first instance before the decision in the administrative case has been passed on merits, and if any appeal proceedings have commenced, such ruling may be made by a court of appeals before decision in the case.

2.4 Are there any other specific procedural rules in the environmental field?

Cases in the environmental field are considered according to the standard procedure envisaged by the CoAJ.

3) The powers of the judge

3.1 What are the powers of the judge responsible for the investigations/during the preparation stage (assessment, amicus curiae, on-the-spot investigation, communication of data by the State or the economic operators, ...)?

3.2 Is the legal control limited to the control of the regularity of the procedure? Does his/her control cover the substance of the decision?

3.3 Is the control exerted by the administrative judge a control of rights? Is it also a control of appropriateness?

3.4 Which is the degree of judicial review?

3.5 What are the measures that the judge can decide? May the judge cancel only the decision or may he also alter the decision? Does he have a power of sanction? Can he use it on his own initiative or only if requested by one of the parties? Can he award damages? How does he calculate the quantum of the
damages? May he order restoration? Is it an obligation for him to order it or is it only a possibility? What form can the restoration take (physical compensation, financial compensation, ...)?

Administrative case consideration is conducted within to the procedure envisaged by the CoAJ according to established rules. During preparatory proceedings the judge faces objectives to clarify possibility of case consideration in the given composition of the court, with present persons who participate in case consideration, other participants of the process and available evidence.

Stages of the preparatory proceedings are formulated in the Article 110 of the CoAJ:

- make decision on discovery of the documents and other materials; make necessary inquiries; conduct the inspection of written evidence and exhibits on the scene, if those cannot be delivered to the court; order expert examination and solve the issue of the need to engage witnesses, a specialist or translator;

- make decision on compulsory personal participation of the persons participating in the proceedings in the court hearing, on engagement of any third persons to the case;

- summon to the court hearing of the administrative case any witnesses, experts, specialists or translators;

- make decision on conduct of preliminary court hearing.

Case consideration and making the decision is the fundamental stage of administrative justice.

According to the part 1 of the Article 123 of the CoAJ when a case is considered by a court of first instance, the presiding judge in court hearing is the judge, who has conducted the preparatory proceedings.

Part 2 of the same Article envisages that the judge presiding in court hearing runs the court hearing, ensures proper sequence and order of execution of procedural actions, exercise by participants to the administrative proceedings of their procedural rights and compliance with their obligation, directs the judicial consideration towards complete, comprehensive and objective clarification of the circumstances of the case removing from the court hearing whatever has no significance for decision in the case. The judge presiding in court hearing takes the required measures to maintain a proper order in the court hearing.

On the day defined for the case consideration, the presiding judge opens the court hearing and declares the case to be considered.

Judicial consideration of the case on the merits begins with the report of the presiding judge concerning the contents of the claim, recognition by the parties of certain circumstances during preparatory proceedings and then the presiding judge asks whether the claimant sustains the claim, whether the defendant recognizes it and whether the parties want reconciliation.
When the case is considered in absence of a person participating in the proceedings, the judge presiding in court hearing reports such person’s position with regard to the claim, if such position was expressed in any written statements.

Upon hearing statements of the parties and other persons participating in the proceedings, the court establishes the procedure of examination of the evidence used by such parties and persons to ground their claims and objections. The procedure of examination of the evidence is established by the court depending on the nature of the disputed legal relations and may be changed, if appropriate. According to the Article 11 of the Code the Court takes statutory measures required to examine all circumstances of the case particularly to include production and discovery of the evidence at the court’s own initiative. Besides the Court shall offer to the persons participating in the proceedings to produce evidence or to receive evidence by their own initiative, if such evidence is deemed missing by the Court. It means that administrative justice envisages judge’s active role.

After examination of all circumstances of the case and their verification by evidence presiding judge in court hearing to the parties and to other persons participating in the proceedings and opportunity to make any additional statement or to produce additional evidence. In connection with additional statements of the persons participating in the proceedings, the court may ask questions to other persons participating in the proceedings, witnesses, experts and specialists. Upon hearing additional statements and examining additional evidence, the court rules on completion of examination of the circumstances in the case and of testing them against evidence and proceeds to judicial debate according to the standard procedure.

After the judicial debate, the court leaves for the conference room (a room, especially designed for making judicial decisions) to make its decision in the case, having declared estimated time required for it.

In the process of administration of justice some significant functions are assigned to the administrative judge. These functions play important role in the process of providing efficient protection of individuals as well as of legal entities’ rights and legal interests. Among such significant functions is the function of judicial control over power entities’ law enforcement activity in the framework of which legitimacy of implementing administrative actions by the power entity or adoption of administrative acts is verified. The following function is a function of control over rulemaking in public legal disputes referred to the competence of the Constitutional Court of Ukraine that emerges in case when an individual act is a matter of a dispute through adjudication this act illegal (abolishment of this act), and in case of challenging legislative act – declaring invalid if violence of rights and legal interests took place.

Review of judicial decisions in administrative justice are realized in such proceedings: appeal proceedings; cassation proceedings; review of court decisions in administrative cases by the Supreme Court of Ukraine after their review in course of cassation proceedings.

According to the Article 198 of the CoAJ based on the effects of consideration of an appellate appeal against a determination of a court of first instance, the court of appeals has the right to:
1) leave the appellate appeal without satisfaction and to leave the court’s determination without changes; 
2) change the court’s determination; 
3) reverse the determination and to adopt a new court’s determination; 
4) reverse the court’s determination and to leave the claim without consideration or to close proceedings in the case; 
5) declare the court’s determination invalid and to close proceedings in the case.

According to the Article 223 of the CoAJ the court of cassation resulting from effects of consideration of cassation appeal has the following powers: 
1) leave the cassation appeal without satisfaction and to leave the judicial decision without changes; 
2) change the judicial decision of the appeal instance having reversed the judicial decision of the court of first instance; 
3) change judicial decision of the court of appeals having left the judicial decision of the court of first instance without changes; 
4) change judicial decision of the court of first instance having reversed the judicial decision of the court of appeals; 
5) reverse the judicial decision of the court of appeals and to leave in force the judicial decision of the court of first instance; 
6) reverse judicial decision of the court of first instance and of appeals and to refer the case for another consideration or for continuation of the consideration; 
7) reverse judicial decisions of the court of first instance and of appeals and to leave the claim without consideration or to close the proceedings; 
8) declare that the judicial decisions of the courts of first instance and of appeals have lost their force and to close the proceedings; 
9) reverse the judicial decisions of the courts of first instance and of appeals and to adopt a new judicial decision.

According to the Article 242 of the CoAJ based on the effects of the case consideration, one of the following determinations is adopted by majority of the votes of the composition of the Supreme Court of Ukraine: 
1) on sustainment of the application in part or in full; 
2) on dismissal of redress. 
The judges, who are not in agreement with the determination, may give their dissenting opinion, which is annexed thereto. 
The determination of the Supreme Court of Ukraine is final and not subject to appeal, except for the cases established by Point 2 Part One Article 237 of this Code.

Concerning compensation of damages in the administrative process according to part 2 of the Article 21 of the CoAJ it is envisaged that it is possible to consider in one proceeding claims concerning compensation of damages caused by unlawful decisions, actions or omissions of a power entity only together with a claim concerning acknowledgement of above-mentioned decisions, actions or omissions illegal. In other cases claims for compensation of damages through administrative
proceeding can’t be considered and relevant claims are decided by the courts through civil or commercial proceedings.

**IV. The enforcement of the court decision**

1) Are there any specific mechanisms for the execution of judicial decisions (power of injunction, periodic penalty payments, other measures of coercion against the administration or the economic operators)?

2) What are the courses of legal action available against such decision? Are they appeal of common law?

In the process of fulfillment of its functions administrative courts approve court decisions which after entering into force are obligatory for performance all around Ukraine (Article 14 of the CoAJ).

Court decisions in administrative cases, not fulfilled voluntarily, are performed compulsorily by bodies of the state enforcement service and state officials in the order of executive proceeding established by the Ukrainian legislation. Correspondent service is included into the system of bodies of the state executive power.

General judicial control over the enforcement of judicial decisions in administrative cases is also implemented according to the procedure established by Article 181 of the CoAJ.

According to part 1 of the Article 181 of the CoAJ of Ukraine participants to enforcement proceedings (except for the state enforcement officer) and persons engaged in enforcement actions have the right to lodge with an administrative court a claim, if such persons believe that any decision, action or omission of state enforcement officer or of any other official of the state enforcement service violate their rights, freedoms or interests, and also if the law does not provide for any other procedure for judicial appeal against decisions, actions or omissions of such persons.

Special mechanisms of judicial control over enforcement of judicial decisions in administrative cases are envisaged by the Article 267 of the CoAJ, provisions of which determine the order of implementation of judicial control over enforcement of judicial decisions in administrative cases directed to securing enforcement of court decisions. Particularly parts 1 and 2 of the Article 267 of the CoAJ envisage that the court, which has passed a judicial decision in an administrative case, has the right to impose on the power entity, against which the judicial decision was passed, the obligation to submit a report on enforcement of the judicial decision. Based on effects of its consideration or in case of failure to submit such report, the judge may rule on renewal of the term established for submittal of the report and to impose on the culpable official responsible for enforcement of the determination a fine.